Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF THE BROADCASTER ASSOCIATIONS

NATIONAL ASSOCIATION OF BROADCASTERS

ABC TELEVISION AFFILIATES ASSOCIATION

CBS TELEVISION NETWORK AFFILIATES ASSOCIATION

FBC TELEVISION AFFILIATES ASSOCIATION

NBC TELEVISION AFFILIATES

June 3, 2010

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Summary

Virtually all of the retransmission consent "reforms" proposed by Petitioners and their supporters have previously been considered by the Commission and rejected. The Commission should again reject these proposals. As the record in this proceeding shows, the Commission does not have statutory authority to adopt the proposals, and there is no evidence to support the Petitioners' and their supporters' claims that the retransmission consent process needs to be reformed.

Contrary to Petitioners' assertions, the Commission may not call upon its "ancillary" authority under the Communications Act to compel retransmission consent during the pendency of carriage negotiations or require binding arbitration. The law is clear: The Commission's "ancillary" regulatory authority does not empower it to do that which Congress has expressly said the Commission cannot do. Although Petitioners might prefer that the Commission ignore Section 325(b)(1)(A) of the Communications Act, which states unequivocally that a television station's signal may not be retransmitted by a multichannel video programming distributor ("MVPD") without the station's "consent," the agency may not do so. Simply put, Petitioners have not and cannot point to any authority for the Commission to adopt the "reforms" they propose.

With regard to compulsory arbitration of broadcast station retransmission consent disputes, one need look no further than Massillon Cable's observations for the public policy reason to reject such proposals. Massillon notes that arbitration of broadcast station retransmission consent disputes would be cost "prohibitive" (citing a million dollars in expenses it incurred in a single arbitration for carriage of a single cable programming network); that arbitration would delay decision-making for years; and that it would simply be "unworkable"

and "inadequate" as a means of resolving broadcast retransmission consent disputes.[1] The Broadcaster Associations agree: Even if the Commission had statutory authority to impose mandatory arbitration—which it does not—it would be a wholly inadequate, unsatisfactory, and expensive substitute for the vastly more efficient and appropriate competitive market negotiation process now in place. Moreover, a compulsory arbitration requirement would give every MVPD, and particularly larger ones, a financial incentive to eschew meaningful negotiations and engage in a war of economic attrition with local stations. In addition, the Commission, should Petitioners' proposal be adopted, would be burdened with hundreds—if not thousands—of regulatory proceedings to resolve retransmission consent disputes. And to what end? Petitioners and their supporters cite *not a single case* in which the Commission has found that a local broadcast station has failed to negotiate retransmission consent in good faith.

The various other regulatory "reforms" proposed by Petitioners and their supporters are equally inappropriate. Some MVPDs advocate, as they have for years, repeal of the Commission's broadcast program exclusivity rules and argue for the right to import duplicating distant network stations from other markets.[2] However, Congress has not only codified local broadcast station exclusivity rules in the case of satellite carriers, but when it enacted STELA just last month, it expressly provided that the exclusivity protection against duplicating distant network signals afforded by the "unserved household" limitation applies with respect to all network-affiliated multicast digital channels of local stations as well as to their primary digital channels. *See Satellite Television Extension and Localism Act of 2010*, Pub. L. No. 111-175,

[1] Comments of Massillon Cable contained in the Comments of Free Market Operators at 2-3.

[2] *Small* cable systems (fewer than 1000 subscribers) are exempt from these rules.

§ 102 (codified at 17 U.S.C. § 119(d)(10)). These rules promote the essential public policy goal of localism that underlies our free over-the-air broadcast system and should continue.

The American Cable Association ("ACA") contends—but offers no proof—that small MVPDs pay higher retransmission consent rates than large MVPDs and that all MVPDs pay more in retransmission consent fees where negotiations involve more than one network-affiliated station (or multicast stream) in the same DMA. To his credit, the ACA's economic expert readily acknowledges there is virtually no factual evidence to support either of those assertions and that he only "believes" that might be the case. Speculation is not a sustainable basis for Commission decision-making. But, even were the assertions true and the Commission had statutory authority to impose the conditions requested by the ACA, there is no evidence of a regulatory or policy failure that should be addressed.

Petitioners and their supporters may not credibly suggest that Commission regulation of the rates broadcast stations negotiate with MVPDs for the right to retransmit and re-sell broadcast signals is necessary to protect MVPD subscribers against escalating MVPD subscription rates without *also* advocating Commission regulation of the *retail rates* MVPDs *charge their subscribers*—the latter of which Petitioners, of course, have long opposed.

Indeed, it is readily apparent that "consumer welfare" is not the true motive behind Petitioners' calls for regulation of retransmission consent. Petitioners contend that in order to protect their subscribers against increased subscriber rates, the Commission must regulate the rates they pay for *some*—but not all—of their program services. (Petitioners and their MVPD supporters do not argue for Commission regulation of the rates of *non-broadcast* programming, presumably because many of Petitioners and their supporters are under common ownership with those very program services.) Notably, they suggest no retail price mechanism to ensure that consumers will actually be protected.

In short, Petitioners advocate Commission regulation of a service "input"—but not regulation of their own service "output." By analogy, it is like suggesting that consumers can be protected against excessive electricity rates by regulation of the price electric utilities pay for coal—without regulation of the *final retail* price electric companies charge their customers for electricity.

Finally, Commission adoption of the intrusive retransmission consent regulatory scheme advanced by Petitioners and their supporters would harm local stations' ability to compete financially with other distribution platforms for programming, for management and on-air talent, for viewers, and for advertising revenues. That result would be detrimental to the 34 million television households that depend on over-the-air service for their primary or secondary TV sets, and to the nation's remaining television viewers who receive their video services by cable and satellite, who value not only the national network and syndicated programming provided by local stations, but also the essential local news, public affairs, political, weather, and emergency programming offered by local television stations.

It is, therefore, respectfully requested that the Petition be denied.

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Retransmission Consent	)	

REPLY COMMENTS OF THE BROADCASTER ASSOCIATIONS

The National Association of Broadcasters, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates (collectively, the "Broadcaster Associations")[1] hereby reply to and oppose comments filed by various entities supporting the Petition for Rulemaking in response to the Media Bureau's Public Notice in the above-captioned proceeding.[2]

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[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts. The ABC Television Affiliates Association is a nonprofit trade association representing television stations affiliated with the ABC Television Network. The CBS Television Network Affiliates Association is a nonprofit trade association representing television stations affiliated with the CBS Television Network. The FBC Television Affiliates Association is a nonprofit trade association representing television stations affiliated with the FOX Television Network. The NBC Television Affiliates is a nonprofit trade association representing television stations affiliated with the NBC Television network. Collectively, the four network affiliate trade associations represent approximately 750 television stations affiliated with the four major broadcast television networks.

[2] *See Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Public Notice, 25 FCC Rcd 2731 (2010).

The Petition is supported by comments by several of the original Petitioners as well as by some of the nation's largest multichannel video programming distributors ("MVPDs"), a few mid-sized MVPDs, and several cable network programmers ("Petitioners" and "MVPD Supporters," respectively). These comments present no statutory basis or legal authority for Commission imposition of Petitioners' highly regulatory and intrusive retransmission consent proposals. They rely on assertions and *ad hominem* attacks on local stations and the retransmission consent statutory requirements and fail to provide any real evidence of marketplace failure or abuse by local stations. In fact, the record shows that the retransmission consent marketplace is functioning as Congress intended. For these reasons, the Commission should deny the Petition for Rulemaking.

I. The Commission Lacks Statutory Authority to Intervene in the Retransmission Consent Marketplace As Petitioners and Their Supporters Propose

As the record clearly demonstrates, the Commission has no authority to implement the MVPD-desired interventions of compulsory interim carriage and binding arbitration.[3] Indeed, the Commission, itself, has so held:

> Section 325(b)(1) of the Communications Act provides that "No cable system or other multichannel video programming distributor shall retransmit the signal of the broadcasting station, or any part thereof, *except . . . with the express authority of the originating*

[3] *See* Opposition of Broadcaster Associations at 63-78; Comments of The Walt Disney Company at 5-11; Comments of CBS Corporation at 17-19; Comments of CBS Corporation et al. ("Broadcast Networks") at 7-11; Comments of Belo Corp. at 7-9; Comments of Fox Television Affiliates Association at 3-6; Joint Comments of Broadcasting Licenses, Limited Partnership et al. at 2-5; Opposition of Barrington Broadcasting Group et al. at 14-17; Joint Comments of the Named State Broadcasters Associations at 12-13; Comments of Sinclair Broadcast Group at 4, 7-9; Comments of Nexstar Broadcasting at 5-7; Comments of Hoak Media at 6-8.

> *station*. . . ." This language clearly prohibits an MVPD . . . from retransmitting a broadcaster['s] signal if it has not obtained express retransmission consent. . . . [*W*]*e see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission*.[4]
>
> The Commission does not have the authority to require the parties to submit to binding arbitration.[5]

In light of the unequivocal language of Section 325(b)(1), Petitioners' arguments that the Commission may impose a standstill requirement on stalemated retransmission consent negotiations under its ancillary authority must fail.[6] Whatever the Commission's ancillary authority might otherwise be, it does *not* authorize the Commission to require the proposed temporary compulsory carriage. Although the Commission's ancillary authority may permit the Commission to mandate a "temporary standstill" in program access disputes where no statutory provision *prohibits* such a measure,[7] the Commission's ancillary authority cannot be invoked in the retransmission consent context in direct contravention of Section 325(b)(1)'s unambiguous

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[4] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), at ¶ 60 (first emphasis in original; second emphasis added).

[5] *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 35 (2007) ("*Mediacom/Sinclair Order*"), at ¶ 25.

[6] *See* Comments of Time Warner Cable at 12-13; Comments of Bright House Networks at 15-16.

[7] As Petitioners note, the FCC did impose a temporary standstill requirement in the program access proceeding, invoking ancillary authority under Sections 4(i) and 303(r) of the Communications Act. *See Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010) ("*Program Access Order*"), at ¶ 72.

prohibition.[8]

Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary in the execution of its functions,"[9] and Section 303(r) empowers the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law*, as may be necessary to carry out the provisions" of the Communications Act.[10] While the temporary standstill rule in the program access context is not "inconsistent" with other provisions of the Communications Act,[11] the retransmission of a local television station's signal *without the station's consent* directly violates Section 325 of the Act.[12] Because Petitioners' proposed compulsory interim retransmission carriage requirement would do precisely what Section 325(b)(1)(A) prohibits, the ancillary authority conferred by Sections 4(i) and 303(r) does not empower the Commission to implement a standstill or interim compulsory carriage

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[8] *Cf.* Comments of the Broadcast Networks at 10 ("As part of the *Program Access Order*, the FCC found that no express statutory guidance conflicted with its use of ancillary authority. Quite clearly, that is not the case when it comes to retransmission consent for broadcast signals.").

[9] 47 U.S.C. § 154(i) (emphasis added).

[10] 47 U.S.C. § 303(r) (emphasis added).

[11] *See* 47 U.S.C. § 548 (granting FCC broad authority to adopt rules prohibiting unfair acts of cable operators that have the purpose or effect of preventing or hindering significantly an MVPD from providing programming to subscribers or consumers).

[12] Section 325(b)(1)(A) states: "No cable system or other multichannel video programming distributor shall retransmit the signal of the broadcasting station, or any part thereof, except . . . with the express authority of the originating station." 47 U.S.C. § 325(b)(1)(A).

requirement during retransmission consent disputes.[13]

The D.C. Circuit's recent decision in *Comcast v. FCC* confirms the limited reach of the Commission's ancillary authority.[14] The Court in *Comcast* reaffirmed that assertions of ancillary authority must be tied to a specific "statutorily mandated responsibility" of the Commission.[15] The Commission's ancillary authority thus cannot be invoked to justify an interim carriage requirement that would contravene an *express* statutory *prohibition*, as a rule that would violate the Communications Act itself is obviously not "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[16] Remarkably, Petitioners and MVPD Supporters ignore the *Comcast* decision altogether.[17]

Given the absence of any statutory authority to impose compulsory interim carriage and

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[13] For that reason alone, it matters not how "useful" Petitioners believe a compulsory interim carriage requirement would be or what "motivations" might otherwise prompt the Commission to consider such a requirement. *See* Comments of Bright House Networks at 15-16. Because Section 325(b)(1)(A) categorically forbids retransmission of a broadcast signal without the station's consent, the Commission has no authority to permit it.

[14] *See Comcast Corp. v. FCC*, 600 F.3d 642, 651-61 (D.C. Cir. 2010).

[15] *Comcast*, 600 F.3d at 646, 661.

[16] *Comcast*, 600 F.3d at 648 (quoting *American Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005) (internal quotation marks omitted)). *See also* Comments of LIN Television at 12 ("[T]his is not a question of whether the FCC might find ancillary authority to do something it is not specifically authorized to do. The Petition asks the FCC to assert ancillary authority to do things Congress has directly proscribed. No application of ancillary authority extends so far.").

[17] The Broadcaster Associations also note that cable operators opposed the Commission's use of ancillary jurisdiction to impose a standstill requirement in the *Program Access Order*. "Having previously argued to the Commission that there is no policy or legal basis for the imposition of a standstill obligation in connection with program access disputes, cable operators should not be heard to endorse a standstill requirement for broadcast programming" in the retransmission context. Comments of the Broadcast Networks at 10.

binding arbitration, the Commission, likewise, lacks authority to impose other proposed MVPD "remedies" designed to achieve the same results. For example, while AT&T acknowledges that the Communications Act "prohibits an MVPD from retransmitting the signal of a broadcast station except with the express authority of the station,"[18] it suggests that the Commission sidestep the statutory authority question to impose compulsory interim carriage by finding that a broadcast station's refusal to grant consent "is inconsistent with the station's public interest obligations and obligation to negotiate in good faith."[19] Not only has the Commission already concluded that "failure to reach agreement does not violate Section 325(b)(3)(C),"[20] the good faith negotiation requirement, but the Commission cannot do indirectly what it is prohibited from doing directly.[21]

As the record and the above discussion show, Petitioners and MVPD Supporters have not provided, and cannot provide, any statutory authority in support of their requests. The reason for

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[18] Comments of AT&T at 11.

[19] Comments of AT&T at 11.

[20] *Good Faith Order* at ¶ 40.

[21] *See, e.g., Northern Cal. Power Agency v. Federal Power Comm'n,* 514 F.2d 184, 189 (D.C. Cir. 1975) (stating that a federal agency could not order contracts to be amended to accomplish litigant's requested relief because the "clear import of such a procedure would necessitate the Commission doing indirectly what it cannot do directly. The Commission wisely avoided this procedure.").

AT&T's other variants on this theme, namely that the Commission require broadcasters to "synch up their retransmission consent contracts with all MVPDs" and "prohibit[] termination of retransmission consent agreements shortly in advance of significant and/or popular events (such as the Super Bowl, Academy Awards, College Bowl Games, or March Madness)," Comments of AT&T at 12, suffer from the same legal infirmity—they would require a television station to grant retransmission consent for some period of time at other than the station's own volition.

this is simple—Congress did not give the Commission the authority to adopt Petitioners' intrusive regulatory proposals, as the Commission itself has previously acknowledged.

II. The Retransmission Consent Marketplace Is Competitive and Working As Congress Intended

Just as Petitioners and MVPD Supporters are short on the legal predicate for their proposed "reforms," so, too, are they short on the economic or any other public policy predicate for Commission interference in retransmission consent negotiations. Instead, the record is replete with examples that demonstrate that the marketplace is working precisely as Congress intended. Indeed, portions of the evidence and data provided by Petitioners and MVPD Supporters support—rather than contradict—the position of the Broadcaster Associations and other parties.

A. Retransmission Consent Rights Promote the Public Interest by Supporting the Free Over-the-Air Broadcast System

As the Broadcaster Associations have shown in this proceeding and in others, the retransmission consent system is an economically efficient vehicle by which broadcasters and MVPDs can arrange for broadcast signals to be delivered to MVPD subscribers. The Broadcaster Associations demonstrated that it is extremely rare for arm's-length marketplace negotiations to result in any interruptions in MVPD distribution of broadcast signals.[22] This evidence is echoed by the experience of broadcast commenters in this proceeding who identified

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[22] A review of reported carriage interruptions since 2006 showed that such interruptions have affected only *one-one hundredth of one percent* (0.01%) of annual television viewing hours. Opposition of the Broadcaster Associations at 7-8 (citing Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (Apr. 2010) ("*Navigant Report*"), at 20).

hundreds of agreements involving stations with various affiliations, multiple markets of different sizes, and a variety of MVPDs over the past few years. Among more than 850 agreements identified by these broadcasters, only one resulted in an impasse that interrupted carriage.[23]

Broadcasters also have demonstrated the importance of the current system of retransmission consent to their ability to offer programming relevant to the needs and interests of their local communities. The CBS Television Network Affiliates Association states that retransmission consent "benefit[s] consumers by supporting local services, such as local news, weather, emergency, sports, and public affairs programming."[24] LIN Television explains that over the past two years, it has "invested heavily to increase both the amount and quality of the local programming it produces and airs" and that "[s]ignal carriage fees, though a modest portion of our revenue, helped us make those investments during a time of especially challenging market conditions."[25] Absent the ability to freely negotiate for the value of broadcast signals, LIN

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[23] *See*, *e.g.*, Comments of Belo Corp. at 5-6 (negotiated more than 250 agreements with various MVPDs since 2006 with only one service disruption); Comments of CBS Corporation at 4-5 ("Since becoming an independent company on December 31, 2005, CBS has agreed on retransmission consent with more than 100 distributors accounting for over 14 million subscribers . . . without ever withdrawing the signal of one of its owned stations from an MVPD."); Comments of Gray Television, Inc. at 2-3 (negotiated 251 agreements with MVPDs since 2008 and no disruptions); Comments of Hoak Media, LLC at 4 (negotiated more than 100 agreements in the past several years with no service disruptions); Comments of Univision Communications, Inc. at 1-2 (negotiated more than 150 agreements with MVPDs, including cable, DBS, and telco in several markets, for nearly all of its 63 full power, Class A and LPTV stations during last 18 months with no service disruptions).

[24] Letter from Jennifer Johnson, Counsel to the CBS Television Network Affiliates Association, to Marlene H. Dortch, FCC Secretary (filed May 26, 2010, in MB Docket No. 10-71) at 2. Without the support of retransmission consent compensation, "broadcasters' ability to produce local programming and to provide the public with other high-quality programming, including national sports programming, would be jeopardized." *Id.*

[25] Comments of LIN Television Corporation at 8 (citing Comments of LIN Television Corporation in GN Docket No. 10-25 (filed May 7, 2010)). *See also* Comments of Nexstar

(continued . . .)

cautions that there is a significant and increasing risk that broadcasters will be unable to afford popular sports and entertainment programming.[26] Such high-quality programming would migrate to pay television platforms, making it "available only to consumers who subscribe to MVPDs"[27] and thereby reducing options for "consumers who would prefer to forego rapidly rising MVPD fees."[28] CBS cites a similar concern that, without the right to bargain with MVPDs for compensation for its stations' signals, the "original drama, marquee sporting events, and other high-quality programming" now available to viewers on free over-the-air television "will continue its migration to pay television, and people who cannot afford, or do not wish, to subscribe to a multichannel service will be unable to view such programming."[29] Univision states that its "ability to recoup a portion of [its] programming investment through the retransmission consent process is key to ensuring the continued quality and availability of its popular program services to the public."[30] Univision explains that its new retransmission

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Broadcasting, Inc. at 2 ("Local television stations spend millions of dollars annually to provide current and up-to-date news and other local programming information with respect to their communities, including breaking news, severe weather alerts, school closing notices, and AMBER alerts. . . . Retransmission consent revenues *defray a small percentage* of all these expenses." (emphasis added)).

[26] *See* Comments of LIN Television Corporation at 5-8.

[27] Comments of LIN Television Corporation at 7.

[28] Comments of LIN Television Corporation at 6.

[29] Comments of CBS Corporation at 12-13.

[30] Comments of Univision Communications, Inc. at 3 (citing examples of Univision's local station performance, including Station KMEX, Los Angeles, CA, ranked number one in the United States, regardless of language, among adults aged 18-49; the top rated early newscast in any language among adults aged 18-49 in eight markets; and the top rated late newscast, again, in any language, among adults aged 18-49 in six markets).

consent agreements have benefited not only its free over-the-air viewers but also MVPD subscribers through new and innovative offerings, including a video-on-demand ("VOD") service consisting of 50 hours of content that is refreshed every month, the delivery of President-elect Obama's inaugural address in Spanish via Comcast's VOD service, and the launch of a free Hispanic VOD channel on Time Warner Cable systems.[31]

In summary, "[m]aintaining consumers' access to the programming offered by broadcasters—programming that is first-class, still available for free to those who exercise that option, and responsive to local needs and concerns—is manifestly in the public interest."[32] The current retransmission consent regime is critical to meeting this public interest objective.[33]

B. Petitioners and MVPD Supporters Cannot Support Their Claims of Marketplace Failure

1. The Marketplace in Which Broadcasters Operate Is Highly Competitive and Retransmission Consent Compensation Is Modest

Petitioners and MVPD Supporters, by contrast, fail to show that retransmission consent is not functioning as Congress intended. For example, a group of mid-sized MVPDs calling itself the "Free Market Operators" would have the Commission abrogate free marketplace contractual arrangements between television stations and their program suppliers for program exclusivity by

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[31] Comments of Univision Communications, Inc. at 3-4.

[32] Comments of CBS Corporation at 12.

[33] *See also* Comments of NAB in MB Docket No. 07-269 (filed July 29, 2009), at 12-17; Reply Comments of NAB in MB Docket No. 07-198 (filed Feb. 12, 2008), at 28-30; Comments of NAB in MB Docket No. 07-198 (filed Jan. 4, 2008), at 27-30 (setting forth the consumer benefits of retransmission consent).

repeal of the Commission's network non-duplication and syndicated program exclusivity rules.[34] They assert that "broadcasters are given a monopoly to an essential facility."[35] First, as previously shown, the network non-duplication and syndicated exclusivity rules themselves *do not* provide program exclusivity.[36] In fact, the rules actually *limit and restrict* program exclusivity by limiting the geographic area in which television stations may enter into program exclusivity agreements with network and syndicated program suppliers. In any event, since multiple television stations are licensed to each local television market (on average, about seven commercial full-power stations in each DMA) and since these stations compete against at least one cable system and one or two satellite carriers, and increasingly a local telephone company—each of which provides hundreds of cable/satellite network program services that compete with local stations for viewers, programming, and advertising revenue—it is hyperbolic in the extreme to suggest broadcasters have a "monopoly." In fact, the television programming market is unconcentrated or moderately concentrated, depending on how it is examined, but in any case it is substantially less concentrated than the local MVPD distribution market.[37]

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[34] *See* Comments of Free Market Operators (Massillon Cable TV, WaveDivision Holdings, NPG Cable, Comporium Group, and Harron Communications) at 2.

[35] Comments of Free Market Operators at 1.

[36] *See* Opposition of Broadcaster Associations at 23-24 (citing the network nonduplication rules, *see* 47 C.F.R. §§ 76.92-76.95, 76.120-76.122, and the syndicated program exclusivity rules, *see* 47 C.F.R. §§ 76.101-76.110, 76.120, 76.123-76.125). The Commission's rules only (a) provide a forum for adjudication of program exclusivity disputes, (b) limit and restrict the geographic scope of a program exclusivity arrangement between a program supplier and a local television station, and (c) impose certain formal notice requirements on local television stations as a condition to enforcement. *See id.*

[37] *See* Opposition of Broadcaster Associations, Appendix C (the HHI of the television programming market ranges between 214 and 1667, whereas the HHI of the MVPD distribution market is likely in the range of 4426 to 4637, with the higher estimate provided by Commission

(continued . . .)

Similarly, the Commission should reject claims such as RCN Telecom's that "since local broadcast affiliates generally produce their own local news and other local programming, they also possess a monopoly over this programming as well."[38] This is like saying that McDonald's has a monopoly in Big Macs and Burger King has a monopoly in Whoppers because they make their own brand of hamburgers. It is meaningless from an economics perspective. Television stations compete against each other (and cable networks) for viewers and advertisers just as surely as McDonald's and Burger King compete against each other (and other fast food restaurants) for consumers of hamburgers.[39]

Interestingly, this notion of broadcaster monopoly is put to rest by William Rogerson, an economist hired by Petitioner American Cable Association ("ACA"), who states that certain price effects for network programming can only occur if the programs within the bundle are

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(continued . . .)
economists).

[38] Comments of RCN Telecom Services at 3. *See also* Comments of Bright House Networks at 9 (stating that an "MVPD must bargain with the broadcaster as if that broadcaster were otherwise prepared to provide exclusive retransmission consent to the MVPD's competitors").

[39] As The Walt Disney Company stated:

> [W]hen petitioners use these terms—"market power" and "must-have"—they simply mean that broadcasters still air, and pay many millions of dollars to produce, some of the highest quality and most highly valued programming available on television today. That is not "market power"; it is just programming excellence. It would be absurd to penalize broadcasters for that excellence by invoking it as a basis for regulating the rates they may charge for it (via compulsory arbitration) or compelling them to allow its retransmission when they no longer consent to it (via compulsory "interim carriage" agreements).

Comments of The Walt Disney Company at 18.

substitutes.[40] Obviously, if the programs are substitutes in an economic sense, then they cannot, by definition, be monopolies in an economic sense.[41]

More significantly, ACA and its economist present data that supports the position of the Broadcaster Associations that broadcast retransmission consent fees are modest by any standard. ACA's economist calculates, based on estimates of retransmission consent fees for 2010, that a "Big 4" Station (i.e., one affiliated with ABC, CBS, Fox, or NBC) will receive, on average, about $0.19 per subscriber per month this year.[42] (See Table 1 below.) This amount is roughly consistent with the calculation provided by the Broadcaster Associations in their Opposition where they showed that, for the prior year (2009), the average monthly per subscriber fee was between $0.14 and $0.175 for Big 4 Affiliates.[43] By any measure of fair market value considering the relative popularity and attractiveness of the programming offered by Big 4 Stations in comparison with their cable network programming competitors, television stations

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[40] *See* William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees* (May 18, 2010) ("*2010 Rogerson Joint Control Report*"), at 9, 10, attached as Appendix B to Comments of American Cable Association.

[41] For the same reason, Bright House's claim that broadcasters "effectively capture the monopoly profits," Comments of Bright House Networks at 9, is incorrect.

[42] *See* William P. Rogerson, *The Economic Effects of Price Discrimination in Retransmission Consent Agreements* (May 18, 2010) ("*2010 Rogerson Price Discrimination Report*"), at 11, attached as Appendix A to Comments of American Cable Association.

[43] *See* Opposition of Broadcaster Associations at 37-38. Prof. Rogerson assumes that all retransmission consent receipts flow only to Big 4 Stations. However, non-Big 4 Stations, such as those affiliated with Univision, CW, and MyNetworkTV, do sometimes receive retransmission consent fees. Indeed, Univision's comments confirm as much. *See* Comments of Univision Communications at 2. Thus, Prof. Rogerson's estimates for Big 4 Stations are somewhat inflated.

receive *substantially less* in compensation on an "eyeball-for-eyeball" basis.[44] This result, standing alone, puts the lie to the pay TV industry's claims of broadcaster market leverage and their pleas for the Commission to tilt marketplace conditions even more in favor of MVPDs.

Table 1
ACA Estimated 2010 Average Retransmission Consent Fees for Big 4 Stations

MVPD Type	Average Retransmission Consent Fee (per subscriber per month)
Cable	$0.14
DBS	$0.25
Telco	$0.30
All	$0.19

Source: Comments of American Cable Association in MB Docket No. 10-71 (filed May 18, 2010), Table 2

2. ACA Presents No Evidentiary Basis for Claims of Alleged Price Discrimination

ACA's core complaint—which is not documented by any submission of factual evidence—is that television stations discriminate against smaller MVPDs in favor of larger MVPDs in retransmission consent rates. ACA, however, offered no evidence, no data, and no proof of any kind in support of its assertion. ACA's economist only states that he "believe[s],"

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[44] *See* Opposition of Broadcaster Associations at 38; Comments of Allbritton Communications Company et al. ("Local Broadcasters Coalition") at 4-7; Comments of CBS Corporation at 10-11 & 11 n.25. As we previously noted in making comparisons between retransmission fees and cable network fees, cable network fees presumably cover both the equivalent of retransmission consent rights and copyright licenses in the cable network programming, but copyright rights in all the programming on television stations that are retransmitted by MVPDs within their local markets are provided royalty-free under the statutory copyright licenses, 17 U.S.C. §§ 111 (cable) & 122 (satellite), and the two are thus comparable on a total cost basis. *See* Opposition of Broadcaster Associations at 38 n.129.

"it appears," and "anecdotal evidence" supports the view that smaller MVPDs pay more in retransmission consent rates (approximately $0.30 per subscriber per month for Big 4 Stations).[45] That is hardly a rationale on which the Commission may base a decision.[46] But, assuming for the sake of argument that the estimate is accurate, an average retransmission consent fee of $0.30 per subscriber per month pales in comparison to the $3.50 per subscriber per month fee that a viewing comparison market calculation suggests is the fair market price for a Big 4 Station's signal.[47]

Moreover, if, in fact, small MVPDs do pay an average fee of $0.30 per subscriber per month in retransmission consent fees, it shows, rather than price discrimination, that smaller MVPDs are able to negotiate just as successfully as large national telcos Verizon FiOS ($5.5 billion in 2009 revenues) and AT&T U-verse ($3 billion in 2009 revenues)[48] for the right to retransmit broadcast signals.[49]

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[45] *2010 Rogerson Price Discrimination Report* at 12, 12, 13 (respectively).

[46] *See, e.g., Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 763-64 (6th Cir. 1995) (rules restricting cellular providers from participating in certain spectrum auctions found arbitrary because FCC had no factual or documentary support for them); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1231 (D.C. Cir. 1980) (Commission order does not qualify as reasoned decision-making where it does not examine the actual evidence in the record and analyze that evidence on its merits).

[47] *See* Opposition of Broadcaster Associations at 38.

[48] *See* 2009 Verizon Communications, 10-K Report (filed with Securities and Exchange Commission) (Mar. 22, 2010), at 3, *available at* <http://investor.verizon.com/financial/quarterly/pdf/09_annual_report.pdf>; Todd Spangler, *AT&T: U-verse Revenue Nears $3 Billion Annually*, MULTICHANNEL NEWS (Jan. 28, 2010) (quoting AT&T CFO Rick Lindner), *available at* <http://www.multichannel.com/article/446516-AT_T_U_verse_Revenue_Nears_3_Billion_Annually.php2>. Revenues are only for the FiOS and U-verse divisions, respectively, not for the entire companies.

[49] *See supra* Table 1.

Furthermore, even if price differentials exist (again, a claim not supported by any facts and which the Broadcaster Associations contest[50]), there is nothing illegal or nefarious about the result. The Commission has already recognized that a broadcaster proposal "for compensation *above* that agreed to with other MVPDs in the same market" is "presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement."[51] ACA's economist states that "there is widespread consensus that an MVPD that serves a larger share of a local broadcaster's viewers is generally able to negotiate lower per subscriber retransmission consent fees than an MVPD that serves a smaller share of the broadcaster's viewers."[52] But this reflects nothing more than economies and efficiencies of scale and volume discounts, a phenomenon familiar to and accepted by any consumer who shops at Costco or Sam's Club. In fact, as Amy Tykeson, Chief Executive Officer of BendBroadband, one of ACA's member cable companies, recently stated: "The major difference between the small and the large operators is scale, and the scale issues come into play with regard to programming and vendor relationships."[53]

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[50] *See, e.g.,* Comments of The Walt Disney Company at 3 ("Ironically, although the smallest cable operators are particularly vocal in seeking repeal of Section 325(b)(1), they often receive the most attractive deals. For example, Disney provides retransmission consent *at no charge* to more than 90 small cable operators in the ten markets where Disney owns local broadcast stations." (emphasis in original)).

[51] *Good Faith Order* at ¶ 56 (emphasis added).

[52] *2010 Rogerson Price Discrimination Report* at 6. More formally, Prof. Rogerson stated the same principle as follows: "Thus, from an economics perspective, the case of retransmission consent appears to be a situation where larger buyers are able to extract lower input prices from a supplier than are smaller buyers." *Id.* at 8.

[53] Jonathan Make, *Cable Operators Unified on Several High-Profile Issues*, COMMUNICATIONS DAILY (May 24, 2010), at 6. *See also id.* (quoting Bob Gessner, Chief Executive Officer of Massillon Cable (and one of the Free Market Operators), as stating: "I

(continued . . .)

While ACA's economist does not suggest any retransmission consent price differentials are illegal, he does assert that "the main direct effect of price discrimination in this case, is simply to allow broadcasters to charge higher prices to MVPDs with less bargaining power."[54] He even implies that non-governmental private market actors, such as local broadcasters, should provide what amounts to *retransmission consent subsidies* to smaller MVPDs.[55] The implication appears to be that retransmission consent price differentials somehow result in higher cable rates for subscribers of smaller MVPDs. But ACA does not suggest that even if the Commission had authority to regulate retransmission consent rates and did so for smaller MVPDs, the Commission should *also* regulate the rates smaller MVPDs charge their subscribers to assure that any regulatory rate subsidy is passed along to their subscribers and not retained by the smaller MVPDs as windfall profits. It would be highly inappropriate—indeed extraordinary—for a government agency to regulate the price of a service "input" without regulating the ultimate price to the consumer of the final service "output."

(continued . . .)
think all cable operators would agree that cable programming costs too much. The only problem is we disagree about how we should make it cost less. Those with *size and leverage* and I guess an ownership interest have one way of doing it . . . ." (emphasis added)).

[54] *2010 Rogerson Price Discrimination Report* at 14. Prof. Rogerson also states that "the main ultimate effect of price discrimination in retransmission consent agreements is simply that different groups of viewers are being charged different prices to view the same programming." *Id*. at 15. However, that is no different than different groups of travelers being charged different prices for airline seats. Such pricing differentials are neither uncommon nor necessarily anti-competitive in the world of commerce.

[55] *See 2010 Rogerson Price Discrimination Report* at 14 (discussing differential pricing for customers with "low ability/willingness to pay" and for customers with "high ability/willingness to pay").

ACA also fails to take into account that small to middle-sized television station owners do not have the same negotiating or purchasing power as large group-owned broadcast companies in negotiating retransmission consent with huge MVPDs, or in negotiating network affiliation agreements with their network, or in negotiating non-network program purchase agreements with program syndicators, or in hiring talent, or in purchasing transmitters, towers, or other goods and services. If the Commission should determine that price regulation is appropriate to assure a uniform market or national retransmission consent rate, and if Congress authorized the Commission to do so, then, by analogy, the Commission would be compelled, in fairness, to mandate uniform pricing for the purchase of broadcast equipment, programming, talent, and other services—a result plainly inappropriate and impossible, as a practical matter, for any agency of government to administer.

3. Negotiations Involving Multiple Stations Are Lawful and Do Not Harm the Public Interest

Arguments by ACA and others concerning alleged price differentials for smaller cable operators[56] and negotiations involving more than one station in a market[57] fail to account for the fact that, through regional clustering, these "small" operators may control large shares of local markets in which broadcasters are negotiating carriage. For example, Gray Television notes that ACA member Mediacom controls systems serving approximately three-fourths of all cable

[56] *See* Comments of American Cable Association at 4-8.

[57] *See* Comments of American Cable Association at 9-13 & Appendices B and C; Comments of Pioneer Communications at 5; Comments of RCN Telecom at 3; Comments of Free Market Operators at 5-6.

subscribers in the Albany, Georgia, DMA.[58] In discussing potential public interest harms that can result from clustering, the Commission recently observed that "over 77 percent of cable subscribers are served by systems that are part of regional clusters."[59]

With the unfettered rise of cable clustering, broadcasters are often faced with the possibility that a failed negotiation with a particular cable company will cause it to lose MVPD access to large percentages of households in a given market. There are no restrictions on common ownership of cable systems or caps on the number of households that can be served by a single MVPD, which means that, in many situations, a broadcaster who competes with an average of six stations per DMA and numerous other outlets is negotiating with a single MVPD that controls a majority—and sometimes an overwhelming majority—of MVPD households in a local market. Such circumstances clearly tip the balance of bargaining power towards an MVPD—regardless of whether a nominally "small" cable operator is involved. There are no restrictions on the ability of MVPDs generally or individual cable systems to negotiate across systems and/or markets for carriage. Negotiations by any television broadcaster, whether a sole

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[58] *See* Comments of Gray Television at 3. Even accounting for competition from MVPDs other than cable, the market shares of some small to middle-sized cable operators can be extremely high. CableOne, for example, serves 64% of all MVPD households in the Biloxi, Mississippi, DMA and nearly 50% of the Boise, Idaho, DMA. Bright House serves 58% of MVPD households in the Bakersfield, California, DMA, 55% of the Tampa, Florida, DMA, and 54% of the Orlando, Florida, DMA. Insight serves 54% of MVPD households in the Louisville, Kentucky, DMA. Suddenlink serves 54% of MVPD households in the Victoria, Texas, DMA, and 47% of the Parkersburg, West Virginia, DMA. Mediacom controls 47% of the Cedar Rapids, Iowa, DMA, and 45% of the Des Moines, Iowa, DMA. *See* MediaBiz: MediaCensus Competitive Intelligence/SNL Kagan, *Video Market Share (Cable & DBS & Telco Video) by DMA—4th Quarter 2009* (note that "MVPD households" refers to households that subscribe to MVPD service, not homes passed).

[59] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746 (2010), at ¶ 28.

owner of a single station negotiating on its own, negotiations involving commonly owned stations, or joint negotiations pursuant to agreements between stations are and should be treated no differently. The Commission's complaint process provides any aggrieved MVPD with a remedy should it be faced with a broadcaster refusal to negotiate in good faith.

Arguments that aspects of the network-affiliate relationship are impacting retransmission consent negotiations and terms are simply inapposite.[60] The current system of free over-the-air broadcasting depends, in part, on network affiliations, just as it did in 1992 when Congress enacted retransmission consent. Congress knew at the time that the result of retransmission consent negotiations would reflect the value of the broadcast signal—a unique mix of programming selected by a local station that includes local content produced by the station, network entertainment and sports programming, and syndicated programming. In enacting retransmission consent, Congress concluded that nothing about recognizing a right to negotiate for carriage of broadcast signals would misuse or circumvent copyright laws. Such an argument is a thinly veiled attempt to overturn the statute.

Economic arguments regarding joint negotiations are equally unavailing. ACA complains that broadcasters' use of joint negotiating increases retransmission consent fees.[61] However, ACA's own data and the conclusion of its own economist contradict and undercut that argument in multiple ways.

First, ACA claims it identified 36 instances where two Big 4 Affiliates operate under

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[60] *See, e.g.*, Comments of Time Warner Cable at 8-10; Comments of Cox Enterprises at 5-8.

[61] *See* Comments of American Cable Association at 11-14.

common ownership in the same DMA.[62] ACA, itself, admits that it makes no distinction between common ownership of two stations—whether full power or low power—which it calls a "duopoly" or between two network affiliations appearing on the *same* station, one on a multicast channel, which it calls a "multicast duopoly."[63] These uses of the word "duopoly," however, have no meaning in the Commission's usual nomenclature for broadcast ownership policies. More significantly, they ignore longstanding Congressional policies intended to bring the widest possible diversity of network television service to every television household, as evidenced by the Satellite Home Viewer Act of 1988 and each of its succeeding reauthorizations. Indeed, in the Satellite Television Extension and Localism Act of 2010, enacted into law during the pendency of this proceeding, Congress recognized that a local station may lawfully affiliate with two or more networks on the station's various digital channels and fashioned policies to protect the "program exclusivity" that local television stations have for each digital channel for that broadcast network programming.[64] Rather than being penalized for extending free, over-the-air network television service to viewers through low power television stations, multicast channels, and joint operating or sales arrangements, local television stations should be lauded for their investments to bring multiple network programming free and over the air to virtually all U.S. households.

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[62] *See* Comments of American Cable Association at 10 & Appendix C, Table 1.

[63] *See* Comments of American Cable Association at 10 n.20.

[64] *See* Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, § 102 (codified at 17 U.S.C. § 119(d)(10)).

ACA also claims that it has identified 57 instances where multiple Big 4 Affiliates in the same DMA operate under some kind of sharing agreement but are not commonly owned.[65] On the one hand, ACA states in the text that these agreements "typically mean[] the stations operate under joint control for purposes of negotiating retransmission consent agreements,"[66] but, on the other hand, ACA states in a footnote that "it is difficult to determine from publicly available documents whether or not a sharing agreement includes the assignment of retransmission consent negotiation rights."[67]

Regardless, the Commission has previously determined that "[p]roposals for carriage conditioned on carriage of any other programming, such as . . . another broadcast station either in the same or a different market" are "presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement."[68] The extent of these negotiating arrangements about which ACA complains are also minimal, constituting less than 8% of such possible combinations, and the vast majority of even these (75%) are in small markets (DMAs 100+)[69] where such sharing agreements may well be necessary for the stations to survive

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[65] *See* Comments of American Cable Association at 10 & Appendix C, Table 2.

[66] Comments of American Cable Association at 10.

[67] Comments of American Cable Association at 10 n.22.

[68] *Good Faith Order* at ¶ 56.

[69] There are six possible two-Big-4-Station pairings in each DMA. Even considering the handful of "short markets," there would remain about 1200 possible two-station pairings. ACA's claimed 93 instances of joint negotiating, therefore, constitute 7.75% of such possible combinations (93 ÷ 1200 = 0.0775). ACA has identified just 23 such pairings involving either common ownership or a sharing agreement in large markets, DMAs 1-99, constituting less than 2% (23 ÷ 1200 = 0.019) of all such possible combinations.

economically.[70] In any event, if ACA believes these arrangements are anti-competitive, it has access to a variety of other available legal remedies.

Second, ACA asserts that "[e]conomic *theory* shows how broadcasters' use of joint negotiating increases retransmission consent fees."[71] However, ACA's own economist concludes otherwise: He states that while economic modeling of bilateral bargaining "certainly explains why it would not be surprising if we found that joint ownership or control of multiple Big 4 stations in the same DMA caused retransmission consent prices to be significantly higher, *it does not prove that we would necessarily expect to find such a result*."[72]

Third, and finally, ACA's economist admits that there is scant data on whether, in fact, joint negotiation results in higher retransmission consent fees. Indeed, he states he is aware of "only one data point,"[73] an *ex parte* filing by Suddenlink in which Suddenlink asserts that where a single entity controls retransmission consent negotiations for more than one Big 4 Station in a single DMA, Suddenlink pays, on average, 21.6% more than it pays on average for the other Big 4 Stations in those markets.[74] Without more, this assertion hardly qualifies as compelling

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[70] Other Commission rules already acknowledge and reflect these economic realities both for television stations and cable systems. The network nonduplication and syndicated exclusivity rules allow for an extra 20 miles of program exclusivity protection for small market television stations and exempt cable systems with fewer than 1000 subscribers for exactly this reason. *See* 47 C.F.R. §§ 76.92 (note); 76.95; 76.101; 76.106(b).

[71] Comments of American Cable Association at 11 (emphasis added).

[72] *2010 Rogerson Joint Control Report* at 11 (emphasis added).

[73] *2010 Rogerson Joint Control Report* at 12.

[74] *2010 Rogerson Joint Control Report* at 12 (quoting Ex Parte Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint in CSR Nos. 8233-C, 8234-M, at 5).

evidence that a retransmission consent premium accrues to the benefit of stations with retransmission consent authority for more than one network-affiliated station. The stations involved in these negotiations may simply be more desirable to MVPDs in terms of viewer preference than other stations in the same market, a fact that would clearly warrant higher retransmission consent fees. More importantly, even assuming for purposes of argument that Suddenlink's single data point does establish a pricing premium, the price differential is virtually *de minimis* in absolute dollar terms.

According to ACA and its economist, the typical large cable operator (such as Suddenlink, the nation's seventh largest MSO) is paying just $0.14 per subscriber per month, on average, for a Big 4 Station in 2010. (See Table 1 above.) If Suddenlink does pay 21.6% more to Big 4 Stations involved in joint negotiations, that amounts to *only three cents more* per subscriber per month for each station, or $0.06 in total for the two of them.[75] Even if smaller cable operators, such as ACA's members, pay an equivalent premium from a higher base rate, that premium is still less than $0.13 per subscriber per month for the pair of Big 4 Stations.[76] This fact, obviously, contradicts the assertion that joint negotiations, including even "low power duopolies" and "multicast duopolies," are driving up consumer retail rates for any class of MVPD.

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[75] $0.14 x 0.216 = $0.0302 for one station, or $0.0604 for both stations.

[76] $0.30 x 0.216 = $0.0648 for one station, or $0.1296 for both stations.

4. Not Only Is Retransmission Consent Compensation Modest, but It Is Necessary to Support Local Stations' Programming and Has No Effect on Broadband Deployment

Petitioners' various claims about "spiraling prices" and "the escalating cost of retransmission consent" are highly exaggerated and misleading.[77] Petitioners' and their MVPD Supporters' undocumented assertions of "[b]roadcasters' triple-digit price discrimination"[78] or "triple-digit percentage price discrimination"[79] or retransmission consent fees that "went up by about 50 percent last year"[80] or "quadruple digit increase in the retransmission consent fees"[81] or a cable operator having "faced a 200%-400% increase in its retransmission consent fees since just 2007"[82] all rely on relative changes, not absolute ones. But for more than a decade, and up until just a few years ago, television stations generally received *zero* in cash compensation from cable operators for their valuable signals.[83] Any increase from *zero* could be described as an

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[77] Comments of American Cable Association at 1.

[78] Comments of American Cable Association at 8.

[79] Comments of American Cable Association at 16.

[80] Comments of Bright House Networks at 7 (internal quotation marks and citation omitted).

[81] Comments of BEVCOMM (filed May 12, 2010), at 1.

[82] Comments of Discovery Communications at 4.

[83] *See* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) at ¶ 10 (although broadcasters initially sought cash compensation during the first round of retransmission consent negotiations, most cable operators were "unwilling to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross-promotions, and carriage of affiliated channels. . . . Twelve years later, cash still has not emerged as a principal form of consideration for retransmission consent.")

infinite increase in percentage terms. At higher dollar amounts, such as those that MVPDs charge their subscribers for video service, percentage changes can be important and meaningful guides, because they can be compared to other yardsticks or indices, such as the Consumer Price Index. But when the issue is pennies on the dollar, the absolute dollar amounts involved are small and percentage differences can be highly misleading.[84]

The comments of Discovery Communications ("Discovery") in support of the Petition's proposals actually show why the retransmission consent marketplace is not "broken," as

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[84] So Bright House's comparison of a 50% increase in retransmission consent fees compared to a 5%-7% increase in cable fees, *see* Comments of Bright House Networks at 7, greatly skews the effect on consumers. A 5%-7% increase in the average cable bill of $99, *see Navigant Report* at 22 (reporting only the $99 figure), would amount to an additional monthly charge of $5-$7 to the consumer. In contrast, an increase from $0.10 to $0.15 in retransmission consent fees for a Big 4 Station would represent a 50% increase, but would still be only a nickel, or $0.20 across all four Big 4 Affiliates in a market, and, even if fully passed on to consumers, would be responsible for just 0.2% of the cable bill.

Similarly, Bright House's "confiden[ce]" that an analysis of retransmission consent cost increases with basic service rate increases "would show retransmission consent fees increasing at a far faster pace than basic service rates," Comments of Bright House Networks at 11, is misplaced. As Drs. Eisenach and Caves have shown, between 2003 and 2008, "for every dollar increase in programming expenses, MVPDs raised total monthly charges to consumers by $3.97," *or nearly four times as much*. *Navigant Report* at 22.

On the other hand, Bright House's observation that "MVPD competition does *not* necessarily lead to lower consumer prices," Comments of Bright House Networks at 8 (emphasis in original), turns out to be correct, but not for the reason advanced by Bright House. Rather, the Commission's economists have found that the only time an incumbent cable operator charges *less* is *when it faces competition from another wireline competitor*, not from DBS competitors, and, in the case of wireline competition, not because it is accommodating entry, but rather because it is "responding aggressively, perhaps as a signaling mechanism to discourage entry in other communities." *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 24 FCC Rcd 259 (2009), at ¶ 14 & Appendix B at ¶ 20.

Discovery contends, but is working as intended.[85] Discovery owns and programs 13 cable channels in the United States.[86] Discovery argues that "[c]reating compelling, innovative programming . . . requires significant resources,"[87] that programming decisions, which must be made "years in advance of airing, depend[] on a steady and predictable stream of income from carriage fees so that [a programmer] can plan its offerings," and that

> [w]ithout the carriage fees and widespread carriage they deserve, high-quality independent programmers . . . cannot continue to produce the programming that contributes innovation, creativity and diversity to the programming line-up. Programmers rely on carriage fees . . . to fund and develop new programming, and need widespread carriage to earn sufficient fees to balance their programming expenditures. Reduced carriage and reduced carriage fees result in a threat to programmers' ability to continue to produce the creative, award-winning programming that contributes a different voice to MVPDs' programming line-ups.[88]

Substituting "television station" for "programmer" illustrates why retransmission consent fees are critical to local stations.

It is ironic, then, that Discovery castigates television stations for their alleged "abuse" of retransmission consent.[89] Discovery claims that broadcasters, whose signals deliver "must have" programming, are responsible for the declines in carriage fees and channels affecting

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[85] Comments of Discovery Communications at 1.

[86] These cable networks are Discovery Channel, TLC, Animal Planet, Discovery Health, Discovery Kids, Science Channel, Investigation Discovery, Military Channel, Planet Green, Fit TV, HD Theater, Discovery en Español, and Discovery Familia. *See* Discovery Communications Businesses and Brands, *available at* <http://corporate.discovery.com/global-businesses-brands/>.

[87] Comments of Discovery Communications at 9.

[88] Comments of Discovery Communications at 16.

[89] Comments of Discovery Communications at 1, 10.

"programmers such as Discovery Communications who are not affiliated with must-have programming."[90] Discovery points to television industry-wide retransmission consent revenues of $739 million in 2009, with an estimated total fee to reach $0.97 per subscriber per month for *all television stations* in a local market in 2011.[91] But Discovery, itself, reported *$982 million* in carriage fee revenues in 2009 for its U.S. networks.[92] In other words, Discovery collected *33% more in carriage fee revenue*—$243 million more—*for its 13 U.S. cable networks than the entire broadcast television industry did with some 1400 commercial full-power television stations*. And Discovery, according to SNL Kagan, collected $1.68 per subscriber per month in aggregate license fees for its 13 cable networks while those cable channels achieved, in the aggregate, prime time ratings of only 3.114 in November 2009.[93] In contrast, the Top 10 broadcast networks (ABC, CBS, Fox, NBC, CW, MyNetwork, Univision, Telemundo, ION, and Telefutura) had aggregate prime time ratings of 25.997 in November 2009 but collected, in total, approximately $0.70 per subscriber per month in retransmission consent fees.[94] Thus, broadcasters generated *8.3 times more viewers* than Discovery's channels did, but received only 42% of the carriage fees that Discovery managed to negotiate. Were broadcasters able to obtain fair market value for their signals on an "eyeball-for-eyeball" basis based on Discovery's rates,

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[90] Comments of Discovery Communications at 15; *see also id*. at 4.

[91] *See* Comments of Discovery Communications at 11 (citing SNL Kagan estimates).

[92] *See* Discovery Communications, Inc., Form 10-K (filed with Securities and Exchange Commission) (Feb. 22, 2010), at 39.

[93] Data aggregated from SNL Kagan, *Economics of Basic Cable Networks 2009*, and SNL Kagan, *Nielsen November 2009 Prime-Time Live Coverage*.

[94] *See* Opposition of the Broadcaster Associations at 36-37.

they would be paid about $14.00 per subscriber per month in the aggregate, rather than the $0.70 they are paid.

Discovery evidently fears that if television stations can successfully negotiate retransmission consent fees even just a fraction of their fair market value, then local stations will have (in Discovery's words) a "steady and predictable stream of income" to produce even more "creative, award-winning," "must have" programming. Of course, that is precisely what Congress intended when it established the retransmission consent scheme in the 1992 Cable Act.[95]

Finally, among all the unfounded assertions made by various MVPDs, the assertion that the retransmission consent marketplace is having a negative effect on broadband deployment might be the most preposterous.[96] This talismanic invocation is made with no factual support and is a patently self-serving attempt to divert the Commission from the core issue in this proceeding. If a station elects retransmission consent, an MVPD, by law, can determine to retransmit the station or not to retransmit it. No MVPD is forced by law to retransmit a station that has elected retransmission consent. Thus, the suggestion that somehow the fact that an MVPD, having determined to retransmit a station and re-sell the station's signal for profit, serves to preclude the MVPD's deployment of broadband is illogical and nonsensical.

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[95] *See, e.g.*, SEN. REP. NO. 102-92 (1991), at 35-36.

[96] *See* Comments of AT&T at 1-2, 10; Comments of American Cable Association at iii, 1, 16, 17; Comments of Bright House Networks at 11; Comments of American Public Power Association et al. at 3; Comments of Discovery Communications at 14.

III. Regulation of Broadcast Retransmission Consent Rates Will Inure to the Competitive Advantage of MVPDs—Not Consumers

It is absurd for Petitioners and MVPD Supporters—some of the largest media companies in the world—to suggest that Commission regulation of the rates broadcast stations charge MVPDs for the right to retransmit and re-sell broadcast signals is necessary to protect MVPD subscribers against escalating MVPD subscription rates (when retransmission consent rates are but a small fraction of the rates MVPDs charge their subscribers) while at the same time opposing rate regulation of their own service to consumers. The irony of Petitioners' self-serving "consumer welfare" argument is striking. Petitioners contend that in order to protect consumers from increased MVPD subscription rates, the Commission must regulate the rates they pay (in a highly competitive market) for the right to retransmit, mark up the price, and re-sell local broadcast signals to their subscribers at a profit. (Petitioners and MVPD Supporters do not argue for Commission regulation of the rates or negotiations for retransmission of non-broadcast program services—presumably because many of Petitioners and their supporters own or are under common ownership with those services.)

In short, Petitioners' "consumer welfare" argument is that the Commission should regulate one service "input"—but not regulate their own service "output." By analogy, it is like suggesting that consumers can be protected against increased electricity rates by regulating the price electric utilities pay for coal—rather than regulating the final retail price electric companies charge their customers for electricity.

The upshot of Petitioners' asymmetrical, intrusive rate regulation scheme would be to grant an irresponsible regulatory subsidy to MVPDs and to assure them windfall profits in perpetuity. Surely, this is not, and cannot be, in the best interest of consumers.

IV. Calls for Greater Intervention in the Retransmission Consent Marketplace Are Without Merit and Should Be Rejected

Some Petitioners and MVPD Supporters seek additional Commission intrusion into the retransmission consent process that goes beyond the proposed "reforms" of compulsory interim carriage and binding arbitration proposed in the original Petition—all in the name of promoting a "free market." The incongruity of these proposals is revealed by Media Access Project:

> The Petition intimates that a "free market" approach to broadcast negotiations might alleviate issues faced by MVPDs seeking retransmission rights for network programming. However, the Petition does not suggest *less regulation* as a cure for supposed broadcaster malfeasance, and calls instead for *greater Commission oversight* of retransmission consent terms and conditions as well as *increased intervention* when negotiations break down.[97]

Inconsistencies in the MVPD industry's position on Commission intervention in broadcast retransmission consent disputes and Commission intervention in cable/satellite program carriage disputes are noted by Free Press, Parents Television Council, and Consumers Union: "In fact, the proposals by Petitioners, many of whom are MVPD service providers, bear a strong resemblance to Commission interventions in program carriage disputes—interventions that, in a different context, numerous *MVPD providers have gone to great lengths to attempt to limit*."[98]

In addition to these logical inconsistencies, some MVPD Supporters and other third parties support the argument of the Broadcaster Associations that the Petition is predicated on various legal flaws and inconsistencies. Thus, Media Access Project states:

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[97] Comments of Media Access Project at 5 n.17 (internal citations omitted) (emphases added).

[98] Comments of Free Press, Parents Television Council, and Consumers Union at 4 (emphasis added).

> [A]s petitioners are well aware, Commission regulations such as the network non-duplication and syndicated exclusivity rules protect broadcasters only to the extent that the network affiliation or syndication contracts grant such exclusive rights. *See, e.g.*, 47 C.F.R. § 76.93 ("Television broadcast station licensees shall be entitled to exercise non-duplication rights . . . in accordance with the contractual provisions of the network-affiliate agreement."). Likewise, while the must-carry option may provide a strong fallback option for guaranteed carriage in the long term, broadcasters must elect must-carry or retransmission consent at the outset of each bargaining cycle, and once the retransmission election is made they cannot resort to must-carry status for that cycle. *See* 47 C.F.R. § 76.64(f)-(g).[99]

In other words, the program exclusivity rules do not grant television stations any rights that they have not acquired and purchased in the television programming marketplace,[100] and television stations must rely on market negotiations to obtain carriage at all if they elect retransmission consent. Claims to the contrary by Petitioners and MVPD Supporters are simply wrong.[101] In fact, Congress has not only codified local broadcast station exclusivity rules in the case of satellite carriers, but when it enacted STELA just last month, it expressly provided that the exclusivity protection against duplicating distant network signals afforded by the "unserved household" limitation applies with respect to all network-affiliated multicast digital channels of

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[99] Comments of Media Access Project at 5 n.17.

[100] *See* Opposition of the Broadcaster Associations at 23-24. *See also* Comments of LIN Television at 18 ("The FCC's network nonduplication and syndicated exclusivity rules do not give broadcasters special rights that would otherwise be unavailable. They do exactly the opposite: *they limit the area in which broadcasters may enforce exclusivity rights* that might otherwise be available." (emphasis in original)).

[101] *See, e.g.*, Comments of Verizon at 3 (claiming (incorrectly) that "normal market dynamics cannot function" because "an MVPD generally cannot refuse to carry a broadcaster's programming, given the broadcaster's compulsory carriage ('must carry') rights" and because an MVPD cannot seek an alternative source for programming "because the network non-duplication and syndicated exclusivity rules prevent the MVPD from delivering it to consumers").

local stations as well as to their primary digital channels.[102]

The *name* of the new satellite legislation (Satellite Television Extension and Localism Act of 2010) is instructive. The term "Localism" is in the title—which, of course, is the very public policy rationale for the network non-duplication and syndicated program exclusivity rules. If the Commission prohibited program providers (which it cannot, by statute, do in the case of broadcast signals retransmitted by satellite carriers) from granting program exclusivity to local stations for local distribution of their programming, then *local*, free, over-the-air broadcast service would cease to exist. The nation would end up with a handful—if that many—of national "super network" stations—a result directly contrary to the Congressional mandate of *local* broadcast television service.

MVPD Supporter Free Market Operators undercut one of the central arguments of the Petition by observing that basic tier rate regulation does not apply in the context of retransmission consent stations where cable systems are subject to effective competition.[103] As the Broadcaster Associations pointed out in their Opposition, approximately half, and probably more, of all MVPD subscribers subscribe to a service *not* subject to the cable rate regulation and the tier buy-through requirements. Accordingly, there is no sound logical or policy rationale to

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[102] *See Satellite Television Extension and Localism Act of 2010*, Pub. L. No. 111-175, § 102 (codified at 17 U.S.C. § 119(d)(10)).

[103] "The Commission has already determined that systems subject to effective competition, and thereby free of local rate regulation, can carry a station's digital signal on a separate digital tier. Other than the rate regulation provision, the only requirement for the carriage of broadcast signals is that must-carry signals must be carried on the lowest basic tier available to all subscribers. As such, *non-must-carry stations* [i.e., retransmission consent stations] *in effective competition markets have no statutory right to be on the basic tier*." Comments of Free Market Operators at 7 (emphasis added).

rely on those basic cable tier rules to justify Commission intervention in the retransmission consent regime—even assuming the Commission had the authority to do so.[104]

In addition to pointing out these various inconsistencies and flaws, the comments of various MVPD Supporters and other third parties demonstrate the sheer administrative and adjudicative morass the Commission would find itself in if it intervened in the retransmission consent marketplace. Massillon Cable, a member of Petitioner ACA and filing here with the Free Market Operators, concludes, based on its own experience with arbitration, that "the cost of arbitration and the time and effort involved in the arbitration were prohibitive and thus make it an inadequate remedy"[105]:

> Any arbitration will require a determination of the market value of the broadcast signal in question. There are a number of ways to establish a market value for a broadcast signal. However, all these market evaluations require dueling expert testimony.[106] It can be fully expected that any such evaluation will be hotly contested, including contentious procedural disputes. In Massillon's arbitration against Fox, it spent close to one million dollars for legal services and expert testimony, and that was merely to determine the fair market value for a single premium sports

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[104] *See* Opposition of the Broadcaster Associations at 30-32. Accordingly, the Commission should reject Free Market Operators' request with respect to rate-regulated systems to force television stations electing retransmission consent onto a separate tier. *See* Comments of Free Market Operators at 7. Moreover, the Commission lacks the statutory authority to impose this "remedy" since the rate regulation statute speaks in unambiguous, mandatory language requiring that the "basic service tier shall, at a minimum, consist of . . . (iii) [a]ny signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station." 47 U.S.C. § 543(b)(7)(A).

[105] Comments of Free Market Operators at 2.

[106] *Cf.* Opposition of the Broadcaster Associations at viii ("Arbitration would simply result in a battle between dueling economists and lawyers that will, frankly, bleed the economic resources that small, local stations could ill afford—and resources that all local stations could better use to invest in high-quality programming and public service stewardship.")

> channel, without regard to many of the complex market factors that would be needed to assess value in a typical retransmission consent situation. Thus, even the extraordinary amount that Massillon was compelled to expend is likely to be much less than an operator would need to commit to launch a retransmission consent arbitration with a single broadcast TV station. . . .
>
> Moreover, arbitration is not swift. . . . It has been 3 1/2 years since the dispute between Massillon and Fox arose, and there is still no final decision.
>
> . . . The commitment of resources required to engage in [retransmission consent] negotiations every three years is daunting enough. The prospect of consuming the hundreds of hours of management-level time that even a single arbitration would require is so unworkable as to foreclose arbitration as a practical remedy for any cable operator in the Companies' position.[107]

If, as the company states, a single arbitration proceeding cost this small cable company *a million dollars* in legal and economic expert expenses for one cable programming network negotiation (which the company says has dragged out for over 3 1/2 years), how much, it may fairly be asked, would it cost a local broadcast station and how long would it take to resolve literally dozens of retransmission consent disputes with cable and satellite companies in each local market should arbitration be mandated by the Commission? As the Broadcaster Associations noted in their Opposition, arbitration would give every MVPD—particularly larger MVPDs—a financial incentive to eschew meaningful negotiations and engage in a war of economic attrition with local stations, knowing full well that the last party standing would be the party who could longest endure the overwhelming expense of dueling lawyers and economists. Even if the Commission had statutory authority to impose mandatory arbitration—which it does not—it would be a wholly inadequate, unsatisfactory, and expensive substitute for the vastly more efficient and appropriate competitive market negotiation process now in place. In addition,

[107] Comments of Free Market Operators at 2-3.

the Commission, should Petitioners' proposal be adopted, would be burdened with hundreds—if not thousands—of regulatory proceedings to resolve retransmission consent disputes. And to what end? Petitioners and their supporters cite *not a single case* in which the Commission has found that a local broadcast station has failed to negotiate retransmission consent in good faith.

If Massillon's real-world example of million-dollar arbitration costs, tortoise-paced decision-rendering, and hundreds of person-hours taken away from actually running businesses is insufficient evidence of the unworkability of the arbitration "reform" proposal, then perhaps RCN Telecom's earnest expectation of Commission involvement is: RCN Telecom envisions that the Commission will assemble a "dedicated corps of experts"[108] to resolve retransmission consent disputes. Indeed, RCN Telecom believes it is "critical" that "the decision-maker(s) have the expertise needed to assess the presentations and data submitted by each party."[109] And where will the expertise come from? RCN Telecom suggests that it will come in part from the Commission "compiling" a "comprehensive body of information as to market conditions, costs and prices that will provide a solid, rational foundation for the fair resolution of these disputes."[110] Even large private media data firms, such as SNL Kagan, BIA/Kelsey, and Nielsen Media Research, cannot comprehensively compile the data RCN Telecom believes is necessary for the fair adjudication of retransmission consent disputes, and the Commission itself already knows well the immensity of the tasks involved in acquiring and compiling the substantially less

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[108] Comments of RCN Telecom Services at 8.

[109] Comments of RCN Telecom Services at 8.

[110] Comments of RCN Telecom Services at 9.

comprehensive data it reports in its video competition and cable industry prices reports.[111]

The fact is—notwithstanding the Commission's lack of authority to implement the proposed "reforms"—these types of Commission intervention in the marketplace would have unintended, harmful consequences. For example, Free Press, Parents Television Council, and Consumers Union, who actually support interim carriage, already warn that they "are concerned that the ability of MVPDs to ensure ongoing carriage for so long as they purport to be acting in 'good faith' may provide them too much power to stall negotiations and continue one-sided terms."[112] Indeed, they express (well-founded) skepticism that the proposed "reforms" are "merely relief for an industry that has historically claimed it needed none"[113] and "may be overly one-sided in favor of MVPDs."[114] The much more significant problem, they acknowledge, is not retransmission consent fees, but that "[c]able operators continue to enjoy supracompetitive profits at the expense of consumers."[115]

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[111] As Belo succinctly stated:

> "[A] government-mandated arbitrator could not sensibly place value on the critical non-cash components of retransmission consent agreements. Given the uniqueness of the issues to each individual negotiation, no party could better weigh the value of all components of a transaction than the broadcaster and the MVPD sitting at the table.

Comments of Belo Corp. at 9.

[112] Comments of Free Press, Parents Television Council, and Consumers Union at 7.

[113] Comments of Free Press, Parents Television Council, and Consumers Union at 5.

[114] Comments of Free Press, Parents Television Council, and Consumers Union at 8.

[115] Comments of Free Press, Parents Television Council, and Consumers Union at 8.

Unsatisfied with "reform" proposals that are already "overly one-sided in favor of MVPDs," Petitioner Cablevision—whose own Chief Operating Officer recently acknowledged that retransmission consent fees *will not* affect its overall cost structure[116]—apparently wants to make absolutely sure that its "supracompetitive profits" are protected.[117] Thus it proposes three "targeted reforms" to the retransmission consent scheme that it euphemistically characterizes as "transparency," "cash-only," and "non-discrimination."[118]

1. "Transparency." "*Every broadcaster must be required to disclose the rates that it charges each MVPD for its retransmission consent*."[119] By "transparency" Cablevision means that broadcasters must lay all their cards on the table while MVPDs get to keep theirs close to the vest. "Transparency" to Cablevision does not mean, apparently, that MVPDs have to disclose the rates that they pay to non-broadcast programming services with substantially less audience appeal, or any of the data relevant to determining their costs per channel.

2. "Cash-only." "*Broadcasters should be prohibited from seeking to obtain any non-cash compensation from MVPDs*."[120] Cablevision asserts that "rates for retransmission consent cannot be evaluated or fairly compared when they include—directly or indirectly—the

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[116] *See* Mike Farrell, *Rutledge: Cablevision Can Manage Retransmission Consent*, MULTICHANNEL NEWS (Nov. 3, 2009).

[117] This is the same Cablevision that, as Media Access Project points out, caused its own subscribers to "los[e] out on nearly *three weeks* of programming on the Food Network and HGTV channels when Cablevision—the MVPD, not the programming provider—decided to terminate carriage at the expiration of its previous contract with independent programmer Scripps Networks." Comments of Media Access Project at 4-5 (emphasis in original).

[118] Comments of Cablevision Systems at 3-4, 12-18.

[119] Comments of Cablevision Systems at 3 (emphasis added).

[120] Comments of Cablevision Systems at 4 (emphasis added).

costs associated with carriage of affiliated networks or other terms or conditions."[121] So, by "cash-only," Cablevision means that an MVPD will pay $X to the broadcaster, but in exchange the *MVPD will decide* on what channel position to carry the station, on what tier to carry the station, whether or not the MVPD will carry any multicasts or what the content of those that it will carry will be, what the quality of the signal will be, which party has to pay for signal delivery, how long the MVPD gets to carry the station, what happens if the MVPD does not actually pay what it agreed to pay, where the MVPD gets to carry the station, etc., etc.[122] If the broadcaster is willing to accept less than $X in exchange for MVPD promotion of the station or for fiber connectivity, it apparently cannot do so. If the MVPD is willing to pay more than $X in exchange for additional video-on-demand and start-over rights, it apparently cannot do so either. And broadcaster-affiliated 24-hour news channels, such as Albritton's NewsChannel 8 in Washington, D.C., or Belo's NorthWest Cable News in Washington, Oregon, and Idaho, would likely cease to exist. Furthermore, it is remarkable that a major MSO would insist on cash-only compensation, for it was the major MSOs that, for at least a decade, strongly resisted paying *any* cash compensation to television stations for retransmission consent.

3. "Non-discrimination." "*Broadcasters . . . should be prohibited from charging different distributors within the same market discriminatory rates*."[123] By "non-discrimination"

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[121] Comments of Cablevision Systems at 4.

[122] *See* Opposition of the Broadcaster Associations at 76-77 (listing common non-cash terms and conditions in retransmission consent agreements); Comments of Local Broadcasters Coalition at 12 (similar list).

[123] Comments of Cablevision Systems at 5. The proposal of OPASTCO and its fellow commenters for MVPDs to have access to "most favored nation" prices and conditions from broadcasters amounts to the same thing. *See* Comments of OPASTCO et al. at 8.

Cablevision means that retransmission consent rates will be set by the largest MVPD with the most negotiating leverage for all MVPDs in the market. "Non-discrimination" does not mean that MVPDs have to pay for broadcast signals at rates that are comparable on an "eyeball-for-eyeball" basis to those they pay for less popular cable networks.

In short, by "targeted reforms" Cablevision means they are targeted at the backs of broadcasters. Commission adoption of proposals so patently one-sided and anti-competitive would plainly be arbitrary and capricious.

Conclusion

For the reasons set forth herein as well as in the Broadcaster Associations' Opposition and the numerous comments of other broadcasters and broadcaster coalitions, the Broadcaster Associations respectfully request that the Commission deny the Petition for Rulemaking to interfere in the television programming and retransmission consent marketplace.

Respectfully submitted,

/s/
Jane E. Mago
Jerianne Timmerman
Erin L. Dozier
Benjamin F.P. Ivins
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

/s/
Wade H. Hargrove
Mark J. Prak
David Kushner
Julia Ambrose
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
150 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601

Counsel for the ABC Television Affiliates Association and the FBC Television Affiliates Association

/s/
Jonathan Blake
Jennifer Johnson
COVINGTON & BURLING LLP
1201 PENNSYLVANIA AVENUE, N.W.
Washington, D.C. 20004

Counsel for the CBS Television Network Affiliates Association and the NBC Television Affiliates

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