

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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

**JOINT COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION,  
CEQUEL COMMUNICATIONS, LLC D/B/A SUDDENLINK COMMUNICATIONS,  
AND BRIGHT HOUSE NETWORKS, LLC**

**MEDIACOM COMMUNICATIONS  
CORPORATION, CEQUEL  
COMMUNICATIONS, LLC d/b/a  
SUDDENLINK COMMUNICATIONS,  
BRIGHT HOUSE NETWORKS, LLC**

**EDWARDS WILDMAN PALMER LLP**  
1255 23<sup>rd</sup> Street, NW  
Eighth Floor  
Washington, DC 20037  
(202) 939-7900

June 26, 2014

## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY .....	2
DISCUSSION .....	6
I.    In Light of Changes in Marketplace and Regulatory Conditions, Granting Non-Duplication Protection to Broadcast Stations During Retransmission Consent Blackouts is No Longer Justified .....	6
A.    The Commission's Adoption of Non-Duplication Rules Was Based on Assumptions About Cable's Role in the Television Marketplace that Bear No Resemblance to Current Competitive and Regulatory Realities.....	6
B.    Marketplace and Regulatory Developments Since 1992 Provide Additional Legal and Policy Justifications for Limiting the Non- Duplication Rights of Stations During Retransmission Consent Blackouts .....	10
II.   The Commission Should Prohibit Agreements, Arrangements and Understandings That Have the Effect of Preventing an MVPD from Carrying an Out-of-Market Broadcast Station During a Retransmission Consent Blackout .....	14
CONCLUSION.....	18

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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

**JOINT COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION,  
CEQUEL COMMUNICATIONS, LLC D/B/A SUDDENLINK  
COMMUNICATIONS, AND BRIGHT HOUSE NETWORKS, LLC**

Mediacom Communications Corporation ("Mediacom"), Cequel Communications, LLC d/b/a Suddenlink Communications ("Suddenlink"), and Bright House Networks, LLC ("Bright House Networks") (collectively "Joint Commenters") hereby comment on the Commission's March 31, 2014 Further Notice of Proposed Rulemaking ("*FNPRM*") in the above-captioned proceeding.<sup>1</sup>

For the reasons set forth herein, Joint Commenters submit that it is necessary and appropriate for the Commission to update its nearly 50-year old cable television non-duplication rules to reflect the current competitive and regulatory environments. In particular, the Commission should ensure that if viewers are denied access to a local station's signal through their chosen multichannel video programming distributor ("MVPD") because of a deadlock in retransmission consent negotiations, the station may not invoke the non-duplication rule to prevent such MVPD from providing the affected consumers with continued access to network content during the duration of the blackout. Moreover, the Commission should clarify that it is a violation of the requirement that

---

<sup>1</sup> *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Red 3351, MB Docket No. 10-71 (rel. March 31, 2014) ("*FNPRM*").

retransmission consent negotiations be conducted in good faith for a negotiating entity to demand or participate in any agreement, arrangement or understanding with a third party where the effect is to limit an MVPD's ability to obtain retransmission consent to carry an out-of-market station during a retransmission consent blackout. The prohibition would apply not only to agreements between stations and broadcast networks or other program suppliers that contractually restrain the station from exercising its statutory right to consent to carriage outside its designated market area, but also to agreements, arrangements, or understandings between stations not to grant consent to carriage of their signals in each other's market or demands by stations or content providers that an MVPD waive its right to seek consent to carry an out-of-market station during a negotiating impasse.

## INTRODUCTION AND SUMMARY

The instant proceeding originated with a rulemaking petition filed in March 2010 by 14 MVPDs (including each of the Joint Commenters) and consumer groups arguing that the Commission's retransmission consent regulations were outdated and causing harm to consumers.<sup>2</sup> A year later, and after receiving extensive comments on the rulemaking petition, the Commission adopted a Notice of Proposed Rulemaking for the stated purpose of considering what steps could be taken to "protect the public from, and decrease the frequency of, retransmission consent negotiation impasses."<sup>3</sup>

Over the intervening years, interested parties including MVPDs, broadcasters, independent programmers, and consumers have submitted and debated numerous

---

<sup>2</sup> *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (March 9, 2010). See also Public Notice, *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend The Commission's Rules Governing Retransmission Consent*, DA 10-474 (March 19, 2010).

<sup>3</sup> *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011) ("2011 NPRM")

proposals to reform the Commission's 20-plus year old retransmission consent rules. The Joint Commenters have supported, and continue to support, many of these proposals.<sup>4</sup> Moreover, Joint Commenters have provided compelling legal support for the Commission's assertion of authority to adopt a wide range of measures aimed at preserving consumers' uninterrupted access to local television service from their chosen MVPD at reasonable prices reflective of a competitive marketplace.<sup>5</sup>

As the problems associated with the current retransmission consent regime persisted and deepened, members of Congress added their voices to those urging that the Commission update its rules.<sup>6</sup> Heeding those calls, the Commission recently restricted joint retransmission consent negotiations by Top-Four broadcasters in the same market.<sup>7</sup>

The rule banning joint negotiations is a welcome development. But no one should be under the illusion that it will significantly stem the tide of supra-inflationary (and supra-competitive) retransmission consent fee increases or put much of a dent in the increasing number of retransmission consent-related service interruptions. One of the

---

<sup>4</sup> The instant comments supplement the extensive comments, reply comments, and other submissions made by Mediacom, Suddenlink, and Bright House in this proceeding over the past four years. *See, e.g.*, Comments of Bright House Networks, LLC, MB Docket No. 10-71 (May 18, 2010); Joint Reply Comments of Mediacom Communications Corporation and Cequel Communications LLC d/b/a Suddenlink Communications, MB Docket 10-71 (June 3, 2010); Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc., MB Docket No. 10-71 (May 27, 2011); Comments of Bright House Networks, LLC, MB Docket No. 10-71 (May 27, 2011); Joint Reply Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc., MB Docket 10-71 (June 27, 2011); Reply Comments Of Mediacom Communications Corporation, MB Docket 10-71 (June 27, 2011).

<sup>5</sup> *See, e.g.*, Joint Reply Comments Of Mediacom Communications Corporation, and Cequel Communications LLC d/b/a Suddenlink Communications, MB Docket 10-71 (June 3, 2010) excerpted portions of which are attached as Exhibit A.

<sup>6</sup> *See, e.g.*, Letter from Rep. Steve Israel, *et. al.*, to Chairman Julius Genachowski, June 27, 2010, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-302394A10.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-302394A10.pdf); Letter from Seth A. Davidson, Counsel to Mediacom Communications Corporation to Chairman Genachowski, MB Docket 10-71 (August 17, 2010) (attaching for record 15 letters that were sent to the FCC by members of Congress during Mediacom's retransmission consent disputes with Sinclair). *See also 2011 NPRM at ¶ 20, n.64* (citing additional examples of Congressional correspondence urging Commission action on retransmission consent).

<sup>7</sup> *FNPRM at ¶ 1.*

more dramatic retransmission consent disruptions of the past year involved CBS' month-long denial of consent to Time Warner Cable and its millions of customers. The fact that CBS does not operate multiple Top-Four affiliates in any markets is a good indication that the problems the instant proceeding was commenced to address will not be solved solely by the joint negotiation ban. Additional changes in the rules are needed – changes designed to restore competitive balance to the negotiations between MVPDs and stations electing retransmission consent. The *FNPRM* seeks comment on one such change: modification of the Commission's non-duplication rules – rules that stand as a barrier to the importation of a station that can serve as a competitive check and balance to the exercise of retransmission consent by a local station that otherwise enjoys monopoly power.

As has been pointed out by many during the course of this proceeding, the retransmission consent regime enacted in 1992 no longer reflects current marketplace and regulatory considerations. The same is equally true when it comes to the non-duplication rules, which were adopted in the mid-1960s. Indeed, it is abundantly clear that had the competitive and regulatory conditions that exist today been present in 1965, the Commission would have adopted a much different set of non-duplication rules, if it had adopted any such rules at all. Furthermore, the Commission's assumption (in its decision implementing the retransmission consent provision of the 1992 Act) that the non-duplication rules would not be a factor in retransmission consent negotiations or encourage service disruptions is belied by the increasing number of retransmission consent blackouts and by recent actions taken by broadcasters to establish non-duplication rights in markets where carriage of "significantly viewed" distant signals has been permitted for years.

The broadcast industry undoubtedly will, as it has in the past, cite statements found in the legislative history of the 1992 Act as evidence that Congress regarded the non-duplication rules as an inviolable part of the statutory retransmission consent regime. However, as discussed at length below, those statements were premised on the continuation of a bilateral monopoly market structure that no longer exists, and as the Commission has tentatively concluded in the *FNPRM*, Congress has not incorporated the non-duplication rules into the Communications Act or otherwise prohibited the Commission from altering or even repealing those rules if doing so would, in light of current circumstances, serve the public interest.

Under the circumstances, there can be no doubt that the Commission has ample authority and justification to protect the public interest by revising the non-duplication rules and, in particular to adopt a modest change in those rules to prevent them from being invoked by a station when an interruption occurs in an MVPD's local retransmission of the station's signal as result of a retransmission consent negotiating impasse. Also, in order to make the proposed modification of the non-duplication rules meaningful, the Commission should clarify that it is a violation of the good faith retransmission consent negotiation rules for any negotiating entity (i.e., broadcast station or MVPD) to participate in any competition-defeating agreement, arrangement or understanding with any third party where such agreement, arrangement, or understanding has the effect of depriving the MVPD of the opportunity to obtain retransmission consent to carry an out-of-market station during a retransmission consent blackout.

## DISCUSSION

### **I. In Light of Changes in Marketplace and Regulatory Conditions, Granting Non-Duplication Protection to Broadcast Stations During Retransmission Consent Blackouts is No Longer Justified.**

#### **A. The Commission's Adoption of Non-Duplication Rules Was Based on Assumptions About Cable's Role in the Television Marketplace that Bear No Resemblance to Current Competitive and Regulatory Realities.**

The Commission adopted non-duplication rules so that broadcast stations could prevent cable systems from offering subscribers within a particular geographic zone access to duplicating programs from distant signals that the cable systems would otherwise be entitled to carry. The non-duplication rules were adopted as an adjunct to rules imposing mandatory carriage of local stations by cable systems on the stated grounds that even with guaranteed access to viewers, the growth of television broadcast service might be "unduly damag[ed] or imped[ed]" by cable's importation of duplicating distant signals.<sup>8</sup>

The Commission's belief that the protection of the television marketplace required the establishment of non-duplication rules (even though, at least in the case of network television, the Commission's rules themselves did not permit contractual exclusivity agreements between a network and an affiliate),<sup>9</sup> was influenced in particular by (i) the Commission's understanding of the competitive and regulatory state of the television marketplace at the time and its assumptions about what that marketplace would

---

<sup>8</sup> *Amendment of Subpart L, Part 11, 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, et. al.*, First Report and Order, 4 RR2d 1725, ¶ 48 (1965) ("First R&O").

<sup>9</sup> While not allowing "the kinds of exclusivity that can be created by agreement between a network and its affiliate," the Commission's rules "do not presently control the kinds of exclusivity which the network can create as a matter of its own practice and for its own reasons....As a result, most network affiliates enjoy substantially exclusive access to programs of their network in an area going well beyond their own communities." *First R&O* at ¶ 53 n.29.

look like in the future and (ii) the Commission's concern that cable operated outside the program distribution marketplace.

*The Commission's assumption that cable was destined to play only a "supplementary" role in the television marketplace.* The Commission's orders adopting the original non-duplication rules are replete with statements reflecting the Commission's perception that cable television was and would remain a limited participant in the television marketplace. For example, the Commission noted that the capacity of the "usual" cable system was only five channels (albeit with a trend towards 12 channel systems).<sup>10</sup> Moreover, cable was generally limited to markets containing two or fewer broadcast stations and the Commission harbored doubts as to whether cable "can ever become a significant factor" in markets with three or more over-the-air signals.<sup>11</sup> The Commission further cited the "prohibitive" expense of extending cable plant "beyond heavily built-up areas" as another reason that cable could not and would not be a source of television programming for a significant portion of the country that could be reached by broadcast signals.<sup>12</sup> Based on these and other findings and assumptions (such as the assumption that cable, unlike broadcasting, was not and would not be a source of local "community self-expression"), the Commission concluded that allowing cable systems to carry distant signals when they duplicated the programming on retransmitted local signals was inconsistent with cable's "appropriate role as a supplementary service" that was "entirely dependent" on television broadcasting.<sup>13</sup>

---

<sup>10</sup> *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, et. al.*, Second Report and Order, 6 RR2d 1717, ¶ 32 (1966) ("Second R&O").

<sup>11</sup> *First R&O* at ¶ 122 n. 63.

<sup>12</sup> *Id.* at ¶ 44.

<sup>13</sup> *Id.* at ¶¶ 57-58.

*The Commission's concern that cable "stands outside of the program distribution process."* Another factor underlying the adoption of the non-duplication rules was the Commission's concern that cable operated outside of the program distribution process applicable to broadcasting and thus was unfairly competing with broadcasting.<sup>14</sup> According to the Commission, cable not only was "entirely dependent" on television broadcasting, but also was under no obligation to negotiate network affiliation agreements, obtain copyright clearances from program suppliers, or get retransmission consent from the stations it carried (local or distant).<sup>15</sup> With particular respect to the last of these requirements, the Commission explained that in 1959 it had recommended to Congress that "rebroadcasting consent" requirements be imposed on cable.<sup>16</sup> In the absence of Congressional action in that regard, the Commission concluded that the imposition of non-duplication requirements would help "equalize[]" the competitive conditions at which such a "rebroadcasting consent" proposal would, in large part, be aimed.<sup>17</sup> And even some broadcasters candidly admitted at the time that giving stations retransmission consent rights would "obviate the need for [non-duplication] regulations."<sup>18</sup>

Fast forwarding nearly 50 years, it is remarkable how far off the mark the Commission was in its assessment of cable's role in the television marketplace. Cable did not remain (to the extent it ever really was) a mere "supplement" to broadcasting with a potential reach that would never equal that of over-the-air television. Rather, cable, later joined by other MVPDs such as direct broadcast satellite and telco-tv service, and

---

<sup>14</sup> *Id.* at ¶¶ 54-56.

<sup>15</sup> *Id.* at ¶¶ 56, 58.

<sup>16</sup> *Id.* at ¶ 57 n.37.

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

<sup>18</sup> *Second R&O*, at ¶ 153.

more recently by Internet-based video distributors, transformed the video marketplace by providing viewers with a vast array of diverse television options – including opportunities for local self-expression through community-based public access channels as well as locally originated news, sports, and entertainment services.

Moreover, cable's copyright exempt status with respect to the carriage of broadcast programming was changed by Congress in 1976 through the enactment of an intricate compulsory licensing regime that incorporates a royalty schedule which takes into account previous Commission rules limiting the importation of distant signals.<sup>19</sup> Under this royalty schedule, a cable system adding a distant signal that could not have previously been carried must pay royalty rates established under a fair market value standard.<sup>20</sup>

Of even greater significance, in 1992, Congress amended Section 325 of the Communications Act to grant retransmission consent rights to local commercial stations.<sup>21</sup> Thus, one of the main reasons given by the Commission for adopting the non-duplication rules in the first place – the absence of any legal requirement for a cable system to negotiate retransmission consent agreements with broadcasters – no longer stands as a justification for continuing to keep those rules in place, at least with respect to those stations that deny their own viewing audience uninterrupted access to the station's signal through those viewers' chosen MVPD.

---

<sup>19</sup> Copyright Act of 1976, Pub. L. 94-553, § 111, 90 Stat. 2541, 2550-58.

<sup>20</sup> *National Cable Television Ass'n, Inc. v. Copyright Royalty Tribunal*, 724 F.2d 176, 185-86 (D.C. Cir. 1983).

<sup>21</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, § 6, 106 Stat. 1460, 1482.

**B. Marketplace and Regulatory Developments Since 1992 Provide Additional Legal and Policy Justifications for Limiting the Non-Duplication Rights of Stations During Retransmission Consent Blackouts.**

This is not the first time the Commission has considered whether the exercise of retransmission consent rights by broadcasters warranted modification of the non-duplication rules.<sup>22</sup> The broadcasters, as they have in the past, undoubtedly will argue that the Commission lacks the authority to modify the non-duplication rules and will point to the previous statements made by the Commission that relied on a discussion of the non-duplication rules in the legislative history of the 1992 Act as a justification for leaving the rules unchanged.<sup>23</sup> However, as the Commission recognized in the *FNPRM*, Congress has never codified the non-duplication rules.<sup>24</sup> Moreover, the statements made by Congress regarding the non-duplication rules in 1992 must be read in the context of the state of the marketplace when they were made. Such statements cannot and do not trump the Commission's ongoing duty to review and update its statutory interpretations and policy judgments in light of current marketplace conditions and consumer needs.<sup>25</sup>

When the Senate Commerce Committee spoke about the role of non-duplication rules as part of the "regulatory structure" created by the 1992 Act, it was dealing with a marketplace in which local broadcasters arguably still needed protection against the

---

<sup>22</sup> See e.g., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, ¶ 180 (1993) ("*Broadcast Signal Carriage Issues Order*"); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, ¶ 114 (1994); ("*Broadcast Signal Carriage Issues Reconsideration Order*"); *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 2206070, ¶¶ 46-53 (Sept. 8, 2005) ("*2005 Report to Congress*").

<sup>23</sup> See *FNPRM* at ¶ 57.

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., *Review of the Commission's Program Access Rules*, 25 FCC Rcd 746, ¶ 11 n. 23 (2010) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984); *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). See also *FNPRM* at ¶ 57.

importation of distant signals in order to give them countervailing power against the local monopolies then enjoyed by most cable systems. Given that the regulatory structure of the 1992 Act was based on a bilateral monopoly model, it is not surprising that the cosponsors of the legislation were confident that the balance of power between broadcasters and cable systems would keep retransmission consent fee demands in check and prevent disruptive blackouts from occurring.<sup>26</sup> Even more significantly, those same legislators made it clear that they expected the Commission to monitor the workings of the retransmission consent regime on an ongoing basis and to make changes in the regulatory structure if and when problems such as those that are now occurring arose.<sup>27</sup>

It is, of course, undeniable that today's video marketplace in general, and the retransmission consent marketplace in particular, is vastly different than the marketplace of 1992 or even the marketplace of 2005. The bilateral monopoly market structure that Congress expected would keep the retransmission consent regime from harming the public has been replaced by a one-sided negotiating environment in which the vibrant competition that now exists between MVPDs gives broadcasters almost infinite bargaining power because they enjoy local monopolies that are protected and preserved by the non-duplication rules. In 1992 it was possible for some members of Congress to

---

<sup>26</sup> As Senator Inouye, Chairman of the Senate Commerce Committee and author of the retransmission consent provision explained:

I believe that instances in which the parties will be unable to reach an agreement will be extremely rare....I am confident, as I believe the other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section...so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.

138 Cong. Rec. S643 (Jan. 30, 1992).

<sup>27</sup> *Id.*

suggest that retransmission consent would not have any impact on the price of service or consumers' access to their local stations from their chosen MVPD;<sup>28</sup> today, broadcast executives openly, and without apology, proclaim that the power to deny MVPD customers access to local stations gives broadcasters "ultimate leverage" in retransmission consent negotiations and that when it comes to the retransmission consent fees that stations can demand, "the sky's the limit."<sup>29</sup>

It also is telling that when the Commission was asked in 1994 to reconsider its initial decision not to change the non-duplication rules, it did not rely solely on the legislative history language it had cited in its initial retransmission consent implementation order.<sup>30</sup> Rather, taking to heart Congress' admonition that the agency "monitor" the workings of the rules, the Commission explained that there was no evidence in the record before it "that subscribers are being deprived" of programming as a result of demands for non-duplication by stations electing retransmission consent.<sup>31</sup>

Unlike the situation presented in 1994, the Commission today has a record that is overflowing with evidence that subscribers by the millions have been and are being deprived of programming as a result of broadcaster-instigated retransmission consent related service interruptions. The broadcasters will argue that most retransmission consent negotiations do not result in blackouts and that, even when a blackout occurs, most consumers have the option of receiving their signals from another MVPD or via over-the-air reception. But the reality is that blackouts are occurring more frequently

---

<sup>28</sup> 138 Cong. Rec. H8677 (Sept. 17, 1992) (statement of Rep. Fields); 138 Cong. Rec. S14605 (Sept. 22, 1992) (statement of Sen. Wellstone).

<sup>29</sup> See CableFAX Daily, June 3, 2011 at 2 (describing remarks made by CBS President Les Moonves at a financial industry conference).

<sup>30</sup> *Broadcast Signal Carriage Issues Reconsideration Order* at ¶ 114.

<sup>31</sup> *Id.*

and, even when they do not occur, it is far more likely because the MVPD, faced with blackout threats, has capitulated to the broadcaster's demands for hyper-inflationary retransmission consent price increases than because of any compromise on the part of the broadcaster. As for the ability of subscribers to switch to a different MVPD or to over-the-air reception, those options (assuming that they are in fact available to the subscriber) come with significant additional costs and burdens. It simply is not in the public interest for the Commission to preserve rules that force consumers into making such choices.<sup>32</sup>

The evidence also is incontrovertible that broadcasters electing retransmission consent can, do, and will continue to use the assertion of non-duplication as a key weapon in their blackout-based retransmission consent negotiating strategy. For example, when Time Warner Cable sought to mitigate the effects of a retransmission consent blackout by importing distant signals as to which it had out-of-market carriage rights, it was hit with federal court litigation alleging, *inter alia*, that it was violating the non-duplication rules.<sup>33</sup> In addition, the number of instances is growing in which broadcasters are petitioning the Commission for waivers of the "significantly viewed" exemption to the non-duplication rules. The reason broadcasters are filing these petitions, of course, is so that they can maintain their "ultimate leverage" by denying consumers an alternative source of programming (often one that has been historically available to those consumers) in the event of a retransmission consent blackout.<sup>34</sup>

In short, the reasoning underlying Congress' comments about the non-duplication rules in the 1992 Act's legislative history and the Commission's past decisions choosing

---

<sup>32</sup> See Letter from Joseph Young, Sr. Vice Pres. And General Counsel, Mediacom Communications Corporation to P. Michele Ellison, Chief of Staff to Acting Chairwoman Mignon Clyburn, MB Docket No. 10-71 (Sept. 16, 2013).

<sup>33</sup> See *Nexstar Broad., Inc. v. Time Warner Cable, Inc.*, No. 12-10935 (5th Cir. May 30, 2013).

<sup>34</sup> See, e.g., *Providence TV Licensee Corp.*, DA 10-769 (MB 2010); *KXAN, Inc.*, 49 CR 1184, DA 10-589 (MB 2010); *WUPW Broadcasting, LLC*, 49 CR 1055, DA 10-460 (MB 2010).

not to modify the non-duplication rules no longer holds water. As the Commission states in the *FNPRM*, Congress' concern with the importation of distant programming that would compete with local programming "does not extend to retransmission consent negotiation impasses, where the local broadcaster pulls its station from a cable system or other MVPD."<sup>35</sup>

Consequently, the time has come for the Commission to revise its rules so that a station electing retransmission consent may continue to assert non-duplication rights against an MVPD, but only if the station has granted that MVPD consent to carry the station's signal. This modest proposal will not give cable operators a "free ride" or create the incentive or ability for them to make unreasonable demands on broadcasters.<sup>36</sup>

Rather, by imposing a measure of competitive balance and discipline on both broadcasters and distributors in their negotiations over retransmission consent, it will serve the Commission's stated goal of "protect[ing] the public from, and decreas[ing] the frequency of, retransmission consent negotiation impasses."<sup>37</sup>

## **II. The Commission Should Prohibit Agreements, Arrangements and Understandings That Have the Effect of Preventing an MVPD from Carrying an Out-of-Market Broadcast Station During a Retransmission Consent Blackout.**

Modifying the non-duplication rules as suggested herein will remove a key regulatory obstacle to competition in the retransmission consent marketplace. However, it will not be effective unless the Commission acts to protect the right of an MVPD to

---

<sup>35</sup> *FNPRM* at ¶ 65.

<sup>36</sup> This is because, unlike the situation that existed when the non-duplication rules were adopted in the mid-1960s, MVPDs today must pay copyright royalties when they carry a distant signal and must obtain retransmission consent from the distant broadcaster. Moreover, under the cable compulsory license, a cable operator must pay six months' worth of royalties (which can be as high as 3.75% of the system's basic service tier revenues for a distant Fox affiliate), even if the distant signal is carried for only a few days or weeks while the cable operator and local broadcaster work to resolve a retransmission consent impasse.

<sup>37</sup> *FNPRM* at ¶ 2.

negotiate in good faith for the carriage of an out-of-market station during a retransmission consent blackout. Without Commission action in this regard, broadcasters and broadcast networks can and will use a variety of strategies to preserve the monopoly power that the local stations wield in retransmission consent negotiations, such as: (i) including provisions in contracts between broadcast stations and program suppliers (particularly national networks) that bar the stations from entering into retransmission consent agreements for the out-of-market carriage of their signals; (ii) collusive agreements, arrangements, and understandings between stations whereby they agree in advance not to grant consent to the carriage of their signals in each other's market; and (iii) demands by stations or program suppliers (including broadcast networks) that, as a condition of obtaining carriage of broadcast or non-broadcast programming, an MVPD waive its right to seek consent to carry an out-of-market station during a retransmission consent blackout. The impact of these and similar strategies on an MVPD's ability to obtain retransmission consent from an out-of-market station is contrary to Congressional intent and the public interest and should be prohibited by the Commission.

It is axiomatic that the retransmission consent right created by the 1992 Act resides in a broadcaster's signal, not in the content delivered over that signal.<sup>38</sup> It follows that whether, and where, a station's signal is carried is dependent on the outcome of good faith negotiations between the station and the MVPD, unencumbered by restrictions artificially introduced through third party agreements or arrangements. Indeed, the 1992 Act's legislative history clearly establishes that Congress intended for the exercise of the

---

<sup>38</sup> See S. Rep. No. 92, 102nd Cong., 1st Sess. 36 (1991) ("The Committee is careful to distinguish between the authority granted broadcasters...to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming on the signal.").

retransmission consent right to be controlled by the stations themselves and not by national networks or other content owners.<sup>39</sup>

Allowing third parties (including networks, program suppliers, and other stations) to limit a station's control over its retransmission consent rights not only is at odds with Congress' intent, but also creates an insurmountable barrier to the emergence of a more competitive retransmission consent marketplace – one in which retransmission consent blackouts will be less frequent and price-disciplining competition will exist on the broadcaster, as well as the MVPD, side of the market. The Commission, exercising a wide range of powers given to it by the Communications Act, can and should prohibit any agreements, arrangements, or understandings that create such a barrier.

More specifically, apart from its general public interest authority, the Commission has authority to engage in regulatory oversight with respect to the network-affiliate relationship – authority the Commission historically has used to address issues relating to territorial restraints.<sup>40</sup> The Commission also has express authority under Section 325 to adopt rules governing both the “exercise by television broadcast stations of the right to grant retransmission consent” and the requirement that negotiations for retransmission consent be conducted in “good faith.”<sup>41</sup> Agreements, arrangements, and understandings that have the effect of preventing stations from engaging in retransmission consent negotiations are the antithesis of “good faith.”

---

<sup>39</sup> As Senator Inouye, the author of the retransmission consent provision stated on the Senate floor: “The retransmission provision of S. 12 will permit local stations, not national networks...to control the use of their signals.” 138 Cong. Rec. S562-63 (Jan. 29, 1992). *See also* Joint Reply Comments of Mediacom Communications Corporation and Cequel Communications LLC d/b/a Suddenlink Communications, MB Docket 10-71 (June 3, 2010) at 26-27; Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc., MB Docket No. 10-71 (May 27, 2011) at 7-15.

<sup>40</sup> 47 C.F.R. § 73.658.

<sup>41</sup> 47 U.S.C. § 325(b)(3).

It is notable that the Commission already has a rule on the books making it a *per se* violation of the duty to negotiate in good faith for any “negotiating entity” (*i.e.*, a broadcast station or an MVPD) to enter into “an agreement with any party, a term or condition of which requires that such [station] not enter into a retransmission consent agreement with any...multichannel video programming distributor.”<sup>42</sup> An agreement, arrangement, or understanding between a negotiating entity and a third party, including a station, network, other program supplier, that has the effect of preventing a station and an MVPD from entering into a retransmission consent agreement for out-of-market carriage is contrary to the plain language of this provision. So too are coercive demands by a station owner or network that an MVPD, as a condition of obtaining the right to carry broadcast or non-broadcast programming, waive its right to seek consent to carry an out-of-market station during a retransmission consent blackout. Yet, the Media Bureau, without citation to any express decision by the full Commission, has inexplicably created an exception to this *per se* rule that allows stations and networks to enter into such restrictive agreements – an exception that effectively swallows the rule itself.<sup>43</sup>

The Commission should revisit its interpretation of its good faith rules to make clear that the prohibition on agreements that restrain stations from granting retransmission consent and/or restrain MVPDs from seeking such consent apply to all such agreements as well as to understandings and arrangements that have the same effect. Failure to take this step would essentially nullify any benefit that might be derived from

---

<sup>42</sup> 47 C.F.R. § 76.65(b)(1)(vi).

<sup>43</sup> *Monroe, Georgia Water Light and Gas Commission d/b/a Monroe Utilities Network v. Morris Network, Inc., owner of WMGT, Channel 41, Macon, Georgia*, Memorandum Opinion and Order, 19 FCC Rcd 13977, ¶ 9 n.24 (MB 2004) (finding that existing contractual arrangements may affect a broadcaster's ability to negotiate a retransmission consent agreement with a MVPD in good faith but that “the good faith requirement applies to negotiations between MVPDs and broadcast stations, and not between a network and an affiliate.”).

modifying the non-duplication rules and ensure consumers continue to suffer the consequences of the competitive imbalance in the marketplace, including ever-more threatened and actual station blackouts. Without Commission action to curtail the practices described, broadcast stations, enjoying freedom from competition, will continue to play competing MVPDs off against each other in order to “keep upping” the price of retransmission consent “forever.”<sup>44</sup>

## CONCLUSION

In the mid-1960s, the Commission adopted non-duplication rules, largely as a substitute for the fact that cable systems were free to import duplicating distant stations without any risk of a copyright infringement claim or without having obtained “rebroadcasting consent” from the distant station. In 1976, the copyright law was amended to cover cable television retransmissions of broadcast stations and in 1992 Congress gave broadcasters retransmission consent rights. While the Commission elected not to change its non-duplication rules in implementing the 1992 Act, it did so based on the record that existed at that time – a record that did not contain any evidence that the non-duplication rules were contributing to an environment in which subscribers were being denied access to programming as a result of retransmission consent disputes.

But times have changed. The Commission’s assumptions have been proven quite mistaken and it is now incumbent on the Commission to move quickly to protect consumers by establishing a more competitively balanced regulatory regime that (i) limits the extent to which a station electing retransmission consent may exploit its non-

---

<sup>44</sup> *Communications Daily*, May 15, 2011 at 15 (statement of David Smith, CEO of Sinclair Broadcast Group):

I think [retransmission consent revenue is] just going to be an ongoing a continuing part of the business. Forever. This isn’t something that just stops tomorrow because [the broadcast networks deem it that they’ve got all the money they think they can get. We just have to keep upping that number.

duplication rights to shield itself from competition and (ii) bars agreements, arrangements, and understandings that prevent an MVPD from engaging in good faith negotiations for the carriage of an out-of-market station during a retransmission consent blackout.

Respectfully submitted,

**MEDIACOM COMMUNICATIONS  
CORPORATION, CEQUEL  
COMMUNICATIONS, LLC D/B/A  
SUDDENLINK COMMUNICATIONS, AND  
BRIGHT HOUSE NETWORKS, LLC**

By: 

Seth A. Davidson  
Craig Gilley  
Ari Moskowitz

Edwards Wildman Palmer LLP  
1255 23<sup>rd</sup> Street, NW  
Eighth Floor  
Washington, DC 20037  
(202) 939-7900

*Their Attorneys*

AM 34680610.1