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

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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Executive Summary

In these reply comments, the National Association of Broadcasters ("NAB") again urges the Federal Communications Commission ("FCC") to resist repeated requests of multichannel video programming distributors ("MVPDs") to micromanage the negotiation of thousands of complex retransmission consent agreements. The record has established that substantial changes in the existing FCC regulations governing retransmission consent are unnecessary, would (in many cases) exceed the Commission's authority, and would be harmful to the public interest. No consumer benefit would flow from the rule changes that MVPDs propose and, indeed, they nearly uniformly oppose Commission proposals that would, in fact, inure to the benefit of consumers.

As evidenced by the record, the current retransmission consent marketplace is a successful and efficient means to deliver broadcast television programming to subscribers of MVPD services. Broadcasters have turned the retransmission consent fees they negotiate into predictable revenue streams that enable them to deliver high quality content to viewers. Importantly, retransmission consent fees represent an opportunity for broadcasters to help defray the high costs associated with the production of local news, which, as recently recognized by the FCC, continues to be important for local communities. An attached declaration and analysis of the economics of television broadcasting demonstrate that regulations artificially limiting broadcasters' ability to realize scale and scope economies (including potential limits on their ability to negotiate for retransmission consent) would substantially reduce both the number of financially viable stations and their programming output, including news.

MVPD claims that the policy base for retransmission consent has been eroded by the emergence of competition among MVPDs are simply false. Congress established retransmission consent to remedy an anticompetitive distortion (as between broadcasters and MVPDs) under which cable systems used retransmission of local television signals without compensation, thereby forcing local stations to subsidize their competitors. This policy rationale is equally as compelling today as in 1992.

There is no factual basis in the record to support claims that the retransmission consent marketplace is "broken." Allegations that the emergence of competition among MVPDs has provided broadcasters with undue bargaining power are greatly exaggerated and misleading. In fact, the record reflects that the carriage of broadcast signals via retransmission consent represents tremendous value for MVPDs, especially compared to carriage fees paid to non-broadcast programming networks. The mere fact that retransmission consent fees have increased from an initial level of zero does not mean that they are now somehow "too high" from the perspective of economic efficiency, or in any way the cause of the rising rates paid by consumers for MVPD services. Although MVPDs complain of "highly disruptive service withdrawals," the record demonstrates that retransmission consent impasses rarely result in an interruption of service to MVPD subscribers, and that any disruptions represent an insignificant portion of annual television viewing hours.

Section 325(b)(3)(A) of the Communications Act of 1934, as amended, does not provide the FCC with authority to make the sweeping changes suggested by the MVPD industry. Section 325(b)(3)(A) merely directs the Commission to ensure that retransmission consent rules "do not conflict" with its obligation to "ensure that rates for the basic service tier are reasonable." It does not provide an independent basis to limit broadcasters' exercise of retransmission consent or support any regulations that would establish the prices broadcasters could charge for retransmission consent. Nor can it be read to permit an MVPD to carry a broadcast station without the station's consent in direct contravention of Section 325(b)(1). The Commission must again reject repeated calls from MVPDs to adopt interim carriage or mandatory arbitration mechanisms, as the FCC has correctly determined it lacks authority to implement these proposals.

The many proposals to turn the statutory good faith negotiation requirement into a tool for micromanagement of retransmission consent negotiations must be rejected. There is no evidence in the record, for example, to demonstrate that non-binding mediation will effectively achieve the FCC's goal of minimizing programming disruptions for consumers. Rather, as the overwhelming majority of comments addressing this issue demonstrate, the Commission should refrain from modifying its rules to effectively mandate non-binding mediation because such a requirement would exceed the Commission's authority and negatively impact the retransmission consent process.

The Commission must reject requests to intervene in the substance of retransmission consent negotiations by adopting regulations that would limit the prices, terms and conditions of carriage that broadcasters could request from MVPDs in exchange for retransmission consent. Directly regulating the fees that MVPDs pay to broadcasters for signal carriage would not only qualify as an intrusion into such negotiations (and thereby exceed the Commission's authority), it would border on full scale appropriation of such negotiations. Moreover, the record in this proceeding simply does not support the proposition that changes in marketplace conditions justify price regulation, nor does it demonstrate that broadcasters unfairly discriminate against smaller MVPDs or that the retransmission consent system has otherwise failed.

MVPDs may not credibly suggest that FCC regulation of retransmission consent rates is necessary to protect consumers without also advocating that the Commission regulate retail rates MVPDs charge their consumers – the latter of which MVPDs have long opposed. To this end, despite their claims that retransmission consent fees raise costs to consumers, no MVPD has provided any credible evidence demonstrating that this is the case. The record in fact reflects that retransmission consent fees represent only a small fraction of programming costs and an even more miniscule fraction of MVPD revenues and, thus, are not the driving force behind MVPD service rate increases.

The Commission should not adopt rules that prohibit or limit joint negotiations among broadcasters, especially while expressly permitting them among MVPDs. Joint negotiations are consistent with FCC rules and the antitrust laws. As shown by the record and the attached economic declaration, such negotiations serve the public interest by enabling broadcasters to more effectively and efficiently negotiate with MVPDs and by facilitating agreements. Joint negotiations are especially important given the increase in clustering and negotiating leverage among cable operators.

There is no basis for elimination or modification of the broadcast-related exclusivity rules. MVPDs' core complaint is not with the FCC's exclusivity rules, which provide a procedural means to enforce privately negotiated contractual rights, but rather reflect their self-serving desire to circumvent underlying exclusivity provisions of privately negotiated contracts.

These rules help promote our system of local broadcasting, which provides important benefits to communities including vital emergency information.

As the record in this proceeding demonstrates, it is readily apparent that "consumer welfare" is not the true motive behind the MVPD industry's calls for regulation of retransmission consent. MVPDs almost uniformly oppose the only proposed change to the retransmission consent process that is truly aimed at consumer protection, namely, enhancing (rather than cutting back on) consumer notification by MVPDs. The record reflects that any potential harms that may result from consumer notification are offset by the substantial benefits of such notices from a consumer perspective.

In short, the record does not provide the Commission with any legal, factual, or policy basis to implement substantial changes to the current retransmission consent rules or to eliminate the exclusivity rules. Rather, as NAB advocated in its initial comments, the FCC should focus on revising its notice rules to the extent necessary to ensure that consumers have adequate information to make informed decisions in the event of a rare retransmission consent impasse.

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REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] respectfully submits these reply comments ("Reply Comments") in response to the *Notice of Proposed Rulemaking* ("*Notice*") released by the Federal Communications Commission ("FCC" or "Commission") in the above-referenced proceeding.[2] In these Reply Comments, NAB explains that the current retransmission consent marketplace provides a successful and efficient means of delivering broadcast television programming to subscribers of multichannel video programming distributor ("MVPD") services, as well as support for the production of quality and locally focused programming. The record simply does not support claims that the retransmission consent system is "broken," but rather demonstrates that the FCC's existing good faith rules are ensuring that market-based mechanisms designed to govern retransmission consent negotiations are working effectively. The Commission must disregard erroneous assertions that the policy basis for establishing

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[1] NAB is a nonprofit trade association that advocates on behalf of free, local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

[2] *See Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, FCC 11-31, Notice of Proposed Rulemaking (rel. Mar. 3, 2011) ("*Notice*").

retransmission consent no longer applies. As explained herein, the policy rationales underlying the retransmission consent regime are equally as compelling today as they were in 1992.

In addition, as the record demonstrates, there is no factual basis to support claims that the retransmission consent marketplace has failed. In fact, the record reflects that broadcast signals carried via retransmission consent represent tremendous value for MVPDs compared to the prices paid to non-broadcast networks for lower-rated channels. Although advocates for FCC intervention in the marketplace complain of "highly disruptive service withdrawals," the record demonstrates that retransmission consent impasses rarely result in an interruption of service to MVPD subscribers, and that any disruptions represent an insignificant portion (0.01%) of annual television viewing hours. Despite their claims that retransmission consent fees raise costs to consumers, no MVPD has provided any credible evidence demonstrating that this is the case. The record shows to the contrary that retransmission consent fees represent only a small fraction of programming costs and an even more miniscule fraction of MVPD revenues. Retransmission consent fees thus are not the driving force behind MVPD service rate increases. Indeed, although MVPDs claim that rule changes are needed to benefit consumers, they nearly uniformly oppose Commission proposals that would, in fact, inure to the benefit of consumers, such as the proposal to enhance consumer notification of a potential signal deletion.

Importantly, Section 325(b)(3)(A) of the Communications Act of 1934, as amended ("Communications Act"), does not provide the FCC with authority to make the sweeping changes suggested by the MVPD industry, such as mandatory arbitration or interim carriage (and their functional equivalents) or the adoption of rate-setting or other mechanisms intended to establish retransmission consent rates, terms and conditions. Even assuming the Commission had authority to modify its rules as suggested by the MVPD industry, which it does not, the

Commission should resist requests for micromanagement of retransmission consent negotiations—all of which are blatant attempts to tilt negotiations in MVPDs' favor.

Specifically, the Commission should not adopt rules that prohibit or limit joint negotiations among broadcasters, especially while expressly permitting them among MVPDs. Joint negotiations serve the public interest by leading to more efficient negotiations and facilitating agreements and by reducing the disparate bargaining positions between broadcasters and MVPDs. Nor should the Commission eliminate or modify the broadcast program exclusivity rules. Not only does the record fail to provide any convincing reason to do so, the record is replete with reasons as to why the rules should be maintained in their current form.

In short, the record does not provide the Commission with any legal, factual, or policy basis to implement substantial changes to the current retransmission consent rules or to eliminate the exclusivity rules. Rather, as NAB advocated in its initial comments, the FCC should focus on revising its notice rules to the extent necessary to ensure that consumers have adequate information to make informed decisions in the event of a rare retransmission consent impasse.

I. THE POLICY RATIONALES UNDERLYING THE SYSTEM OF RETRANSMISSION CONSENT ARE AS COMPELLING TODAY AS THEY WERE WHEN CONGRESS ESTABLISHED THE RETRANSMISSION CONSENT REGIME

Throughout this proceeding, the MVPD industry has called for "reform" of the retransmission consent regime, based upon their claims that the system is outdated due to changes in marketplace conditions, primarily, an increase in competition among MVPDs since Congress adopted retransmission consent in 1992.[3] To this end, MVPDs assert that the policy basis for establishing retransmission consent no longer applies in today's marketplace.[4] These

[3] *But see infra* Section III.A. (emergence of competition in the MVPD marketplace did not occur in a vacuum; there have been additional significant developments that have resulted in a decrease in negotiating power for broadcasters).

[4] *See* Comments of Verizon, MB Docket No. 10-71 at 9 (filed May 27, 2011) ("Verizon Comments"); Comments of American Cable Association ("ACA"), MB Docket No. 10-71 at 1 (filed May 27, 2011) ("ACA

assertions are wrong, however, as Congress did not enact retransmission consent because cable was a monopoly provider of paid television service. Rather, Congress adopted retransmission consent to ensure that broadcasters were not required to subsidize the establishment of their chief competitors (for viewership and advertising alike), but instead had the same opportunity as any other programmer to negotiate for compensation from pay TV providers retransmitting their signals.[5] Thus, in enacting retransmission consent, Congress rectified an anticompetitive marketplace distortion (between broadcasters and MVPDs) that threatened the vibrancy of free broadcasting. As explained below, this rationale remains as valid today as it was in 1992. Looking beyond their heated rhetoric and hollow complaints, MVPDs essentially object to retransmission consent because it requires them to negotiate for the right to use broadcasters' signals to attract subscribers when, prior to 1992, they simply took stations' signals without permission.

Prior to the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), cable operators were not required to seek the permission of a broadcaster before carrying its signal and were not required to negotiate with the broadcaster for compensation for the value of its signal. At a time when cable systems had few channels and were largely limited to an antenna function of improving the reception of nearby broadcast signals, this lack of recognition for the rights broadcasters possess in their signals had limited practical significance. However, in the 1970s and 1980s, cable systems began to include not only local signals, but also distant broadcast signals and the programming of vertically integrated cable networks and premium services. Thus, by 1992, cable systems were no longer merely retransmitting local television stations' signals, but were competing head-to-head with those stations for

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Comments"); Comments of Bright House Networks, LLC ("Bright House Networks"), MB Docket No. 10-71 at 8-9 (filed May 27, 2011) ("Bright House Networks Comments").

[5] S. REP. NO. 102-92 at 35 (1991) ("*Senate Report*").

programming, national and local advertising dollars, and viewers. Although cable operators were required to pay for the cable programming services they offered to their customers,[6] they were still allowed to use local broadcasters' signals – without permission or compensation – to attract paying subscribers, notwithstanding the direct competition between broadcasters and cable systems. In effect, the lack of retransmission consent had created a regulatory "subsidy"[7] for MVPDs in competing against local stations.

By the early 1990s, Congress concluded that this failure to recognize broadcasters' rights in their signals had "created a distortion in the video marketplace" that "threaten[ed] the future of over-the-air broadcasting."[8] Using the revenues they obtained from carrying broadcast signals, cable systems had supported the creation of cable programming (including program networks vertically integrated with cable system operators) and were able to sell advertising on these cable channels in direct competition with broadcasters. Given this change in the nature of cable systems, program services and advertising practices, Congress determined that the then-existing law was unfair and anticompetitive because it enabled MVPDs to retransmit programming of local broadcast stations (their primary competitors) without permission and without compensation.

Specifically, Congress concluded that public policy should not support "a system under which broadcasters in effect subsidize the establishment of their chief competitors."[9] Noting the continued popularity of broadcast programming, Congress also found that a very substantial portion of the fees that consumers pay to cable systems is attributable to the value they receive

[6] *Senate Report* at 35.
[7] H.R. CONF. REP. NO. 102-862 at 58 (1992).
[8] *Senate Report* at 35.
[9] *Id*.

from watching broadcast signals.[10] To remedy this "distortion," Congress in the 1992 Cable Act gave broadcasters control over the use of their signals and permitted broadcasters to seek compensation from cable operators and other MVPDs for carriage of their signals.[11] Congress specifically noted that cable operators pay for the cable programming they offer to customers and that programming services originating on broadcast channels should be treated no differently.[12] In other words, Congress's decision to enact the retransmission consent requirement for MVPDs is grounded in fundamental notions of equity and fair competition between broadcasters and MVPDs, and was not based on cable's monopoly position in the MVPD marketplace as the MVPD industry contends.[13]

The reasons for establishing this retransmission marketplace remain as valid and important today as they were in 1992. Congress enacted retransmission consent because it recognized both the value of broadcasters' signals (which are still highly valued by viewers and advertisers today) and that, without the ability to control the retransmission—and resale—of their signals, television stations could not compete on level terms with MVPDs for viewers and advertising revenues. It is still the case today that MVPDs would like to take the signals of local broadcasters and use those signals to attract paying subscribers. As the record reflects, not only do MVPDs and broadcasters continue to compete directly for viewers and advertisers today, this competition is more fierce than it was in 1992.[14] Accordingly, it would still be unfair and anticompetitive to allow MVPDs to retransmit local broadcast signals without the permission of

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[10] *Id*.

[11] *See* 47 U.S.C. § 325.

[12] *Senate Report* at 35.

[13] The plain language of the 1992 Cable Act, which applies to all MVPDs, not just cable operators, shows that the right is not premised on an assumption of monopoly status. *See* 47 U.S.C. 325(b)(1) (A) ("no cable system or multichannel video programming distributor shall retransmit the signal of a broadcast station … except with the express authority of the originating station"). Had Congress intended for the statute to be rendered ineffective upon the emergence of competition in the MVPD marketplace, it would have drafted the retransmission consent right in Section 325(b) much more narrowly, *e.g.*, to apply to cable operators alone.

[14] *See* Section III.A.

local stations. It is also still true today that MVPDs pay for all of the other, non-broadcast programming they offer to attract subscribers (and in fact pay *more* for that programming on a per viewer basis). And there is still no reason that broadcasters should be uniquely disfavored and not be allowed to negotiate for others' use of their signals. In sum, contrary to claims of the MVPD industry, Congress's original goals of correcting distortions in the video marketplace, promoting competition, and "ensur[ing] that our system of free broadcasting remains vibrant," are still served today by the retransmission consent system.[15]

II. THE RECORD IN THIS PROCEEDING DEMONSTRATES THE IMPORTANCE OF RETRANSMISSION CONSENT TO SUPPORT QUALITY AND LOCALLY FOCUSED PROGRAMMING

As evidenced by the record in this proceeding, the retransmission consent system benefits the viewing public by creating a fundamentally fair competitive environment in which broadcasters have the ability to develop unique and diverse programming, including local news and public affairs programming, and to provide other valuable services to their communities.[16] As observed by CBS Corporation ("CBS Corp.") in its comments, retransmission consent compensation allows broadcasters to invest in "programming that is first-class, still available at no cost to those who exercise that option, and responsive to local needs and concerns . . ."[17] Retransmission consent fees enable "greater investment by local stations in programming [and] more and better local programming."[18] The revenue streams that retransmission consent fees generate have become critical to broadcasters' ability to deliver high quality content to viewers

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[15] *Senate Report* at 36.

[16] Comments of the CBS Television Network Affiliates Association, MB Docket No. 10-71 at 1 (filed May 27, 2011) ("CBS Television Comments") (explaining that retransmission consent compensation supports "the ability of local broadcasters to serve their communities.")

[17] Comments of CBS Corporation, MB Docket No. 10-71 at 11 (filed May 27, 2011) ("CBS Corp. Comments").

[18] Comments of Sinclair Broadcast Group, Inc., MB Docket No. 10-71 at 14 (filed May 27, 2011) ("Sinclair Comments").

and to survive in the increasingly competitive programming marketplace.[19] Modifications to the system of retransmission consent proposed by MVPDs would create a competitive distortion that would cause quality programming, like high-profile sporting events, to migrate from broadcasters to platforms that enjoy additional revenue streams.[20] As smaller broadcasters observed, retransmission fees help fund free, quality local programming that "does not pay for itself."[21] In short, retransmission consent fees help broadcasters large and small defray the costs of high-quality programming that serves diverse viewers in local markets across the country.

Ironically, although Discovery Communications LLC ("Discovery") advocates for changes to the retransmission consent rules, its comments illustrate that the retransmission consent marketplace, in fact, is working as intended.[22] Discovery owns and programs 13 cable channels in the United States, and, therefore, is very familiar with the resources that must be devoted to developing innovative and compelling programming. Discovery argues 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.[23]

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

Retransmission consent fees also specifically represent an opportunity for broadcasters to help defray the high costs associated with the production of local news. As has been recently recognized in the Commission's *Future of Media* report, "[t]oday, the most popular source for

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[19] Joint Comments of Small and Mid-Sized Market Broadcasters, MB Docket No. 10-71 at 6 (filed May 27, 2011) ("Gilmore Comments").

[20] CBS Corp. Comments at 12. *See also* Sinclair Comments at 14 (noting that retransmission consent fees lead to "a slowing of the migration of programming from free-to-air television to pay-only MVPD services").

[21] Comments of Morgan Murphy Media, MB Docket No. 10-71 at 2-3 (filed May 27, 2011).

[22] Comments of Discovery Communications LLC, MB Docket No. 10-71 at 8 (filed May 27, 2011) ("Discovery Comments").

[23] *Id*.

local news is television."[24] "In 'a typical day,' 78 percent of Americans say they get news from their local TV news station—more than from newspapers, the Internet, or the radio."[25] Local television news plays an important role in the day-to-day lives for half of America.[26] Nevertheless, because more viewers now use a combination of media platforms to obtain news,[27] broadcasters have come to rely increasingly on non-advertising revenue to support local news budgets. As the president of Gannett Broadcasting, Inc.'s broadcast division observed, "[i]f [broadcasters] can't use retransmission consent [to fund news budgets], local news will die."[28] Thus, it is highly likely that retransmission consent fees will continue to play a critical role in ensuring the ongoing vitality of local broadcast television news in the future.[29]

To help assess the impact of retransmission consent on broadcasters' ability to deliver the content and services viewers have come to expect, NAB commissioned a detailed analysis of the economics of television broadcasting, including modeling the significance of economies of scale and scope.[30] The attached economic analysis explains that television broadcast stations are subject to strong economies of scale and scope,[31] and that "non-traditional" revenue sources (such as retransmission consent and online advertising) therefore play an important role in stations' financial viability.[32] Any current or future regulations that artificially limit

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[24] FCC, Steve Waldman and the Working Group on Information Needs of Communities, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* (June 2011), *available a*t: www.fcc.gov/infoneedsreport, at 76 ("Future of Media").

[25] *Id*.

[26] *Id.* (Half of all Americans watch local TV news "regularly.").

[27] *Id*.

[28] *Id.* at 299.

[29] *Id.* at 76 (noting "that the loss of local TV advertising as more viewers switch to cable will be at least partly offset by an increase in the fees that the highly profitable cable operators pay to local TV stations for broadcast programming.").

[30] This analysis and a related declaration are attached hereto at Appendix A. *See Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves* (June 27, 2011) ("Eisenach Reply Declaration"); Jeffrey A. Eisenach and Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* (June 2011) ("Economies of Scale Report").

[31] *See* Eisenach Reply Declaration at ¶¶ 4-8; Economies of Scale Report at Section II.

[32] *See* Eisenach Reply Declaration at ¶¶ 9-13; Economies of Scale Report at Section III.

broadcasters' ability to realize scale and scope economies (including potential limitations on broadcast stations' ability to negotiate for retransmission consent that may arise in this proceeding) would substantially reduce both the number of financially viable broadcast stations and their programming output.[33] Because "retransmission consent fees are used by broadcasters to pay for inputs that increase the quantity and quality of television broadcast content," depriving stations of retransmission consent revenue would result in a reduction in the quantity and quality of available programming, as well as, in the long run, "significant exit from the industry."[34]

Given the empirically well-established, significant relationship between station revenue and local news production, the economic analysis conservatively estimates that local news programming would decline by 14,250 minutes per week in the aggregate (or an average of approximately 11 minutes per week per station for all commercial television broadcast stations nationwide), if retransmission consent compensation were eliminated.[35] Thus, as the attached declaration and analysis clearly demonstrate, preserving the ability of broadcasters to negotiate freely with MVPDs for retransmission consent is critical to broadcasting's ability to compete in the marketplace and continue to offer highly relevant, top quality content for viewers.

III. THE MVPD INDUSTRY YET AGAIN HAS FAILED TO SUPPORT ITS CLAIMS OF MARKETPLACE FAILURE

To support their calls for change, the MVPD industry alleges that broadcasters today have increased leverage vis-à-vis MVPDs in retransmission consent negotiations,[36] leading to

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[33] *See* Eisenach Reply Declaration at ¶¶ 14-17; Economies of Scale Report at Section IV.

[34] Eisenach Reply Declaration at ¶¶ 14-15 (explaining how a lack of retransmission consent compensation would reduce the median station's future profit margins and lower its rate of return below its cost of capital).

[35] *See* Eisenach Reply Declaration at ¶ 17; Economies of Scale Report at Section 4.C.2. These estimates assume the current number of broadcast television stations (i.e., no significant exit) and are therefore conservative.

[36] *See, e.g.*, Comments of AT&T, MB Docket No. 10-71 at 7-8 (filed May 27, 2011) ("AT&T Comments") (growth in competition in the MVPD industry "has dramatically shifted the balance of negotiating power towards broadcasters."); Bright House Networks Comments at 8-9 (discussing broadcasters' supposed increased leverage due to competition among MVPDs); Comments of Cablevision Systems Corporation ("Cablevision"), MB Docket No. 10-71 at 6-8 (filed May 26, 2011) ("Cablevision Comments") (same); Comments of Charter Communications, Inc., MB Docket No. 10-71 at 4 (filed May 27, 2011) ("Charter Comments") (same); Comments of DIRECTV, Inc.,

"spiraling costs" for MVPDs and "highly disruptive service withdrawals" when MVPDs and broadcasters disagree as to the proper value of broadcast signals.[37] As explained below, however, allegations that the emergence of competition among MVPDs has provided broadcasters with increased bargaining power are unsupported by facts or economic theory.

When one combines the recurring calls by the MVPD industry to alter the retransmission consent system to limit or restrict broadcasters from seeking cash compensation,[38] prohibit broadcasters from seeking compensation in the form of carriage of other programming,[39] and to permit MVPDs to carry broadcast signals without the consent of the local station (e.g., through interim carriage or mandatory mediation mechanisms),[40] it is clear that the goal of some MVPDs is to simply use retransmitted broadcast signals without compensation or permission – the very

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MB Docket No. 10-71 at 4 (filed May 27, 2011) ("DIRECTV Comments") (same); Discovery Comments at 1-2 (same); Comments of the United States Telecom Association ("USTA"), MB Docket No. 10-71 at 2-4 (filed May 27, 2011) ("USTA Comments") (same).

[37] ACA Comments at 5.

[38] Indeed, some commenters go as far as to suggest that broadcasters should be prohibited from receiving compensation for the programming provided to MVPDs. *See* AT&T Comments at 2 n. 3 ("reducing or eliminating retransmission consent payments would have little, if any deleterious impact, on the incentives of program producers to produce innovative programming."); *see also id.* at 4 (broadcast television "is supposed to be free over-the-air programming…"); Charter Comments at 1 ("Charter urges the Commission to exercise its authority under Section 325(b)(1)(A) of the Communications Act and impose meaningful restraints on rapidly increasing retransmission consent fees."); Comments of Time Warner Cable Inc.("TWC"), MB Docket No. 10-71 at 41 (filed May 27, 2011) ("TWC Comments") (arguing that the Commission should adopt "rate-setting" to prevent broadcasters from receiving "higher payments").

[39] *See, e.g.*, AT&T Comments at 18 ("the Commission should amend its rules to prevent broadcasters from demanding both cash and in-kind compensation"); Comments of Cablevision at 11 ("Broadcasters and their affiliated entities [sh]ould be banned from tying retransmission consent to carriage of affiliated programming services or an MVPD's agreement to enter into other ancillary deals, such as sponsorship or advertising deals, carriage of multicast channels or carriage of VOD content."); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, *et al.* MB Docket No., 10-71 at iii (filed May 27, 2011) ("OPASTCO Comments") (urging the Commission to adopt rules prohibiting in-kind consideration); TWC Comments at 32-33 (same).

[40] *See, e.g.*, ACA Comments at 71 ("There is nothing in Section 325(b) that expressly prohibits regulatory action to require interim carriage pending resolution of retransmission consent disputes"); Comments of AT&T at 12 ("the Commission should adopt rules to provide for interim carriage"); OPASTCO Comments at 24 (advocating for a rule providing for interim carriage during retransmission consent negotiation impasses); Comments of Starz Entertainment, LLC, MB Docket No. 10-71 at 4 (filed May 27, 2011) ("Starz Comments") (urging the Commission to adopt mandatory dispute resolution procedures); Comments of SureWest Communications, MB Docket No. 10-71 at 6 (filed May 27, 2011) ("SureWest Comments") (urging the Commission to "enact rule provisions for mandatory interim carriage while an MVPD negotiates in good faith, and mandatory commercial arbitration (and interim carriage) if negotiations have broken down"); TWC Comments at 38 ("Commission should adopt new rules that would establish . . . dispute-resolution mechanisms and require interim carriage"); USTA Comments at 19 ("the Commission has sufficient statutory authority based on Section 325 to order interim carriage").

problem that Congress sought to resolve in the 1992 Cable Act. And, while the record in this proceeding is littered with unsupported assertions and ad hominem attacks upon local broadcast stations and the retransmission consent requirements, the MVPD industry fails to substantiate these attacks with any showing that the current environment contravenes congressional intent or any examples of rule violations by local stations.[41] Indeed, it cannot do so, as the FCC has never deemed a broadcaster to be in violation of the good faith rules. In short, there is no legal, factual, or policy reason that broadcasters—unique among programming suppliers—should not be permitted to negotiate for compensation for the signals that MVPDs are reselling to their subscribers, or to be uniquely limited in the type or amount of compensation they may even request.

A. The Emergence Of Competition Among MVPDs Has Not Resulted In Decreased Leverage For MVPDs In Retransmission Consent Negotiations

The MVPD industry's focus on the emergence of limited competition among MVPDs as a game changer for retransmission consent negotiations with broadcasters is misplaced. Competition in the MVPD marketplace does not automatically mean that MVPDs are now significantly disadvantaged vis-a-vis local broadcast stations in retransmission consent negotiations. What MVPDs routinely overlook is the fact that the emergence of MVPD competition has been accompanied by several other significant developments. As explained

[41] DISH, for instance, recounts one-sided anecdotes of specific negotiations that have resulted in retransmission consent impasses. *See* Comments of DISH Network L.L.C., MB Docket No. 10-71 at 14-17 (filed May 27, 2011) ("DISH Comments"). Incredibly, DISH takes no responsibility for any of the impasses it describes, but instead states that it "chooses to fight for its subscribers and the American consumer." DISH Comments at 5. Yet DISH did not "fight for its subscribers" when it attempted to prevent a broadcaster from providing viewers with notice of a possible programming interruption to enable DISH customers to make informed viewing choices. *See* Comments of LIN Television Corporation ("LIN Television"), MB Docket No. 10-71 at 24 n. 56 (filed May 27, 2011) ("LIN Television Comments") ("During the course of its recent negotiations with DISH, LIN Television notified the Commission of actions by DISH aimed at preventing LIN Television from notifying DISH subscribers of a possible programming disruption."). If DISH truly believed that the broadcaster had violated the good faith requirement, it could have availed itself of the Commission's existing procedures and remedies and filed a complaint. The anecdotes in DISH's comments do not reveal any evidence of wrongdoing by broadcasters and should be disregarded.

below, together these changes in the video programming marketplace have not increased broadcasters' leverage in negotiations but, in fact, have decreased it.

In their comments, MVPDs are quick to point out that, in many markets, there are multiple MVPDs competing to offer video programming services to consumers.[42] MVPDs fail to mention, however, that their market position is more concentrated now than it was in the early 2000s. In 2010 the top ten MVPDs controlled nearly 90% of the market nationally.[43] Similarly, at the local level, cable multiple system operators ("MSOs") have increased their market shares through clustering,[44] which reduces the number of individual systems in each local market (thereby increasing the clustered MSOs' relative bargaining power against a local television station).[45] At the time Congress enacted the retransmission consent statute in 1992, there generally were multiple MSOs serving a broadcaster's viewing area. Today, as a result of clustering, the number of MSOs has decreased such that a high proportion of the market is served by only one or two MSOs.

In short, although it is true that there has been some increase in the varieties of MVPDs serving each market, the video programming distribution market (both nationally and locally)

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[42] *See, e.g.*, AT&T Comments at 7 (discussing the "increasingly competitive MVPD marketplace."); Bright House Networks Comments at 8-9 (arguing that there is increasingly more competition in the MVPD marketplace); Cablevision Comments at 6-8 (same); Charter Comments at 4 (same); DIRECTV Comments at 4 (same); Discovery Comments at 1-2 (same); USTA Comments at 2-4 (same).

[43] The market shares (measured in terms of subscribers) of the top four MVPDs rose from 51.5% in 2002 to 68.5% in the fourth quarter of 2010, and the market shares of the top ten MVPDs rose from 67.4% to 89.9% during that same time period. *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 6 (May 27, 2011) ("*Declaration*") (citing SNL Kagan data), attached to NAB Comments as Attachment A.

[44] Clustering refers to the practice by which two MVPDs agree to "swap" cable systems in different geographic areas where the other already has a significant presence, thus concentrating their operations into specific regions where all or nearly all households receive service from the MSO. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227, 20 FCC Rcd 2755 at ¶141 (rel. Feb. 4, 2005) ("Eleventh Annual MVPD Report") ("Cable operators continue to pursue a regional strategy of 'clustering' their systems.").

[45] The number of clustered cable systems (cable systems under the same ownership serving the same local market area or region) serving over 500,000 subscribers rose from 29 in 2005, covering 29.8 million subscribers, to 36 at the end of 2008, covering 36.7 million subscribers. *See* SNL Kagan, Broadband Cable Financial Databook (2009). Of the fifty largest system clusters, seventeen are owned by TWC, including two of the top ten – Los Angeles and New York City. Comcast owned six of the top ten, twelve of the top twenty, and sixteen of the top thirty clusters, as of December 31, 2008. *Id.*

nevertheless continues to be dominated by a few large MVPDs.[46] For example, Landmark Television, LLC ("Landmark") recounts how its station in Las Vegas, Nevada must negotiate retransmission consent with one MVPD that reaches almost two-thirds of the households in the DMA.[47] In addition, Landmark notes that only three MVPDs collectively serve 92% of the households in the DMA.[48]

Whereas the MVPD market has remained quite concentrated, the market for television programming is significantly more competitive now than it was in 1992. MVPDs now offer dozens and often hundreds of channels of video programming, which compete with local broadcast stations for viewership and advertising dollars. As a result, non-broadcast programming networks have surpassed broadcast networks in terms of total viewership, and the gap is projected to continue widening.[49] In addition, broadcasters now face increasing competition for viewers from over-the-top video providers, such as Netflix, Apple TV and Google TV. CBS Corp. explains that cable, DVR, the Internet, and iPads are examples of "increased competition and dramatic technological change [that] have brought the business model of television broadcasters under increasing strain."[50] As a result, broadcasters "face much more competition for viewers than they did in 1992."[51] Indeed, unlike the MVPD industry, "the

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[46] *See* Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* at 4-7 (Apr. 2010) ("*Navigant Report*") attached as Appendix A to Opposition of the Broadcaster Associations, MB Docket No. 10-71 (filed May 18, 2010) ("Opposition of the Broadcaster Associations") (discussing how national MVPD concentration and regional clustering harms broadcasters' bargaining position). *Accord Declaration* at 5-7.

[47] Gilmore Comments at 6.

[48] *Id*.

[49] *Declaration* at 10; *see also* Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, Empiris, LLC, at 17-18 (Mar. 2009) ("*2009 Eisenach Report*"), attached as Appendix A to Reply Comments of the National Association of Broadcasters, MB Docket Nos. 07-269 (filed Jun. 22, 2009) ("NAB Reply Comments").

[50] CBS Corp. Comments at 12.

[51] Comments of the Walt Disney Company, MB Docket No. 10-71 at 7 (filed May 27, 2011) ("Disney Comments").

broadcasting industry is not highly concentrated," and in 2010 the top ten station owners in the top twenty-five markets accounted for only 31.2% of the advertising revenues in these markets.[52]

Given the multiple – and significant – developments that have occurred in the video programming industry since 1992, the Commission should not give credence to the one-sided account of changes in the competitive landscape presented by the MVPD industry.[53] As the record demonstrates, the emergence in competition among MVPDs has been accompanied by the rise of cable clustering, increased concentration in the national MVPD market, falling concentration in the video programming market, increased competition between broadcasters and other content providers, and declining viewer share of over-the-air broadcasting. These changes all tend to reduce broadcasters' negotiating power relative to MVPDs.[54] The Commission accordingly must reject calls to modify its retransmission consent rules based upon allegations that the balance of power in retransmission consent negotiations has unreasonably tipped in favor of broadcasters.

B. Retransmission Consent Fees Are Not "Too High" Merely Because They Have Increased From Zero And, In Fact, Broadcast Signals Represent Tremendous Bargains In An Evolving Programming Market

Commenters supporting modifications to retransmission consent rely on assertions that retransmission consent rates have increased dramatically over the past few years. For example, SureWest states that retransmission consent fees have "increased by 229% between 2008 and

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[52] *Declaration* at 8 (showing that even the top broadcast television station groups do not earn large shares of the advertising market).

[53] *See* Thomas W. Hazlett, *If a TV Station Broadcasts in the Forest…An Essay on 21st Century Video Distribution* (May 19, 2011). This paper, commissioned by the American Television Alliance (comprised largely of MVPDs), does not provide any evidence or data relevant to the issues being considered in this proceeding. It consists of a series of musings about the history of television broadcasting and other video distribution platforms, including numerous unsupported assertions and personal opinions (for example, "[t]he structure of the industry dictated 'lowest common denominator' programming" or "traditional TV broadcasting is the most expensive and the least valuable" of all platforms over which video programming is viewed today). *See id.* at 29, 3. This essay's combination of revisionist history, opinion and invective provides no basis for any Commission regulatory action in this proceeding.

[54] *Declaration* at 1-2; 4-10.

2011."[55] Discovery similarly alleges that retransmission consent fees have resulted in "four straight quarters of double-digit gains in TV groups' retransmission revenue in 2010"[56] or "23% year-over-year growth."[57] For its part, ACA claims that broadcasters have engaged in "triple-digit percentage price discrimination" against smaller MVPDs.[58]

These commenters fail to substantiate their anecdotal assertions that retransmission consent fees have "spiraled" out of control. But, even assuming the comments accurately characterize the percentages of increases in retransmission consent fees, such information is meaningless given that, historically, television stations generally received zero in cash compensation from MVPDs for their valuable signals.[59] Certainly the mere "fact that retransmission consent fees have increased from an initial level of zero"[60] does not mean that they are now somehow "too high" from the perspective of economic efficiency, or in any way the cause of the rising rates paid by consumers for MVPD services.[61] Any increase from *zero* could

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[55] SureWest Comments at 5.

[56] Discovery Comments at 5.

[57] *Id*.

[58] ACA Comments at 85.

[59] *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 at ¶ 10 (2005) ("*2005 FCC Retransmission Consent Report"*) (although broadcasters initially sought cash compensation during the first round of retransmission consent negotiations, most cable operators were "not willing 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."). Further, the record reflects that some broadcast television stations received their first cash payments for retransmission consent as recently as earlier this year. *See* Gilmore Comments at 6 (Rockfleet Broadcasting received its first cash retransmission consent fees from cable operators in 2011 for WJFW(TV) and WFVX-LP). *See also* CBS Television Comments at 15 ("Retransmission consent per-subscriber fees previously have been depressed due to MVPDs' historical refusal to pay broadcasters *anything* for the popular programming that MVPDs retransmit and resell to consumers…") (emphasis in original); Nexstar Comments at 4 (Nexstar did not receive cash compensation for retransmission consent until 2006); Sinclair Comments at 8-9 (broadcasters generally failed to negotiate for cash compensation for retransmission consent after passage of the 1992 Cable Act); Disney Comments at 8-9 (same); Comments of Allbritton Communications Company, MB Docket No. 10-71 at 2 (filed May 27, 2011) ("Allbritton Comments") ("For the first dozen years - four full cycles of must-carry/retrans periods - broadcasters essentially received no cash.").

[60] Further, as the record demonstrates, it is completely consistent with legislative intent for broadcasters to seek monetary or other compensation in exchange for retransmission consent. *See* CBS Corp. Comments at 25-26.

[61] *Declaration* at 1-2. As Dr. Eisenach explains, "[g]iven that retransmission consent fees were previously capped at zero, it is unsurprising that broadcasters have eventually succeeded in negotiating compensation" for their signals in the years since 1992. "Indeed, from an economic perspective, it would have been virtually inconceivable

be described as an infinite increase in percentage terms. At higher dollar amounts, such as those that MVPDs charge their subscribers for video services, 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.[62]

Contrary to claims of the MVPD industry that retransmission consent rates are too high, the record demonstrates that broadcast signals carried via retransmission consent offer MVPDs a significant value compared to carriage fees paid by MVPDs to non-broadcast networks.[63] A study submitted by Sinclair Broadcasting Group, Inc. ("Sinclair") demonstrates that stations affiliated with Big 4 networks would each command "estimated per subscriber, per month fees

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for retransmission fees to have remained at zero indefinitely" unless "broadcasters' signals were truly devoid of any real economic value." *Id*. at 1. *See also* CBS Corp. Comments at 5 (MVPD industry claims that retransmission consent fees are too high and driving up the price of cable subscription rates "are utterly without foundation, and reflect nothing but economic self-interest."); CBS Television Comments at 13 ("Although the recent marketplace trend may show an increase in retransmission consent rates, those rates are just *beginning* to approach a fair level.") (emphasis in original); Nexstar Comments at 7-9 (retransmission consent fees offer MVPDs tremendous programming value and such fees are not the "sole or main reason for MVPD rate increases."); Sinclair Comments at 11 (even though retransmission fees are higher now than in the past, they are substantially underpriced and that "there is not necessarily a direct correlation between higher or lower retransmission rights fees and the price consumers pay for MVPD service."); Disney Comments at 8-9 (the fact that more broadcasters are seeking cash for retransmission consent is a sign that the marketplace is working as Congress intended).

[62] Discovery estimates retransmission consent fees increase annually by 23%. Discovery Comments at 5. Bright House Networks previously estimated that cable bills increase annually by an average of 5-7%. *See* Comments of Bright House Networks in MB Docket No. 10-71 (filed May 18, 2010) at 7. Thus, a 5% increase in the average cable bill of $99, *see Navigant Report* at 22 (reporting only the $99 figure), would amount to an additional monthly subscriber charge of $5 per month. In contrast, an annual increase in retransmission consent fees of 23% for a Big 4 network affiliate station would amount to an annual increase of only three cents in a cable subscriber's monthly bill assuming (unrealistically) such cost is fully passed on to consumers. *See* NAB Comments at 43-44 (citing for 2009 a $0.14 average monthly retransmission consent fee for each Big 4 station on a per subscriber basis). Further, if the increase in retransmission consent fees for all Big 4 Stations were to be passed on to consumers, consumer bills would rise slightly more than one dime ($0.03 X 4 = $0.12) and would be responsible for slightly more than a 0.1% increase in a consumer's cable bill.

[63] *See, e.g.,* Comments of the National Association of Broadcasters, MB Docket Nos. 07-269 *et al.* at 16-17 (filed Jan. 4, 2008) ("2008 NAB Comments") ("There is no evidence of any cable company having paid more in retransmission consent fees for broadcast stations whose ratings were less than those of cable program services paid for by cable companies."); CBS Corp. Comments at 6; CBS Television Comments at 14.

averaging $2.48" if sold on the same basis as basic cable networks.[64] Indeed, the CBS Television Network Affiliates Association observes that "[c]able operators pay more than 10 times the per-subscriber fee for cable networks that are less than half as popular as the network-affiliated broadcast channels."[65] Especially as compared to other programming costs, broadcast signals carried via retransmission consent offer tremendous value to MVPDs and, as such, cannot be responsible for driving increases in consumer rates for MVPD service. "There is simply no evidence that the fees MVPDs pay to broadcasters are in any way inefficient or uneconomic" or "harm consumer welfare."[66]

C. The Open Market For Retransmission Consent Negotiations Has Not Resulted In A Significant Number Of Signal Deletions That Have Impacted Consumers

Many MVPDs claim that retransmission consent impasses have resulted in "highly disruptive service withdrawals" thereby justifying revisions to the Commission's rules.[67] This claim is greatly exaggerated, however, as the record reflects that retransmission consent disputes rarely result in an interruption of service to MVPD subscribers. As one broadcaster observed, the viewers of its television stations "have been **unaffected for 99.9982%** of the almost 20 years since the advent of the retransmission consent regime."[68] On an industry-wide basis, the few

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[64] Sinclair Comments at 11 (citing Dr. Michael G. Baumann, *Proposals for Reform of the Retransmission Consent Good Faith Bargaining Rules: An Economic Analysis,* Economists Incorporated at 7 (May 27, 2011), attached as Exhibit 1 to the Sinclair Comments).

[65] CBS Television Comments at 14.

[66] *Declaration* at 33. Dr. Eisenach explained in further detail in his reply declaration that the "growth of cash compensation for retransmission consent constitutes an efficient response to changing market and technological circumstances." Eisenach Reply Declaration at ¶ 32. In fact, he observed that "[t]his result is precisely what the economic literature on two-sided markets predicts will occur in such a situation, and is entirely consistent with economic efficiency and the maximization of consumer welfare." *Id*. at ¶ 13.

[67] *See* Verizon Comments at 8; *see also* CAGW Comments at 1-2 (citing two high profile impasses over the past two years).

[68] Allbritton Comments at 4 (emphasis in original). *See also* NAB Comments at 8; CBS Corp. Comments at 8 (noting that CBS Corporation has never withdrawn its signal from an MVPD since becoming an independent company in 2005); Gilmore Comments at 7 (stating that the three broadcasters have experienced only one service disruption combined due to a retransmission consent impasse); Comments of Belo Corporation, MB Docket No. 10-71 at 8 (filed May 27, 2011) ("Belo Corp. Comments") ("Belo Corp. and MVPDs have agreed to terms without any 'hostage' holding, public 'showdowns,' or substantial loss of service."); Comments of The Writers Guild of

interruptions in service that have occurred have affected, on average, only about one-one hundredth of one percent (0.01%) of annual total television viewing hours since 2006.[69] There is no evidence to suggest that retransmission negotiating impasses are increasing in frequency or impact over time. Quite the contrary, it is likely that, as cash compensation becomes more common through subsequent transactions, retransmission consent impasses will occur even less frequently in the future.[70]

Importantly, retransmission consent is not the only context in which an MVPD subscriber may temporarily lose access to programming. For example, there are also recent examples of carriage disputes between non-broadcast networks and MVPDs.[71] Yet no MVPD suggests that the Commission should regulate the rates or negotiations for retransmission of non-broadcast program services – presumably because much of the MVPD industry is vertically integrated with those programming services. Such inconsistencies in the arguments of MVPDs demonstrate the MVPDs' true motive: to eliminate broadcasters' rights to negotiate for any form of compensation in return for permission to retransmit and resell local broadcast signals.

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In short, the record does not support MVPDs' allegations that the retransmission consent marketplace is broken. Indeed, as explained above, no MVPD has presented any evidence or data demonstrating that the system has failed on a widespread basis thereby warranting significant change. By contrast, the record contains specific economic and empirical evidence that the existing retransmission consent rules are "ensuring that the market-based mechanisms

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America, West, Inc., MB Docket No. 10-71 at 5 (filed May 27, 2011) ("Writers Guild Comments") ("Signal cutoff is a rare occurrence.").

[69] *Declaration* at 30.

[70] *Id*. at 30-32. *See* SNL Kagan, *The Economics of Retransmission for Broadcasters and Cable MSOs* at 3 (2010) ("The incidences of high profile spats between cable MSOs and broadcasters will diminish as the practice [of paying retransmission fees] becomes routine . . . .").

[71] CBS Corp. Comments at 10.

Congress designed to govern retransmission consent negotiations are working effectively."[72] Accordingly, NAB encourages the Commission to recognize yet again that the current process is working efficiently to the ultimate benefit of consumers.[73] Substantial or numerous changes in the existing rules are not warranted, and would be harmful because they would skew the existing retransmission consent system that presently functions well.[74]

IV. THE FCC LACKS AUTHORITY TO IMPLEMENT MANY OF THE SPECIFIC PROPOSALS SUGGESTED BY THE MVPD INDUSTRY, WHICH ARE NOT AIMED AT PROTECTING CONSUMERS BUT RATHER AT EXEMPTING MVPDS FROM RETRANSMISSION CONSENT FEES

MVPD commenters continue to request sweeping change to the FCC's regulatory regime for retransmission consent based upon Section 325(b)(3)(A) of the Communications Act and the FCC's authority to ensure that rates for basic cable service are reasonable. However, as explained below, Section 325(b)(3)(A) provides no authority for the Commission to adopt regulations that would override the clear congressional intent to establish a free marketplace in which broadcasters could negotiate compensation in exchange for retransmission consent. Section 325(b)(3)(A) cannot be read to "trump" the absolute retransmission consent right in Section 325(b)(1). Moreover, the MVPD industry has failed to demonstrate any relationship between the retail rates for basic tier cable service and retransmission consent fees.

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[72] *Notice* at ¶ 1.

[73] *See 2005 FCC Retransmission Consent Report* at 44 ("[T]he regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals. . . . Most importantly, consumers benefit by having access to [broadcast] programming via an MVPD.").

[74] *See id*. (concluding that local television stations and MVPDs "negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side").

A. Section 325(b)(3) Cannot Be Used As Justification For The Sweeping Revisions Proposed By The MVPD Industry

Despite repeated incantation by MVPDs,[75] Section 325(b)(3)(A) of the Communications Act provides no authority for the Commission to override clear congressional intent and rewrite the retransmission consent statute. Rather, Section 325(b)(3)(A) merely directs the Commission to ensure that retransmission consent rules "do not conflict" with its obligation to "ensure that rates for the basic service tier are reasonable."[76]

Simply put, there is no language in Section 325(b)(3)(A) that suggests that the Commission's authority to regulate the basic tier pursuant to Section 632(b)(1) provides independent authority for the Commission to override the retransmission consent right created by Section 325(b)(1)(A). Section 325(b)(1)(A) is an absolute right, subject only to the exemptions set forth in Section 325(b)(2). Notably, the plain language of Section 325(b)(1)(A) does not reference any conditions described in Section 325(b)(3)(A), nor does Section 325(b)(3)(A) direct the Commission to enact regulations that would contravene the express retransmission consent right for broadcasters to negotiate the terms and conditions of carriage set forth in Section 325(b)(1)(A). Rather, Section 325(b)(3)(A) provides that the Commission should ensure that its regulations governing retransmission consent "do not conflict" with its basic tier regulations.

Significantly, when the Commission adopted rules implementing the 1992 Cable Act, some segments of the cable industry advocated a cap on retransmission consent rates in light of Section 325(b)(3)(A), while others contended that it required the Commission to ensure that

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[75] *See, e.g.,* Bright House Networks Comments at 4, 6-7 (Section 325(b)(3)(A) "clearly conveys" to the Commission the obligation to regulate retransmission consent fees in the best interest of MVPD consumers); ACA Comments at 72 ("expansive and far-reaching grant of authority—either standing alone or in conjunction with the Commission's ancillary authority under Sections 303(r) and 4(i) of the Communications Act—encompasses the power to adopt whatever measures are necessary to protect consumers affected by retransmission consent disputes").

[76] 47 U.S.C. §325(b)(3)(A).

retransmission consent terms were not unreasonable.[77] The Commission, however, recognized that Congress did not intend for retransmission consent rates to be directly regulated.[78] Moreover, it stated that the record before it "provide[d] no evidence that the effect [of retransmission consent on basic service tier rates] may be significant, no credible analysis suggesting that the effect cannot be dealt with in the [cable] rate regulation proceeding, and, hence, no basis for considering such effect in the decisions we make herein."[79] Accordingly, the Commission declined to adopt the cable industry proposals.[80]

The same Commission analysis and conclusions apply with equal force today. Although the MVPD industry claims that retransmission consent fees have resulted in increased subscriber rates,[81] no MPVD has provided any credible evidence demonstrating that this is the case. Indeed, the MVPD industry continues to fail to show any relationship between the retail rates for MVPD services and retransmission consent fees, let alone that such fees are the driving forces behind subscriber rate increases. By contrast, NAB has demonstrated through economic analysis that retransmission consent rates do not drive MVPD consumer rates.[82] In fact, retransmission consent fees represent only a small fraction of programming costs whereas MVPD revenues and profits are increasing at a rate that outpaces all of their programming costs.[83] In 2010,

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[77] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order, 8 FCC Rcd 2965 at ¶ 177 (1993) ("*Consumer Protection Order*").

[78] *Id.* at ¶ 178 (citing *Senate Report* at 36).

[79] *Id.*

[80] *See id.*

[81] ACA Comments at 15; TWC Comments at 9; USTA Comments at 13-14.

[82] *See, e.g.,* NAB Comments at 42; 2008 NAB Comments at 17 (citing a 2003 Government Accountability Office ("GAO") study which did not attribute higher cable rates to retransmission consent fees); GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 28-29; 43-44 (Oct. 2003) ("GAO Study"); Opposition of the Broadcaster Associations at 47; CBS Corp. Comments at 5 ("Retransmission fees make up only a small percentage of programming costs. That being the case, they are not the reason that cable subscription rates have reliably increased at a pace greater than inflation, a trend that was established well before broadcasters were first successful in getting paid by operators for use of their signals.").

[83] *See Declaration* at 11-24 (retransmission consent fees represent a tiny fraction of MVPD costs; MVPDs' programming costs are decreasing relative to other costs, revenues, and profits); *Navigant Report* at 21-22 ("programming costs are rising slower than MVPD revenues, slower than other components of MVPD costs, and

retransmission consent fees were only about six-tenths of one percent of cable MSO revenues.[84] In short, as was the case in 1992, there is "no evidence that the effect [of retransmission consent on basic service tier rates] may be significant."[85]

In any event, under basic principles of statutory construction,[86] the basic tier rate provision cannot be read to authorize the Commission to override or nullify the explicit statutory prohibition in Section 325(b)(1) against carriage of a television station's signal without the station's consent. Statutes must be read, whenever possible, to give effect to all of their provisions,[87] and no provision of a unified statutory scheme should be treated as superfluous or nullified altogether.[88] In plain contradiction of those fundamental principles, MVPDs would interpret the Commission's authority to regulate basic tier rates to nullify Section 325(b)'s command. The statute simply cannot be read in this way.

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slower than MVPD profits, while retransmission fees make up a small fraction of programming costs, and an even smaller percentage of MVPD revenues"); Jeffrey A. Eisenach, *Video Programming Costs and Cable TV Prices*, at 5-15 filed by The Walt Disney Company in MB Docket Nos. 10-71 *et al*. (filed Apr. 23, 2010) (conducting similar analysis with similar results).

[84] *See* NAB Comments at 46; *Declaration* at 22.

[85] *Consumer Protection Order* at ¶ 178.

[86] *See, e.g., United States v. Nader*, 542 F.3d 713, 720 (9th Cir. 2008) ("It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose." (citation and parentheses omitted)); *see also Dep't of the Air Force v. Fed. Labor Relations Auth.*, 294 F.3d 192, 196 (D.C. Cir. 2002) (agency's interpretation of its enabling statute "is entitled to deference only if it is reasonable and consistent with the statute's purpose").

[87] *See, e.g., United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2234 (2009) (invoking "well-established principles of statutory interpretation that require statutes to be construed in a manner that gives effect to all of their provisions" (citing cases)); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (describing as a "cardinal principle of statutory construction" the "duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section" (citations omitted)); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, [a court] must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous" (citations omitted)); *Regular Common Carrier Conference v. United States*, 820 F.2d 1323, 1331 (D.C. Cir. 1987) (rejecting agency's proffered construction of statute in part for failure "to give full effect to all relevant provisions of the statute").

[88] *See Bennett*, 520 U.S. at 173; *accord Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (court hesitates "'to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law'" (quoting *Mackey v. Lanier Collection Agency & Service, Inc*., 486 U.S. 825, 837 (1988))); *Bridger Coal Co./Pac. Minerals, Inc. v. Director, Office of Workers' Comp*., 927 F.2d 1150, 1153 (10th Cir. 1991) (court "will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous" (citing cases)).

B. No Commenter Has Effectively Demonstrated That The Commission Has Authority To Mandate Interim Carriage, Mandatory Arbitration Or Their Effective Equivalents

Once again, commenters proposing revisions to the retransmission consent system argue that the Commission should adopt mechanisms to require a broadcaster to agree to interim carriage or mandatory arbitration procedures even if the broadcaster objects to carriage of its signal by a particular MVPD.[89] The FCC must again reject these repeated calls for adoption of interim carriage or mandatory arbitration because it has correctly determined it lacks authority to implement these requirements. Similarly, the Commission must reject proposals that effectively require broadcasters to submit to dispute resolution procedures or otherwise permit an MVPD to carry a broadcast signal without the consent of a local station.

1. The Record Supports The FCC's Conclusion In The *Notice* That The Commission Lacks Authority To Mandate Interim Carriage Or Mandatory Arbitration

No commenter calling for interim carriage or mandatory arbitration has persuasively rebutted the FCC's legally sound conclusion that it lacks authority to adopt interim carriage or mandatory arbitration.[90] As NAB explained in its initial comments, the FCC's determination that it lacks authority to mandate interim carriage and binding dispute resolution procedures is fully consistent with the plain language of the retransmission consent statute, congressional intent, and

[89] *See* SureWest Comments at 6 (arguing that the FCC should adopt mandatory arbitration); TWC Comments at 43 (asserting that an arbitration regime that includes *de novo* review by the Commission would be entirely consistent with the ADR Act); Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc., MB Docket No. 10-71 at 29-30 (filed May 27, 2011) ("Joint Comments") (disagreeing with the Commission's tentative conclusion that it lacks the statutory authority to adopt interim carriage requirements and mandatory dispute resolution proceedings); AT&T Comments at 12 (urging the FCC to provide for interim carriage pending the resolution of retransmission consent negotiations and disputes); OPASTCO Comments at 24 (same); SureWest Comments at 1 (same); TWC Comments at 38 (same).

[90] *See Notice* ¶18 ("We do not believe that the Commission has authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations.")

the FCC's past decisions interpreting and applying the statutory scheme.[91] No commenter calling for either of these modifications has presented any new argument or evidence demonstrating an error in the Commission's legal analysis.[92]

FCC merger precedent cited by some MVPDs does not undermine the Commission's analysis. For example, TWC argues that the Commission has established a dispute resolution mechanism for resolving retransmission consent disputes as a condition of three mergers since 2004, including in its *Comcast-NBCU Order*, and that the approach used in those cases could serve as a template for a generally applicable dispute resolution process.[93] Conditions imposed in the context of transaction approvals, however, are by definition case-specific, based upon analysis of facts and circumstances involving particular companies and the transaction before the FCC. These types of conditions are often proposed by the parties to the transaction in the first instance, and also are subject to the merger applicants' consent. Further, as the NAB has previously explained, the conditions cited by TWC and other MVPDs were designed to address potential issues arising from the vertical integration of the merging parties' broadcast stations and MVPD platforms, and are not relevant to broadcasters generally.[94] Reference to these merger

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[91] *See* NAB Comments at 17.

[92] For the reasons set forth in comments previously filed, Sections 4(i), 303(r) or 309 of the Communications Act also do not authorize the Commission to issue rules requiring carriage of broadcast signals without consent. *See* Opposition of the Broadcaster Associations at 71-72; *see also* Reply Comments of the Broadcaster Associations at 3-5. Although the Commission has delegated authority to act under Sections 4(i) and 303(r) of the Communications Act, any action taken pursuant to either section must be consistent with other provisions of the Communications Act, including Section 325. Similarly, Section 309's general mandate to ensure that broadcast licensees operate in the public interest cannot be read to authorize the Commission to take actions directly contradicting the congressional directive to establish a retransmission consent marketplace in which private negotiations, not government regulation, establish the terms and conditions of retransmission consent agreements. *See* 47 U.S.C. § 309(a). It is, moreover, a fundamental principle of statutory construction that the "[s]pecific terms" of a statute "prevail over the general in the same or another statute." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957); *accord Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). The *general* mandate that the Commission act in "the public interest" cannot override the *specific* statutory provisions that unambiguously prohibit the retransmission of broadcast signals by MVPDs without consent of the broadcast stations.

[93] *See* TWC Comments at 42; *see also* ACA Comments at 74.

[94] *See* Opposition of the Broadcaster Associations at 75, citing *Applications for Authority to Transfer Control, News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee*, Memorandum Opinion and Order, 23 FCC Rcd 3265 at ¶ 220 (2008) ("*DIRECTV-News Corp. Order*") (merger

conditions cannot form the legal basis for an across-the-board arbitration or carriage mandate for retransmission negotiations.

MVPDs' reliance on the program access rules[95] as a source of authority for the FCC's imposition of standstill requirements is equally misplaced. Several MVPDs argue that the FCC either has express or ancillary authority to adopt a standstill requirement in the event of a negotiation impasse.[96] No such authority exists. The effect of a standstill requirement would be to mandate carriage of a broadcaster's signal over the objection of the broadcaster – a result contrary to the plain language of Section 325(b)(1), which requires the "express authority of the originating station" for retransmission of the station's signal.[97] Thus, under the unequivocal language of Section 325(b)(1), the Commission is expressly prohibited from imposing a standstill requirement. And, as the Commission has rightly concluded, its ancillary authority does not authorize the Commission to act in a manner inconsistent with other provisions of the Communications Act.[98] Whatever the Commission's ancillary authority might otherwise be, it does not authorize the Commission to override Section 325(b)(1). For that reason, references to

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conditions relating to mandatory arbitration and interim carriage were not imposed because News Corp., as a broadcaster, had disproportionate bargaining power over MVPDs in retransmission consent negotiations; rather, News Corp.'s vertical integration with DIRECTV provided it with the "incentive and ability to threaten or impose broadcast service interruptions on subscribers of competing MVPDs to extract greater price increases"). *See also Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc*., 26 FCC Rcd 4238 ¶¶ 29-52 (2011) (the "*Comcast/NBCU Order*") (imposing arbitration and standstill conditions because "[t]he proposed transaction creates the possibility that Comcast-NBCU, either temporarily or permanently, will block Comcast's video distribution rivals from access to the video programming content [that it] would come to control or raise programming costs to its video distribution rivals"). Broadcast stations that are not affiliated with MVPDs do not possess either the incentive or the ability to foreclose access to their programming by competing MVPDs, and, therefore, there is no basis in law or in logic for the Commission to impose involuntary arbitration or interim carriage on parties to retransmission negotiations as a general rule. Indeed, the Commission relieved News Corp. of the obligation to comply with these conditions following the divestiture of its interest in DIRECTV.

[95] 47 C.F.R. § 76.1000 *et. seq*.

[96] *See* USTA Comments at 21.

[97] *See* NAB Comments at 17-22. As the Commission has found repeatedly, it has "no latitude…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." *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 ¶ 60 (2000) ("*Good Faith Order*").

[98] *See Notice* at ¶18.

the FCC's ancillary authority to mandate a "temporary standstill" in program access disputes where no statutory provision prohibits such a measure are inapposite.[99]

2. MVPD Proposals Which Effectively Amount To Interim Carriage Or Mandatory Arbitration Should Also Be Rejected As Outside The Scope Of The Commission's Authority

Given the absence of any statutory authority to impose compulsory interim carriage and binding arbitration, the Commission, likewise, lacks authority to impose other proposed MVPD "remedies" designed to achieve the same results. For example, Mediacom recommends that the FCC adopt a "cooling off" approach, where either party may give notice of deadlocked negotiations when 5 days or less of the existing contract term are left.[100] This notice would trigger a "cooling off" period where the parties would need to agree to an extension of the existing agreement or agree to submit to binding arbitration.[101] This proposal in effect mandates either interim carriage (to the extent a broadcaster is forced to extend a carriage agreement that it otherwise would not extend) or binding arbitration (which a broadcaster might not otherwise choose but for the "Hobson's Choice" proffered by Mediacom), both of which the Commission has already decided is contrary to its statutory authority.

Similarly, while AT&T acknowledges that the Communications Act "prohibits MVPDs from retransmitting the signal of a broadcasting station except without the express authority of that station,"[102] 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

[99] *Cf.* Comments in Response to the Petition for Rulemaking of CBS Corp., Fox Entertainment Group, Inc., and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., The Walt Disney Company, Univision Communications, MB Docket No. 10-71 at 10 (filed May 18, 2010) ("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.").
[100] *See* Joint Comments at 30.
[101] *Id.*
[102] AT&T Comments at 13.

faith."[103] Not only has the Commission already concluded that "failure to reach agreement does not violate Section 325(b)(3)(C),"[104] the good faith negotiation requirement, but the Commission cannot do indirectly what it is prohibited from doing directly. Further, a broadcaster's decision to withhold consent for the retransmission of its station's signal is fully consistent with the station's public interest obligations and Congress' intent that broadcasters control the retransmission and resale of their signals. Consequently, the FCC may not sidestep Section 325 of the FCC's rules and impose mandatory interim carriage on either the basis of a station's public interest obligations or its obligation to negotiate in good faith.

Several MVPDs offer variants on the theme that the Commission adopt requirements that would, in effect, result in mandatory carriage without the express consent of the broadcasters. For example, AT&T urges the Commission to require broadcasters to "synch up their retransmission consent contracts with all MVPDs so that all such contracts terminate at the same time," to require broadcasters to grant interim carriage to all MVPDs if interim carriage is offered to one, and to prohibit termination of "retransmission consent agreements shortly in advance of significant and popular events (such as the Super Bowl, Academy Awards, College Football Bowl Games, or March Madness)."[105] Other MVPDs ask the FCC to conclude that it is bad faith for a party to refuse to agree to a temporary extension of a retransmission consent agreement if the parties are engaged in bona fide negotiations,[106] or fail to offer comparable short-term extension agreements to all MVPDs in the same market.[107] All of these proposals

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[103] *Id.* at 15.

[104] *Good Faith Order* at ¶40.

[105] AT&T Comments at 19. *See also* Joint Comments at 28 (proposing uniform retransmission consent election periods and expiration dates). Uniform election periods already are prescribed in the FCC's rules. *See* 47 C.F.R. §76.64(f) and 47 C.F.R. § 76.66(c). Pursuant to these rules, a broadcaster must make a new carriage election every three years, regardless of whether the agreement in place is coterminous with the three year cycle. Accordingly, the proposal to establish uniform retransmission consent election and expiration dates is not necessary.

[106] *See* DISH Comments at 3.

[107] *See* Joint Comments at 23.

suffer from the same legal infirmity—they would require a television station to grant retransmission consent for some period of time against the station's own volition. But Congress has made clear that under no circumstances should an MVPD retransmit a station's signal without the express consent of the broadcaster, and the Commission must reject any proposal to penalize a broadcaster for asserting its Section 325 rights.[108] Even if the proposed regulation of the timing and termination dates of retransmission agreements would shorten, rather than lengthen, agreement terms, such proposals would still be unlawful because they would require the Commission to regulate a key aspect of the terms and conditions of retransmission consent agreements – the length and timing of such agreements. As with the proposals for price regulation discussed at below,[109] such Commission intervention is far beyond what Congress intended when it established the retransmission consent marketplace.

V. THE RECORD REFLECTS THAT NON-BINDING MEDIATION WOULD EXCEED THE FCC'S AUTHORITY AND NEGATIVELY IMPACT THE RETRANSMISSION CONSENT PROCESS

Not surprisingly, several MVPDs support the Commission's proposal to deem it a violation of the good faith rules if a party refuses to submit to non-binding mediation in the event of an impasse in negotiations during the 30-day window before an agreement terminates.[110]

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[108] DISH contends that taking down programming during a retransmission consent dispute where a broadcaster has failed to build out its transmission infrastructure to cover the entire DMA should be deemed bad faith. DISH Comments at 24. DISH conveniently ignores the technical reality that in DMAs where a broadcaster's over-the-air digital signal does not cover the entire DMA, it typically is not because the broadcaster lacks the commitment to cover the entire DMA. Rather, it is more likely that the Commission's rules (e.g., interference protection, largest facility in the market, power limits, etc.) inhibit the ability of the broadcast station to construct facilities that would cover the entire market. As the FCC is aware, a broadcast station's ability to serve its entire DMA was made more difficult for some stations by the digital television transition (especially those operating on VHF channels). In any event, even if there were no technical or legal obstacles, broadcasters would not be able to secure the necessary FCC authorization and complete the required build out in the short time frame of the impasse in retransmission consent negotiations. Thus, under the DISH proposal, the broadcaster effectively would have no choice but to permit the MVPD to continue to carry its signal. Such a result would amount to mandated interim carriage, which, as described herein, is beyond the FCC's authority.

[109] *See supra* Section VI.

[110] *See* Comments of Cox Enterprises, Inc. ("Cox"), MB Docket No. 10-71 at 2 (filed May 27, 2011) ("Cox Comments") (stating the FCC's mediation proposal strikes the right balance); DISH Comments at 21 (proposing that it would be bad faith for a party to refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement); OPASTCO Comments at 13.

Notably, however, none of these commenters has demonstrated that the FCC actually has authority to impose this requirement, nor have they demonstrated that non-binding mediation will effectively achieve the FCC's goal of minimizing programming disruptions for consumers.[111] Rather, as the overwhelming majority of comments addressing the issue of non-binding mediation show, the Commission should refrain from modifying its rules to require parties to either submit to non-binding mediation or be deemed to have violated the good faith standard because such a requirement would exceed the Commission's authority and negatively impact the retransmission consent process. Accordingly, the FCC should defer to the parties to choose their own forum and procedures for handling retransmission consent negotiations and disputes, rather than mandating mediation as the only acceptable conduct for engaging in good faith negotiations during the 30-day window.

A. The Record Confirms That There Is No Legal Basis For The Commission To Adopt Rules That Would Subject Parties To Non-Binding Mediation Procedures During Impasses In Negotiations

Commenters supporting the Commission's proposal with respect to non-binding mediation have failed to demonstrate that the FCC has authority to subject retransmission consent impasses to mediation where the parties have not affirmatively and voluntarily agreed to such a dispute resolution procedure. Rather, they simply assert that "the Commission correctly concludes [non-binding mediation] is within its authority to impose,"[112] or that non-binding mediation is consistent with the Alternative Dispute Resolution Act ("ADRA") because it is not mandatory.[113] In short, the record contains no legal basis to conclude that the Commission has

[111] *See* OPASTCO Comments at 13 (recommending that it should be a *per se* violation for a negotiating entity to refuse to agree to non-binding mediation in the event of an impasse, but failing to provide the justification as why the FCC has authority to adopt such a proposal).

[112] DISH Comments at 21.

[113] Cox Comments at 4 n. 6. Neither OPASTCO nor APPA even address the question of authority when discussing non-binding mediation.

authority to modify its rules to impose non-binding mediation in the event of a retransmission consent dispute.

By contrast, several commenters have demonstrated, consistent with NAB's initial comments, that the Commission lacks authority to impose non-binding mediation. The Walt Disney Company explains that "the Commission lacks authority under Section 325(b) to require parties to submit to non-binding mediation because Congress expressly prohibited the Commission from intruding into the substantive terms and conditions of retransmission consent negotiations, including the selection or use of a particular mechanism for resolving disputes involving retransmission consent agreements or renewals."[114] Commenters further explain that non-binding mediation would be prohibited under the ADRA because this statute permits the use of alternative dispute resolution procedures, such as mediation, only if such procedures are voluntary.[115] Where a party would be required to either choose to submit to non-binding mediation or have its refusal to do so be "a key factor in any analysis of allegations of violations of the good-faith bargaining requirement that stem from the dispute,"[116] mediation is no longer voluntary. As evidenced by the record, the FCC simply does not have authority to impose mandatory mediation, whether binding or non-binding.

[114] Disney Comments at 11. *See also* Comments of Nexstar Broadcasting, Inc. ("Nexstar"), MB Docket No. 10-71 at 23 (filed May 27, 2011) ("Nexstar Comments") (the FCC is without authority to deem it a *per se* violation for a party to refuse to agree to non-binding mediation because to do so would effectively make "such participation a non-voluntary choice," thereby rendering non-binding mediation a mandatory dispute resolution procedure for all retransmission consent negotiation impasses); Writers Guild Comments at 11 ("To find a *per se* violation would amount to the institution of a new requirement that broadcast stations to submit to mediation."); Comments of the NBC Television Affiliates, MB Docket No. 10-71 at 17 (filed May 27, 2011) ("NBC Television Comments") (the use of arbitration or mediation as a mandatory means to resolve retransmission consent negotiations was never contemplated by Congress, "particularly given the fact that, as the Commission has recognized, 'Congress did not intend that the Commission should intrude in the negotiation of retransmission consent.'").

[115] CBS Television Comments at 17 (under the ADRA, the definition of "alternative means of dispute resolution" does not turn on whether or not the outcome is binding"). *See also* NBC Television Comments at 17; NAB Comments at 35-38.

[116] Cox Comments at 4.

B. Comments Demonstrate That Mandatory Non-Binding Mediation Is Impractical, Costly, And Counter-Productive To Swift Resolution Of Retransmission Consent Impasses

Not only does the record demonstrate that the FCC's mediation proposal is beyond the scope of its statutory authority, it also shows that the proposal is unnecessary and impractical. For example, CenturyLink, a telecommunications company that recently began offering MVPD service, observes that "[m]andating non-binding mediation for the parties in drawn out retransmission consent negotiations, seems to require more procedural hoops without any certainty that an agreement will be reached. Mandating what may be a fruitless endeavor seems impractical and not useful for accomplishing any Commission objective."[117] Similarly, Cox notes that "[m]ost parties resolve the majority of retransmission consent negotiations without government facilitation and without harming consumers," thereby rendering mediation procedures unnecessary in the vast majority of negotiations.[118] As Cox also observes, "where parties are very close to a deal and neither party believes mediation would be useful[,] the need to prepare for and participate in the mediation might actually slow down the process of concluding an agreement."[119] Belo Corporation ("Belo Corp.") agrees, observing that parties often reach an agreement within the final 30 days before the retransmission consent agreement expires. Mandating non-binding mediation within the final 30 days would only "disrupt these discussions so the parties could educate a new participant about their issues and their

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[117] Comments of CenturyLink, MB Docket No. 10-71 at 7 (filed May 27, 2011) ("CenturyLink Comments").

[118] Cox Comments at 1.

[119] Cox Comments at 4. Thus, contrary to DISH's suggestion, preparation for non-binding mediation would not bring public interest benefit, but disruption. *See* DISH Comments at 21.

positions."[120] Besides causing unnecessary delay, mandating non-binding mediation is also impractical because it imposes unnecessary costs on both parties.[121]

Notably, none of the advocates of mandatory non-binding mediation have shown that it will advance the FCC's goal of mitigating the potential for service disruptions as a result of retransmission consent impasses. For example, DISH concludes that the presence of a third party mediator will "inspire a greater degree of rationality and less posturing by the parties" but does not offer any evidence that non-binding mediation will, in fact, lead to faster resolution of contentious negotiations.[122] Although OPASTCO and the APPA urge the FCC to adopt its proposal for non-binding mediation, they make no attempt to describe how non-binding mediation will serve the public interest or benefit consumers.[123] In short, the record demonstrates that imposing mandatory non-binding mediation is impractical because it will likely result in unnecessary delays and costs rather than facilitating a swift resolution of any retransmission consent disputes.

[120] Belo Corp. Comments at 20. *See also* CBS Corp. Comments at 21 (non-binding mediation would create a counter-productive dynamic because it would cause MVPDs to delay making their "best and final" offer in the expectation that a third party's bridging proposal would treat them more favorably); Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., MB Docket No. 10-71 at 24 (filed May 27, 2011) ("Fox Comments") (any mediation would pit the parties as dueling adversaries racing to convince an outside party that they are "right" rather than focusing their efforts on working toward reaching an accord); Sinclair Comments at 27 (describing how mediation is not helpful in resolving retransmission consent impasses); Disney Comments at 11 (demonstrating how mediation could be used as a delay tactic wherever a party views delay in its self-interest).

[121] *See* Belo Corp. Comments at 20 (in addition to paying a mediator, parties and their counsel would have to devote significant time and expense to drafting position statements, reviewing the other parties submissions, and participating in mediation sessions).

[122] DISH Comments at 21.

[123] OPASTCO states that "non-binding mediation is preferable to the current situation, where small MVPDs are typically presented with take it or leave it offers without any dispute resolution mechanism." OPASTCO Comments at 13. However, non-binding mediation is not required to resolve OPASTCO's concern, as the current good faith rules already preclude negotiating parties from making take-it-or-leave-it offers. *See* note 130. To the extent OPASTCO recommends that the Commission look to merger precedent to implement certain aspects of its non-binding mediation proposal, as described herein, merger precedent is inapposite in the retransmission consent context. *See supra* Section IV.B.1.

VI. PROPOSALS TO PLACE REGULATORY CONSTRAINTS ON THE PRICES, TERMS AND CONDITIONS OF RETRANSMISSION CONSENT AGREEMENTS WOULD RESULT IN EXCESSIVE GOVERNMENT INTERVENTION INTO THE FREE MARKET RETRANSMISSION CONSENT SYSTEM ESTABLISHED BY CONGRESS

The Commission must resist requests for government micromanagement of the negotiations of thousands of complex retransmission agreements among broadcast stations and MVPDs. Congress never intended for the Commission to play a substantive role in the private negotiations among broadcasters and MVPDs and did not give the FCC authority to intervene into the retransmission consent marketplace to regulate such price, terms, and conditions.[124] As explained below, many of the MVPD proposals would require the FCC to directly regulate retransmission consent fees and effectively amount to a government takeover of the substance of retransmission consent negotiations. Notably, the Commission has determined previously that virtually all of the practices related to pricing, terms, and conditions of which MVPDs now complain are presumptively legitimate. Moreover, the record in this proceeding simply does not support the proposition that changes in marketplace conditions since the Commission made this determination justify price regulation, nor does it demonstrate that broadcasters unfairly discriminate against smaller MVPDs or that the retransmission consent system has otherwise failed.[125]

[124] *See* NAB Comments at Section. V.; *see also* LIN Television Comments at 14.

[125] *See supra* Section I (demonstrating that policy rationales behind the retransmission consent rules remain valid today); *see supra* Section III (disproving the MVPD industry contention that the retransmission consent marketplace is failing).

A. The FCC Should Reject Calls To Establish Uniform Retransmission Consent Rates Or Otherwise Impede Broadcasters' Ability To Negotiate For Fair Compensation In Exchange For Retransmission Consent

MVPDs argue that the FCC should regulate the fees that broadcasters negotiate with MVPDs for retransmission of their signals, supposedly to protect consumers.[126] As an initial matter, it is absurd for MVPDs—some of the largest media companies in the world—to suggest that Commission regulation of the rates MVPDs pay for the right to retransmit and resell broadcast signals is necessary to protect subscribers against escalating MVPD subscription rates while at the same time opposing rate regulation of their own service to consumers. This is especially true because retransmission consent rates are but a very small fraction of the rates MVPDs charge their subscribers.[127] More importantly, as explained below, the Commission, as it has previously found, lacks authority to implement the specific proposals for price regulation advocated by MVPDs. Indeed, MVPDs are asking the Commission to assume the role of a party to a retransmission consent negotiation – determining the value of a broadcast signal and the fees that MVPDs should pay for retransmission consent. The kind of excessive and unwarranted governmental takeover of the substance of retransmission consent negotiations contemplated by MVPDs' pricing proposals cannot be reconciled with congressional intent, the plain language of the statute, or Commission precedent.

Commenters advocating for price regulation generally request that the Commission adopt some form of rate-setting mechanism that would establish the price and terms upon which broadcasters could offer retransmission consent. For example, TWC calls for the Commission to establish a rate-setting mechanism to determine the price and other terms that should be included

[126] TWC Comments at 41-43; Bright House Networks Comments at 4; Charter Comments at 3; Cablevision Comments at 9-10; OPASTCO Comments at 25-26.

[127] *See supra* Section III.B.

in a retransmission consent agreement.[128] Cablevision recommends that the FCC adopt a rule pursuant to which a broadcaster could set its own price for carriage of its broadcast signal by negotiating an agreement with a MVPD. However, under the Cablevision proposal, once the price within the market was set, the broadcaster could not charge different rates for the other MVPDs in the market.[129] Although these proposals vary in form, they share a common theme – direct government intervention into the substance of retransmission agreements in a manner that advantages MVPDs. In many cases, the price regulation proposals would establish a uniform price for retransmission consent, which rates would be established by the largest MVPD with the greatest negotiating leverage in the market.[130]

The MVPD requests for uniform pricing are in direct contravention of Section 325(b) and legislative intent. The plain language of Section 325(b)(3)(C) expressly allows broadcast stations to enter into retransmission agreements "containing different terms and conditions, including price terms, with different multichannel video programming distributors if such

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[128] *See* TWC Comments at 43. *See also* Bright House Networks Comments at 3 (arguing that Congress conveyed rate regulation responsibility to the Commission when it charged the Commission with evaluating the risk that consumers may be harmed and adopting any regulations necessary to ensure that the rates for the basic service tier are reasonable); Charter Comments at 3 ("Congress expressly instructed the Commission to regulate retransmission consent fees for the benefit of MVPD consumers.").

[129] Cablevision Comments at 9-10. *See also* AT&T Comments at 19 (requesting the FCC to adopt a presumption that it is bad faith for a broadcaster to request higher retransmission consent fees from one MVPD than it obtains from another MVPD in a market, unless the broadcaster affirmatively demonstrates that such a request is consistent with competitive marketplace conditions); Joint Comments at 23 (urging the FCC to define a competitive marketplace in a manner that would effectively render the vast majority – if not all – television markets not competitive, thereby, requiring broadcasters to offer the same terms and conditions to all MVPDs in the market); OPASTCO Comments at 26 (requesting a most favored nations clause "that would allow small and mid-size MVPDs to request the same prices and conditions from any of the other existing retransmission consent agreements that a broadcast station has entered into with other MVPDs.").

[130] TWC also proposes that the FCC deem it a *per se* violation for a broadcaster to request carriage on basic tier on a "take-it-or-leave-it basis . . . in areas where a cable operator faces effective competition." TWC Comments at 27. As explained in footnote [139], however, it is unnecessary for the FCC to adopt further rules relating to take-it-or-leave-it negotiations because the Commission not only has determined that take-it-or-leave-it negotiating is inconsistent with the good faith obligation but also has established a rule to deal with this very issue. *See* 47 C.F.R. § 76.65(b)(iv) (deeming it a violation of the good faith requirement for a negotiating entity to refuse to "put forth more than a single, unilateral proposal"); *see also Good Faith Order* at ¶ 43.

different terms and conditions are based on competitive marketplace considerations."[131] In addition, the legislative history of Section 325 demonstrates that Congress intended to create a free "marketplace for the disposition of the rights to retransmit broadcast signals" and did not intend the government to "dictate the outcome of the ensuing marketplace negotiations."[132] In short, the law is clear – the Commission has no authority to regulate the price, terms, or conditions of retransmission consent.

In recognition of this clear congressional directive, the Commission has found on numerous occasions that it does not hold the authority to directly regulate retransmission consent. In the *Good Faith Order*, the Commission expressly found that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent."[133] Directly regulating the fees that MVPDs pay to broadcasters for signal carriage would not only qualify as an intrusion into such negotiations, it would border on full scale appropriation of such negotiations.

Tellingly, MVPDs do not suggest regulating the price, terms, and conditions of carriage fees paid by MVPDs to non-broadcast channels, presumably because many of these channels are owned by, or under common ownership with, MVPDs. Accordingly, by proposing to regulate the rates MVPDs pay for the right to retransmit and resell local broadcast signals, MVPDs are attempting to re-create the distortion in the video programming marketplace that Congress sought to remedy by enactment of the retransmission consent regime.[134] There is simply no

[131] 47 U.S.C. § 325(b)(3)(C).

[132] *Senate Report* at 36.

[133] *Good Faith Order* at ¶ 14. *See also Consumer Protection Order* at ¶178 (finding that Congress did not intend for the Commission to be involved in direct regulation of retransmission consent negotiations).

[134] *Senate Report* at 35 ("[c]able operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently.").

reason that broadcasters should be uniquely disfavored and not be allowed to negotiate freely for compensation in exchange for others' use of their signals.

B. The Commission Should Reject Proposals To Limit The Types Of Compensation Broadcasters May Seek In Arms-Length Retransmission Consent Negotiations As Contrary To Law

The MVPD industry calls for the Commission to prohibit or limit broadcasters from seeking non-cash compensation (e.g., carriage of affiliated non-broadcast channels, multicast channels, etc.) in retransmission consent negotiations. As NAB has previously noted,[135] MVPDs' use of the antitrust term "tying" in the context of retransmission consent negotiations is misleading because it is not a practice employed by broadcasters. Broadcasters typically offer a menu of consideration options in the course of retransmission consent negotiations, among them cash payment, MVPD promotion of the station, purchase of additional advertising by the MVPD, payment by the MVPD for video-on-demand rights, and carriage of other commonly-owned stations, other program services, or digital multicast streams. In fact, MVPDs historically have encouraged and favored non-cash forms of consideration in retransmission consent negotiations. The willingness of local stations to offer such a variety of consideration options (with express congressional sanction) differs dramatically from anticompetitive "tying" arrangements.

Both law and public policy dictate that broadcasters' decision to negotiate for non-cash compensation in exchange for retransmission consent should not be considered by the Commission as part of the good faith negotiation standard.[136] As a matter of law, the legislative history of Section 325 shows that Congress clearly envisioned that broadcasters would be permitted to negotiate for various forms of compensation in arms-length negotiations, including the right to negotiate for MVPD carriage of one or more additional commonly owned stations or

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[135] *See, e.g.*, Comments of the National Association of Broadcasters, MB Docket No. 07-269 at 14-16 (filed July 29, 2009); NAB Reply Comments at 5-10; Opposition of the Broadcaster Associations at 78-81.

[136] *See* NAB Comments at Section. V.D.

non-broadcast program services.[137] In light of that unambiguous expression of congressional intent, the Commission has concluded that seeking carriage of an additional channel or program service is "presumptively consistent" with broadcasters' obligation to negotiate retransmission consent in good faith.[138] MVPDs do not provide any rational legal basis under which the Commission could modify its rules to limit or restrict broadcasters' ability to determine the types of compensation they seek in exchange for retransmission consent.[139]

MVPDs also fail to advance any credible public policy rationales to support their demands to limit or prohibit non-cash forms of consideration in retransmission consent negotiations.[140] For example, Cablevision asserts that "[w]hen broadcasters receive compensation for retransmission consent through carriage of additional programming services or other deals for marketing support, advertising time, or other forms of consideration, the true costs of retransmission consent on the public cannot be readily identified."[141] This rationale, however, is self-serving as Cablevision itself evidently understands the impact of retransmission consent costs on its overall operating structures and has publicly stated that these costs are

[137] *Senate Report* at 36 (finding "the right to program an additional channel on a cable system" an appropriate form of consideration); s*ee also* Belo Corp. Comments at 21-22 (finding that in-kind consideration is "consistent with Congress' expectation [for] a marketplace approach to retransmission consent"); CBS Corp. Comments at 25-27 (demonstrating that both the legislative history of the 1992 Cable Act and the Commission precedent show that is perfectly legitimate for broadcasters to seek in-kind consideration); Disney Comments at 12-13 (same).

[138] *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 2598 (2001), at ¶ 35; *accord Good Faith Order* at ¶ 56. Given its prior decisions, the Commission would face a particularly heavy burden in justifying a dramatic change in its rules to now prohibit broadcasters from negotiating for particular forms of compensation, such as carriage of additional programming. *Cf. Monroe Commc'ns Corp. v. FCC*, 900 F.2d 351, 357 (D.C. Cir. 1990) (Commission "must supply a reasoned analysis explaining [a] departure from its prior policies").

[139] *See supra* Section VI.

[140] Without any defensible legal or policy rationale, or empirical evidence to support its position, AT&T asserts that the FCC should prohibit broadcasters from securing a combination of cash and in-kind consideration in return for retransmission consent (i.e., if a broadcaster receives any monetary compensation in exchange for retransmission consent, receiving in-kind compensation as part of that agreement would be prohibited under FCC rules). *See* AT&T Comments at 18.

[141] Cablevision Comments at 15.

manageable.[142] TWC's claims that "tying" practices drive up programming costs and "translate into higher rates" for subscribers are equally unavailing.[143] The record in fact shows that retransmission consent fees are responsible for a small percentage of the overall programming costs of MVPDs, and represent only a fraction of one percent of their revenues.[144] As explained herein, MVPDs' conclusory claims that subscriber costs increase as a result of retransmission consent simply have not been substantiated by any credible evidence.[145]

Rather than cause consumer harm, the practice of arms-length negotiations for non-cash consideration (e.g., in-kind compensation such as the carriage of additional programming, placement of programming on particular channels or within certain packages, or compensation that is connected to such market factors as the number of viewers who will be able to access the content) is supported by public policy. As the record in this proceeding demonstrates, the opportunity to obtain a variety of benefits by offering menus of options in retransmission consent negotiations creates additional incentive for broadcast stations to agree to carriage deals with MVPDs.[146] Indeed, in-kind consideration for retransmission consent helps increase the diversity

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[142] *See* Mike Farrell, Rutledge: *Cablevision Can Manage Retransmission Consent*, MULTICHANNEL NEWS (Nov. 3, 2009). Under Cablevision's proposal, broadcasters would be prohibited from seeking any "forms of consideration" other than cash. In other words, 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**.** *See* NAB Comments at 36-37; *see also* Opposition of the Broadcaster Associations at 76-77. 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 the ability of broadcasters to create and distribute affiliated 24-hour news channels, such as Allbritton's NewsChannel 8 in Washington, D.C., or Belo Corp.'s NorthWest Cable News in Washington, Oregon, and Idaho, would be threatened. *See* NAB Comments at 6-7. Furthermore, it is remarkable that a major cable operator would insist on cash-only compensation since it was the major cable operators that, for at least a decade, strongly resisted paying any cash compensation to television stations for retransmission consent.

[143] TWC Comments at 33.

[144] *See* NAB Comments at 49-51, *Declaration* at 22; *see also* CBS Corp. Comments at 5-7; CBS Television Comments at 14; Sinclair Comments at 12.

[145] *See* Section VII.

[146] NAB Comments at Section I.

of content available to the viewing public, including entire channels dedicated to local and regional news.[147]

C. The Record Does Not Support Regulation Of Retransmission Consent Rates Based Upon Alleged Price Discrimination Among Smaller MVPDs

Many MVPD commenters repeat the tired refrain that broadcasters discriminate against smaller MVPDs in favor of larger MVPDs in retransmission consent negotiations.[148] However, these comments yet again offer no probative evidence, no reliable data, and no credible proof of any kind in support of allegations of price discrimination. Accordingly, the Commission should dismiss proposals to micromanage the retransmission consent process by regulating rates that may be charged to MVPDs, including smaller ones.[149] Moreover, given that the record fails to support bald assertions that there is "widespread price discrimination against smaller MVPDs,"

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[147] *Id.*

[148] *See* Cox Comments at 3-4 (volume discounts can "threaten to distort the competitive marketplace by unreasonably raising costs for smaller distributors and making it harder for them to compete"); SureWest Comments at 12-13 (the FCC should adopt regulations aimed at price discrimination among smaller MVPDs); Cablevision Comments at 11-13 (advocating for a rule in which "[a] broadcaster could set its own price for retransmission consent for carriage of its broadcast signal by negotiating an agreement with a MVPD, but once the price within the market was set, the broadcaster could not charge discriminatory rates among MVPDs within the market."); AT&T Comments at 19 (arguing for a presumption that a broadcaster is not negotiating in good faith if it demands higher retransmission consent payments from an MVPD than it obtains from other MVPDs in the market); OPASTCO Comments at 25-26 (small and mid-sized MVPDs should have access to most favored nation pricing for programming).

[149] For example, some MVPDs allege that for purposes of determining what constitutes competitive marketplace considerations that justify different retransmission consent fees for different MVPDs serving the same market, the FCC should define a competitive marketplace as one in which more than one station (either local or distant) affiliated with the same network has the right to grant retransmission consent in the relevant geographic area and whose programming would not be subject to network non-duplication blackout. *See* Joint Comments at 23. Because no evidence of discrimination has been supplied by any MVPD or supporter, there is absolutely no policy or legal reason for the FCC to take such action. Moreover, the proposed definition would deem a market to be non-competitive if the market is served by only one affiliate of each of the networks with retransmission consent rights, which is generally the case under the network affiliate structure. Accordingly, the proposed definition of "competitive marketplace conditions" would have the effect of rendering all (or virtually all) television markets not competitive such that broadcasters would be required to offer all MVPDs the same terms and conditions of carriage. In short, the Joint Commenters' proposal is a veiled attempt by the MVPDs to subject broadcasters to a uniform price for retransmission consent in a market, a result not justified by either law or policy. *See supra* Sections V.A.,VI.; *see also* Reply Comments of the Broadcaster Associations at Section II.B.2. (addressing the unsubstantiated claims of alleged price discrimination of the ACA) (incorporated herein by reference).

there is no need to initiate an investigation of retransmission consent rates as proposed by ACA.[150]

ACA – one of the primary commenters to allege price discrimination – offers no new evidence to support its claims that broadcasters unfairly discriminate against smaller MVPDs. To support its repeated allegations, ACA simply cites to the same report from their economist, William Rogerson, to which it cited in comments last year on this same issue.[151] NAB thoroughly addressed the shortfalls of this economic study in its initial comments in this proceeding.[152] For example, NAB explained that, in relying on "estimates and projections" of retransmission consent fees,[153] Rogerson only states that he "believe[s]," "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 network affiliated stations).[154] This is hardly a rationale on which the Commission may base a decision.[155] However, 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.[156]

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[150] ACA Comments at 4.

[151] *Id*. at n. 3.

[152] *See* Reply Comments of the Broadcaster Associations at Section II.B.2.; NAB Comments at Sections V.B. & V.C.

[153] ACA Comments at 79.

[154] 2010 Rogerson Price Discrimination Report at 12, 12, 13 (respectively); *see also* Reply Comments of the Broadcaster Associations at 14-18 (refuting Rogerson's argument that price discrimination is occurring.).

[155] *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).

[156] *See* Opposition of the Broadcaster Associations at 38.

Moreover, if small MVPDs do, as ACA claims, pay an average fee of $.30 per subscriber per month in retransmission consent fees, this does not demonstrate price discrimination.[157] In fact, ACA's economist calculates, based on estimates of retransmission consent fees for 2010, that a Big 4 Station will receive, on average, about $0.30 per subscriber per month from telcos offering MVPD service (and about $0.25 from direct broadcast satellite providers).[158] This ability to secure carriage at about $0.30 per subscriber shows that smaller MVPDs are able to negotiate just as successfully for the right to retransmit broadcast signals as behemoth national telecommunications companies like Verizon and AT&T.[159] Given this evidence, there is no basis or need for an investigation into retransmission consent rates.[160]

In any event, even if price differentials exist (again, a claim not supported by the evidence and which NAB contests), there is nothing illegal or nefarious about the result. Economies of scale and volume discounts are pillars of an open marketplace, as any consumer who shops at Costco or Sam's Club knows. In fact, the role of economies of scale in the video programming marketplace has been acknowledged by the Chief Executive Officer of BendBroadband, an ACA member company: "The major difference between the small and large operators is scale, and the scale issues come into play with regard to programming and vendor relationships."[161] The Commission itself 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

[157] ACA Comments at 80-81.

[158] *See* Reply Comments of the Broadcaster Associations at 14-15.

[159] *See id*.

[160] *See* ACA Comments at 87 (requesting an investigation into price discrimination against smaller MVPDs based upon "anecdotal evidence.")

[161] 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 as stating: "I 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)).

requirement."[162] No credible evidence has been provided to justify reversal of this well-established precedent.[163]

Price discrimination arguments posited by the MVPD industry also fail to recognize that there are small and large players on both sides of retransmission consent negotiations. Small broadcasters often find themselves negotiating carriage against large regional and national MVPDs. And, even "small" MVPDs, through regional clustering, often control large shares of local markets in which small broadcasters are negotiating carriage.[164] In these instances, small broadcasters find themselves at a significant disadvantage when negotiating for retransmission consent, and, clearly, failure to reach a retransmission consent agreement would cause a major economic disruption to such small broadcasters. Consequently, many small broadcasters currently do not receive retransmission consent fees, or only very recently began receiving such fees.[165] For all these reasons, the Commission should resist once again the requests for

[162] *Good Faith Order* at ¶ 56. If the Commission were to intrude in the substance of retransmission consent negotiations to prohibit compensation that is connected to such market factors as the number of viewers who will be able to access the content, it would directly contravene its previous decisions and congressional intent, as expressed in both the statutory language and legislative history of Section 325. *See* 2009 Reply Comments of the National Association of Broadcasters, MB Docket No. 07-269 at 8-10 (filed Jun. 22, 2009) (citing *Senate Report* at 36).

[163] Program access rules cannot be used as guidance to determine the legitimacy of volume discounts, as some commenters from the MVPD industry suggest. *See* Cox Comments at 9 ("A useful analogy for such considerations would be the anti-discrimination prohibition of the statutory program access provision. The program access rules do permit volume discounts to the extent they are justified by the factors listed in Section 76.1002(b) of the Commission's rules, but they do not permit unlimited, uneconomic volume discounts. These standards could provide useful guidance in the retransmission consent context as well."). As previously demonstrated, the program access rules are intended to address potential anticompetitive acts by vertically integrated content distributors. *See supra* Section IV.B.1. As a result, it would be inappropriate for the Commission to rely on the program access rules to determine the legitimacy of volume discounts.

[164] In addition, small cable operators are significantly less likely to face head-to-head competition from another cable operator or telecommunications provider offering MVPD service than their larger counterparts. *See* Jeffrey A. Eisenach, *Why the FCC Should Not Increase Regulation of Wholesale TV Programming*, MB Docket No. 07-198 at ¶ 24 (Feb. 12, 2008) (only 2.4 percent (82) of systems owned by small MSOs have competition from overbuilders, compared with 8.0 percent (300 systems) of systems owned by large MSOs; and, only 4.7 percent (327) of small cable systems have competition from overbuilders, compared with 35.3 percent (55) of large systems).

[165] *See, e.g.*, Gilmore Comments at 6 (stating that two stations owned by Rockfleet Broadcasting, Inc. began receiving cash for retransmission consent as late as this year while a third station has never received cash compensation); Nexstar Comments at 4 (stating that Nexstar did not receive cash compensation for retransmission consent until 2006).

government micromanagement of retransmission consent negotiations between broadcast stations and MVPDs in disparate markets across the country.[166]

VII. EVEN ASSUMING THE FCC HAD AUTHORITY TO REGULATE BROADCAST RETRANSMISSION CONSENT RATES, SUCH REGULATIONS WOULD NOT BENEFIT CONSUMERS AS MVPDS CLAIM

Throughout this proceeding, the MVPD industry has claimed that the retransmission consent regime must be changed in order to protect their subscribers against increased subscriber rates and service disruptions. Tellingly, however, MVPDs have nearly uniformly opposed Commission proposals that would, in fact, inure to the benefit of consumers, such as the proposal to notify consumers in advance of a potential signal deletion.[167] MVPDs may not credibly suggest that Commission regulation of the rates broadcast stations negotiate with MVPDs for the right to retransmit and resell broadcast signals is necessary to protect MVPD subscribers against escalating MVPD subscription rates without *also* advocating Commission regulation of the *retail*

[166] The Commission also should avoid micromanaging the retransmission consent process by modifying its rules to deem it a *per se* violation of the good faith standard if a party does not offer bona fide proposals on important issues. Not only would it be extremely difficult for the Commission to determine which issues are "important," but the very step of making a determination as to which issues are important would require the Commission to involve itself in the substance of retransmission consent negotiations, in violation of Congress's intent in enacting retransmission consent. *See* CenturyLink Comments at 6; *see also* Belo Corp. Comments at 17-19; CBS Television Comments at 21; Gilmore Comments at 12-13; NBC Television Comments at 19-20; Nexstar Comments at 23. Comments supporting the adoption of the FCC's proposal relating to bona fide issues fail to demonstrate that the proposal is within the scope of the FCC's authority, or that it is necessary in the public interest. *See, e.g.,* Comments of American Public Power Association, *et al.* ("APPA"), MB Docket No. 10-71 at 23 (filed May 27, 2011) ("APPA Comments"); Comments of Public Knowledge and New America Foundation, MB Docket No. 10-71 at 8 (filed May 27, 2011) ("Public Knowledge Comments"); Comments of DISH Network L.L.C., MB Docket No. 10-71 at 21 (filed May 27, 2011) ("DISH Comments"); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), *et al.* MB Docket No. 10-71 at 12 (filed May 27, 2011) ("OPASTCO Comments"); Comments of Verizon, MB Docket No. 10-71 at 10 (filed May 27, 2011) ("Verizon Comments"). For example, APPA makes unsubstantiated assertions that "broadcasters are too easily able to evade the purpose, if not the letter, of the good faith negotiation requirement by essentially couching their 'negotiation' terms in what essentially amount to de facto take-it-or-leave-it proposals." APPA Comments at 23. However, the Commission already has made clear that "'take it, or leave it' bargaining is not consistent with an affirmative obligation to negotiate in good faith." *See Good Faith Order* at ¶ 43; *see also* 47 C.F.R. § 76.65(b)(iv) (deeming it a violation of the good faith requirement for a negotiating entity to refuse to "put forth more than a single, unilateral proposal"). Accordingly, APPA's rationale that a rule relating to bona fide proposals is required to address take-it-or-leave-it proposals fails.

[167] *See* Section XII.

rates MVPDs *charge their subscribers* – the latter of which MVPDs, of course, have long opposed.

MVPDs argue that the FCC should protect consumers by regulating the fees that broadcasters negotiate with MVPDs for retransmission of their signals.[168] Claiming to be concerned about "consumer welfare," MVPDs make conclusory statements that increases in retransmission consent fees are passed along to consumers in the form of higher cable rates.[169] Notably absent from the record, however, is any credible evidence demonstrating the correlation between retransmission consent rates and subscriber fees. By contrast, as discussed above, there is specific economic evidence in the record demonstrating that retransmission consent fees do not drive programming costs.[170] The record reflects that, even today, when some broadcasters have succeeded in negotiating monetary compensation for retransmission consent, the compensation paid to broadcasters by MVPDs is miniscule in comparison with both the fees paid for non-broadcast programming and recent cable rate increases.[171] Moreover, MVPDs have continued to enjoy substantial profits even as they continue to offer additional programming channels to subscribers and fees for distribution of non-broadcast channels are increasing.[172]

In short, it appears that MVPDs are concerned about the high rates they charge consumers only when it is expedient for their interests. MVPDs contend that in order to protect their subscribers against increased subscriber rates, the Commission must regulate the rates they

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[168] *See* Cablevision Comments at 9-10 (proposing that broadcasters be required to charge all MVPDs within a market the same retransmission consent fees); OPASTCO Comments at 18 (arguing that the FCC has authority to regulate retransmission consent rate differentials for rural MVPDs); SureWest Comments at 12 (advocating that it should be a *per se* violation of the good faith standard for a broadcaster to demand financial compensation from one MVPD that is disproportionately greater than the compensation the broadcaster has obtained from a similarly-situated MVPD).

[169] *See* ACA Comments at 15; TWC Comments at 6; USTA Comments at 25.

[170] *See supra* Section IV.A.

[171] *See supra* Section III.B.

[172] A recent study by Ernst and Young found that from 2006 to 2010, cable operators had the highest average profitability – 38 percent – of any segment of the media and entertainment industries. By comparison, broadcast television ranked seventh of the ten media sectors studied, with 18% profitability between 2006 and 2010, and 16 percent last year. *See* CBS Corp. Comments at 7.

pay for *some* – but not all – of their programming services. MVPDs do not argue for Commission regulation of the rates of *non-broadcast* programming. More importantly, they suggest no retail price mechanism to ensure that consumers will actually be protected.[173] Without regulation of MVPD subscription rates, even if the government unwisely chose to intervene in the free marketplace and itself establish a rate-setting mechanism or other formula or cap for retransmission consent compensation, there would be no guaranteed impact on the rates MVPDs charge to consumers. Unless and until the government also regulates the consumer prices charged by MVPDs (which the pay TV industry vociferously opposes), any cost savings potentially realized by MVPDs could be used for anything from executive bonuses or cash distributions to owners, to expanding non-video business lines such as telephony, or paying for utilities or office supplies. There would be no reason to assume that any potential cost savings would be passed on to consumers.

VIII. THE RECORD CONFIRMS THAT JOINT NEGOTIATIONS PROVIDE PUBLIC INTEREST BENEFITS AND ARE NOT UNLAWFUL OR ANTICOMPETITIVE

The right of a station to grant a non-commonly owned station the authority to negotiate a retransmission consent agreement on its behalf ("Joint Negotiations") serves the public interest because it enables more efficient negotiations between broadcasters and MVPDs and facilitates retransmission agreements. Such Joint Negotiations are not anticompetitive and are especially important given the increase in clustering and negotiating leverage among cable operators.

[173] Advocating for Commission regulation of a service "input" – but not regulation of their own service "output" – is akin to 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.

A. Joint Negotiations Help Reduce The Disparate Bargaining Positions Between Broadcasters And MVPDs

As NAB explained in our opening comments, Joint Negotiations increase efficiencies, level the retransmission consent negotiation playing field, and serve the public interest.[174] MVPDs nonetheless ask the Commission to adopt a *per se* prohibition, applicable only to broadcasters, against any coordinated retransmission consent negotiations involving another station not under common ownership,[175] even if the stations are using legitimate local marketing agreements, joint sales agreements, or any other similar agreements.[176] Any such one-sided regulation is plainly contrary to the public interest. As noted above, MVPDs have increased their leverage against broadcasters when negotiating for retransmission consent at both the national and local level.[177] 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 against an average of six stations per DMA and numerous other outlets is negotiating with a single MVPD that controls a majority—and

[174] *See* NAB Comments at Section IV.A.3.

[175] ACA Comments at 22; *see also* Cablevision Comments at 22 ("any joint arrangement should be prohibited, even if the two stations are both present at negotiations or must separately approve the agreement."); CenturyLink Comments at 5 (stating that it should be a *per se* violation of the good faith rules when a broadcaster "agrees to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned."); DIRECTV Comments at 19 (supporting a proposal that would effectively prohibit joint retransmission consent negotiations by stations that are not commonly owned); Joint Comments at 19; OPASTCO Comments at 11; TWC Comments at 35-37: USTA Comments at 27.

[176] Comments suggesting that the Commission enact an absolute prohibition against joint operating agreements would require a change to the Commission's broadcast ownership rules, and are outside the scope of this proceeding. In any event, the Commission has consistently approved transactions involving the use of joint operating agreements, and such agreements provide substantial public interest benefits. *See, e.g.,* Comments of NAB in MB Docket No. 09-182 (filed July 12, 2010) at 81-82 ("television stations commonly owned or operated (via an LMA or local service agreement) with another station in the same market are more likely to carry local news, public affairs or current affairs programming"); Comments of NAB in MB Docket No. 07-269 (filed June 8, 2011) at 29-31 (stating that operational efficiencies afforded by JSAs, SSAs, and LMAs have allowed broadcasters to maintain and even expand local news on many stations in spite of economic challenges and providing examples of same). Even certain MVPD commenters recognize the public interest benefits of such arrangements. ACA, for example, is not opposed to such arrangements and recognizes the benefits realized from such agreements through operating efficiencies. *See* ACA Comments at 24, n. 46. *See also* USTA Comments at 27 (such agreements may have certain benefits to local broadcasters, particularly in smaller markets).

[177] *See supra* Section III.A.

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.[178] Indeed, the Commission itself stated that the competitive balance between broadcast and cable had shifted to favor cable since the 1990s.[179]

An excellent example of leverage held by large, clustered MVPDs over broadcasters is provided by Allbritton Communications ("Allbritton"), which owns eight full power television stations throughout the country in markets such as Anniston, Al.; Harrisburg, Pa.; Lynchburg, Va.; and Washington, D.C.[180] Allbritton indicates that it often finds itself engaged in retransmission consent negotiations "with companies substantially larger than Allbritton."[181] "Allbritton estimates that 5 entities control more than 75% of the MVPD homes served by Allbritton's television stations."[182] Moreover, the record is replete with similar examples of broadcasters that must negotiate retransmission consent with a handful of dominant MVPDs.[183] For these broadcasters, the failure to reach an agreement with one of the dominant MVPDs in their markets will impair access to a significant portion of their viewers.

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[178] *See supra* note 164 (another factor mitigating against any potential "disadvantage" that small cable operators may face is the lack of MVPD competition in the markets where they operate).

[179] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules,* Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 at ¶¶ 49-52 (2007) ("*DTV Carriage Order*"); *id.* at ¶49 ("The shift in the competitive balance between broadcast and cable can also be seen in viewership trends.").

[180] *See* Letter from Jerald N. Fritz, Senior Vice President, and Claire Magee, Assistant General Counsel, Allbritton Communications to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 at 1-2 (filed May 27, 2011).

[181] *Id*. at 2.

[182] *Id.*

[183] *See also* Comments of Cordillera Communications, MB Docket No. 10-71 at 2 (filed May 27, 2011) (estimating that five entities control over 75% of the MVPD homes served by its stations); Comments of Granite Broadcasting Corporation, MB Docket No. 10-71 at 2 (filed May 16, 2011) (estimating that four entities control over 75% of the MVPD homes served by its stations); Comments of Gray Television, Inc., MB Docket No. 10-71 at 2 (filed May 27, 2011) (estimating that ten entities control over 75% of the MVPD homes served by its stations); Comments of New Age Media, MB Docket No. 10-71 at 2 (filed May 27, 2011) (estimating that six entities control over 80% of the MVPD homes served by its stations).

In circumstances such as this, Joint Negotiations help local broadcasters more effectively negotiate retransmission consent with MVPDs. And, it is even more important when the MVPD is engaged in its own coordinated negotiations. For example, LIN Television, notes that TWC, the nation's second largest cable operator, "routinely negotiates retransmission rights jointly on behalf of itself and Bright House Networks, which is the tenth largest cable operator."[184] LIN Television notes that TWC and Bright House Networks "presumably engage in joint negotiations for the economic efficiencies involved."[185] Broadcasters should be permitted to do the same.

Indeed, the Commission is expressly considering adopting a rule affirmatively permitting coordinated retransmission consent negotiations by small and mid-sized MVPDs.[186] It would be inconsistent, arbitrary and capricious, and contrary to public policy, to prohibit non-commonly owned broadcasters from engaging in Joint Negotiations, but to adopt a rule to permit small non-commonly owned MVPDs to bargain as a group.[187]

B. Joint Negotiations Among Broadcasters Are In the Public Interest And Consistent With Antitrust Laws

There is significant evidence that Joint Negotiations result in public interest benefits. In its comments, ACA identifies 36 pairs of "Big 4" broadcast network affiliates (for a total of 72 stations) in the same DMA that are operating under some joint arrangement and that have participated in joint retransmission consent negotiations. To assess the propensity of stations that

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[184] LIN Television Comments at 19.

[185] *Id*.

[186] *Notice* at ¶ 29.

[187] *See* NAB Comments at Section IV.A.4. (noting that nothing currently prohibits small MVPDs from bargaining as a group). In addition, to the extent that commenters request a prohibition on coordinated negotiations for commonly owned stations in the same market, such a prohibition similarly should be denied. *See*, *e.g.*, ACA Comments at 9 (arguing that common ownership of broadcast stations in the same DMA likely "will" lead to higher retransmission consent fees). ACA also suggests that the Commission forbid broadcasters from delegating retransmission consent negotiations to another party. *See* ACA Comments at 44. If a rule prohibiting coordinated negotiations for commonly owned stations were to be adopted, broadcasters that owned two stations in the same DMA would be unfairly and unduly restricted from engaging in business in the ordinary course, a preposterous result that could not be justified as a matter of law or policy and which would defy both logic and common sense.

are parties to Joint Negotiations to be involved in negotiation impasses, the attached economic declaration compares ACA's list against a database of negotiating impasses that have occurred since 2006.[188] The comparison showed that *only three* of the 72 stations on the list (or 4.2%) had been involved in a negotiating impasse that resulted in a carriage disruption.[189] By comparison, approximately 7.2% of all commercial television broadcast stations had been involved in at least one disruption in carriage.[190] Thus, if ACA's list of stations involved in Joint Negotiations is accurate, such stations are *just over half as likely to be involved* in MVPD carriage disruptions as compared to broadcast stations as a group. Contrary to claims that Joint Negotiations cause consumer harm or delays in reaching agreements, actual data shows that such negotiations are more "efficient" and "actually facilitate agreements."[191]

We also note that joint arrangements, such as local marketing or joint sales agreements, generally "allow broadcasters, especially in small markets, to reduce their fixed costs" (i.e., "to realize economies of scale and scope") and "continue to operate where it would otherwise be uneconomic to do so."[192] Thus, "[i]f anything," these joint arrangements "likely lower stations' operating costs, which, all else equal, would tend to place *downward* pressure on retransmission consent compensation."[193]

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[188] *See* Eisenach Reply Declaration at ¶¶ 24-25. Please note that neither NAB nor the declarant have independently verified whether the stations identified in ACA's Joint Negotiations list are actually involved in joint agreements or are engaged in joint negotiations for retransmission consent.

[189] *See id.* at ¶ 25.

[190] *See id.*

[191] *Id*.

[192] *Id*. at ¶ 26.

[193] *Id*. at ¶ 19 (emphasis added). Furthermore, it is likely that inclusion of retransmission consent negotiation may be an important part of many local marketing, joint sales and similar arrangements. If the FCC prohibits stations in these joint arrangements from engaging in joint retransmission consent negotiations, it would undermine the ability of stations to engage in in these "efficient cost-sharing arrangements that reduce overall operating costs" and thus put downward pressure on retransmission consent compensation. *Id*. at ¶ 27.

Contrary to MVPDs claims,[194] antitrust concerns do not require and should not motivate the Commission to modify the good faith standard to prevent Joint Negotiations by broadcast entities. Despite the long history of Joint Negotiations, antitrust actions involving Joint Negotiations are essentially non-existent. TWC was only able to point to a single, fifteen-year-old instance of an antitrust enforcement action to prevent stations from entering into an anticompetitive group boycott.[195] The facts of that case were sufficiently unique and the Department of Justice has taken no additional, similar enforcement actions involving Joint Negotiations, and neither has any agency. The FCC in fact has expressly recognized that Congress never intended to prohibit Joint Negotiations among broadcasters.[196] In short, antitrust-related arguments in this rulemaking proceeding are a red herring.[197] Neither the factual data discussed above nor economic theory support contentions that Joint Negotiations are anticompetitive.[198]

Finally, USTA suggests that the FCC should evaluate whether negotiating a retransmission consent agreement on behalf of a station gives an entity "control" of that station.[199] This argument is without merit. In analyzing claims that a licensee has relinquished ultimate control over a broadcast station, in violation of Section 310(d) of the Communications

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[194] ACA Comments at 26; *see also* Cablevision Comments at 21 ("Such arrangements lead to MVPDs paying artificially high retransmission consent fees."); CenturyLink Comments at 6; DIRECTV Comments at 19-20; Joint Comments at 18-22; OPASTCO Comments at 11-12; TWC Comments at 19-21.

[195] *United States v. Texas Television, Inc.*, Civil No. C-96-64, Competitive Impact Statement (S.D. Tex. Feb. 2, 1996) *available at* http://www.justice.gov/atr/cases/texast0.htm.

[196] *Good Faith Order* at ¶56 (concluding 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.").

[197] If an occasion arises in which a particular Joint Negotiation created a problem, there exist ways to address that problem without declaring all Joint Negotiations *per se* bad faith. An MVPD who believes that a station is acting in bad faith can bring its complaint to the Commission. The Commission would still have the ability to determine whether, under the totality of the circumstances, the facts of the particular negotiation at issue rose to the level of bad faith.

[198] *See* Eisenach Reply Declaration at ¶¶ 20-23. Dr. Eisenach's discussion of models of bargaining power shows that it is by no means theoretically axiomatic that Joint Negotiations confer a retransmission bargaining advantage to broadcasters, a conclusion consistent with other analyses. *See id*. at n. 23.

[199] *See, e.g.,* USTA Comments at 27-28.

Act, the Commission considers whether the licensee has retained control over the station's programming, personnel and finances.[200] Retransmission consent agreements do not implicate personnel matters, such as the hiring, firing and compensation of employees. The FCC's analysis of control over finances has traditionally focused on whether the licensee or some other party is paying station expenses (e.g., utilities) – a question also unrelated to retransmission consent. Further, FCC analysis of control over programming relates to whether the licensee maintains ultimate control over what programming the station airs, not whether another party represents a station in negotiating an agreement for MVPD carriage of that station's signal. Under the reasoning of USTA, a law firm engaging in retransmission consent negotiations on behalf of a client station would be regarded as having gained control of that station – a clearly erroneous position.

IX. MVPDs Have Shown No Convincing Reason To Eliminate Broadcast-Related Exclusivity Rules, Which Provide The Procedural Means To Enforce Privately Negotiated Contractual Rights

For apparently self-serving reasons, several MVPDs urge the Commission to repeal or modify its non-duplication and syndicated exclusivity rules.[201] The Commission should reject these proposals. As MVPDs admit, the FCC's exclusivity rules "do not create [exclusivity] rights but rather provide a means for the parties to the exclusive contracts to enforce them through the Commission rather than through the courts."[202] TWC concedes that if the FCC were to eliminate the exclusivity rules, "private exclusive contracts between broadcasters and

[200] *See, e.g., Hicks Broadcasting of Indiana, LLC,* Hearing Designation Order, 13 FCC Rcd 10662, 10677 (1998).

[201] *See* AT&T Comments at 16-17; Cablevision Comments at 23-26; DIRECTV Comments at 8-12; Discovery Comments at 12-14, DISH Comments at 27-28; Joint Comments at 15-18; OPASTCO Comments at 27; Starz Comments at 8-11; SureWest Comments at 14-16; TWC Comments at 13-14; USTA Comments at 22-24; Verizon Comments at 11.

[202] *See* TWC Comments at 22-23.

programming suppliers would remain in place."[203] In fact, as NAB has previously explained, the FCC's 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.[204] And, as MVPDs are well aware, the Commission's network non-duplication and syndicated exclusivity rules apply only to the extent that network affiliation or syndication contracts grant such exclusive rights.[205] Therefore, it appears that MVPDs' core complaint is not with the FCC's exclusivity rules, which provide a procedural means to enforce privately negotiated contractual rights, but rather with the underlying exclusivity provisions of privately negotiated contracts.

Although the *Notice* expressly sought comment only on elimination of the exclusivity rules "without abrogating any private contractual rights,"[206] TWC calls on the Commission to not only "rescind its rules authorizing exclusivity agreements, but [to] affirmatively ban such agreements."[207] This drastic proposal would undermine our system of local broadcasting and contradict the public interest. The FCC has no authority to prohibit private parties from entering into privately negotiated exclusivity contracts and, indeed, there is no public interest rationale for such a prohibition.[208]

It is telling that MVPDs only want government intervention with regard to broadcast programming relationships when it is to their own advantage. For example, certain MVPDs ask the FCC to "take the draconian step" of intervening in private contractual relationships between

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[203] *Id*. at 24.

[204] *See* NAB Comments at 59 and n. 174.

[205] *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."); *see also* NAB Comments filed June 3, 2010 at 31-32.

[206] *Notice* at ¶ 44.

[207] TWC Comments at 34.

[208] Congress sought to keep the competitive marketplace in balance by protecting the broadcasters' private contractual arrangements. *See* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong. ("Joint Explanatory Statement"), 145 CONG. REC. H11793, H11796 (daily ed. Nov. 9, 1999).

programmers and suppliers in one context—exclusivity—but then bewail such FCC intervention in another context—early termination fees.[209] Ironically and without justification, MVPDs only want intervention with regard to broadcast programming relationships, not other programming relationships, including their own exclusive ones. MVPDs offer no sound legal or policy rationale to ban broadcast-related exclusivity agreements, which as the attached economic analysis confirms, "are presumptively efficient and promote consumer welfare."[210]

Eliminating the FCC's exclusivity rules would unnecessarily "make it more costly for broadcasters and owners of program rights to enter into and enforce efficiency-enhancing contracts."[211] While MVPDs complain that the FCC's exclusivity rules grant broadcasters a virtual monopoly,[212] the reality is that local stations are but one source of programming on MVPD systems. Each station creates its own unique mix of programming that it transmits through its signal. Stations compete against a variety of programming outlets including cable networks and non-traditional media providers. To suggest this is a monopoly is to blink reality. It is true that local stations have desirable programming and have contracts to be the "sole source" of some popular programming in the market.[213] But such a situation is no different than MVPDs negotiating with non-broadcast programming suppliers that have programming highly

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[209] *See* DISH Comments at 22 (FCC regulation of early termination fees would be a "draconian step").

[210] Eisenach Reply Declaration at ¶¶ 28-29 (explaining that the contracts enforced under the FCC's exclusivity rules "are essentially exclusive territory agreements," which have been recognized as efficient by economists and the courts for many years).

[211] Eisenach Reply Declaration at ¶ 28.

[212] *See* TWC Comments at 22 ("The effect of the Commission's exclusivity rules is to create hundreds of local, government-sanctioned monopolies for network and syndicated programming across the country.").

[213] *See* AT&T Comments at 16 (complaining that MVPDs are forced to acquiesce to broadcasters' demands, no matter how unreasonable, or lose significant amounts of business); CenturyLink Comments at 12 (arguing the rules give broadcasters too much leverage); OPASTCO Comments at 21(the non-duplication and syndicated exclusivity rules create a one-sided level of protection for broadcasters, which forces MVPDs to pay whatever retransmission rates are demanded by the broadcasters and MVPDs have no alternatives and cannot provide programming without acquiescing to the often unreasonable demands of broadcasters); SureWest Comments at 14-16 (claiming that elimination of the rules would facilitate a freer market for programming). We note that a single local station is not the sole source of local programming because there typically are multiple local television stations licensees in any particular community that provide local programming to their viewers.

valued by viewers. If a cable operator and the Discovery Channel could not come to an agreement, the cable operator could not turn to an alternative supplier to obtain Discovery Channel programming. Instead, if the cable operator wished to carry Discovery Channel programming, the cable operator and Discovery must reach a mutually acceptable resolution. Or using the words of the MVPDs, the cable operator would be forced to "acquiesce" to Discovery's "unreasonable demands" or "risk losing significant amounts of business." There is no policy rationale to hold broadcasters alone to a different standard if a MVPD and a local broadcast station come to an impasse in the negotiations. They too must come to a mutually agreed upon resolution if the MVPD wishes to carry the local station's broadcast signal. Therefore, MVPDs' claims that the exclusivity rules unfairly advantage broadcasters are inaccurate.

In stark contrast to the MVPDs' failure to provide justification as to why the FCC's exclusivity rules should be eliminated,[214] the record is replete with reasons as to why the FCC's exclusivity rules should be maintained.[215] Exclusivity—as Congress and the Commission have

[214] For example, while SureWest offers several reasons as to why it believes that removing the FCC's exclusivity rules would not harm localism, its reasoning is flawed. *See* SureWest Comments at 14-16. First, contrary to SureWest's assertions, local broadcasters do provide significant amounts of local programming. *See generally* Comments of the National Association of Broadcasters, MB Docket No. 04-233 (filed Apr. 28, 2008); Reply Comments of the National Association of Broadcasters, MB Docket MB Docket No. 04-233 (filed Jun. 11, 2008). Second, regardless of the fact that local broadcasting would still be available over-the-air, undermining the local audience share by removing viewers on an MVPD system would decrease a local station's advertising revenues and the local station's ability to produce quality local programming. Third, while it is true that viewers may benefit from competition, broadcasters already face a high level of competition both among its peer competitor broadcast television stations and among non-broadcast cable networks.

[215] *See* CBS Television Comments at 2-3 ("The network non-duplication rules, together with the syndicated exclusivity rules, advance the goals of localism and diversity in programming. Eliminating the rules would have a severe adverse impact on these important interests. Exclusivity within a market allows stations to maximize viewership and local advertising revenues, and thereby to invest further in quality local programming. Local advertising sales, which are based on local broadcast markets, are the single most important revenue source that stations use to support investments in the television service upon which the public relies. CBS affiliates rely on advertising revenues to invest in providing local news, public affairs, investigative journalism, weather coverage, and reporting of emergency information. When duplicating *national* programming is imported into a market, such as by carriage of a distant CBS station's signal, the duplication fractures the audience for the local station's programming and consequently results in substantially reduced advertising revenue for the local station."); *see also* Gilmore Comments at 16 ("Deprived of effective exclusivity rules, a broadcaster would not have an effective means to prevent a MVPD from importing a duplicating distant signal from the neighboring market, causing the local station to likely lose viewership to the imported signal. Since the vast majority of broadcast revenues are generated by advertising, the loss could be substantial, especially since the most popular and highly-rated programming is the

consistently recognized—constitutes an essential component of America's unique system of free, over-the-air television stations licensed to serve local communities.[216] In fact, Congress has observed that amendments to or deletions of the program exclusivity rules in a manner that would usurp localism would be "inconsistent with the regulatory structure" crafted by the 1992 Cable Act.[217]

The FCC expressed concern in the *Notice* as to whether eliminating the non-duplication and syndicated exclusivity rules would harm localism. Broadcasters have shown in this proceeding and others how elimination of these rules would severely hurt the provision and preservation of local television service.[218] As the Barrington Broadcasting Group, LLC, Bonten Media Group, LLC, Dispatch Broadcast Group, Gannett Co., Inc., Newport Television, LLC, Post-Newsweek Stations, Inc., and Raycom Media, Inc. ("Joint Broadcasters") explain, the exclusivity rules "are part of the regulatory and statutory landscape that existed at the time Congress created retransmission consent, and they form a crucial part of an essential system of rules that is required for the broadcast television marketplace to function effectively. The importation of distant signals into local markets fundamentally threatens localism and jeopardizes the richness and diversity of television programming generally." Proposed changes in the exclusivity rules would jeopardize stations' advertising revenues because the lack of

most likely programming to be duplicated."); Joint Comments of Barrington Broadcasting Group, LLC, Bonten Media Group, LLC, Dispatch Broadcast Group, Gannett Co., Inc., Newport Television, LLC, Post-Newsweek Stations, Inc., and Raycom Media, Inc., MB Docket No. 10-71 at 3 (filed May 27, 2011) ("Joint Broadcasters Comments") ("The importation of distant signals into local markets fundamentally threatens localism and jeopardizes the richness and diversity of television programming generally.")

[216] *See e.g., 2005 FCC Retransmission Consent Report* at ¶50; *Consumer Protection Order* at ¶¶ 50-51; *Senate Report* at 38. For further discussion *see* NAB Comments at 59-60.

[217] *Id; see also* Belo Corp. Comments at 4 (explaining how Congress believed that exclusivity is integral to achieving congressional objectives)*;* CBS Corp. Comments at 15 (stating that alteration of the Commission's network non-duplication rules would contravene the express intent of Congress because the rules advance Congress' goals of localism and diversity).

[218] *See* NAB Comments at 58-60.

exclusivity in a market makes television stations less attractive to advertisers.[219] Without adequate advertising revenue streams, stations cannot afford to invest in local and public affairs programming.[220] Consequently, local stations are severely harmed when MVPD are able to end-round retransmission consent negotiations by importing a distant station's signal.[221] As the attached economic analysis explains, in the absence of "exclusive territories" preventing the importation of out-of-market signals, retransmission consent fees would be driven down, a result that "MVPDs would desire" but would undermine the "economic viability" of a number of local broadcast stations.[222]

While MVPDs baldly assert that elimination of the exclusivity rules would not harm consumers, they fail to substantiate such claims. For example, SureWest alleges that elimination of the exclusivity rules would provide consumers with access to broader, more regional programming.[223] Stated more precisely, eliminating the FCC's exclusivity rules would lead to the unavailability of local programming in a cable subscriber's local market. Consider the example provided by the Joint Broadcasters during the devastating tornado in Joplin. If a cable operator in Joplin imported a distant station's signal rather than broadcasting the local Joplin television station's signal, viewers in Joplin could not have heeded the warnings of the Joplin

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[219] *See* Joint Broadcasters Comments at 3; *see also* Belo Corp. Comments at 29-30 (when the same programming is available on two channels, it affects a station's ratings and consequently the station's revenue stream).

[220]. Joint Broadcasters Comments at 4.

[221] As the Commission has previously explained, "[w]hen the same program a broadcaster is showing is available via cable transmission of a duplicative signal, the broadcaster will attract a smaller audience, reduce the amount of advertising revenue it can garner and . . . reducing the amount it will be willing to pay for the program." *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, Gen. Docket No. 87-24, 3 FCC Rcd 5299, at ¶¶23, 62 (1988). Indeed, "the removal of syndicated exclusivity lessened the ability of independent broadcasters to compete for the best programming and hence reduced their ability to meet their viewers' demands. Thus, rather than expanding the richness and diversity of programs available to viewers, . . . the elimination of syndicated exclusivity protection increased the likelihood that programming less valued by viewers would be substituted for more highly valued programming." *Id.* at ¶68.

[222] Eisenach Reply Declaration at ¶ 30 (stating that retransmission fees could become "effectively zero").

[223] *See* SureWest Comments at 15.

weathercasters to take cover from the approaching tornado. It would not have been in the public interest for viewers located in the Joplin area to view the sunny weather forecast provided by an imported out-of-market station rather than the in-depth emergency alerts provided by the local Joplin station. Consequently, claims that the importation of distant signals leads to broader, more regional programming miss the point. Rather, the importation of distant signals as a substitute for the market's local broadcast station will not only lead to confusion to local viewers but could have serious adverse public safety implications for local MVPD subscribers.[224] Therefore, the FCC should preserve its exclusivity rules because they "serve as an important cornerstone of Congress' carefully balanced approach to program carriage."[225]

The FCC should also reject MVPDs' various proposals to modify the syndicated exclusivity and non-duplication rules. For example, Discovery asks the FCC to modify the exclusivity rules so that MVPDs could import distant signals when the station's retransmission consent negotiating demands become "excessive" or "unreasonable."[226] Here again, the MVPDs mistakenly interchange the concept of contractual exclusivity with the FCC's exclusivity rules. As explained above, the FCC's rules provide the broadcaster a forum for enforcing privately negotiated contractual rights.[227] Just because a broadcaster and an MVPD cannot reach an agreement on whether the MVPD should be permitted to carry the station's signal, this does not affect the existing exclusivity agreement between the broadcaster and the network. To hold

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[224] *See* Joint Broadcasters Comments at 8.

[225] *See* Belo Corp. Comments at 2.

[226] *See* Discovery Comments at 12-13.

[227] Similarly, the Joint Commenters' proposal to scale back the FCC's exclusivity rules as applied to stations that elect retransmission consent by allowing a broadcast station to enforce its contractual rights only if the station's over-the-air signal is available to at least 85% of the local market households passed by the MVPD must be rejected. *See* Joint Comments at 17. This proposal ignores the critical fact that the rules do not provide exclusivity but merely the process for enforcement of exclusive agreements that have been negotiated at arms' length in the marketplace. Moreover, the resources and practical difficulties in determining whether a broadcaster meets the 85% requirement would inevitably require significant FCC intervention to resolve the many disputes that would be inevitable under such an approach.

otherwise would put the broadcaster in breach of its exclusivity agreement. Additionally, implementing Discovery's proposal would be onerous. It would be a daunting challenge for the FCC to make the determinations as to whether the broadcaster's proposed terms are "excessive" or "unreasonable." Moreover, any attempt by the FCC to make such a determination would exceed its statutory authority because it would necessarily involve evaluation of the substantive terms of the retransmission consent agreements.[228]

Since the FCC's exclusivity rules are somewhat different for cable operators than for satellite providers, satellite providers advocate for a "policy [that] would effectively achieve for satellite carriers the same relief that elimination of the exclusivity rules would achieve for cable operators."[229] The FCC should reject this proposal for the same reasons that it should uphold its exclusivity rules.

Finally, Block Communications proposes that the Commission should harmonize the cable exclusivity rules by including a Grade B/noise limited service contour exception to the network non-duplication rules such as the exception that is included in the syndicated exclusivity rules.[230] A Grade B service contour exception is not needed in the non-duplication rules because the non-duplication rules include an exception—the significantly viewed exception outlined in

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[228] Congress expressly prohibited the Commission from intruding into the substantive terms and conditions of retransmission consent negotiations. *See, e.g., Notice* at ¶9 ("In implementing the good faith negotiation requirement, the Commission concluded 'that the statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission.'") (quoting *Good Faith Order* at ¶6).

[229] Specifically, DISH and DIRECTV argue that eliminating the "exclusivity rules for cable operators would not afford satellite carriers any meaningful relief from the exclusivity advantages currently enjoyed by the broadcasters. *See* DIRECTV Comments at 8-11; *see also* DISH Comments at 27. In the satellite context, territorial exclusivity is enforced by statute, which permits satellite carriers to retransmit network broadcast signals outside the local market only to "unserved households." *Id.* Consequently, DISH and DIRECTV ask the Commission to establish a *per se* violation of the good faith negotiation requirement for a broadcaster to withhold retransmission consent from a satellite carrier without granting that carrier a temporary waiver to permit the importation of same-network distant signals through the DMA. *Id.*

[230] *See* 47 C.F.R. § 76.106(a).

Section 76.92(f) of the FCC's rules—which is intended generally to address the same issue.[231] Therefore, Block's proposal is not needed and is beyond the scope of this proceeding.

X. THE COMMISSION SHOULD NOT REQUIRE BROADCASTERS TO PUBLICLY DISCLOSE TERMS OF PRIVATELY NEGOTIATED AGREEMENTS

Several MVPDs propose that the FCC require broadcasters to disclose the terms of their privately negotiated retransmission agreements.[232] As explained below, the Commission should not require public disclosure of private agreements between broadcasters and distributors because it would be unfair to require broadcasters alone to disclose commercially-sensitive programming agreements when no other programmer (many of which are owned or under common control with MVPDs) would be required to do so. Indeed, any public disclosure requirements will inure to the competitive advantage of MVPDs and not to consumers as MVPDs claim. Moreover, such a rule would contravene the Commission's public disclosure rules. In short, the Commission should reject proposals to publicly disclose retransmission consent agreements.

The policy rationales advanced by MVPDs for public disclosure of retransmission consent rates are unconvincing. For example, Cablevision argues that disclosure will inform consumers of rates, but given that MVPDs have not made clear how (if at all) retransmission consent fees impact rates, it is not clear how such disclosure would provide consumers with truly useful information about rates they pay to MVPDs.[233] This is especially true given that MVPDs

[231] *See* 47 C.F.R. §76.92(f). Specifically both Section 76.106(a) of the syndicated exclusivity rules (the Grade B contour exception) and Section 76.92(f) of the non-duplication rules (significantly viewed exception) are intended to permit a MVPD to carry a distant station's signal when that signal is likely to be received by the cable community over the air.

[232] *See* Cablevision Comments at 10-11 (proposing that "[e]ach broadcast station would be required to disclose the retransmission consent carriage rates between itself and each MVPD in a given market on a per subscriber basis"); Cox Comments at 7 (advocating for public disclosure of final best offers); SureWest Comments at 13-14 (proposing that the FCC "should provide that [retransmission consent] agreements, once executed, must be made available to the public).

[233] *See* Cablevision Comments at 13.

do not propose to disclose the rates they pay for non-broadcast programming or other elements of consumer bills. SureWest argues that disclosure will provide the Commission with access to information about rates to resolve disputes and to track video competition and the impact of rates paid by consumers.[234] However, even with disclosure, it is not clear that the data will prove useful. As we have previously emphasized, the Commission does not have authority to involve itself in the substantive terms of the retransmission consent agreements, such as by resolving disputes.[235] Even assuming the Commission had authority to require public disclosure of retransmission consent rates, it is unlikely that such data will be able to be compiled in any useful and meaningful way. Even large private media data firms, such as SNL Kagan, BIA/Kelsey, and Nielsen Media Research, cannot comprehensively compile the vast array of data that would be relevant to adjudication of retransmission consent disputes. The Commission itself already knows well the immensity of the tasks involved in acquiring and compiling the substantially less comprehensive data contained in its video competition and cable industry price reports. Furthermore, disclosure of such information would not address the problem of comparing complex agreements involving multiple forms of compensation and various non-price terms and conditions.

It is telling that MVPD proposals request information only from broadcasters and do not request information from non-broadcast program suppliers.[236] To the extent proposals relate only to broadcasters (and not all programming arrangements), the proposals are unfair as broadcasters must lay all their cards on the table while MVPDs get to keep theirs close to the vest. This is especially unfair because MVPDs would not have to disclose the rates that they pay to non-broadcast programming services with substantially less audience appeal, or any of the data

[234] *See* SureWest Comments at 14.
[235] *See supra* Sections IV. and V.
[236] *See* Cablevision Comments at 13.

relevant to determining their costs per channel. For all these reasons, the FCC should not compel disclosure of retransmission fees because the fees are confidential financial information, which have been traditionally exempt from public disclosure.

Importantly (and largely overlooked by MVPDs), mandating public disclosure of privately negotiated retransmission consent agreements is in conflict with the FCC's rules that protect such information from public disclosure.[237] Specifically, Section 0.457(d)(iv) of the FCC's rules exempts from public disclosure agreements that contain "commercial and financial information."[238] The Commission generally has exercised its discretion to release public information falling within Section 0.475(d)(iv) only in very limited circumstances,[239] where a persuasive showing is made.[240] Even in such circumstances, the Commission does not automatically authorize public release of such information.[241] Rather, the Commission adheres to a policy of not authorizing the disclosure of confidential financial information "on the mere

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[237] 47 C.F.R. §0.457(d)(iv). The FCC's public disclosure requirements are based on the provisions in the Freedom of Information Act ("FOIA"). While the FOIA requires agencies to disclose information to members of the public, certain types of sensitive information are exempt from public disclosure. For example, trade secrets and commercial and financial information is deemed confidential and exempt from compelled disclosure under the FOIA.

[238] *Id*. The Commission has consistently recognized that disclosure of programming contracts between MVPDs and programmers can result in substantial competitive harm to the information provider and has afforded confidential treatment to such contracts in a variety of contexts. *See Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 11 FCC Rcd 18223, 18293 ¶ 131 (1996) (rejecting arguments that open video system operators should comply with the same disclosure requirements as common carriers); *National Rural Telephone Cooperative On Request for Inspection of Records*, 5 FCC Rcd 502, 503 (1990); *Letter from Meredith J. Jones to Wesley R. Heppler and Paul Glist*, 10 FCC Rcd 9433, 9434 (1995) (declining to adopt a blanket exemption for programming contracts without notice and comment); *Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3391 n.103 and 3419 (1993). *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24822-23 (1998).

[239] *See, e.g., The Western Union Telegraph Co.*, 2 FCC Rcd 4485, 4487 (1987) (citing *Kannapolis Television Co.*, 80 F.C.C. 2d 307 (1980) (where a party placed its financial condition at issue in a Commission proceeding); *MCI Telecommc'ns Corp*., 58 RR 2d 187, 190 (1985) (where the Commission identified a compelling public interest in disclosure).

[240] *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission,* Report and Order, 13 FCC Rcd 24816, 24822-23 (1998).

[241] *See, e.g., Hubbard Broadcasting, Inc.*, 46 RR 2d 1261, 1265 (1979) (where released financial data already demonstrates losses, it is not necessary to disclose additional data to pinpoint causes of losses); *Newport TV Cable Co., Inc.*, 55 F.C.C. 2d 805, 806-07 (1975) (where released balance sheets already demonstrate profits, it is not necessary to disclose additional data to prove profitability).

chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence" that will resolve an issue before the Commission.[242] MVPDs have failed to make a persuasive showing that the provision of retransmission consent agreements will provide a "necessary link in the chain of evidence" as to why cable subscription rates are high. Accordingly, the FCC should not require disclosure of this confidential and highly protected information on the "mere chance that it might be helpful." This is especially the case where MVPDs have not demonstrated that disclosure of retransmission consent agreements will be helpful to anyone other than themselves.

XI. NO COMMENTER HAS DEMONSTRATED THAT IT IS NECESSARY TO PROVIDE SPECIAL CONSIDERATION TO GOOD FAITH VIOLATIONS DURING THE LICENSE RENEWAL PROCESS

The few comments that address the question of whether the FCC should modify its existing enforcement procedures as a means to provide an "incentive for compliance with the good faith standard" fail to provide any compelling legal or policy basis that would warrant special consideration of good faith violations in the context of the license renewal process.[243] For example, neither TWC nor OPASTCO offer any legal or policy rationale to support their proposal that a broadcast station's good faith violation be considered in the context of license renewals. Rather, TWC merely concludes without explanation that any good faith violation by a broadcaster be deemed "presumptively contrary to the public interest and sufficiently 'serious' to

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[242] *Classical Radio for Connecticut, Inc.*, 69 F.C.C. 2d 1517, 1520 n.4 (1978) ("*Classical Radio*") (*citing Sioux Empire Broadcasting Company*, 10 F.C.C. 2d 132 (1967)); *accord*, Letter from Kathleen M. H. Wallman to John L. McGrew, 10 FCC Rcd 10574, 10575 (Com. Car. Bur. 1995) (*citing Classical Radio*), app. for rev. pending; *see also Petition of Public Utility Commission, State of Hawaii*, 10 FCC Rcd 2881, 2888 (Wireless Bur. 1995) (information must be directly relevant to a required determination), modified on other grounds 10 FCC Rcd. 3984 (Wireless Bur. 1995); *Robert J. Butler*, 6 FCC Rcd 5414, 5418 (1991); *American Telephone and Telegraph Co*., 5 FCC Rcd 2464 (1990) (*quoting* AT&T, FOIA Control No. 88-190 (CCB Nov. 23, 1988) distinguishing between material of "critical significance" and data providing a "factual context" for the consideration of broad policy issues and concluding with respect to the latter the prospect of competitive harm likely to flow from release outweighs value of making information available).

[243] *See Notice* at ¶ 30.

warrant denial of a station's renewal application."[244] Similarly, OPASTCO simply states that "the Commission should consider whether a broadcaster that violates the good faith rules is a worthy steward of the public airwaves when that broadcaster seeks to renew any licenses it holds."[245] Unsurprisingly, each of these proposals fail to suggest a reciprocal enforcement procedure for MVPDs that have violated the good faith rules, notwithstanding that the obligation to negotiate in good faith is a reciprocal obligation, applied to broadcasters and all MVPDs alike. The failure of these comments to consider how MVPD conduct might be taken into account demonstrates that it would be difficult to apply the FCC's proposal to consider good faith violations in connection with the license renewal process in a fair and equitable manner.[246]

In any event, no broadcaster has ever been found by the Commission to have breached its obligation to negotiate in good faith with MVPDs. Accordingly, it is not necessary for the FCC to evaluate and consider modifying the sanctions applicable to good faith violations, especially where, as here, the proposed method of "incentivizing" compliance with the good faith rules would have a disproportionate impact on broadcasters, as compared to MVPDs. In short, the FCC's existing retransmission consent requirements, including its remedies for non-compliance, are adequate to ensure ongoing conformance to such rules. Indeed, the importance of reaching agreement with MVPDs that serve very high percentages of broadcasters' viewers effectively

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[244] TWC Comments at 38.

[245] OPASTCO Comments at 17. OPASTCO also argues that the Commission should consider whether a broadcaster has refused to engage in non-binding mediation during the license renewal process, regardless of whether the FCC has authority to require that parties to retransmission consent disputes submit to such non-binding mediation. Even assuming that it was appropriate to provide special consideration to consider good faith violations during the license renewal process (which NAB has demonstrated is not the case), it would certainly not be appropriate to take into consideration whether a station had engaged in non-binding mediation (or abided by its outcome). First, there is no obligation to submit to non-binding mediation, and a broadcaster should not be punished for exercising its discretion as to whether or not to engage in a voluntary activity that is not required by the FCC's rules. Second, non-binding mediation is just that – non-binding. Thus, neither party has any obligation to comply with the outcome of a non-binding mediation.

[246] *See* NAB Comments at 62-64.

ensures that local stations diligently negotiate to conclude retransmission agreements with MVPDs in a timely manner.

XII. THE FCC SHOULD ADOPT THE NOTICE REQUIREMENT BECAUSE, DESPITE MVPDS RHETORIC, THIS PROPOSAL IS TRULY AIMED AT CONSUMER PROTECTION

As the record in this proceeding demonstrates, it is readily apparent that "consumer welfare" is not the true motive behind the MVPD industry's calls for regulation of retransmission consent. Indeed, the vast majority of the "reforms" proposed by the MVPD industry seek to regulate the rates MVPDs pay for some—but not all—of their program services. Not only do MVPDs fail to suggest regulation of MVPD retail prices to ensure that consumers will actually be protected, they also oppose the only proposed change to the retransmission consent process that is truly aimed at consumer protection, namely, enhancing (rather than cutting back on) consumer notification.[247] As explained below, any potential harms that may result from consumer notification are offset by the substantial benefits of such notices from a consumer perspective.[248]

MVPDs claim that notification of pending signal deletions would harm the public interest by causing consumer confusion and providing no corresponding benefits to viewers.[249] It is on

[247] *See* Cablevision Comments at 26; CenturyLink Comments at 11; DIRECTV Comments at 29-30; Discovery at 9; DISH Comments at 30; OPASTCO Comments at iii; SureWest Comments at 17-18; TWC Comments at 44-46; Verizon Comments at 3-4.

[248] NAB demonstrated in its initial comments in this proceeding that there is no policy reason to apply the notice requirement to cable systems but not to extend the requirement to direct broadcast satellite systems and other non-cable MVPDs. *See* NAB Comments at 9-13. Several commenters agree that the public interest is served by requiring non-cable MVPDs to provide notification to consumers in the event of a negotiating impasse. *See, e.g.,* TWC Comments at 47; NBC Affiliates Comments at 21.

[249] *See* Cablevision Comments at 26 ("Requiring MVPDs to give notice to subscribers of potential interruptions in service would exacerbate the existing imbalance in retransmission consent negotiations, making consumers even worse off than they are today."); CenturyLink Comments at 11 (commenting that the FCC's proposed notice rule "would provide little, if any, benefit to customers or incentive to negotiating parties to successfully negotiate a new retransmission consent agreement"); DIRECTV Comments at 30 (claiming "that notice will cause confusion among consumers, and that the steady drumbeat of warnings will ultimately lead consumers to ignore them"); DISH Comments at 30 (claiming that "There is no way to adequately ―balance useful advance notice against the potential for causing unnecessary anxiety to consumers"); OPASTCO Comments at iii (opposing the FCC's proposed notice requirement because providing notice to consumers about potential signal loss is "unnecessary and potentially disruptive"); SureWest Comments at 17 ("a revised notice requirement would also

this basis that MVPDs generally oppose adoption of enhanced consumer notification requirements.[250] However, as explained below, preservation of the status quo (namely, a notice requirement that applies only to cable operators) - or worse, a reduction in notice requirements - simply does not enable consumers to understand their options in the rare case of a signal deletion as a result of a retransmission consent impasse.[251]

Cable operators already are required to provide notification of signal deletions under existing Commission rules.[252] Unfortunately, however, broadcasters have observed that cable operators often fail to provide consumers notice of a signal deletion or provide such notice in a manner that renders the notification virtually meaningless.[253] Accordingly, viewers would be

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likely reduce the possibility of good faith RC negotiations"); Verizon Comments at 3 ("given the risks of unnecessary consumer confusion and frustration, the Commission should not adopt new notice requirements on MVPDs that would apply before the actual expiration of a retransmission consent arrangement").

[250] *Id*.

[251] The Joint Commenters propose that the FCC modify the existing notice requirement to apply only where a loss of service is certain to occur; in addition, broadcasters and MVPDs would be *prohibited* from notifying the public of an imminent service disruption more than 30 days before the grant of consent is set to expire. *See* Joint Comments at 25-26. Adoption of such a proposal would be a significant step backwards in the FCC's efforts to extend its notice requirements, which are intended to inform consumers of a potential service disruption. Similarly, DISH's proposal that the notice obligations of MVPD be accompanied by a corresponding requirement that a broadcaster both build out its transmission infrastructure to cover the entire DMA and provide converter boxes to affected subscribers not only fails from a practical perspective, it is beyond the scope of the FCC's authority to adopt. *See supra* note 108 (explaining that DISH's proposal to impose build-out obligations on broadcasters would amount to mandatory carriage and, in any event, likely would be difficult for many broadcasters to comply with under the FCC's current technical rules governing DTV broadcast facilities).

[252] Section 614(b)(9) of the Communications Act requires a cable operator to notify a local commercial television station in writing at least 30 days before either deleting or repositioning that station. Section 76.1601 of the Commission's rules further specifies that a cable operator must "provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system." 47 C.F.R. § 76.1601. *See also* 47 C.F.R. §§ 76.1602, 76.1603 (detailing requirements for notifying subscribers and cable franchise authorities). Under the current rule, if a cable operator fails to give notice 30 days before the retransmission consent agreement's expiration, and the agreement is ultimately renewed without the station being deleted, then the cable operator has not violated the rule. *See Notice* at ¶35. If, however, the station is ultimately deleted, and the cable operator has not given the required 30-day notice, then the cable operator is in violation of Section 76.1601. *Id.*; *see also* CenturyLink Comments at 10 ("[c]urrent FCC rules require 'cable operator[s]' to provide written notice to any broadcast station and the cable system subscribers at least 30 days before deleting carriage of or repositioning the broadcast station").

[253] LIN Television Comments at 24 (observing, *inter alia*, that (a) "in practice, many MVPDs do nothing to give consumers *actual* notice of the potential service disruption"; (b) "in LIN Television's experience, most MVPDs give only technical notice, typically, publication in newspaper classifieds"; and (c) "MVPDs often give contradictory and confusing notice to their consumers"); Belo Corp. Comments at 24 ("in Belo Corp.'s experience, many cable operators fail to effectively notify customers 30 days before an agreement is due to expire. And, even when notice is given, it is rarely *meaningful*, often published in obscure locations where it is likely to be unseen.");

well served by adoption of the Commission's notice proposal aimed at increased consumer education, which would enable viewers to have access to adequate information to make informed choices about their viewing options in the event of a rare negotiating impasse.[254] Any potential consumer confusion can be mitigated by the adoption of a requirement that all notifications be clear, concise, and factually accurate.[255] By enabling MVPDs to exercise discretion to determine the specific content of the notices (subject to the foregoing requirement), the FCC can ensure that consumer notifications contain appropriate information based upon "the realities of retransmission consent negotiations and disputes."[256]

Consumer confusion can be further mitigated by placing notice obligations on the MVPD, rather than the broadcaster, since the MVPD is the only party to the retransmission consent negotiations with the technical ability to provide the notice to only those consumers that will be directly affected by any interruption in service.[257] As NAB observed in its initial

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Sinclair Comments at 28 ("MVPDs appear to routinely disregard such requirement. In addition, even those MVPDs who nominally provide such notice, also intentionally send a mixed message to consumers that while such notice is being provided merely to comply with a government rule, the recipient should disregard such notice because impasse probably will not occur.").

[254] *See* Fox Comments at 11-12 (arguing that vigorous notice enforcement would protect consumers and give them the opportunity to take advantage of the many alternative choices when one MVPD's behavior threatens the potential loss of popular content); Nexstar Comments at 26 ("[N]otice may sometimes cause unnecessary subscriber anxiety; however, the alternative of failing to give notice deprives the subscriber of the information needed to make an informed decision."); Sinclair Comments at 27-28 (arguing that adequate notice is vital so that consumers have choices as to how to receive a broadcast station if there is an impasse).

[255] *See, e.g.*, Comments of National Consumers League, MB Docket No. 10-71 at 2 (filed May 27, 2011) ("notices should be provided in a manner that is accessible and understandable to the greatest number of potentially affected subscribers while avoiding unnecessary consumer confusion.").

[256] TWC Comments at 46 (stating that "the Commission should provide maximum discretion to MVPDs to determine the form and content of any required notice" because MVPDs "are better suited to identify the best ways to provide notice of a programming disruption to their subscribers.").

[257] The vast majority of comments filed by MVPDs that address the FCC's proposal regarding notice do not discuss whether the requirements should extend to broadcasters. The Joint Commenters, however, propose to require broadcasters to provide notice to their viewers of a potential impasse. *See* Joint Comments at 27 ("the principal notice obligation would be placed on the broadcaster"). According to the Joint Commenters, broadcasters are "in the best position to know whether a signal will 'go' dark'" and thus should be the party responsible for providing viewers notice. *Id*. at 26. Because retransmission consent negotiations are two-way discussions, the participating MVPD will certainly be aware of whether a negotiation is likely to lead to an impasse. Thus, the attempt of the Joint Commenters to place all responsibility for a failed negotiation on broadcasters is disingenuous. As discussed in the text, there are several practical reasons that MVPDs can provide notice more efficiently than

comments, there are disadvantages from a consumer's perspective to extending the notice requirement to broadcasters that do not apply to MVPDs.[258] To this end, the Joint Broadcasters explain that an "ongoing negotiation with a small or midsize community operator with hundreds of subscribers could cause many thousands of viewers to receive notice. This could be confusing to subscribers of other MVPDs in the market and would make it more likely that viewers will discount such notices."[259] As a practical matter, broadcasters will not be able to effectively target the notice to only the subset of its viewers that would be affected by a possible signal deletion. By contrast, MVPDs can ensure that notifications are received by their subscribers alone and not delivered to viewers of a station that are not impacted by a potential impasse. For this reason, the Commission should continue to provide broadcasters with discretion to determine how or whether to provide notifications to viewers.

MVPDs also allege that expansion of the notification requirements to all MVPDs will provide broadcasters with increased leverage in retransmission consent negotiations.[260] However, the record does not demonstrate that the existing notice requirements under Section 76.1601 of the FCC's rules have provided broadcasters with any advantages in retransmission consent negotiations. Rather, as demonstrated herein, it is often the MVPD – not the broadcaster – that has significant leverage in a particular retransmission consent negotiation.[261] In any event, because neither broadcasters nor MVPDs stand to benefit from the loss of viewers if a signal is

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broadcasters, including the fact that MVPDs can target their subscribers to mitigate consumer confusion. The record does not support adoption of a notice rule that would apply to broadcasters.

[258] *See* NAB Comments at 12-13.

[259] Joint Broadcasters Comments at 16-17 (noting as well that broadcaster notice could be " damaging to MVPDs as well; consumers who mistakenly believe they are about to lose access to highly valued broadcast signals might choose to switch MVPDs."). *See also* Gilmore Comments at 14 ("Unlike the MVPD whose notices would be received only by its subscribers, broadcast station's notices would be viewed by every MPVD subscriber in the market, as well as by over-the-air viewers. As a result, compelling a station to broadcast an announcement about a potential service disruption for subscribers of a single operator could create unnecessary confusion for subscribers of all other MVPDs that carry that station.")

[260] *See, e.g.,* Discovery Comments at 9.

[261] *See supra* Section III.A.

deleted, notification of a pending signal deletion does not increase or decrease the bargaining position of either party. Importantly, as several commenters observe, the notification requirement can serve as an incentive for broadcasters and MVPDs alike to resolve open issues well in advance of the expiration of an existing retransmission consent agreement in order to avoid any consumer impact.[262]

XIII. CONCLUSION

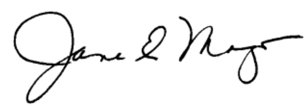
As the record demonstrates, the retransmission consent regime has worked effectively and efficiently to bring broadcast programming to MVPD subscribers since it was enacted by Congress in the 1992 Cable Act. Contrary to claims of the MVPD industry, the policy bases for enactment of the retransmission consent statute are just as valid today as they were in 1992. Indeed, MVPDs reliance on the emergence of competition among MVPDs as justification for retransmission consent rule changes is misplaced, as Congress did not enact retransmission consent because cable was a monopoly provider of MVPD services but rather to remedy an anticompetitive distortion in the market as between broadcasters and cable operators. Once again, MVPDs have failed to provide any legal, factual, or policy basis to support their claims that the FCC's rules must be changed to benefit consumers. As the record reflects, many of the rule changes advocated by the MVPD industry cannot be implemented in a manner consistent with the FCC's authority, legislative intent, or sound public policy. Most notably, in the absence of regulation of MVPD subscriber rates, the vast majority of proposed changes will not inure to the benefit of consumers, but instead to the competitive or financial advantage of MVPDs. Accordingly, the Commission should refrain from making substantial changes to the existing

[262] *See, e.g.,* Fox Comments at 10 ("notice might help incentivize broadcasters and MVPDs to conclude their negotiations more than 30 days before a deal is set to expire, obviating the need for either party to have to advise consumers of any potential impasse"); Joint Comments on Behalf of the Named State Broadcaster Associations, MB Docket No. 10-71 at 10 (filed May 27, 2011) (stating that consumer notice would "incentiv[ize] MVPDs to lock down those rights through the commencement of active retransmission consent negotiations").

good faith rules and resist requests to micromanage the negotiation of thousands of complex retransmission consent agreements in disparate markets across the country. Rather, the FCC should focus its efforts on rule changes that will directly impact and benefit consumers, namely, revision of its notice requirements.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS



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June 27, 2011

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

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

REPLY DECLARATION OF
JEFFREY A. EISENACH AND KEVIN W. CAVES

JUNE 27, 2011

<u>CONTENTS</u>

I. INTRODUCTION

1. On May 27, 2011, our Initial Declaration in this matter was submitted by the National Association of Broadcasters (NAB).[1] NAB has requested that we review certain comments filed by other parties in this proceeding. The results of our review are contained in this Reply Declaration.[2] As before, while we prepared this declaration at the request and on behalf of NAB, the views expressed are our own.

2. This Reply Declaration focuses on comments associated with the benefits of retransmission consent compensation (and other non-traditional revenues) in terms of broadcasters' financial viability and the production of news and other local content; on comments relating to the Federal Communications Commission's (FCC or Commission) proposal to restrict how Local Marketing Agreements (LMAs) and similar types of arrangements operate in the retransmission context; and, on comments relating to proposals that the Commission no longer recognize private contracts providing for network non-duplication and syndicated exclusivity. The benefits of retransmission consent are discussed in Section II. Arguments relating to joint management contracts such as LMAs are discussed in Section III. The economic rationale for continuing to enforce network non-duplication and syndicated exclusivity rules is explained in Section IV. Section V briefly summarizes our conclusions.

II. RETRANSMISSION CONSENT COMPENSATION GENERATES SUBSTANTIAL BENEFITS

3. Several of the comments submitted in this proceeding address the question of whether retransmission consent fees generate benefits or costs for consumers. MVPDs, for example, argue that retransmission consent fees are passed through to consumers, and tacitly

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[1] *In the Matter of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, *Comments of the National Association of Broadcasters* (May 27, 2011), Attachment A (hereafter "NAB Comments" and "Initial Declaration" respectively).

[2] Our qualifications were summarized in, and our curriculum vitae attached to, the Initial Declaration.

assume they generate no benefits in the form of added programming or otherwise.[3] To assess this issue, we performed a detailed analysis of the economics of television broadcasting, including modeling the significance of economies of scale and scope utilizing station-level data from annual surveys conducted for the National Association of Broadcasters (NAB). This section briefly summarizes our report,[4] which concludes that broadcast stations are indeed subject to strong economies of scale and scope, that retransmission consent (and other non-traditional revenues) therefore play an important role in broadcast stations' financial viability, and that any current or future regulations that artificially limit broadcasters' ability to realize scale and scope economies (including potential limitations on broadcast stations' ability to negotiate for retransmission consent that may arise in this proceeding) would substantially reduce both the number of financially viable broadcast stations and their programming output. (The *Economies of Scale Report* is at Attachment A to this Reply Declaration.)

A. Television Broadcasting is Subject to Significant Economies of Scale and Scope

4. To assess the existence and significance of scale economies in the television broadcasting industry, we compiled a financial dataset for various size classes of broadcasters spanning the years 1995 – 2009, derived from an annual NAB survey.[5] Specifically, our data set consists of detailed financial information on revenues, costs and profits, aggregated by market and by size of station (as measured by net revenues).

5. The data are consistent with what one would expect to observe in an industry characterized by economies of scale. As shown in Figure 1, there is a nearly perfect correlation

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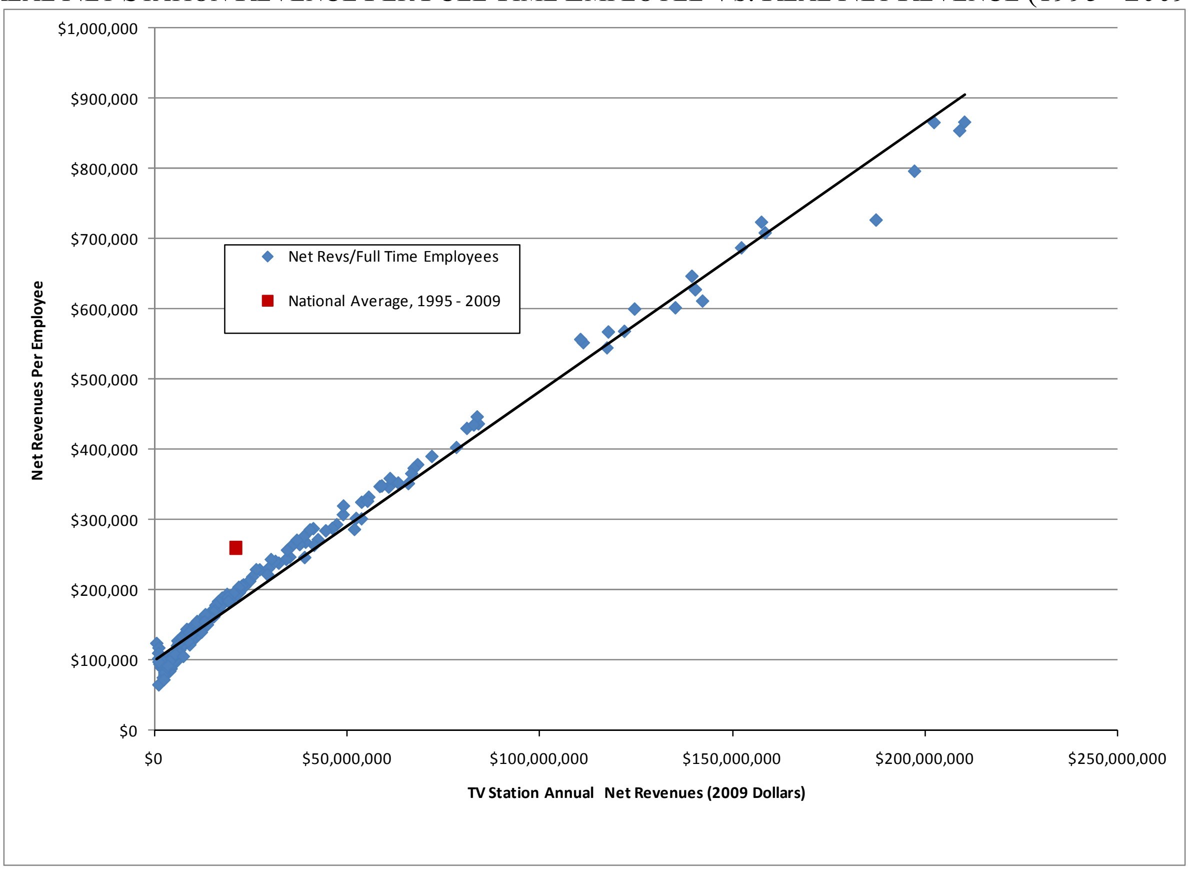
[3] See, e.g., *In the Matter of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, *Comments of the American Cable Association* (May 27, 2011) (hereafter "ACA Comments").

[4] Jeffrey A. Eisenach and Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* (Navigant Economics, June 2011) (hereafter *Economies of Scale Report*).

[5] *Television Financial Report: Station Revenue, Expenses and Profit* (National Association of Broadcasters, 1996 - 2010) (hereafter *NAB Survey*).

between a television station's size (as measured by real net revenues) and its (inflation-adjusted) revenue per employee, a proxy for labor productivity. For example, in 2008, the average revenue per employee at stations with $50 million-$75 million in annual revenue ($264,000) was more than double the average revenue per employee at stations with $8 million-$10 million in revenue ($126,000).

FIGURE 1:
REAL NET STATION REVENUE PER FULL TIME EMPLOYEE VS. REAL NET REVENUE (1995 - 2009)



Note: Each data point reflects the ratio of average revenue to the average number of full time employees for ABC, CBS, and NBC affiliate stations falling within a particular revenue range (e.g., greater than $35 million, less than $50 million). All figures are expressed in 2009 dollars. *Source: NAB Survey*, Navigant Economics.

6. Figure 2 shows the relationship between station size (again measured by real net revenues) and profitability. As the figure demonstrates, the profit margins of television stations are strongly correlated with net revenues, with smaller stations actually showing negative profit

margins.[6] Once again, these data are consistent with what one would expect to observe in an industry characterized by economies of scale: Not only do stations with larger operations generate more output per worker; they also generate more profit per unit of output. In other words, Figure 2 indicates that the increased output per worker documented in Figure 1 is associated with efficiencies (i.e., lower costs per unit of output), and hence higher profits. (This would not be the case if large stations were unable to realize the efficiencies suggested by increased output per worker; e.g., if any potential cost savings were somehow offset by a disproportionate increase in the intensity of other inputs and/or increased input costs.)

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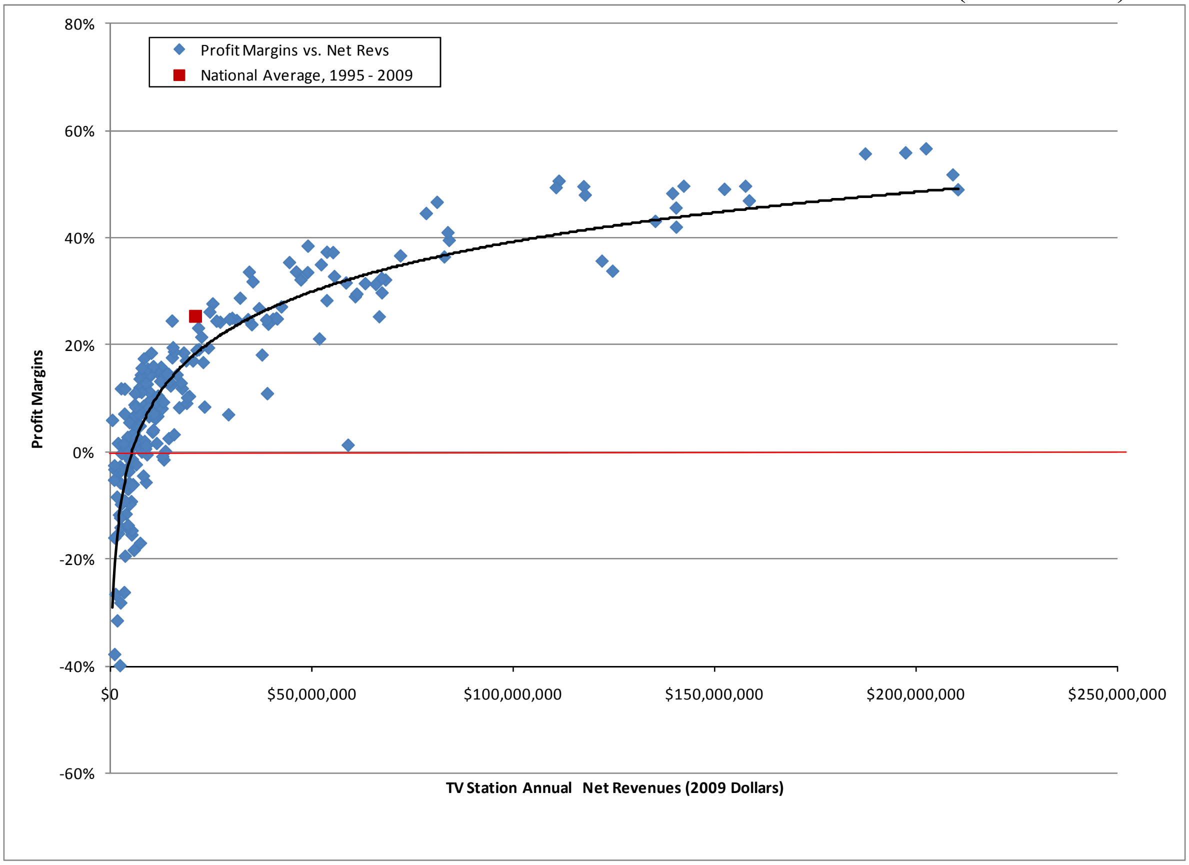
[6] Economies of scale are station-specific, not market-specific, i.e., the evidence shows that "larger" stations have lower costs, other things equal, not necessarily that stations in larger markets have lower costs. That said, stations in larger markets tend to have higher revenues than stations in smaller markets. See Federal Communications Commission, *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, 13698 (2003) ("Small market stations are competing for disproportionately smaller revenues than stations in large markets.").

FIGURE 2:
PROFIT MARGINS VS. REAL NET REVENUES FOR BROADCAST STATIONS (1995 - 2009)



Note: Each data point reflects the average profit margin for ABC, CBS, and NBC affiliate stations falling within a particular revenue range (e.g., greater than $35 million, less than $50 million). Where applicable, figures are expressed in 2009 dollars. *Source: NAB Survey*, Navigant Economics.

7. To more formally demonstrate and quantify scale economies, we estimated a cost function for television stations econometrically. Our econometric results indicate that broadcast television stations are characterized by significant scale economies. Specifically, we find that a one percent increase in output is associated with a 0.82 percent increase in total cost. (Conversely, a one percent increase in costs would yield a 1.22 percent increase in output.) Our estimate is highly statistically significant and thus quite precise.[7]

[7] As explained in the *Economies of Scale Report*, although this analysis provides a baseline estimate of scale economies, it likely conservative in that it is based on historical experience with the traditional broadcast business model, and therefore not necessarily representative of additional efficiencies associated with new business models and sources of revenues, some of which significantly increase output while adding little or nothing to costs.

8. As we note in the *Economies of Scale Report*, our econometric results confirm the existence of strong economies of scale at the level of individual television stations. There is also abundant empirical evidence of scale and scope economies affecting joint operation of multiple stations, especially in the literature on the determinants of local news programming, which we discuss in Section II. C. below.

B. Increasing Competition and Technological Change are Altering Broadcasters' Business Models

9. Changes in the market for video programming in recent years have placed broadcasters under increasing financial stress. Largely as a result of marketplace fragmentation and of the growing numbers of options for advertisers (including online), television broadcasters' revenues and profits have fallen significantly. SNL Kagan reports that total revenues for local television stations fell from $26.3 billion in 2000 to $18.1 billion in 2009, a decline of $8.2 billion (or 31 percent), and that advertising revenues over the same period fell even faster – by $9.5 billion, or 37 percent.[8]

10. Not surprisingly, as shown in Table 1, broadcasters' pre-tax profits have also fallen substantially in recent years, with the profits for the average station falling by 56 percent, from $6.1 million in 1998 to $2.7 million in 2008. In each year, stations falling in the lowest quartile of profits actually earned negative pre-tax returns. Eleven TV broadcasters have filed for Chapter 11 protection since 2008.[9]

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[8] Station revenues rebounded somewhat in 2010 as the macroeconomy began to recover, but nevertheless declined substantially from 2000 - 2010. Note also that traditional advertising revenues are projected to remain below historical levels in the years to come. See *Economies of Scale Report*, Section III.B.

[9] *Economies of Scale Report*, Section III.B.

TABLE 1:
TELEVISION STATION PRE-TAX PROFITS OVER TIME

Pre-Tax Profits Average All Markets All Stations				
		--------------Percentiles--------------		
Year	***Average***	***25%***	***50%***	***75%***
1998	$6,145,583	($220,970)	$1,575,778	$5,944,967
1999	$4,361,828	($659,146)	$916,554	$4,323,452
2000	$4,537,894	($584,884)	$1,113,634	$4,596,413
2001	$2,171,188	($1,445,544)	$67,067	$2,575,895
2002	$3,858,644	($451,601)	$911,827	$4,188,476
2003	$4,073,056	($458,512)	$464,019	$3,344,000
2004	$4,442,379	($158,079)	$1,128,782	$4,686,237
2005	$3,512,208	($512,639)	$670,946	$3,426,952
2006	$4,210,359	($305,161)	$1,120,443	$4,154,310
2007	$3,320,667	($454,837)	$520,164	$3,446,126
2008	$2,686,481	($750,149)	$630,300	$3,178,780

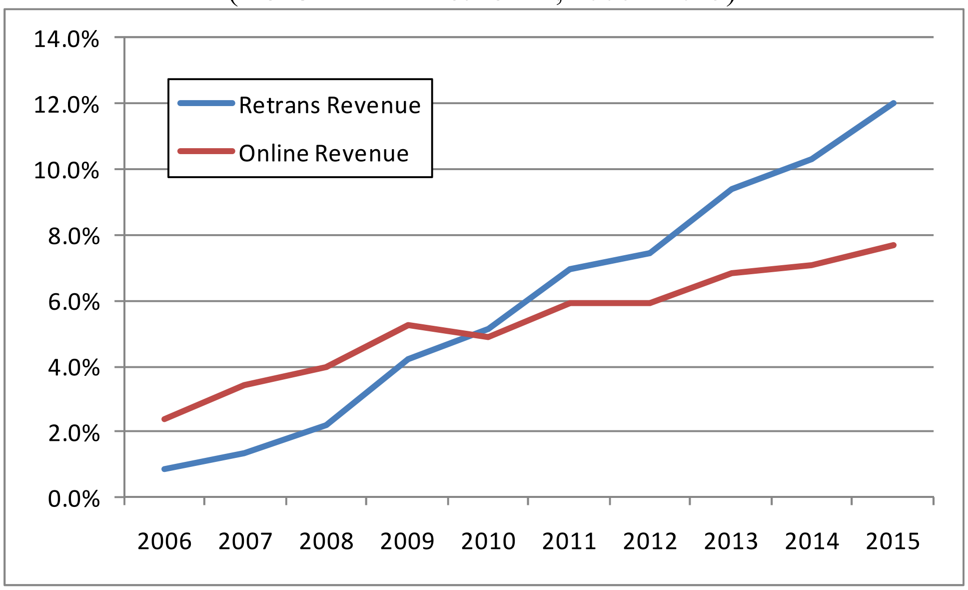
Source: Attachment C to *Comments of the National Association of Broadcasters in the Matter of Examination of Future of Media and Information Needs of Communities in a Digital Age* (GN Docket No. 10-25, May 7, 2010).

11. On the other hand, broadcasters are developing new services and business models, which are beginning to yield new revenue streams. The fact that the overall decline in station revenues has been somewhat smaller than the decline in traditional advertising revenues is primarily accounted for by two new revenue sources: (1) Online content – i.e., advertising revenue generated by television stations' web sites; and (2) cash compensation for retransmission rights.

12. As shown in Figure 3, analysts expect online advertising and retransmission consent to account for an increasing share of both revenues and profits: by 2015, SNL Kagan projects that online revenues will have increased by more than 75 percent, while retransmission consent revenues will have more than doubled, compared to 2010, together making up nearly 20 percent of TV station revenues and a majority of TV station profits. Other non-traditional

revenue sources, including advertising revenues from Mobile TV offerings, are likely to increase in the future as well.

FIGURE 3
RETRANSMISSION CONSENT AND ONLINE REVENUES AS A SHARE OF TOTAL TV REVENUES
(ACTUAL AND PROJECTED, 2006 – 2015)



Source: SNL Kagan.

13. In short, broadcasters have responded to increasing competition in two primary ways. First, they have sought to exploit economies of scope by "repurposing" their core product – video content – into new markets (e.g., online and Mobile TV). Second, as demand on the "upstream" (advertising) side of their markets has become more price-sensitive, they have rebalanced their revenue streams by obtaining increased compensation for retransmission consent (on the "downstream" side). This result is precisely what the economic literature on two-sided markets predicts will occur in such a situation, and is entirely consistent with economic efficiency and the maximization of consumer welfare.[10] In other words, the fact that retransmission consent revenues are playing an increasingly significant role in the economics of

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[10] See generally Jean-Charles Rochet and Jean Tirole, "Platform Competition in Two-Sided Markets," *Journal of the European Economic Association*, 1;4 (June 2003) 990-1029.

broadcast television represents an efficient response to changing market conditions, not a cause for regulatory intervention.

C. Retransmission Consent Compensation Affects Broadcasters' Financial Viability and Increases the Output of News and Other Local Content

14. As noted above, critics of retransmission consent focus on the idea that some portion of retransmission consent compensation ultimately is passed through to consumers in the form of higher rates for pay TV. They neglect to point out, however, that those same retransmission consent fees are used by broadcasters to pay for inputs that increase the quantity and quality of television broadcast content.[11] The *Economies of Scale Paper* presents estimates of the impact of retransmission consent compensation on the rates of return of television broadcast TV stations (and thus on the long-run ability of local broadcasters to earn sufficient economic returns to continue investing in their businesses), and on the output of local news and public affairs programming.[12]

15. Based on forecasts of retransmission revenues and other financial metrics by SNL Kagan, we estimate that the effect of depriving the median broadcast television station (in terms of total revenues) of retransmission consent compensation would be to reduce its 2015 (pre-tax) profit margin from 14.8 percent to 3.1 percent. Further, we estimate that the profit margin required for TV broadcasters to continue attracting capital (i.e. their weighted average cost of capital) lies between 9.3 percent and 12.9 percent, with a point-estimate of 11.0 percent.

[11] In our Initial Declaration, we also demonstrated that the empirical evidence did not support the proposition that programming costs in general, or retransmission fees in particular, have played or will play a significant role in increasing the prices that multichannel video programming distributors (MVPDs) charge to consumers. In fact, we showed that programming costs are decreasing relative to the costs, revenues and profits of MVPDs, while retransmission consent fees make up a small fraction of MVPD programming costs, and an even smaller percentage of MVPD revenues.

[12] The paper also examines the effects of other alternative revenue sources, such as online advertising, on stations' economic returns, and of the effects of ownership restrictions on the output of local news programming. See *Economies of Scale Paper* at Sec. IV.

Thus, we conclude that depriving the median broadcaster of retransmission consent revenues would lower its rate of return below its cost of capital and, in the long run, result in significant exit from the industry.

16. To estimate the impact of retransmission consent compensation on local news programming, we examined the existing empirical literature on the determinants of local news output by broadcasters, and identified eight studies that estimate revenue effects econometrically, all but one of which find at least some evidence of a positive and statistically significant relationship between revenue and local news production. Averaging across the studies that yield quantitative estimates of the effects of station revenues, the empirical results suggest that an additional \$1 million in revenue yields an increase of approximately 4.75 minutes per week of local news programming.

17. Currently, broadcasters in the aggregate earn roughly \$1.1 billion annually from retransmission consent fees, and, by 2015, are projected to earn approximately \$3.0 billion.[13] Based on this forecast, we estimate the aggregate reduction in local news associated with the elimination of retransmission consent revenues. Specifically, the existing empirical literature suggests that local news programming would fall by approximately (4.75 minutes per week per \$1 million) × \$3.0 billion ≈ 14,250 minutes per week in the aggregate, which is approximately equivalent to an 11 minute per week reduction in local news programming by each of the approximately 1,300 commercial broadcast stations nationwide.[14] These estimates assume the current number of broadcast stations (i.e., no significant exit), and are thus conservative in view

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[13] See SNL Kagan, *Broadcast Retransmission Fee Projections Through 2017* (2011).

[14] The aggregate effects refer to the average across all stations, regardless of whether they result from increases in news programming among stations that already carry news, incremental news coverage offered by stations that do not currently carry news, or (most likely) a combination of the two effects.

of our estimates of the impact of lost retransmission consent revenues on the economic returns to broadcasting.

III. MANAGEMENT SERVICE CONTRACTS ARE NOT ANTICOMPETITIVE AND ALLOW BROADCASTERS TO REALIZE ECONOMIES OF SCALE AND SCOPE

18. Several commenters present arguments relating to negotiation of retransmission consent agreements by stations operated under certain types of Management Service Contracts (e.g., "local marketing agreements," "shared services agreements," and "joint sales agreements" (referred to collectively below as MSCs)), under which two stations in the same market may conduct some of their operations under joint management.[15] These arguments build on and repeat arguments proffered in previous comments submitted prior to the initiation of the Commission's rulemaking.[16] The essence of the argument, as advanced by Professor Rogerson on behalf of the American Cable Association (ACA), is that:

> By negotiating together, separately owned broadcasters are able to obtain the same level of retransmission consent fees that they would be able to attain if they were allowed to merge and a single owner were to negotiate a bundled deal on behalf of all of them….[B]oth economic theory and the available evidence suggest that this practice allows local broadcasters to charge higher retransmission consent fees than they would otherwise be able to ….[17]

19. To the contrary, neither economic theory nor the available evidence provide a persuasive basis for concluding that joint negotiation of retransmission consent by stations in the same market has a positive effect on retransmission consent compensation. If anything, MSCs likely lower stations' operating costs, which, all else equal, would tend to place downward pressure on retransmission consent compensation. Further, in direct response to the

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[15] See, e.g., ACA Comments at 5-25.

[16] *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, Petition for Rulemaking,* MB Docket No. 10-71, *Comments of the American Cable Association* (May 18, 2010) (hereafter "ACA May 2010 Comments").

[17] William P. Rogerson, "Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market" (May 27, 2011), Appendix A to ACA Comments (hereafter Rogerson II), at 3.

Commission's expressed concern that such arrangements might result in "delays" or "unnecessarily complicate" retransmission consent negotiations, we examined data on the likelihood of stations involved in MSCs of one sort or another being involved in retransmission consent negotiating impasses. As we demonstrate below, the data show that such stations are considerably less likely than other stations to be involved in impasses.

A. Neither Theory nor Evidence Supports Claims that MSCs are Anticompetitive or Result in Higher Retransmission Prices

20. Professor Rogerson's claim that MSCs raise prices by allowing broadcasters to "collude" in retransmission consent negotiations[18] is neither theoretically compelling nor empirically supported. One point of general agreement in this proceeding is that retransmission consent negotiations can be accurately described (at least up to a point) by models of bargaining power. In such relationships, the ability of each party to win favorable terms depends largely on the degree of harm it suffers in the absence of an agreement (or, put differently, its best alternative to a negotiated agreement, or BATNA). The degree of harm suffered by an MVPD can be measured by the departure rate of its customers: If an MVPD's inability to offer a given broadcast station causes relatively large numbers of its customers to depart (for other MVPDs, or simply to "cut the cord"), it is in a weaker position than if relatively few customers depart.[19]

21. In order for the "collusion" to which Professor Rogerson refers to increase retransmission consent compensation, it would have to be the case that the departure rate associated with failing to reach agreement with two stations is greater than the sum of the departure rates for each of the stations separately. That is, assuming two "identical" broadcast

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[18] Rogerson II at 3.

[19] See generally *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees,* MB Docket No. 10-56, *Memorandum Opinion and Order* (January 20, 2011) at Appendix B (hereafter *Comcast-NBCU Order*).

stations, it must be the case that the departures resulting from an impasse with both stations simultaneously exceed the sum of the departures that would result from two separate impasses.

22. This condition would hold if a significant number of a given MVPD's subscribers (a) would not defect from the MVPD if either station *A* or station *B* became unavailable; but (b) would defect from the MVPD if both stations became unavailable simultaneously (implying that the two stations are substitutes from the MVPD's point of view).[20] But if stations *A* and *B* are not substitutes, then the stations gain no bargaining advantage through joint action. For instance, if 100 subscribers would defect from the MVPD if station *A* became unavailable, regardless of whether station *B* were withdrawn, then the two stations are independent (neither substitutes nor complements), and no bargaining advantage is gained from joint action.[21] In other words, as Professor Rogerson correctly acknowledges, for MSCs to confer a bargaining advantage to broadcasters, it must be the case that "the programs are substitutes in the sense that the marginal value of either of the programs to the MVPD is lower conditional on already carrying the other program."[22]

23. There are two primary problems with Professor Rogerson's argument. First, it is by no means theoretically axiomatic that two broadcast stations must be substitutes from the perspective of an MVPD. It *might* be the case, as Professor Rogerson assumes, that an MVPD would suffer a disproportionate loss from failure to agree with a second broadcast station, given that it had failed to agree with the first. *A priori*, however, the opposite case seems equally

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[20] More generally, it must be the case that the joint bargaining strategy for two stations does not dominate the strategies for the two stations bargaining independently.

[21] Similarly, no bargaining advantage is gained from joint action if the goods are complements – i.e., in the case where 100 subscribers would defect if station *A* were withheld and station *B* were not withheld, but only 50 incremental subscribers would defect as a result of station *A* being withheld after station *B* had already been withheld.

[22] William P. Rogerson, "Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and its Effect on Retransmission Consent Fees," Attachment B to ACA May 2010 Comments (hereafter Rogerson I) at 8.

plausible. If, for example, MVPD customers who prefer broadcast programming regard the absence of a single broadcast station as sufficient reason to switch to a competitor, so that relatively few additional customers switch if a second station is absent, then the stations are not substitutes and Professor Rogerson's conclusion is reversed.[23] Second, the empirical evidence upon which Professor Rogerson relies is far from compelling: The filings by three rural cable operators in response to a concerted effort by ACA to generate evidence for this proceeding must be regarded as (at best) highly anecdotal and subject to selection bias. Further, the Commission's findings in the *Comcast-NBCU Order*, upon which Professor Rogerson relies, are simply not on point, as they relate not to two broadcast stations but rather to a broadcast station and a cable regional sports network.[24]

24. According to the ACA, coordinated negotiations by separately owned broadcasters in the same market (and the MSCs that facilitate these negotiations) result in consumer harm.[25] ACA identifies 36 pairs of "Big Four" broadcast network affiliate stations in the same DMA that are operating under an MSC and have participated in joint retransmission

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[23] Other analyses in fact have concluded that, because MVPDs do not regard broadcast television stations as substitutes, there is unlikely to be any adverse competitive effects from such television stations having an agreement involving retransmission consent. See Christopher S. Reed, "Regulating Relationships Between Competing Broadcasters," *Hastings Communications and Entertainment Law Journal* 33 (Fall 2010) 1-48 at 35 ("Thus, while television stations located within the same geographic market clearly compete in certain dimensions, when it comes to carriage by local cable operators it appears that stations are more appropriately viewed as complements, rather than substitutes, and cannot be said to compete in the market for carriage by multichannel video programming distributors. Accordingly, to the extent that an agreement between competing television stations involves retransmission consent arrangements of those two stations, there will unlikely be any demonstrable adverse competitive effects.")

[24] See Rogerson II at 9-10. That is, there is no basis whatsoever for Professor Rogerson's casual assumption that "two broadcast networks should be at least as close substitutes for one another as a broadcast network and an RSN."

[25] ACA Comments at Executive Summary. In addition, the Notice of Proposed Rulemaking specifically seeks evidence on whether such agreements "delay" or "complicate" the negotiating process. See *In the Matter of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-7, *Notice of Proposed Rulemak*ing (March 3, 2011) at ¶23.

consent negotiations (for a total of 72 "MSC Stations").[26] Despite ACA's expressed concerns about the effects of negotiating impasses, however, it provides no evidence that the MSC Stations are more likely to be involved in negotiating impasses than other broadcast stations.

25. To assess the propensity of MSC Stations to be involved in negotiating impasses, we compared ACA's list of MSC stations against our database of negotiating impasses from 2006 through the present,[27] and determined that just three (or 4.2 percent) of the 72 MSC Stations identified in ACA's filings have been withheld from an MVPD as a result of a negotiating impasse, and that none have been involved in multiple impasses since January 2006. By way of comparison, of the approximately 1,300 commercial broadcast stations nationwide, approximately 7.2 percent have been withheld in the course of at least one impasse, and several of these stations have been withheld on multiple occasions.[28] Simply put, MSC Stations are, at most, only about half as likely to be involved in negotiating impasses when compared with broadcast stations as a group. This finding is not consistent with the Commission's concerns that MSCs "delay" or "complicate" retransmission consent negotiations, but instead supports the alternative hypothesis that MSCs lead to more efficient negotiations and actually facilitate agreements.[29]

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[26] Appendix B to ACA Comments.

[27] See Initial Declaration at 27.

[28] Our estimates are conservative for at least two reasons. First, our finding that 7.2 percent of broadcast stations were involved in impasses is based on all broadcast stations, including those which do not elect retransmission consent, whereas the ACA list of MSC stations includes only Big Four affiliate stations, all of which presumably do elect retransmission consent. Second, our analysis assumes that the stations identified as MSC stations by ACA were involved in MSCs throughout the 2006-2010 period, when in fact some of them may only have been MSC Stations for part of the period. Thus, we count all impasses involving any of these stations as "MSC impasses," when in fact some of them may have occurred prior to the station's involvement in an MSC.

[29] See, e.g., Michael G. Baumann, "Proposals for Reform of the Retransmission Consent Good Faith Bargaining Rules: An Economic Analysis," Exhibit 1 to *Comments of Sinclair Broadcasting*, MB Docket No. 10-71 (May 27, 2011) at 31-32.

B. MSCs Generate Substantial Efficiencies Which Could be Lost if the Commission Banned Joint Negotiations

26. Any consideration of constraining the ability of broadcast stations to engage in MSCs must also take into account the results, detailed above, of our analysis of economies of scale and scope in television broadcasting. It is widely understood that MSCs allow broadcasters, especially in small markets, to reduce their fixed costs – i.e., to realize economies of scale and scope – and thus continue to operate where it would otherwise be uneconomic to do so.[30] Our results suggest that depriving stations, especially smaller ones, of the ability to engage in MSCs could have a significant impact on both the production of local news and on the stations' ultimate financial viability.

27. Further, the nature of MSCs suggests that the inclusion of retransmission consent negotiation as part of the MSC agreement may, in some or all situations, be an important part of the arrangement: A station owner who contracts with a third party to undertake designated operational and/or management functions expects that third party to acquire and analyze the information necessary to make sound decisions, including sound negotiating decisions, thereby relieving the owner of the burden of doing so herself. If the owner is forced to step in and "re-learn the business" in order to engage in retransmission consent negotiations, the value of the MSC may be significantly reduced. In more formal terms, it is likely that negotiation of retransmission consent agreements is subject to strong economies of scope relative to the other services performed under MSCs, and that by prohibiting realization of those economies, the Commission would undermine the ability of stations to engage in efficient cost-sharing

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[30] See, e.g., Reed at 2-3 ("[A]s the increasingly competitive media landscape forces broadcasters to confront economic challenges, many broadcasters are entering into various business arrangements with competitors in an attempt to reduce expenditures by creating and leveraging efficiencies and economies of scale and scope.")

arrangements that reduce overall operating costs and thus ultimately result in lower retransmission consent compensation.

IV. ENFORCEMENT OF NETWORK NON-DUPLICATION AND SYNDICATED EXCLUSIVITY RULES PROMOTES ECONOMIC EFFICIENCY

28. As the Commission has repeatedly noted, its network non-duplication and syndicated exclusivity rules ("program exclusivity rules") do not create rights for broadcast stations, but rather provide for the enforcement of "contractual agreement[s] between the station and the holder of the rights to the program."[31] For the reasons explained briefly below, such agreements are presumptively efficient and promote consumer welfare. Moreover, there appears to be no disagreement that FCC enforcement of the rules is effective – indeed, it seems that the real complaint of those wishing to weaken or repeal of the rules is that FCC enforcement is *too* effective. Thus, the effect of repealing or weakening the program exclusivity rules would be to make it more costly for broadcasters and owners of program rights to enter into and enforce efficiency-enhancing contracts.[32]

29. The contracts enforced by the FCC under the program exclusivity rules are essentially exclusive territory agreements: Agreements between broadcast stations and rights holders that the programming licensed to the broadcaster will not be made available within the

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[31] See, e.g., Federal Communications Commission, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (SHVERA Report) (Sep. 8, 2005) at ¶18 ("The network non-duplication rules protect a local commercial or non-commercial broadcast television station's right to be the exclusive distributor of network programming within a specified zone, and require programming subject to the rules to be blacked out when carried on another station's signal imported by an MVPD into the local station's zone of protection. A television station's rights under the network non-duplication rules are limited by the terms of the contractual agreement between the station and the holder of the rights to the program.") and at ¶23 ("The syndicated exclusivity rules are similar in operation to the network non-duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming.").

[32] See SHVERA Report at ¶49 ("If networks and syndicators have entered into contracts with broadcasters that limit broadcasters' exclusivity such that a duplicative distant signal could be imported by an MVPD without blacking out the duplicative programming, the Commission's rules would not prevent that result. Conversely, where exclusivity contracts exist, repeal of the Commission's rules would not necessarily be sufficient to enable the retransmission of duplicative programming.")

broadcasters' service territory during a specified time period. The economic efficiency rationale for such agreements has been well understood by economists for many years, and by the courts at least since the Supreme Court's decision in *GTE Sylvania*:[33] They ensure that the local retailer (in this case, the broadcast station) is able to appropriate the benefits of activities it undertakes to promote the manufacturers' (in this case, the network owners' or syndicators') brand, without fear of free-riding, opportunistic competitors.[34]

30. In the case of broadcasting, the need for exclusive territories is also motivated by the fact that the marginal cost (to a broadcast station) of each additional television viewer (or MVPD distributor) is zero – i.e., by the public goods nature of the underlying product. Thus, a broadcast station which chose to offer "retransmission consent" to an "out-of-market" MVPD would experience zero increase in costs, and thus stand to earn a 100 percent margin on its retransmission consent revenues. The effect, in short order, would be to drive retransmission fees to a level approximating the cost of negotiating the agreement itself, i.e., effectively zero.[35] While it is easy to see why MVPDs would desire such a result, the effect – as we have shown above – would be to undermine and ultimately destroy the economic viability of a large number of local broadcast stations.

31. In fact, network owners and program syndicators have a strong interest in avoiding such a result – hence their decision to enter into exclusive territory contracts in the first instance. Thus, as others have noted, a decision by the FCC to eliminate or weaken the program

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[33] *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 97 S. Ct. 2549 (1977).

[34] See, e.g., Benjamin Klein and Kevin M. Murphy, "Vertical Restraints as Contract Enforcement Mechanisms," *Journal of Law and Economics* 31;2 (October 1988) 265-297. It is widely agreed that the use of exclusive territories can "promote economically efficient investments by the dealer in the manufacturer's line." See Warren S. Grimes, "The Sylvania Free Rider Justification for Downstream-Power Vertical Restraints: Truth or Invitation for Pretext?" in Robert Pitofsky, ed., *How the Chicago School Overshot the Mark* (Oxford University Press, 2008) 181-195 at 195.

[35] For a discussion of exclusive territories in the analogous case of trademarks associated with franchising, see Roger D. Blair and David L. Kaserman, *Antitrust Economics* (Irwin, 1985) at 365-372.

exclusivity rules would not lead to the elimination of exclusive territory contracts, but rather to a period of uncertainty and litigation, as broadcasters and rights holders found it necessary to access the courts in order to enforce their contracts.[36]

V. CONCLUSIONS

32. Advocates for various changes in the retransmission consent regime have failed to recognize that the regime, in its present form, constitutes an economically efficient mechanism for reaching efficient agreements for the distribution of broadcast signals by MVPDs. The growth of cash compensation for retransmission consent constitutes an efficient response to changing market and technological circumstances, as broadcasters rebalance their revenue streams to reflect increasing competition for advertising. Such revenues are essential to broadcasters' continuing economic viability, and a decision by the Commission to artificially curtail them would result not only in less local news and other broadcast programming but ultimately in fewer local broadcasters. Similarly, LMAs and similar management service contracts between TV stations facilitate the realization of economies of scale; there is no evidence they result in higher retransmission consent compensation; and, there is empirical evidence that they facilitate negotiations between broadcasters and MVPDs and thereby reduce the incidence of negotiating impasses. Finally, the Commission's network non-duplication and syndicated exclusivity rules provide for the efficient enforcement of presumptively beneficial contracts between broadcasters program rights owners, and should be left in place.

[36] See, e.g., Bauman at 36.

ATTACHMENT A

THE EFFECTS OF REGULATION ON ECONOMIES OF SCALE AND SCOPE IN TV BROADCASTING

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CONTENTS

I. INTRODUCTION

Television broadcasting is subject to economies of scale and scope. Scale economies arise, for example, from the need for large capital investments in broadcasting equipment, production facilities, and spectrum licenses, and from the "first copy" property generally associated with intellectual property (e.g., the fact that the "first copy" of a news or entertainment program is expensive to produce, but distribution to additional users is essentially costless). Economies of scope arise from the potential to use productive assets to create multiple products (e.g., a single transmitter and antenna tower can broadcast multiple digital video streams over a single six MHz television channel; a single reporter can be assigned to cover a story for both the nightly news and the TV station's web page).[1] By definition, economies of scale and scope are associated with falling unit costs of production – that is, with the production of more output at lower average cost – and hence are *prima facie* welfare enhancing.

Federal Communications Commission (FCC or Commission) regulations limit or proscribe altogether TV broadcasters' ability to achieve certain scale and scope economies, and the Commission has been urged to consider further limitations. Most obviously, FCC restrictions on cross-ownership of newspapers and broadcast stations, and on ownership of multiple TV and/or radio stations in a single market, pose barriers to realizing efficiencies associated, for example, with operating a combined news operation. The agency has also been petitioned to change retransmission consent rules in ways that would inhibit local TV broadcasters' abilities to capture economies of scale associated with distribution of their signals

[1] As discussed further below, economies of scope can also take the form of "complementarities in demand," or "demand-side economies of scope," which occur when an entity prefers to purchase multiple products from a single provider. For example, advertisers might prefer to be able to coordinate advertising campaigns by purchasing newspaper, radio and television ads from a single owner.

to cable and satellite customers. In March 2011, the FCC formally initiated a rulemaking proceeding to examine the retransmission consent process.[2]

Regulations that limit realization of economies of scale and scope result in higher costs, lower revenues, reduced returns on invested capital, lower output and, potentially, fewer firms.[3] In the broadcasting business, local news production is likely to decline disproportionately, for two reasons. First, it is subject to strong economies of both scale and scope, as it requires investments in non-divisible production facilities and is amenable to sharing local resources (e.g., a news reporter) between multiple outlets (e.g., one or more TV stations, a newspaper, a radio station, and a local web site). Second, local news production is a form of investment, as local news programming contributes to a television station's brand reputation, enhances viewer loyalty, and stimulates demand for complementary outputs. Regulations that lower the overall return on investment in broadcasting will thus result in less local news.

Regulation of television broadcasting must also be understood in the context of the dramatic changes taking place in the media marketplace. Cable and satellite providers have captured a large share of TV households, Internet-based media are growing competitors for advertising revenues, and marketplace changes have adversely affected other traditional broadcast station income sources. This market fragmentation has reduced broadcasters' revenues and made it difficult or impossible to defray fixed costs based solely on traditional advertising.

In this context, this paper presents an analysis of the effects of FCC regulations on economies of scale and scope in television broadcasting, including their effects on the production of local news. We conclude that current FCC regulations are limiting, and potential future

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[2] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent,* Notice of Proposed Rulemaking, MB Docket No. 10-71 (rel. March 3, 2011).

[3] The FCC itself has acknowledged that regulatory restrictions, including specifically its ownership rules, have "limited [broadcasters'] flexibility to evolve their business model or industry structure over time in response to changing consumer preferences and habits." See Federal Communications Commission, OBI Technical Paper No. 3, *Spectrum Analysis: Options for Broadcast Spectrum* (June 2010) at 10.

regulations could further limit, the ability of broadcasters to realize beneficial economies of scale and scope, thereby lowering economic returns to broadcasting, depressing investment below the economically optimal level, significantly reducing the output of news programming, and threatening to shrink the size of the industry.

We begin by examining the significance of economies of scale and scope in television broadcasting, including analyzing station-level financial data spanning 1995 through 2009. Using standard econometric methods, we find that, all else equal, smaller broadcast stations face higher average costs than larger stations. In other words, the average costs of TV stations' traditional operations are declining in output such that (for example) a one percent increase in output raises costs by less than one percent. Specifically, we estimate that, as broadcast stations expand the scale of their operations, output increases approximately 22 percent faster than costs.

It should noted that our estimates are based on historical data and thus reflect the traditional broadcast business model, and therefore are likely conservative, in the sense that they fail to capture the economies of scale and scope associated with new business models and sources of revenues, some of which significantly increase output while adding little or nothing to costs. For example, the incremental cost of distributing broadcast programming to Mobile TV customers is potentially very low compared to the increase in output (measured by the number of viewers, or the associated increase in advertising revenues).

With this in mind, we analyze the effects of potential regulatory limitations on broadcasters' ability to evolve their business models so as to realize available economies of scale and scope. We focus first on the relationship between retransmission consent revenues and the financial returns to television broadcasting, and find that regulatory limits on retransmission consent compensation would significantly reduce investment returns in the broadcasting industry. Specifically, in the absence of such revenues, the median broadcaster is projected to earn profits below the level necessary to attract capital, a situation which, if allowed to persist, ultimately would lead to a significant reduction in the number of broadcast television stations.

We also examine the impact of regulation on the output of local news programming, which is also affected by economies of scale and scope. With respect to economies of scope, there is strong evidence that existing regulations limiting cross-ownership of newspapers (and radio stations) reduce the amount of news programming produced and carried by local broadcast TV stations. We estimate the magnitude of this effect at approximately 43.3 minutes per week – that is, we estimate that each commercial broadcast station which became cross-owned with a local newspaper in the absence of the current rules would, on average, broadcast nearly three quarters of an hour of additional weekly news programming.

With respect to scale economies, empirical research also has found consistently that news output is strongly and positively correlated with station revenues. Based on existing empirical estimates, we estimate that curtailing revenues from retransmission consent would reduce local news programming by about 11 minutes per station per week. If scope and scale economies are taken into account simultaneously, and if we assume that (a) the two sets of effects are independent of one another (as opposed to mutually reinforcing), and (b) absent ownership restrictions, about half of all stations would be cross-owned, then we estimate that the combination of maintaining existing cross-ownership rules while simultaneously depriving broadcasters of retransmission revenues would reduce the amount of local news produced by the average U.S. commercial TV station by about one half-hour per week. This effect does not take into account the potential for exit – i.e., a reduced number of commercial TV stations – that would also likely result from such policies.[4]

[4] Note that these estimates are based on averages across all commercial broadcast stations, including those which currently do not carry news programming. Our estimated effects refer to the average across all stations,

The remainder of this paper is organized as follows. Section II explains the concepts of scale and scope economies, applies them to the television broadcasting business, and describes in broad terms how they are affected by FCC regulations. Section III discusses the ways in which technological and marketplace changes are driving broadcasters to change their business models to remain economically viable. In the context of these developments, Section IV analyzes the impact of regulatory constraints on the economics of the broadcast TV business and the output of local news programming. Section V presents a summary of our conclusions.

II. SCALE AND SCOPE ECONOMIES IN TELEVISION BROADCASTING

The concepts of economies of scope and scale, and complementarities in demand, are fundamental to the economics of multi-product firms engaged in information and entertainment distribution, including both television broadcasters and the alternative video content platforms with which they now compete. Video content distributors rely on capital-intensive networks with significant fixed costs and low marginal costs.[5] Such firms have high break-even points: before earning any profits, they must produce sufficient output to pay for their fixed costs. However, they also enjoy high margins on incremental sales. In a competitive environment, all firms seek to minimize average costs by exploiting economies of scale and scope in the production process, and by harnessing demand complementarities to stimulate demand for multiple outputs. It is worth emphasizing that the realization of economies of scale and scope, *ceteris paribus*, represents a pure improvement in economic welfare – the creation of more value through the utilization of fewer resources. Conversely, public policies or other impediments which prevent the realization of such economies result in a pure welfare loss.

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regardless of whether they result from increases in news programming among stations that already carry news, new local news coverage offered by stations that do not currently carry news, or (most likely) a combination of the two.

[5] To be concrete, broadcasters need towers and transmitters; cable operators and telcos need wireline distribution plant; and satellite operators need satellites. In each case, the cost of serving a marginal customer, once the infrastructure is deployed, is zero or close to zero. Similarly, once a television program is produced, the marginal cost of an additional viewer is effectively zero.

Economies of scale are present when average costs fall as output increases.[6] As noted above, television broadcasting requires large capital investments in broadcasting equipment, news production facilities, licenses, and so forth, the costs of which do not vary with output. In addition, the "first copy" aspect of intellectual property means that high-quality programming is expensive to obtain (or produce), while the marginal costs of distributing that programming to incremental viewers are extremely small. By disseminating its programming to a wider audience, a broadcaster reduces the average cost per viewer.

Economies of scope are present whenever it is less expensive for a single firm to produce two types of output (e.g., traditional television and mobile television) jointly than it would be for two firms to produce the same outputs separately.[7] As noted above, economies of scope in television broadcasting arise from the potential to "multi-task" productive assets and intermediate products – for example, to use the same antenna/transmitter to broadcast multiple video streams, or to assign the same reporter and camera to produce a video story for both the nightly news and the web page. Stated differently, scope economies allow broadcasters to achieve greater efficiency by sharing costs across different product lines.

Demand complementarities are present if the expansion of one product line stimulates demand for other product lines. Multi-product firms often start out as single-product firms, and then expand into complementary products. For example, cable operators have utilized video services as a vehicle for cross-marketing both high-speed data service and voice telephony. When competitive multi-product firms successfully harness demand complementarities along with scale and scope economies, efficiencies on the cost side stimulate complementarities on the

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[6] See, e.g., Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (4th ed., 2005) at 36. In television broadcasting, output is typically defined in terms of audience, which translates into advertising dollars. Thus, economies of scale generally are associated with declining average costs per viewer. See, e.g., Bruce M. Owen and Steven S. Wildman, *Video Economics* (Harvard University Press. 1992) at 3.

[7] See, e.g., John C. Panzar and Robert D. Willig, "Economies of Scope," *American Economic Review* 71; 2 (May 1981) 268-272.

demand side, and vice-versa, through a self-reinforcing process: As a multi-product firm expands production, demand-side complementarities cause demand for the entire product line to grow, leading to greater output, further exploitation of scale and scope economies, greater efficiencies, lower quality-adjusted prices, and so forth.[8]

Digital technologies have allowed communications and content providers of all stripes to capture such efficiencies by multi-tasking both their content and their infrastructures. Cable operators have been highly successful marketing bundled services.[9] Telephone companies and wireless broadband providers (formerly "mobile telephone" companies) are now doing the same, and even satellite providers offer broadband in conjunction with their video packages. Virtually all subscription-based video distributors pursue incremental revenues from a diversified set of products and services, including digital video recorders, on-demand video services, premium commercial-free channel offerings (such as HBO and Showtime), and specialized channel packages (such as DirecTV's NFL Sunday Ticket and various foreign-language channel packages) – as well, of course, as selling advertising. Beyond cable and satellite operators, both Internet-based and traditional content distributors generate increasingly diversified revenue streams, often including revenues from both sides of the market, e.g., both subscription or pay-per-view revenues from viewers, plus pay-per-ad or pay-per-click revenue from advertisers.[10]

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[8] See generally, Carl Shapiro and Hal R. Varian, *Information Rules* (Harvard Business School Press, 1999) at Chapter 7.

[9] To increase and maintain demand for video, and thereby also stimulate the demand for its high-speed data and voice offerings, it is rational for a cable operator to offer high-quality video services to potential subscribers. All else equal, a profit-maximizing multi-product cable operator offering complementary services will expend more resources to stimulate demand for video than it would if there were no complementarities across its product offerings. See, e.g., Jeffrey A. Eisenach and Kevin W. Caves, "Video Programming Costs and Cable TV Prices: A Reply to CRA," Navigant Economics LLC (June 2010).

[10] As discussed further below, retransmission consent revenues result from sales by broadcasters to the "downstream" side of their two-sided markets. The fact that retransmission consent revenues have increased in recent years is consistent with the evolution of the video programming and advertising markets.

The existence of economies of scale and scope in television broadcasting has been demonstrated empirically. As discussed further below, much of the existing research relates to the output of local news programming, demonstrating (for example) that the amount of local news produced is strongly correlated with station size (as measured by revenues) and with whether stations operate as multi-product firms (e.g., through cross-ownership with newspapers). Other research directly supports the existence of overall economies of scale and scope. One study, for example, found that "broadcasters which provide both television and radio services save 12% of cost at the sample mean, as compared to providing each service separately."[11]

To analyze scale economies in the television broadcasting industry, we compiled a financial dataset for various size classes of broadcasters spanning the years 1995 – 2009, derived from an annual survey by the National Association of Broadcasters (NAB).[12] The resulting data set consists of detailed financial information on revenues, costs and profits, aggregated by market and by size of station (as measured by net revenues). Two aspects of this data set are particularly relevant for our purposes. First, because the financial data are aggregated by size class, it allows us to compare financial results based on station size. Second, the period covered precedes both the digital transition and the emergence (at a significant level) of new revenue sources such as online advertising and retransmission consent. Thus, the NAB data set is well suited to estimating economies of scale in the traditional television broadcasting business model.

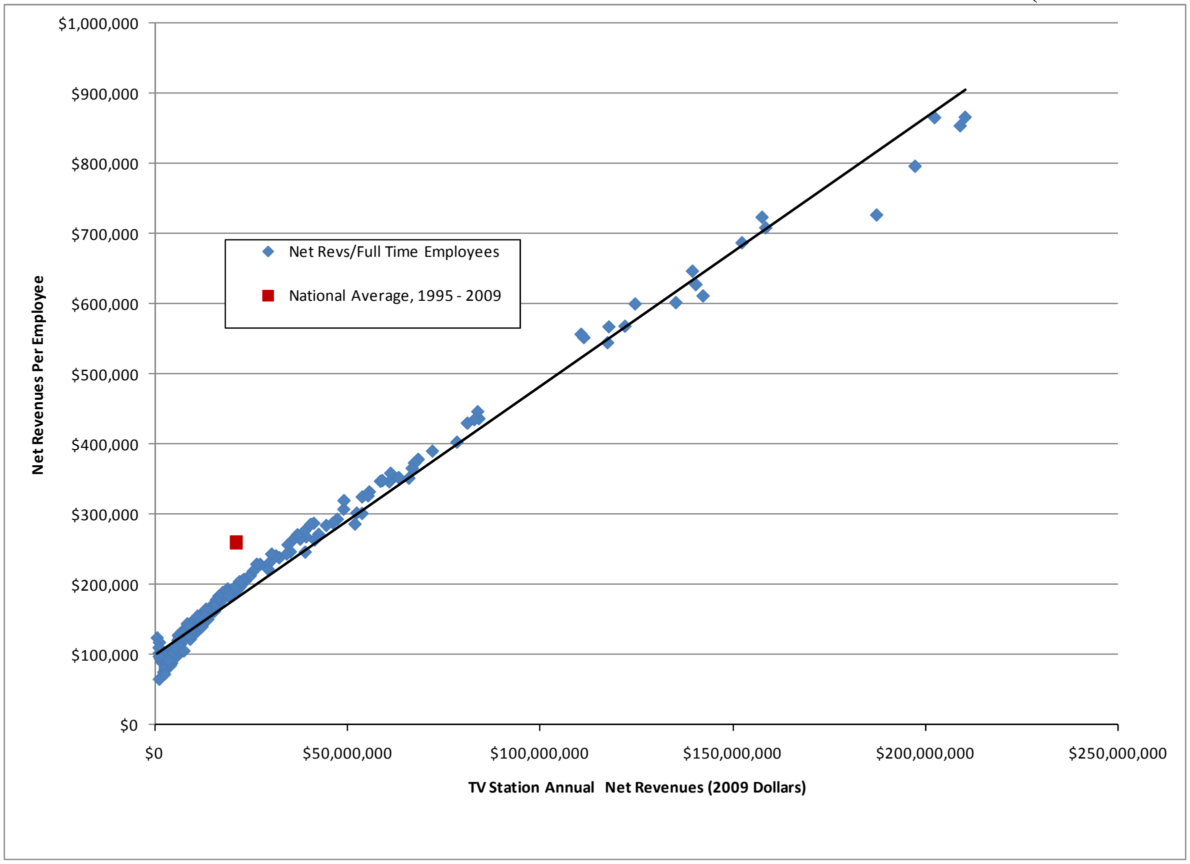
[11] See Sumiko Asai, "Scale Economies and Scope Economies in the Japanese Broadcasting Market," *Information Economics and Policy* 18 (2006) 321-331, 321.

[12] *Television Financial Report: Station Revenue, Expenses and Profit* (National Association of Broadcasters, 1996 - 2010) (hereafter *NAB Survey*). Each year, the National Association of Broadcasters conducts the *NAB Survey* in conjunction with an independent accounting firm. Financial questionnaires are sent to all commercial television stations nationwide, with response rates of 60 to 70 percent. Given a universe of roughly 1,300 stations, each annual survey draws on financial data obtained from several hundred broadcasters of varying sizes and from varying regions of the country. Data for individual stations are not published in the *NAB Survey*. However, the survey reports a variety of statistics (e.g., sample mean/median) for detailed cost and revenue line items (e.g., gross advertising revenues, network compensation, engineering expenses, etc.). These statistics are reported by geography (e.g., Designated Market Areas 1 – 25), and by revenue size class (e.g., broadcasters with revenues from $15 million - $25 million), as well as other designations (e.g., Spanish Language, Independent, etc.). Data aggregated by revenue class data is provided for network affiliate (ABC, CBS, NBC) stations only.

As shown in Figure 1 below, there is a nearly perfect correlation between a television station's size (as measured by real net revenues) and its real net revenue per employee, indicating that labor productivity is positively correlated with station size. For example, in 2008, the average revenue per employee at stations with $50 million-$75 million in annual revenue ($264,000) was more than double the average revenue per employee at stations with $8 million-$10 million in revenue ($126,000).

These data are consistent with what one would expect to observe in an industry characterized by economies of scale. Advertising revenues, which account for the vast majority of revenues in our data set, are a proxy for the aggregate output level – that is, the number of viewers and other content consumers. Thus, the data indicate that output per worker increases with the scale of production; stated differently, large stations appear to require fewer inputs to produce a unit of output than smaller stations.

FIGURE 1:
REAL NET STATION REVENUE PER FULL TIME EMPLOYEE VS. REAL NET REVENUE (1995 - 2009)



Note: Each data point reflects the ratio of average revenue to the average number of full time employees for ABC, CBS, and NBC affiliate stations falling within a particular revenue range (e.g., greater than $35 million, less than $50 million). All figures are expressed in 2009 dollars. *Source: NAB Survey*, Navigant Economics.

Figure 2 shows the relationship between station size (again measured by real net revenues) and profitability. As the figure demonstrates, the profit margins of television stations are strongly correlated with net revenues, with smaller stations actually showing negative profit margins.[13] Once again, these data are consistent with what one would expect to observe in an industry characterized by economies of scale: Not only do stations with larger operations generate more output per worker; they also generate more profit per unit of output. In other

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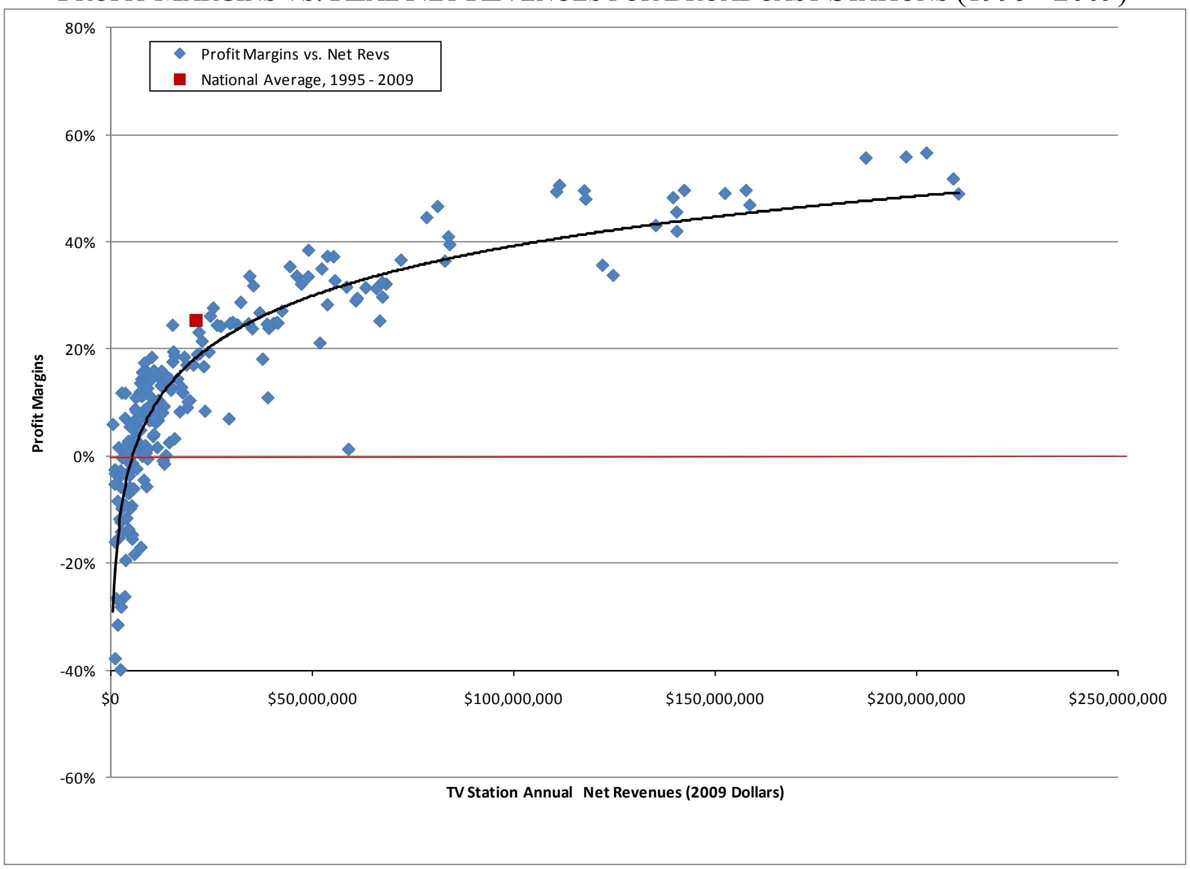
[13] Economies of scale are station-specific, not market-specific, i.e., the evidence shows that "larger" stations have lower costs, other things equal, not necessarily that stations in larger markets have lower costs. That said, stations in larger markets tend to have higher revenues than stations in smaller markets. See Federal Communications Commission, *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, 13698 (2003) ("Small market stations are competing for disproportionately smaller revenues than stations in large markets.").

words, Figure 2 indicates that the increased output per worker documented in Figure 1 is associated with efficiencies (i.e., lower costs per unit of output), and hence higher profits. (This would not be the case if large stations were unable to realize the efficiencies suggested by increased output per worker; e.g., if any potential cost savings were somehow offset by a disproportionate increase in the intensity of other inputs and/or increased input costs.)

FIGURE 2:
PROFIT MARGINS VS. REAL NET REVENUES FOR BROADCAST STATIONS (1995 - 2009)



Note: Each data point reflects the average profit margin for ABC, CBS, and NBC affiliate stations falling within a particular revenue range (e.g., greater than $35 million, less than $50 million). Where applicable, figures are expressed in 2009 dollars. *Source: NAB Survey*, Navigant Economics.

To more formally demonstrate and quantify scale economies, we estimated a cost function for television stations econometrically. The cost function describes the relationship between a given level of output and the minimum cost at which it can be produced. Because broadcasting is characterized by economies of scale, this relationship should be evident in the behavior of broadcasters' cost functions.[14] To test this proposition, we applied the econometric model below to our dataset of broadcaster financials:

$$\ln(C_{it}) = \beta_0 + \beta_1 \ln(Y_{it}) + \sum_j \gamma_j X_{jt} + \varepsilon_{it}$$

Above, C_{it} gives the total cost for observation *i* in year *t*, while Y_{it} is the level of output for observation *i* in year *t*. For any given year, each observation employed in the regression analysis reflects the average value reported for all ABC, CBS, or NBC affiliate stations falling within a particular revenue range (e.g., greater than \$35 million but less than \$50 million). In addition, the data set also contains observations reflecting the national average across all stations responding to the NAB survey.[15] The X_{jt} represent other factors, such as input prices, that may cause the cost of producing a given amount of output to shift upward or downward. Finally, ε_{it} is a random error term. For each data point contained in our analysis, C_{it} is set equal to the total non-interest expenses reported by the each station in the data set (including depreciation and amortization).[16] With respect to output, for the time period spanned by our data set (2001-2009),[17] the vast majority of broadcasters' revenue was derived from television advertising. Thus, Y_{it} is measured by an index of advertising volume, defined as gross advertising revenues deflated by the Producer Price Index for television advertising rates, obtained from the Bureau of

[14] Technically, economies of scale are defined in terms of a firm's production function, rather than its cost function: If output more than doubles when inputs are doubled, then scale economies are said to exist. However, because cost and production functions are dual to each other, scale economies exist in the production function if and only if they are also present in the cost function. See, e.g., Daniel McFadden, *Production Economics: A Dual Approach to Theory and Applications*, with M. Fuss (eds.) (North Holland: Amsterdam, 1978).

[15] In more recent years, the national average reported in the *NAB Survey* reflects an average across all stations responding to the survey. In earlier years, it reflects an average across all ABC, CBS, and NBC affiliate stations.

[16] The specific cost categories included in C_{it} are Engineering, Program, Production, News, Sales, Advertising & Promotion, General & Administrative, and Depreciation & Amortization.

[17] The regression analysis incorporates data only for the years 2001 – 2009 because the BLS advertising price index that was utilized to estimate advertising output did not exist in earlier years.

Labor Statistics (BLS).[18] Finally, the X_j are year-specific fixed effects, which control for shifts in input prices and similar factors over time.

In cost function analysis, scale economies can be said to exist if average costs are decreasing in output – that is, if an increase in output leads to a less than proportionate increase in total cost.[19] In the context of our econometric model, this implies:

$$\frac{\%\Delta C}{\%\Delta Y} = \frac{\partial \ln(C)}{\partial \ln(Y)} = \beta_1 < 1$$

That is, scale economies are present if a given percentage change in output ($\%\Delta Y$) results in a smaller percentage increase in cost ($\%\Delta C$).

We estimated the television station cost function using Ordinary Least Squares (OLS). The results of the regression analysis are displayed in Table 1. All of the parameter estimates are highly statistically significant, and the independent variables collectively explain over 99 percent of the variation in the dependent variable.

[18] To formally model economies of scope, it would be necessary to employ a multiproduct cost function. However, for the time period spanned by our data set, broadcasters were essentially single-product firms. Thus, our econometric analysis is focused on modeling economies of scale, rather than economies of scope.

[19] See, e.g., Laurits Christensen and William Greene, "Economies of Scale in U.S. Electric Power Generation," *Journal of Political Economy* 84 (1976) 655–676.

TABLE 1:
ECONOMETRIC ESTIMATE OF THE COST FUNCTION FOR TELEVISION STATIONS

	Coef.	Std. Err.	*t*	*p*>|t|	[95% Conf. Interval]	
β_1	0.82404	0.005493	150.01	0.000	0.813175	0.834905
β_0	2.723124	0.091864	29.64	0.000	2.541421	2.904827
γ_1	0.10686	0.028777	3.71	0.000	0.049941	0.163778
γ_2	-0.03096	0.028779	-1.08	0.284	-0.08788	0.025968
γ_3	0.011581	0.027909	0.41	0.679	-0.04362	0.066784
γ_4	-0.04279	0.028306	-1.51	0.133	-0.09878	0.013198
γ_5	-0.03134	0.028305	-1.11	0.270	-0.08733	0.024646
γ_6	-0.12471	0.028304	-4.41	0.000	-0.18069	-0.06872
γ_7	-0.05562	0.028305	-1.96	0.051	-0.11161	0.000367
γ_8	-0.07929	0.028305	-2.8	0.006	-0.13528	-0.0233
					Observations:	*143*
					R-squared:	*0.9942*

Our estimate of β_1 is positive, meaning that an increase in output is, naturally, associated with an increase in total cost. However, it is also significantly less than one, meaning that costs increase less rapidly than output. Thus, the econometric results indicate that broadcast television stations are characterized by significant scale economies. Specifically, our parameter estimate of 0.82 means that a one percent increase in output is associated with a 0.82 percent increase in total cost. (Conversely, a one percent increase in costs would yield a 1.22 percent increase in output.) This coefficient is estimated with a high degree of statistical precision, as the 95 percent confidence interval ranges from 0.81 to 0.83.

Our econometric results confirm the existence of strong economies of scale at the level of individual television stations, but – because the available data pertain to individual stations – they do not demonstrate broader economies of scale (or scope) at the level of the firm (i.e., economies associated with ownership of multiple television stations, cross-ownership between television/radio/newspaper, etc.). As noted above, the empirical evidence of such scale and scope economies is found primarily in the literature on the determinants of news and public affairs programming, which is discussed in Section IV below.

It is noteworthy that broadcasters themselves consider economies of scale and scope – at the firm level as well as the level of the individual station – to be an important aspect of the broadcasting business model. In their formal SEC filings, for example, broadcasters report economies of scale in purchasing inputs,[20] improving the effectiveness of marketing efforts,[21] reducing operational and capital costs,[22] and achieving overall operating efficiencies.[23] They report realizing economies of scope through the sharing of capital and operating costs across different services,[24] and capitalizing on complementarities in demand inherent in offering

[20] LIN Television Corporation, SEC Form 10-K (fiscal year ended December 31, 2009) at 8 ("We have achieved company-wide operating efficiencies through economies of scale in the purchase of programming, ratings services, research services, national sales representation, capital equipment and other vendor services.")

[21] Nexstar Broadcasting Group, Inc., SEC Form 10-K (fiscal year ended December 31, 2009) at 3 ("These [duopoly] markets increase revenue share by capitalizing on multiple sales forces.")

[22] Sinclair Broadcast Group, SEC Form 10-K (fiscal year ended December 31, 2009) at 14 ("Duopolies and LMAs allow us to realize significant economies of scale in marketing, programming, overhead and capital expenditures."); Nexstar 10-K at 3 ("Additionally, we achieve significant operating efficiencies by consolidating physical facilities, eliminating redundant management and leveraging capital expenditures between stations.")

[23] Nexstar 10-K at 1 ("The benefits achieved through these [cost control] initiatives are magnified in our duopoly markets by broadcasting the programming of multiple networks, capitalizing on multiple sales forces and achieving an increased level of operational efficiency.")

[24] LIN 10-K at 8 ("A current initiative is to improve our newsgathering and production process by sharing resources and multitasking. We are transitioning to journalists that have a wide range of skills, including video camera operation, writing and editing. Our modern newsrooms create a unique and instantaneous reporting culture that drives cost reduction and efficiency. As a result of careful planning, training and communication, our stations are embracing our new culture and working hard to produce more local news on a 24/7 real-time basis for our web, mobile and television using fewer resources."); Hearst 10-K at 5 ("In addition, we seek to make our content available to our audience as they use additional content platforms, such as the Internet and portable devices, during their day. We stream a portion of our television programming, including our news and weather forecasts, and we publish community information and entertainment content on our stations' websites. We invite visitors to these sites to enter into the dialogue about newsworthy community events by encouraging them to comment on specific stories or to submit newsworthy photos or videos. … We believe that capitalizing on the opportunities afforded the television industry by digital media is important to our future success. Specifically we seek to expand the availability of our content to multiple platforms, such as on-air (through digital multicasting), on-line (through streaming on broadband and video-on-demand), and on mobile and other portable devices."); LIN 10-K at 5 ("This multi-channel strategy enables us to increase our audience share by operating multiple stations on multiple platforms in the same market.")

multiple products, noting (for example), that advertisers benefit from the broader audiences associated with operating multiple media outlets in a single market.[25]

Also, as noted above, our econometric results apply to the traditional TV broadcasting business model, and do not pertain directly to economies of scale and scope associated with new services, such as web sites and associated online advertising, or new aspects of the broadcast business model, such as cash payments for retransmission consent. The economic implications of the evolving broadcast business model are discussed in the next section, immediately below.

III. THE EVOLVING BROADCAST BUSINESS MODEL

The rapid transformation of the television broadcasting business model is evident from a variety of industry metrics, which we present below. Until recently, TV broadcasters were essentially single-product firms, distributing one product – video content – and receiving revenues from one source – advertisers. The simplicity of this business model was driven in part by technology, in part by regulation, and in part by economics. Technology limited broadcasters to distributing a single analog signal; regulation limited (and still limits) their ability to enter complementary markets, such as newspaper publishing; and, economics made it possible to finance TV broadcast operations from a single revenue stream.

In recent years, increasing competition from cable, direct broadcast satellite (DBS), telephone companies, VCRs and DVDs, and the Internet have eroded audience shares, reduced broadcasters' share of the market for local advertising, and made it uneconomic to rely on solely

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[25] Nexstar 10-K at 3 ("Duopoly markets broaden audience share by providing programming from multiple networks with different targeted demographics."); Hearst 10-K at 4 ("We believe that aligning our content offerings with audience media consumption patterns in this manner ultimately benefits our advertisers. Our advertisers benefit from a variety of marketing opportunities, including traditional spot campaigns, community events and sponsorships at our television stations as well as on our stations' Internet and/or mobile websites, enabling them to reach our audience in multiple ways.")

on television advertising revenues.[26] At the same time, changes in technology have made it possible for broadcasters to offer new products and services, including web-based content, multiple streams of broadcast content, and mobile video. As a result, TV broadcasters are evolving from single-product firms to multi-product firms, and from a single-revenue-stream business model to multiple revenue streams. In the first section below, we briefly describe the changes taking place in the broadcast television market. Next, we describe the impact these changes are having on broadcasters' financial performance.

A. The Changing Market for Broadcast Television

The competition faced by television broadcasters has increased dramatically in recent years, fueled largely by technology-driven changes in the media marketplace. Pay TV providers now enjoy much larger market shares, and Internet-based media account for a growing share of advertising revenues. Moreover, the programming choices available to the typical household have increased dramatically, resulting in audience fragmentation. All of these phenomena have affected the demand conditions facing broadcasters and created pressure to evolve away from the traditional business model.

The variety of programming available to consumers who subscribe to pay TV has expanded substantially in recent years. For example, the FCC reports that the average number of channels carried on the expanded basic cable television tier rose by nearly 50 percent in a

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[26] See, e.g., Federal Communications Commission*, In the Matter of 2010 Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry* (MB Docket No. 09-182, May 25, 2010) at ¶5 (hereafter *Ownership NOI*) ("The media marketplace has seen other dramatic changes in recent years. Broadcasters have navigated the digital television transition, and a transition to digital radio is under way. In addition, increased penetration of the Internet, and the availability of alternative sources of news, information, and entertainment online have presented the broadcast television, radio, and newspaper industries with increased competition for audiences, as well as advertising dollars, the primary sources of revenue for these industries."); see also Kenneth C. Wilbur, "A Two-Sided, Empirical Model of Television Advertising and Viewing Markets," *Marketing Science* 27; 3 (May-June 2008) 356-378, 357 ("The television advertising market has become substantially more price elastic over the past 30 years.").

decade, from 50.3 in 1998 to 72.8 in 2008.[27] And, according to Nielsen, the number of channels received by the average household rose from 61.4 channels in 2000 to 96.4 channels in 2005, 104.2 channels in 2006, and over 118 channels in 2007.[28]

As shown in Figure 3, this expansion in variety has caused ratings for individual channels to decline steadily over time, even as television viewing remains the single most popular leisure activity in the U.S.[29] In the 1950s, the most popular shows (e.g., *I Love Lucy*) could capture ratings as high as 50 to 60 percent. Yet in recent years, even the most successful programs (e.g., *American Idol*) garner ratings well under 20 percent, and ratings for individual channels and programs continue to fall over time.

[27] *In the Matter of 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* (MB Docket No. 92-266, Released February 4, 2005) at 20 (hereafter *2005 Cable Price Report*) and *In the Matter of 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* (MB Docket No. 92-266, Released January 16, 2009) at 27.

[28] "Average U.S. Home Now Receives a Record 104.2 TV Channels, According to Nielsen," *PR Newswire*, March 19, 2007; and, David Rolsen, "Nielsen: Record Number of Channels for Average U.S. Home," *SNL Kagan* (June 9, 2008).

[29] For example, according to Nielsen, despite the increasing popularity of the Internet, online gaming, mobile devices, and other alternative entertainment options, Americans watched a record average of 158 hours and 25 minutes of traditional television per month in the first quarter of 2010. See Sarah Barry James, "The Enduring Allure of Traditional TV Viewing," *SNL Financial* (June 11, 2010).

FIGURE 3:
DECLINE IN AUDIENCE SHARES OF HIGHEST-RATED PROGRAMS

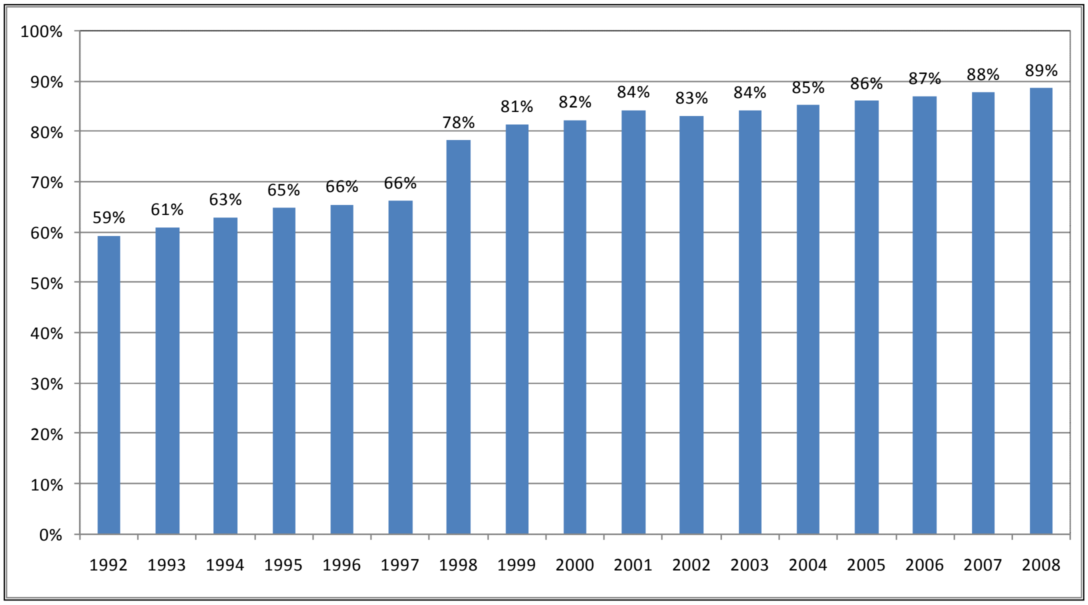
Highest-Rated TV Shows of Each Season (1950-2005)					
Season	***Program***	**Rating**	**Season**	***Program***	**Rating**
1950-51	*Texaco Star Theater*	**61.6**	1978-79	*Laverne & Shirley*	**30.5**
1951-52	*Godfrey's Talent Scouts*	**53.8**	1979-80	*60 Minutes*	**28.2**
1952-53	*I Love Lucy*	**67.3**	1980-81	*Dallas*	**31.2**
1953-54	*I Love Lucy*	**58.8**	1981-82	*Dallas*	**28.4**
1954-55	*I Love Lucy*	**49.3**	1982-83	*60 Minutes*	**25.5**
1955-56	*$64,000 Question*	**47.5**	1983-84	*Dallas*	**25.7**
1956-57	*I Love Lucy*	**43.7**	1984-85	*Dynasty*	**25**
1957-58	*Gunsmoke*	**43.1**	1985-86	*Cosby Show*	**33.8**
1958-59	*Gunsmoke*	**39.6**	1986-87	*Cosby Show*	**34.9**
1959-60	*Gunsmoke*	**40.3**	1987-88	*Cosby Show*	**27.8**
1960-61	*Gunsmoke*	**37.3**	1988-89	*Roseanne*	**25.5**
1961-62	*Wagon Trail*	**32.1**	1989-90	*Roseanne*	**23.4**
1962-63	*Beverly Hillbillies*	**36.0**	1990-91	*Cheers*	**21.6**
1963-64	*Beverly Hillbillies*	**39.1**	1991-92	*60 Minutes*	**21.7**
1964-65	*Bonanza*	**36.3**	1992-93	*60 Minutes*	**21.6**
1965-66	*Bonanza*	**31.8**	1993-94	*Home Improvement*	**21.9**
1966-67	*Bonanza*	**29.1**	1994-95	*Seinfeld*	**20.5**
1967-68	*Andy Griffith*	**27.6**	1995-96	*E.R.*	**22.0**
1968-69	*Rowan & Martin's Laugh-In*	**31.8**	1996-97	*E.R.*	**21.2**
1969-70	*Rowan & Martin's Laugh-In*	**26.3**	1997-98	*Seinfeld*	**22.0**
1970-71	*Marcus Welby, MD*	**29.6**	1998-99	*E.R.*	**17.8**
1971-72	*All in the Family*	**34.0**	1999-00	*Who Wants to be a Millionaire*	**18.6**
1972-73	*All in the Family*	**33.3**	2000-01	*Survivor II*	**17.4**
1973-74	*All in the Family*	**31.2**	2001-02	*Friends*	**15.3**
1974-75	*All in the Family*	**30.2**	2002-03	*CSI*	**16.1**
1975-76	*All in the Family*	**30.1**	2003-04	*CSI*	**15.9**
1976-77	*Happy Days*	**31.5**	2004-05	*CSI*	**16.3**
1977-78	*Laverne & Shirley*	**31.6**	2005-06	*American Idol*	**12.9**
			2006-07	*American Idol*	**12.3**
Source: Nielsen Media Research					

Source: Adam Thierer and Grant Eskelsen, *Media Metrics: The True State of the Modern Media Marketplace* (The Progress & Freedom Foundation, 2008) at 58, citing Nielsen Media Research.

This audience fragmentation has been accompanied by a large increase in the share of households subscribing to pay TV. As Figure 4 below illustrates, as late as the 1990s, less than two-thirds of TV households subscribed to pay TV. In recent years, this figure has climbed to nearly 90 percent, though more recent data suggests the proportion of over-the-air-only homes has stabilized and perhaps begun to rise.[30]

[30] See Knowledge Networks, "Over-the-Air TV Homes Now Include 46 Million Consumers" (June 6, 2011) (available at http://www.knowledgenetworks.com/news/releases/2011/060611_ota.html).

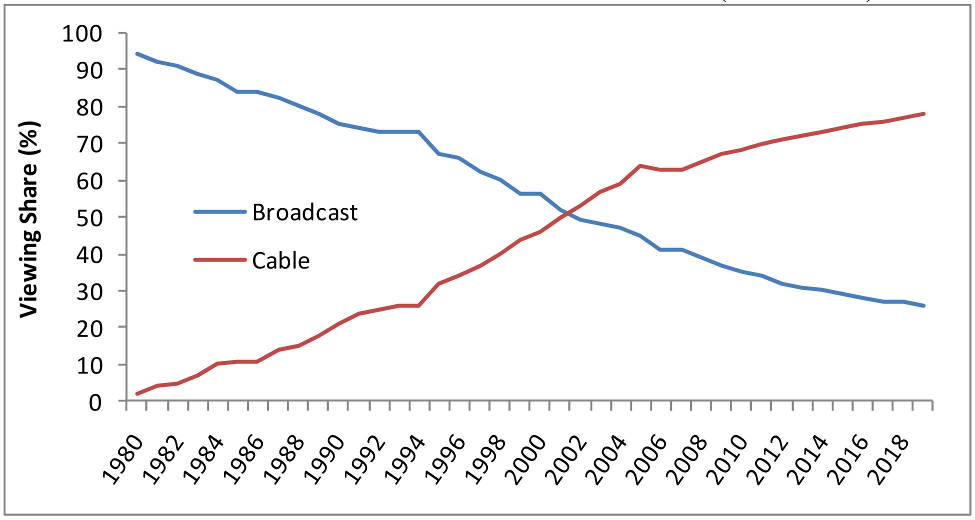
FIGURE 4:
MVPD HOUSEHOLDS AS A PERCENTAGE OF TOTAL TV HOUSEHOLDS, 1992 - 2008



Source: Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (various years). Figure for 2008 is based on Nielsen's "Broadcast Only" percentage. Figure for 2007 is calculated as the average of 2006 and 2008 statistics.

As a consequence, while broadcast channels still carry the bulk of the highest-rated individual programs, broadcasters have nonetheless lost viewership share to pay TV networks. As seen in Figure 5, in the early 1980s, broadcast networks commanded over 70 percent of total viewership. In contrast, present-day broadcasters, while still accounting for a large share of aggregate viewing (and a relatively small share of total channels), have experienced a decline in viewership relative to previous decades. Conversely, basic cable networks, in part because they account for a disproportionate share of all channels, have captured increasing shares of total viewership, and this trend is projected to continue.

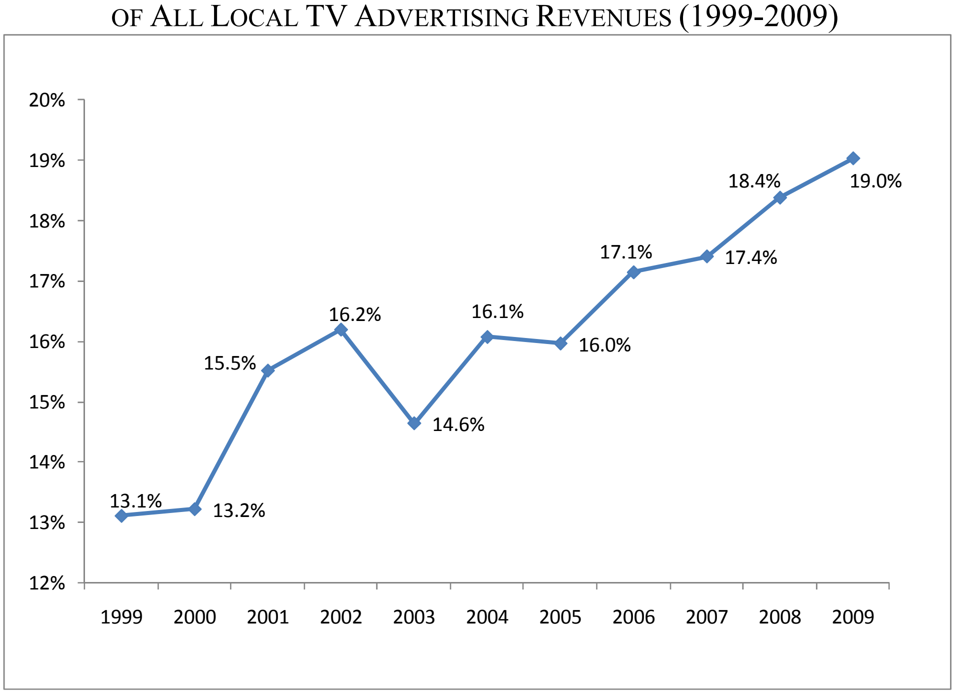
FIGURE 5:
BROADCAST VS. BASIC CABLE VIEWING SHARES (1980-2018)



Source: SNL Kagan, "Broadband Cable Financial Databook," 2009 Edition.

In light of these trends, it is unsurprising that cable networks have succeeded in capturing an increasing share of the advertising market. As shown in Figure 6 below, cable advertising revenues now account for about one fifth of the local television advertising revenues upon which broadcasters traditionally have depended, and the proportion has grown substantially over time.

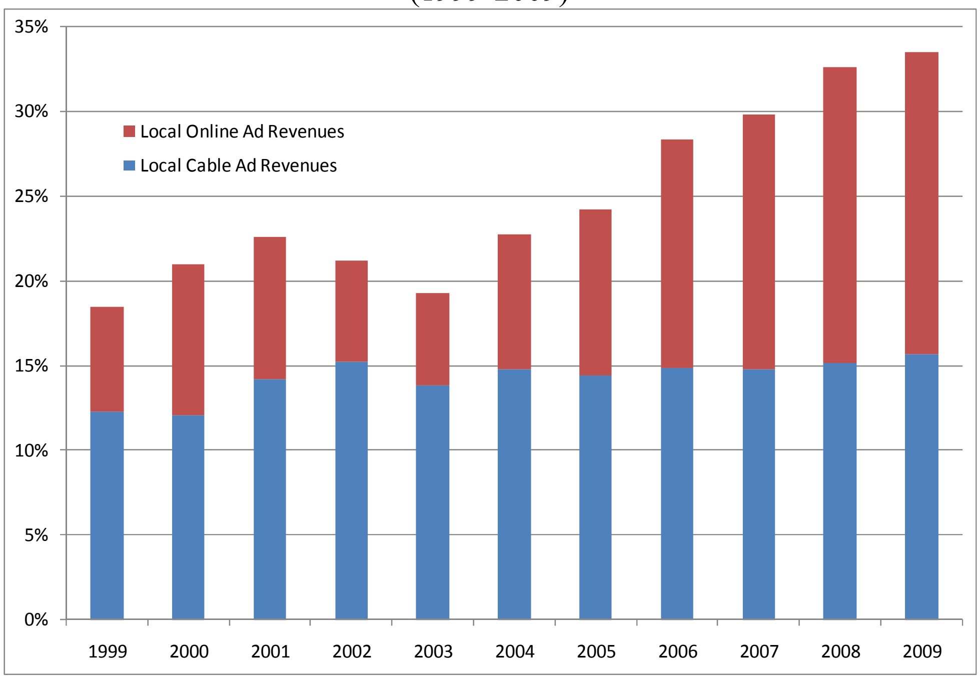
FIGURE 6:
CABLE ADVERTISING REVENUES AS A PROPORTION
OF ALL LOCAL TV ADVERTISING REVENUES (1999-2009)



Source: Michael A. Meltz, *TV & Radio Broadcasting 2010 Television Fact Book*, J.P. Morgan North American Equity Research (May 2010) at Table 7.

Another perspective on competition for local advertising revenues is shown in Figure 7, which shows both local cable advertising revenues and local online advertising revenues as a proportion of total local television and online ad revenues.

FIGURE 7:
CABLE AND ONLINE ADVERTISING REVENUES AS A PROPORTION OF
ALL LOCAL ONLINE AND TV ADVERTISING REVENUES
(1999-2009)



Source: Michael A. Meltz, *TV & Radio Broadcasting 2010 Television Fact Book*, J.P. Morgan North American Equity Research (May 2010) at Table 7.

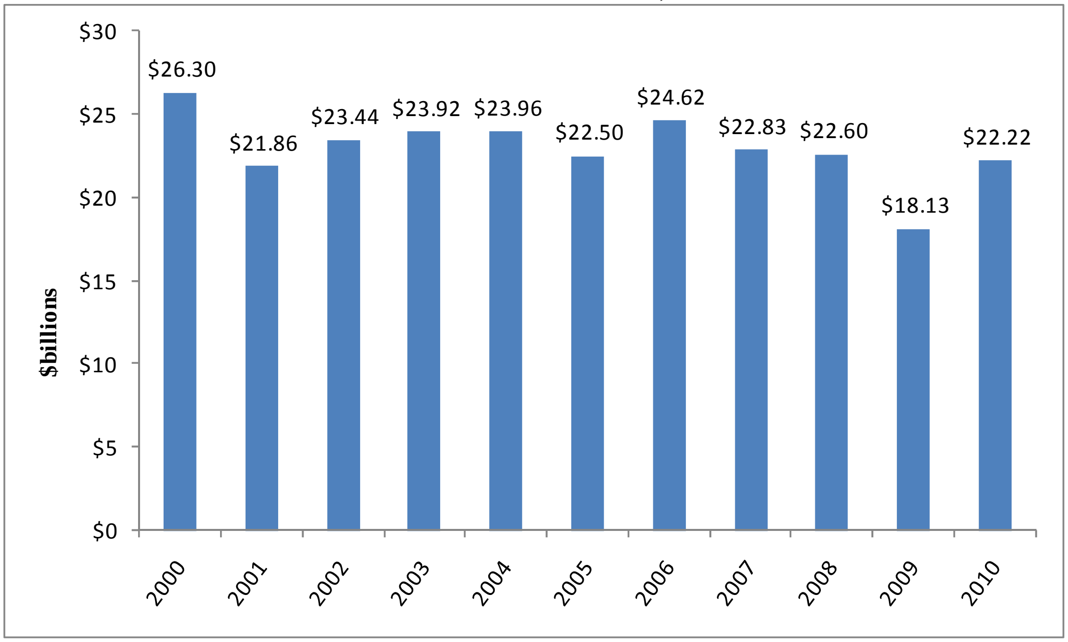
As the figure shows, cable and online advertising account for about one third of local ad dollars, with online ad revenues surpassing cable revenues, and continuing to grow.

B. The Effects of Market Changes on Broadcasters' Financial Performance

Largely as a result of marketplace fragmentation and of the growing numbers of options for advertisers (including online), television broadcasters' revenues and profits have fallen in recent years. As shown in Figure 8 below, SNL Kagan reports that total revenues for local television stations fell from $26.3 billion in 2000 to $18.1 billion in 2009, a decline of $8.2

billion (or 31 percent). Station revenues rebounded somewhat in 2010 as the macroeconomy began to recover, but remained more than 15 percent below their peak in 2000.

FIGURE 8:
TELEVISION STATION REVENUES, 2000-2010



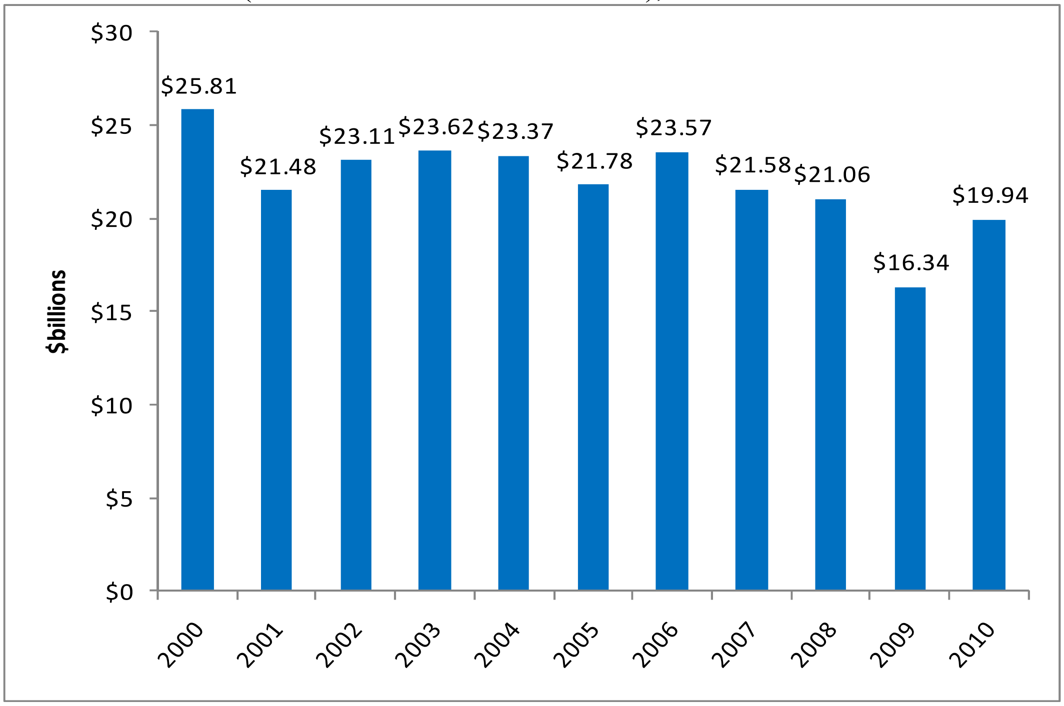
Source: SNL Kagan

As shown in Figure 9, traditional advertising revenues have fallen even faster from 2000 to 2009 – by $9.5 billion, or 37 percent.[31] Although traditional advertising revenues have recovered from their steep decline in 2009, they are nevertheless projected to remain below historical levels in the years to come.[32]

[31] The other significant source of decline in station revenues was network compensation, which declined from nearly $500 million in 2000 to less than $50 million in 2009. See SNL Kagan, *TV Station Revenues*, *1999-2009*; see also SNL Kagan, *TV Network Industry Benchmarks, Broadcast Stations* (2011).

[32] *See* SNL Kagan, *TV Station Advertising Revenue Projections* (2011), projecting that traditional advertising revenues (local spot + national spot) will remain below at or below ~$23 billion (in nominal terms) through the year 2020. In contrast, as shown in Figure 9, traditional advertising revenues averaged ~$23 billion (in nominal dollars) for the years 2000 – 2005.

FIGURE 9:
TELEVISION STATION TRADITIONAL ADVERTISING REVENUES
(LOCAL SPOT + NATIONAL SPOT), 2000-2010



Source: SNL Kagan

Not surprisingly, as shown in Table 2, broadcasters' pre-tax profits have also fallen substantially in recent years, with the profits for the average station falling by 56 percent, from $6.1 million in 1998 to $2.7 million in 2008. In each year, stations falling in the lowest quartile of profits actually earned negative pre-tax returns.

TABLE 2:
TELEVISION STATION PRE-TAX PROFITS OVER TIME

Pre-Tax Profits Average All Markets All Stations				
		---------------*Percentiles*---------------		
Year	***Average***	***25%***	***50%***	***75%***
1998	$6,145,583	($220,970)	$1,575,778	$5,944,967
1999	$4,361,828	($659,146)	$916,554	$4,323,452
2000	$4,537,894	($584,884)	$1,113,634	$4,596,413
2001	$2,171,188	($1,445,544)	$67,067	$2,575,895
2002	$3,858,644	($451,601)	$911,827	$4,188,476
2003	$4,073,056	($458,512)	$464,019	$3,344,000
2004	$4,442,379	($158,079)	$1,128,782	$4,686,237
2005	$3,512,208	($512,639)	$670,946	$3,426,952
2006	$4,210,359	($305,161)	$1,120,443	$4,154,310
2007	$3,320,667	($454,837)	$520,164	$3,446,126
2008	$2,686,481	($750,149)	$630,300	$3,178,780

Source: Attachment C to *Comments of the National Association of Broadcasters in the Matter of Examination of Future of Media and Information Needs of Communities in a Digital Age* (GN Docket No. 10-25, May 7, 2010).

As a result of these declines, many broadcasters have found it difficult to continue attracting capital, and some have entered into bankruptcy proceedings. As shown in Table 3, a total of eleven TV broadcasters have filed for Chapter 11 protection since 2008.

TABLE 3:
BROADCASTERS FILING FOR BANKRUPTCY SINCE 2008

Company	**Date**	**Type**
Pappas Telecasting	5/2008	TV/Radio
Johnson Broadcasting of Dallas, Inc.	10/2008	TV/Radio
Tribune Company	12/2008	TV/Radio
Equity Media Holdings	12/2008	TV
Young Broadcasting	2/2009	TV/Radio
Simons Broadcasting	3/2009	TV
Ion Media Networks	5/2009	TV
New Vision Broadcasting	7/2009	TV
Freedom Communications	9/2009	TV
Las Vegas TV Partners	2/2010	TV
Global Broadcasting	7/2010	TV

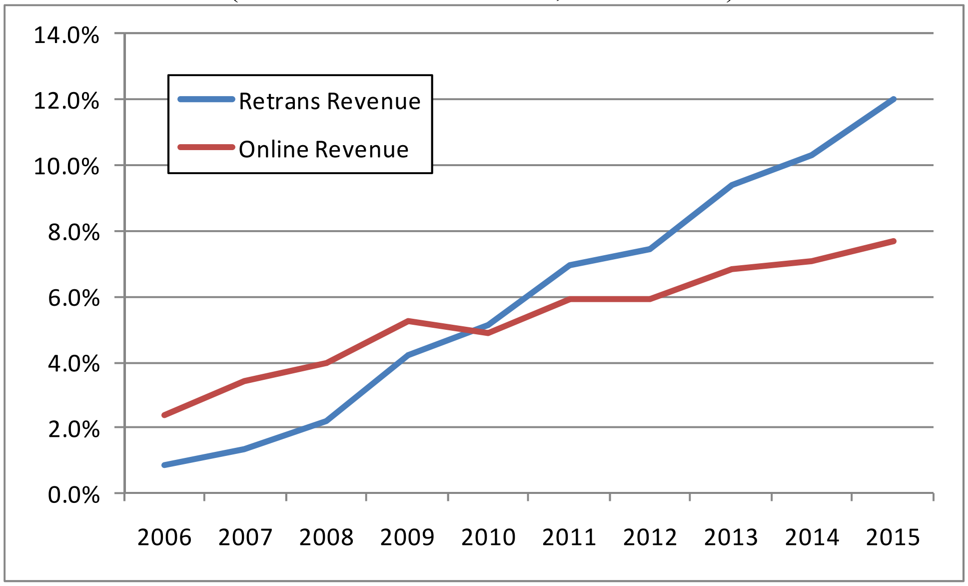
Sources: SNL Kagan; Broadcasting & Cable

The bright side of the television financial picture is that broadcasters are developing new services and business models, which are beginning to yield new revenue streams. The difference between the 2000-2010 decline in advertising revenues and the somewhat smaller decline in overall revenues, shown above, is primarily accounted for by two new revenue sources: (1) Online content – i.e., advertising revenue generated by television stations' web sites; and (2) cash compensation from retransmission rights. Currently, these revenue streams together account for about 10 percent of total TV station revenues ($2.2 billion in 2010 according to SNL Kagan). However, because of their low incremental costs, these revenue streams account for a much larger share – perhaps over half – of current profits.[33]

As shown in Figure 10, analysts expect online advertising and retransmission consent to account for an increasing share of both revenues and profits: by 2015, SNL Kagan projects that online revenues will have increased by more than 75 percent, while retransmission consent revenues will have more than doubled, compared to 2010, together making up nearly 20 percent of TV station revenues and a majority of TV station profits.

[33] Based on the average station profit reported by NAB of $2.686 million (see Table 2), we estimate total broadcast station profits at approximately $3.5 billion in 2008 (= $2.686 million times ~1,300 commercial TV stations). If comparable or lower profits were earned in 2010 (when total industry revenues were slightly lower), then retransmission consent revenues for that year ($2.2 billion) would exceed 60 percent of industry profits.

FIGURE 10:
RETRANS AND ONLINE REVENUES AS A SHARE OF TOTAL TV REVENUES
(ACTUAL AND PROJECTED, 2006 – 2015)



Source: SNL Kagan.

Both of these new revenue sources reflect broadcasters' presumptively efficient economic responses to specific changes in the marketplace. Online revenues are the result of opportunities brought about by the rise of the Internet and digital convergence to "multi-task" news and other video programming content into new distribution channels, such as Web sites. Retransmission consent revenues, on the other hand, represent a response to changing market conditions: as demand on the "upstream" (advertising) side of their markets has become more price-sensitive,[34] broadcasters have rebalanced their revenue streams by obtaining increased compensation for retransmission consent (on the "downstream" side). This result is precisely what the economic literature on two-sided markets predicts will occur in such a situation (i.e. Ramsey pricing), and is entirely consistent with economic efficiency and the maximization of consumer welfare.[35] In other words, the fact that retransmission consent revenues are playing an increasingly significant

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[34] See Wilbur (2008).

[35] See generally Jean-Charles Rochet and Jean Tirole, "Platform Competition in Two-Sided Markets," *Journal of the European Economic Association*, 1;4 (June 2003) 990-1029, at 1013.

role in the economics of broadcast television represents an efficient response to changing market conditions, not a cause for regulatory intervention.

A third source of new revenues likely to come on line in the next few years involves new services made possible by digital television (DTV) broadcasting technology. DTV permits broadcasters to send a 19.39 Mbps digital signal comprised of any type of digitized information – audio, video, text or data – over each 6 Mhz channel. Broadcasters have begun making use of these new capabilities, initially by developing multicasting services that allow them to provide multiple content streams and, most recently, by entering the market for mobile video through Mobile TV. Although it is difficult to forecast accurately future revenues from these relatively nascent services, some analysts have projected rapid growth in the number of mobile TV users over the next few years.[36] Should anything on the order of these projections materialize, it is virtually certain that these services also will exhibit economies of scale and scope.

In summary, although there is little question that intermodal competition has cut into broadcasters' traditional advertising revenue streams, broadcasters have responded by adapting their business models to accommodate a variety of non-traditional revenue sources. As would be expected, some of these new lines of business have matured more rapidly than others, and it is still too early to predict precisely what the new, long-run equilibrium mix of revenues will be for twenty-first century broadcasters. What is already quite clear, however, is that it will differ markedly from that of the twentieth century, and that regulatory attempts to constrain broadcasters to an increasingly obsolete business model are likely to be counterproductive. Below, we explore these concepts in more detail, focusing primarily on retransmission consent

[36] SNL Kagan, "U.S. Broadcast Mobile TV Users, 2007 – 2020" (2010) (projecting over 40 million mobile TV users by 2015).

revenues. However, the same basic concepts would apply equally well to other non-traditional revenue streams.

IV. The Economic Effects of Regulatory Limits on Scale and Scope

In this section, we analyze the economic effects of existing and potential regulatory barriers to the exploitation of scale and scope economies in television broadcasting. Specifically, we examine the impact of: (a) the existing limitations on TV station ownership and cross-ownership of newspapers and radio stations; and (b) potential limitations on stations' ability to bargain for compensation for retransmission of their signals by pay TV providers. The first section below provides a very brief précis of these regulatory issues. The second section presents our analysis of the effects of limiting retransmission revenues on the returns to, and economic viability of, television broadcasting. The third section reviews the evidence on the impact of economies of scale and scope on the output of news programming.

A. Regulatory Barriers to Realizing Scale and Scope Economies

The television broadcasting business is subject to extensive regulation by the FCC. We focus on two types of regulation that specifically affect the realization of scale and scope economies, and which are under active deliberation at the Commission at this time. First, and most obviously, ownership limits directly prevent the realization of scale and scope efficiencies by forcing broadcasters to operate below minimum efficient scale and imposing an inefficient industry structure. Second, proposed changes in the retransmission consent regime have the potential to deprive broadcasters of the ability to capture the economies of scale inherent in retransmission of their signals by pay TV providers. Below, we provide a brief explanation of how each regulatory regime affects, or has the potential to affect, broadcasters' ability to realize economies of scale and scope.

1. Ownership Rules

Historically, the FCC has limited broadcaster ownership rights along several dimensions. In 1975, the Commission formally adopted rules prohibiting a company from owning either a television station or a radio station in a community where it also publishes a daily newspaper.[37] Existing newspaper-broadcast combinations were generally exempted from the ban, with exceptions to this "grandfathering" in cases where there was only a single local newspaper, along with a single radio or television station, serving the local community.[38] Recently, the Commission determined that cross-ownership of a newspaper and either a single radio station or (with further limitations) a single television station should be presumed to be allowed in the twenty largest Designated Market Areas (DMAs), but any combinations would be presumed contrary to the public interest in all other markets.[39] Thus, it remains the case that only a very small fraction of television stations nationwide are cross-owned with newspapers serving the same market.

The Commission has also imposed a "duopoly rule" restricting television station ownership in local markets.[40] As adopted in 1999, the current rule imposes a "top four/eight voices" test, which prohibits a company from owning two television stations in the same DMA, unless (1) at least one of the two stations is not ranked among the top four stations in terms of audience share; and, (2) eight or more independently owned and operated television stations

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[37] *Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, 50 F.C.C.2d 1046 (1975), *as amended upon reconsideration*, 53 F.C.C.2d 589 (1975).

[38] See, e.g., Richard T. Kaplar, *Cross Ownership at the Crossroads: The Case for Repealing the FCC's Newspaper-Broadcast Crossownership Ban* (1997).

[39] *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Report and Order and Order on Reconsideration, MB Docket No. 06-121, et al., 23 FCC Rcd 2010, 2064 ¶ 97 (2008).

[40] Despite its name, the "duopoly rule" does not represent a prohibition on "duopoly" in the standard economic sense of the word. Instead, it prohibits a single company from owning two or more stations in the same local market, even if there are many additional competitors in the market.

would remain in the DMA after the acquisition.[41] In practice, the "duopoly rule" in its current form generally bans companies from owning two or more television stations in the same DMA outside the 50 largest U.S. markets.[42] Finally, the Commission also limits the number of radio stations a single entity can own in any local market,[43] as well as the cross-ownership of television and radio stations. The radio/television cross-ownership rule specifies a maximum number of radio stations that can be owned by an entity that also owns television stations in a given market. The number of radio stations that an entity can own under the radio/television cross-ownership rule decreases with the size of the market, according to an elaborate set of triggers defined by the Commission.[44]

2. Retransmission Consent

Before 1992, pay TV providers were legally permitted to retransmit and resell broadcasters' signals without permission or compensation. In the Cable Act of 1992, Congress created the retransmission consent regime, which allowed broadcasters to negotiate for compensation for pay TV providers' use of their signals. While cable operators initially refused

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[41] *Further Notice of Proposed Rule Making*, MB Docket Nos. 06-121 and 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244, FCC 06-93 (rel. July 24, 2006), at ¶ 11.

[42] *In the Matter of 2010 Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 09-182, Comments of the National Association of Broadcasters (July 12, 2010), at 78-79 (hereafter *NAB Ownership NOI Comments*). The Commission also prohibits any one station group from reaching more than 39 percent of TV households nationwide as calculated based on a complex formula in which the "audience reach" of UHF stations is discounted relative to VHF stations.

[43] The number of radio stations permitted to be commonly owned in any local market depends on the total number of radio stations in the market.

[44] See *In the Matter of 2010 Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry,* MB Docket No. 09-182 (May 25, 2010). (The radio/television cross-ownership rule allows a party to own up to two television stations (to the extent permitted under the local television ownership rule) and up to six radio stations (to the extent permitted under the local radio ownership rule) in a market where at least 20 independently owned media voices would remain post-merger. In markets where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations. A party may own up to two television stations (where permitted under the current local television ownership rule) and up to four radio stations (where permitted under the local radio ownership rule) in markets where, post-merger, at least 10 independently owned media voices would remain. The rule allows a combination of two television stations (where permitted under the local television ownership rule) and one radio station regardless of the number of voices remaining in the market.")

to pay cash compensation, retransmission consent payments are now becoming a significant portion of broadcasters' revenues.[45] Cable and satellite companies, however, have asked the Commission to re-examine the current regime, and have proposed changes that would increase their bargaining power and potentially reduce compensation substantially or even eliminate it altogether.[46] The Commission initiated a proceeding examining the retransmission marketplace in March 2011. Changes such as those urged by cable and satellite interests would effectively inhibit the ability of broadcasters to rebalance their revenue streams in response to shifting market conditions and thus limit their ability to realize economies of scale.[47]

B. Effects of Regulation on Economic Returns to Television Broadcasting

To assess the effects of retransmission consent revenues on future TV station profitability, we analyze broadcaster financial data derived from the station-level survey described in Section II above.[48] We combine this information with projections from industry analysts, along with our econometric estimates of the broadcasting cost function, to estimate revenues, costs, and profit margins for the median broadcast station (defined in terms of revenues) through the year 2015. We then compare our financial projections to the average of three different estimates of the level of profitability required for broadcasters to continue attracting capital in the long run. Our analysis indicates that FCC rules inhibiting or foreclosing retransmission consent revenues would cause the median U.S. television station to earn insufficient profits to cover its cost of capital. If this situation persisted for an extended period, roughly half of all stations – that is, all those below the median – would potentially face

[45] *See, e.g.,* Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, Empiris LLC (May 2009).

[46] *See Petition for Rulemaking*, MB Docket No. 10-71 (March 9, 2010).

[47] As one analyst has emphasized, "[i]n a rapidly changing video world, broadcast TV has recently made its move to gain a secondary revenue stream with retransmission…[t]hey definitely need it." See Deana Myers, "Broadcast Nets: Struggling in the New Video World," SNL Kagan (August 2010).

[48] As a result of the extremely deep recession, which produced a steep, one-time decline in advertising revenues, we omit 2009 from our analysis. Including 2009 data would lead to generally more pessimistic results (i.e., it would result in lower projected revenues and profits than those shown below). See Figure 9, *supra*.

shutdown. Thus, the ultimate result would be to dramatically reduce the number of local broadcast stations in the U.S.

Table 4 provides an analysis based on median values from our station-level data set. As in many empirical applications, the sample median provides a superior approximation to the financial condition of the "representative broadcaster" when compared with the sample average, due to the fact that the distribution of key financial statistics is skewed towards larger values.[49] As seen in the table, as of 2008, the median broadcaster earned pre-tax profit margins of approximately 7.2 percent (net of depreciation, amortization, and interest), with the bulk of revenues derived from advertising.

For the years 2010 - 2015, we employ data from SNL Kagan to estimate and project the station-level financial metrics.[50] Total net revenues are extrapolated forward based on SNL Kagan's projections of aggregate television revenues.[51] In addition, the various subcomponents of total revenues are estimated based on their projected share of the total.[52] Total expenses are then projected forward based in part on our econometric estimate of scale economies. Specifically, recall that our estimate of the broadcasting cost function implies that a one percent increase in output is associated with a 0.82 percent increase in cost. Our financial projections allow expenses associated with traditional services (i.e., traditional advertising) and online

[49] For example, in 2008, broadcasters reported average net revenues of approximately $15.8 million, while median net revenues were only $8.8 million. In other words, half of all broadcasters responding to the survey reported net revenues less than $8.8 million, and half reported more. See *NAB Survey* (2008), at ii.

[50] As noted above, the latest available data from the *NAB Survey* are as of 2009. Hence, industry-level data from SNL Kagan are used to estimate station-level financials as of 2010, and projections from SNL Kagan are employed to estimate station financial metrics for the years 2011-2015.

[51] For example, Kagan projects that industry revenues will grow by approximately 10 percent from 2008 to 2015. Thus we estimate total net revenues in 2015 by increasing actual net revenues by approximately 10 percent.

[52] For example, because Kagan projects retransmission fees to be approximately 12 percent of total revenues in 2015, our projections estimate Retrans fees in 2015 as 12 percent of total net revenues.

services to increase (or decrease) according to the same relationship.[53] Thus, a given increase (decrease) in projected future revenues is associated with a smaller percentage increase (decrease) in projected future costs. Finally, we assume that retransmission compensation does not significantly affect costs, due to the "first copy" effect discussed above.

Given projections for each sub-component of total revenue, and for total expenses, we compute projected profit margins, and extrapolate the effect on profitability of eliminating non-traditional revenue streams, particularly retransmission consent revenues. As seen in Table 4, median broadcaster profit margins are substantially diminished when broadcasters are foreclosed from such non-traditional revenue streams. Without retransmission fees, projected profit margins in 2015 fall from 14.8 percent to 3.1 percent for the median broadcaster.

TABLE 4:
ACTUAL AND PROJECTED REVENUES, EXPENSES, AND PROFIT MARGINS
MEDIAN TELEVISION STATIONS, 2008 – 2015 (EST.)

	2008	2010	2011	2012	2013	2014	2015
TV Ad Revenue	$7,901,693	$7,738,260	$7,051,855	$8,009,389	$7,538,006	$8,089,211	$7,770,146
Retrans Revenue	$368,687	$441,138	$564,728	$687,786	$842,516	$1,006,317	$1,162,047
Online & Other Revenue	$498,337	$440,284	$488,107	$550,034	$616,200	$690,128	$745,334
Total Net Revenue	$8,768,717	$8,619,682	$8,104,690	$9,247,209	$8,996,722	$9,785,657	$9,677,527
Expenses (incl. depr./amrt. & interest)	$8,138,417	$7,962,456	$7,452,653	$8,278,931	$7,957,542	$8,457,788	$8,249,348
Profits (Baseline)							
Pre-Tax Profits	$630,300	$657,227	$652,037	$968,278	$1,039,180	$1,327,869	$1,428,179
Profit Margin	7.2%	7.6%	8.0%	10.5%	11.6%	13.6%	14.8%
Profits (Without Retransmission Consent Revenues)							
Pre-Tax Profits	$261,613	$216,089	$87,309	$280,492	$196,664	$321,551	$266,132
Profit Margin	3.1%	2.6%	1.2%	3.3%	2.4%	3.7%	3.1%

The next step in our analysis is to compare our financial projections to the minimum level of profitability that broadcasters must attain to attract capital in the long run. We employ three

[53] We believe this assumption is quite conservative, as we suspect economies of scope associated with online services (e.g., the ability to repurpose content) are quite strong, such that a one percent increase in the output of these services would result in less than a 0.82 percent increase in costs.

independent estimates of this threshold. First, we examine our historical survey data to gauge the level of profitability attained by broadcasters in earlier years. Second, we obtain information on the average returns earned by competing firms in similar industries. Finally, using data on broadcasters' cost of equity capital, we estimate the long-run profit margins required for broadcasters to attract capital.

The three long-run profitability benchmarks are summarized in Table 5 below. The *NAB Survey* provides median profitability statistics for the years 2002 – 2008.[54] On average, the profitability statistics for median broadcasters indicate a pre-tax profit margin of approximately 9.3 percent for this time period. Given the relatively poor performance of the macro economy and the growing level of competition faced by broadcasters during this period, combined with the substantial investments made in the digital transition towards the end of the period, we regard this estimate as an extremely conservative one, i.e., it is likely below the long-run average level of required profitability.

The second benchmark is based on a compilation of publicly available financial data for the major firms operating in the telecommunications industry, the cable television industry, and the direct broadcast satellite industry. On average, firms in this industry earned pre-tax profit margins of approximately 10.9 percent from 2002 through 2008.[55]

[54] We exclude 2009 due to the severity of the economic downturn in that year. Note also that, prior to 2002, the *NAB Survey* does not publish median (or average) statistics for all surveyed firms.

[55] Financial data for these companies were obtained from public financial statements compiled by SNL Kagan for the major publicly traded telecommunications carriers, cable companies, and DBS providers. Pre-tax profit margins were computed based on the weighted average ratio of net income before taxes to net operating revenue.

TABLE 5:
LONG-RUN BROADCASTING PROFITABILITY BENCHMARKS

Benchmark	**Source**	**Value**
Historical Pre-Tax Profit Margins (Median Broadcasters)	*NAB Survey* (Average, 2002 – 2008)	9.3%
Historical Pre-Tax Profit Margins (Telco/Cable/DBS)	Public Financial Data (Average, 2002 – 2008)	10.9%
Forward-Looking Long-Run Minimum Profit Margin (Transformation of Cost of Equity Capital)	Ibbotson *Cost of Capital Yearbook* (Small Firm Composite, March 2009)	12.9%
	AVERAGE	**11.0%**

The third and final benchmark consists of an estimate of the long-run profit margin that broadcasters must earn in equilibrium to satisfy the cost of equity capital for broadcasters reported in Ibbotson's *Cost of Capital* yearbook. Unlike the first two benchmarks, our third benchmark is forward-looking, and reflects a long-run equilibrium relationship, as opposed to a *pro forma* accounting relationship.

Ultimately, a firm raises capital in order to cover the long-run cost of doing business. The returns to equity for a given firm reflect the residual profits available to investors, net of all costs. In steady-state equilibrium, the expected value of these costs should be roughly constant from one year to the next. This relationship should hold for both short-term operating costs and for the costs of long-lived assets – assuming the costs of owning such assets are consistently reflected in a firm's annual depreciation and amortization, and that the firm reinvests at a constant rate to maintain its capital stock.

Stated differently, if we allow TC to represent a firm's long-run expected total annual cost of doing business (inclusive of depreciation, amortization and interest), and if we allow E to represent the long-run expected value of equity raised by the firm, it should be the case that:

$$TC = E$$

Further, if we let R denote the firm's long-run annual revenues, then the firm's long-run annual returns to equity, RE_{LR}, can be written:

$$RE_{LR} = \frac{R - TC}{TC}$$

It is then relatively straightforward to relate RE_{LR} to the firm's long-run profit margins, which we denote M_{LR}:

$$M_{LR} = \frac{R - TC}{R} = 1 - \frac{1}{RE_{LR} + 1}$$

The Ibbotson *Cost of Capital Yearbook* estimates the cost of equity for broadcasters at approximately 12.59 percent.[56] Applying the formula above, and adjusting for taxes, we estimate that the minimum profit margin implied by broadcasters' cost of equity is approximately 12.9 percent, as shown in Table 5.[57] Finally, the average across the three benchmarks is 11.0 percent.

Figure 11 below summarizes the results of the analysis of long-run financial viability. For each year of our projection period, the high end of the range depicted in the figure shows the projected profit margin in the base case, in which no revenue streams are foreclosed by regulation; the low end of the range shows the projected profit margins in the absence of retransmission revenues.

[56]Ibbotson *Cost of Capital Yearbook* (2009), statistics for SIC Code 4833 (Television Broadcasting Stations). Ibbotson's Capital Asset Pricing Model (CAPM) estimates for the cost of equity capital is 12.59 percent for its "Small Composite" index. We employ the Small Composite index here because the publicly traded companies sampled by Ibbotson are significantly larger than the median broadcaster in the *NAB Survey*. (For example, if the broadcasters in Ibbotson's sample are ranked by revenue size, the tenth percentile of net sales is approximately $32 million). Note also that Ibbotson does not publish a separate cost of capital estimate for television broadcasters in subsequent years, and instead reports an aggregate for radio and television broadcast stations.

[57] Ibbotson indicates that the majority of the firms in the Compustat database (the data source for Ibbotson's cost of equity capital calculations) pay expected tax rates substantially below the top statutory tax rate, with approximately 60 percent having tax rates under ten percent. See Ibbotson *Cost of Capital Yearbook* (2009) at 22. For simplicity, our calculations assume an average tax rate of 15 percent. Therefore, adjusting the 12.59 percent figure for taxes yields 12.59%/(1 – 15%) = 14.81%. Transforming this figure into a long run pre-tax profit margin using the formula above yields M_{LR} = 1 – 1/(14.81% +1) = 12.90%.

FIGURE 11:
RANGE OF PROFIT MARGINS FOR MEDIAN TELEVISION STATION
COMPARED WITH AVERAGE LONG-RUN PROFITABILITY BENCHMARK, 2008 - 2015 (EST.)

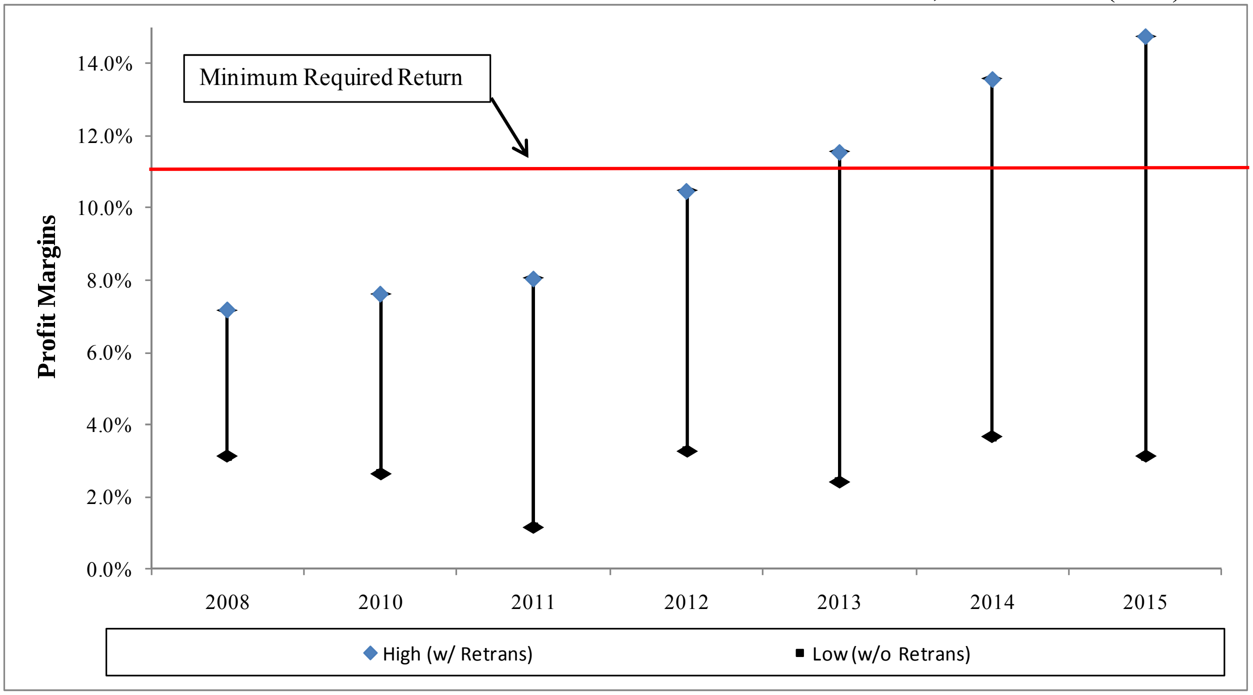

Figure 11 shows that if all non-traditional revenue streams including retransmission consent are available to broadcasters, projected profitability steadily improves to the point that the median television station earns sufficient returns to cover its estimated cost of capital by 2013-2015. In contrast, when retransmission consent revenues are foreclosed, the median broadcaster consistently earns profit margins far below this level (in the neighborhood of three percent). Simply put, the analysis demonstrates that in the absence of alternative revenue sources such as retransmission consent fees, the median broadcaster would earn profits well below the level necessary to continue attracting capital. In the long run, such returns would result in the exit of a significant number of firms.[58]

[58] As noted previously, there are other sources of nontraditional revenues (such as online advertising and mobile DTV), which are projected to grow over time, and to add to stations' revenues and profit margins in the future. Our analysis in this section assumes that these revenue streams will remain intact, and therefore isolates the effect of retransmission revenues (which are the focus of the current FCC proceeding) on future profitability.

C. Effects of Regulation on Local News Programming

As noted above, regulatory constraints on economies of scale and scope may affect the production of news programming in two ways. First, news production is directly subject to economies of scale and scope (e.g., the sharing or re-use of content across multiple programs, or between a TV station, a radio station and a newspaper). Regulations that inhibit the exploitation of such economies raise the cost of news production relative to other, unaffected types of programming (e.g., syndicated game shows). Second, because production of local news represents an investment in brand equity, regulations that limit the returns to television station ownership will lower investment overall, including investment in news.

In this section, we first address the investment aspects of local news production and then turn to the empirical evidence on the determinants of news programming. Taken as a whole, the empirical evidence indicates ownership restrictions have limited broadcasters' abilities to exploit scope and scale economies, both in general and in the production of news in particular. Lifting these limitations would increase local news output. Conversely, new constraints on the realization of scale and scope efficiencies would result in lower news output.

1. Local News as an Investment in Brand Equity

In the television industry, broadcasters and economists have long recognized the importance of local news in building brand equity and driving demand for complementary products. Local news broadcasts are the most profitable form of local programming, allowing stations to differentiate their programming from nationally syndicated content and create a locally recognized brand. Local news accounts for a disproportionate share of viewership and station ad revenue,[59] and a substantial share of station operating expenditures and investment. In

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[59] *The Economic Realities of Local Television News – 2010, A Report for the National Association of Broadcasters* (Apr. 30, 2010), Attachment B to NAB Comments in MB Docket No. 09-182 (July 12, 2010), at 10.

fact, survey data indicate that the average station devotes over half its capital budget to news-related investments and over half its station employees to news-related production.[60] The resources devoted to local news reflect its value as an efficient means of expanding the scope and scale of broadcast operations. As media economists Bruce Owen and Steven Wildman have observed:

> Local stations in the 1980s greatly expanded their news programs…the stations found that they could generate larger or more attractive audiences more efficiently with news than with alternative syndicated programming…the expansion of local news broadcasts allowed the fixed costs of the local station's news effort to be spread over more hours.[61]

Similarly, FCC economist Daniel Shiman concludes that

> More expensive news programming may attract a larger audience and help establish a brand identity for the television station, however. In general there are significant fixed costs to producing news programming, and much lower physical costs to distributing the programming using the equipment the station has invested in.[62]

Broadcasters view spending on local news as an investment in local reputation and goodwill, allowing them to create "a highly recognizable local brand, primarily through the quality of local news programming and community presence,"[63] and acknowledge the importance of local news broadcasts as a means of attracting viewers to both the newscasts themselves and to other programming, and of investing in brand equity.[64] Excerpts from recent SEC filings by publicly traded station groups show that broadcasters view local news as a means of building their brands and investing in their reputations.

("[A]lthough local news programming accounts, on average, for only 16% of the broadcast day, 39% of a station's revenue, on average, is derived from advertising associated with the broadcast of local news. In fact, this number may well be conservative, as the 2010 Papper/RTDNA Study found that across all markets stations derived nearly 45% of their yearly revenue from the local news.").

[60] *The Economic Realities of Local Television News* at 12-13.

[61] Owen and Wildman at 176.

[62] Daniel Shiman, "The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming," Section I, FCC Media Ownership Study #4 (2007), at I-10.

[63] Nexstar 10-K at 3.

[64] Brand equity is present when "a product's value to consumers, the trade and the firm is somehow enhanced when it is associated or identified over time with a set of unique elements that define the brand concept." For a review of the academic literature on brand equity, see T. Erdem *et al*, "Brand Equity, Consumer Learning and Choice," *Marketing Letters* 10(3) (1999), at 301-318.

LIN Television

We operated the number one or number two local news station in 91% of our news markets for the year ended December 31, 2009. Our stations are committed to a "localist" approach, which sustains our strong news positions and enhances our brand equity in the community. We have been recognized for our local news expertise and have won many awards during the past year, including several Emmy, Associated Press, Edward R. Murrow and other local and regional awards. We believe that strong local news programming is among the most important elements in attracting local advertising revenue. In addition, news audiences serve as vital lead-ins for other programming and help minimize the impact of changes in network programming.[65]

Belo

The Company believes the success of its media franchises is built upon providing the highest quality local and regional news, entertainment programming and service to the communities in which they operate. These principles have built durable relationships with viewers, advertisers and online users and have guided Belo's success.[66]

Hearst

We believe that local news leadership, the effective showcasing of network and syndicated programs, and serving our local communities, drive market-competitive ratings, revenue share and station and website profitability. … [E]xcellence in news coverage is a key determinant to developing a loyal audience, which is crucial to a station's competitive, operational and financial success.[67]

Sinclair Broadcasting

We believe that the production and broadcasting of local news is an important link to the community and an aid to a station's efforts to expand its viewership. In addition, local news programming can provide access to advertising sources targeted specifically to local news viewers. We assess the anticipated benefits and costs of producing local news prior to the introduction of local news at our stations because a significant investment in capital equipment is required and substantial operating expenses are incurred in introducing, developing and producing local news programming.[68]

Nexstar

Each of the stations that we own, operate, program, or provide sales and other services to creates a highly recognizable local brand, primarily through the quality of local news programming and community presence…. Strong local news typically generates higher ratings among attractive demographic profiles and enhances audience loyalty, which may result in higher ratings for programs both preceding and following the news. High ratings and strong community identity make the stations that we own, operate, program, or provide sales and other services to more attractive to local advertisers…. Additionally,

[65] LIN 10-K at 8.
[66] Belo Corporation, SEC Form 10-K (fiscal year ended December 31, 2009), at 3.
[67] Hearst-Argyle Television, SEC Form 10-K (fiscal year ended December 31, 2008), at 4.
[68] Sinclair 10-K at 14.

> local advertising has historically been a more stable source of revenue than national advertising for television broadcasters.[69]

Clearly, broadcasters view local news as (a) an investment in brand equity, and (b) a means of promoting demand for complementary products (e.g., online advertising).

2. Empirical Evidence on the Determinants of News Programming

There is a substantial body of empirical evidence on the relationship between local programming output by broadcast stations, particularly local news programming, and cross-media ownership – that is, the *scope* of operations. The key finding that emerges from this research is a positive and significant relationship between local news output and various forms of cross-media ownership, particularly co-ownership of newspapers and broadcast stations.

A similar body of empirical work (encompassing many of the same studies) has examined the extent to which local programming output increases with the *scale* of operations (as measured by station revenues). Empirical researchers have consistently found a positive and significant relationship between these variables as well.

Finally, there is also a body of empirical evidence on the impact of co-ownership of multiple television stations in the same market (i.e., "duopoly" status), another indicator of the *scale* of operations. Some of this research suggests that duopoly status is associated with higher levels of news output; however, the body of empirical work on this topic is less developed, and the results less conclusive.

In this section, we provide a concise survey of this literature. A more detailed description of the existing literature is found in the Appendix.

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[69] Nexstar 10-K at 3.

TABLE 6:
EMPIRICAL STUDIES OF THE DETERMINANTS OF LOCAL NEWS OUTPUT

Study	Relevant Research Issue(s)	Methodology
FCC (1975)	Effect of cross ownership & station revenue on various programming	Regression model (moderate sample size).
Wirth & Wollert (1979)	Effect station revenue on news programming	Regression model (moderate sample size).
Spavins et. al. (2002)	Effect of cross-ownership on news & public affairs programming	Within-market comparisons (no regression)
Napoli (2004)	Effect of cross-ownership & revenue on news & public affairs programming	Regression model (separate regressions for news/public affairs; moderate sample size).
Yan (2006)	Effect of cross-ownership, revenue, & duopoly status on news & public affairs programming	Two-stage regression model (moderate sample size).
Baumann (2006)	Effect of duopoly status on non-entertainment programming	Paired-market comparisons (no regression)
Napoli & Yan (2007)	Effect of revenue & duopoly status on news programming	Two-stage regression model (moderate sample size).
Shiman (2007)	Effect of cross-ownership, revenue, & duopoly status on news programming	Regression model (large sample size with fixed effects for market, network, time period)
Baumann & Mikkelsen (2007)	Effect of duopoly status (common ownership & operation) on news & public affairs programming	Regression model (moderate sample size)
Milyo (2007)	Effect of cross ownership on news programming	Regression model (moderate sample size).
Crawford (2007)	Effect of cross-ownership & revenue on local news programming & other content	Regression model (large sample size with fixed effects for market, network, time period)
Yan & Napoli (2008)	Effect of revenue & duopoly status on local news & public affairs programming	Regression model (moderate sample size).
Yan & Park (2009)	Effect of duopoly status on local content	Before/after comparisons (moderate sample size).
Yanich (2010)	Effect of duopoly status on news programming	Regression model (small sample size).

The studies considered are listed in chronological order in Table 6, along with a brief summary of the methodology employed in each study. As seen in the table, the existing body of empirical work spans a variety of time periods, data sets, and methodologies. Most studies employ regression models of one form or another. Of these, the majority utilize data sets of moderate size (typically comprising a cross section or short panel of 100 to 300 observations), although two relatively recent studies have used large panel data sets with thousands of observations, enabling the researchers to control for, e.g., market-specific effects. Broadly speaking, the topics covered by empirical researchers can be divided into (1) the effect of cross-ownership on local news (scope economies); and (2) the effect of station revenue and/or duopoly status on local news (scale economies). Below, we summarize the findings of this literature as they relate to each topic.

a. Economies of Scope: The Effects of Cross-Ownership Regulation on Local News Programming

The empirical evidence with respect to economies of scope and the output of news programming is summarized in Table 7. Taken as a whole, the existing body of empirical work provides substantial support for the proposition that the amount of local news programming is positively associated with newspaper cross-ownership. Of the nine studies that consider cross-ownership effects, all but one find at least some evidence of a positive relationship between newspaper cross-ownership and local news production. Of the seven studies that utilize regression analysis, all but one find at least some evidence that this effect is statistically significant.

Averaging across the studies that yield quantitative estimates of the effects of cross-ownership, the empirical results indicate that newspaper cross-ownership is associated with an increase of approximately 43.3 minutes per week of local news programming. Currently, only a handful (well under one percent) of broadcast stations nationwide are cross-owned with newspapers.[70] If cross-ownership restrictions were lifted, there would be opportunities for expanded local news provision in virtually every market in the country. Specifically, if half of all stations nationwide became cross-owned, the empirical estimates indicate that local news programming would increase by an average of approximately $43.3*0.5 \approx 22$ minutes per station per week.

[70] For example, according to Milyo (2007), there are only 29 cross-owned television stations nationwide, out of well over 1,200 commercial stations. *See* Jeffrey Milyo, "The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News," FCC Media Ownership Study #6 (2007), at Table 1.

TABLE 7:
EMPIRICAL EVIDENCE ON ECONOMIES OF SCOPE AND LOCAL NEWS

Study	Evidence of Positive Effect of Newspaper Cross-Ownership On Local News Programming?	Evidence of Positive & Significant Effect of Newspaper Cross-Ownership On Local News Programming?	Quantitative Cross-Ownership Effect
FCC (1975)	Y	Y	Cross-ownership→ 20 additional minutes of weekly news
Wirth & Wollert (1979)	N	N	n/a
Spavins et. al. (2002)	Y	n/a	n/a
Napoli (2004)	Y	Y	Cross-ownership→ 67 additional minutes of weekly news
Yan (2006)	Y	Y	n/a
Baumann (2006)	Y	n/a	n/a
Shiman (2007)	Y	Y	Cross-ownership→ 120 additional minutes of weekly news
Milyo (2007)	Y	Y	Cross-ownership→ 10.5 additional minutes of weekly news
Crawford (2007)	Y	Y	Cross-ownership → 3 percentage point increase in local news ≈ 75.6 additional minutes of weekly news
Average Effect	-	-	**43.3 minutes/week**

Notes: Statistical significance and quantitative effects are not applicable to Spavins et al (2002) and Baumann (2006), because the authors do not employ regression analysis. Yan (2006) estimates positive and significant effects for the probability of providing local news, but not for the quantity produced, conditional on nonzero news production. Finally, to be conservative, the average cross-ownership estimate of 43.3 minutes per week excludes from the average the largest estimated cross-ownership effect, derived from Shiman (2007). (Note that Shiman (2007) examines total news content, as opposed to only local news).

b. Economies of Scale: The Effects of Limiting Non-Traditional Revenues on News Programming

The empirical evidence with respect to economies of scale and news programming is summarized in Table 8. Taken as a whole, the empirical literature provides substantial evidence that an increase in the scale of operations is associated with increased news programming. Of the eight studies that estimate revenue effects econometrically, all but one find at least some evidence of a positive and statistically significant relationship between revenue and local news production.[71]

TABLE 8:
EMPIRICAL EVIDENCE ON ECONOMIES OF SCALE AND LOCAL NEWS

Study	Evidence of Positive/Significant Effect of Revenue On Local News Programming?	Quantitative Revenue Effect (2009 Dollars)	Evidence of Positive Effect of "Duopoly" Status On Local News Production?
FCC (1975)	Y	$1M in station revenues→ 4.85 additional minutes of weekly news	n/a
Wirth & Wollert (1979)	Y	$1M in station revenues→ 1,656 additional minutes of weekly news	n/a
Napoli (2004)	N	n/a	n/a
Yan (2006)	Y	n/a	N
Napoli & Yan (2007)	Y	$1M in station revenues→ 5.06 additional minutes of weekly news	N
Shiman (2007)	Y	$1M in corporate parent revenues → 0.27 minutes of news per two-week period	Y
Baumann & Mikkelsen (2007)	n/a	n/a	Y
Crawford (2007)	Y	$500M in corporate parent revenues → 1.65 percentage point increase in local news	n/a
Yan & Napoli (2008)	Y	$1M in station revenues → 4.45 minutes of local news per two-week period	N
Yan & Park (2009)	n/a	n/a	Unclear
Yanich (2010)	n/a	n/a	Unclear
Average Effect	-	**4.75 minutes/week/$1 million**	-

Notes: Yan (2006) estimates a positive and significant relationship between revenue and the probability of providing local news, but not on the quantity produced, conditional on nonzero news production. Shiman (2007) examines total news content, as opposed to only local news. For comparability, the calculation of average revenue effects excludes studies focusing on the revenues of the corporate parent. To be conservative, the estimated revenue effect of minutes per week excludes from the average the largest estimated revenue effect, from Wirth and Wollert (1979).

Averaging across the studies that yield quantitative estimates of the revenue effects of station size, the empirical results suggest that an additional $1 million in revenue yields an increase of approximately 4.75 minutes per week of local news programming.

Currently, broadcasters earn roughly $1.1 billion annually from retransmission consent fees, and are projected to earn approximately $3 billion by 2015.[72] Thus, we can estimate the

[71] The evidence with respect to "duopoly" status is less conclusive: Of the seven studies that consider this effect, two find evidence of a positive and statistically significant effect, three find no evidence of such an effect, and two report contradictory results. Because of these less conclusive results, further research on this issue may be useful.

aggregate reduction in local news associated with the elimination of retransmission consent revenues. Specifically, the studies suggest that local news programming would fall by approximately (4.75 minutes per week per \$1 million) × \$3.0 billion ≈ 14,250 minutes per week in the aggregate, which is approximately equivalent to an 11 minute per week reduction in local news programming by each of the approximately 1,300 commercial broadcast stations nationwide.[73]

c. Combined Effects of Regulation on Local News Programming

If economies of scale and scope are taken into account simultaneously, we can compare local news output in a world without retransmission consent revenues and with cross-ownership restrictions to a world in which both retransmission consent revenues and cross-ownership are permitted. Assuming conservatively that the two sets of effects are independent of one another (as opposed to mutually reinforcing), we can simply add (a) the impact of barring newspaper cross-ownership, which, (assuming that roughly half of all stations nationwide would be cross-owned with newspapers, but for existing regulations), reduces news output, on average, by 22 minutes per station, per week; to (b) the potential effects of eliminating retransmission consent revenues and other non-traditional revenues (11 minutes less news per station, per week). The total of (a) and (b) yields an estimate of approximately 33 minutes less news per station, per week. That is, the effect of existing and potential regulation is estimated to be roughly equivalent to that of eliminating one half-hour of local news per week from the lineup of every commercial television station in the U.S.

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[72] See SNL Kagan, *Broadcast Retransmission Fee Projections Through 2017* (2011).

[73] The aggregate effects refer to the average across all stations, regardless of whether they result from increases in news programming among stations that already carry news, incremental news coverage offered by stations that do not currently carry news, or (most likely) a combination of the two effects.

This estimate, it should be noted, does not account for the effects of limiting economies of scale and scope on the long-run economic viability of television broadcasting. As discussed above, if stations were unable to earn non-traditional revenues from retransmission consent, we estimate that as many as half of them would ultimately be unable to attract the capital required to replace their capital stock, and eventually would cease to operate. Obviously, the amount of local news programming produced would decline significantly as a result.

V. CONCLUSIONS

Television broadcasting – including especially production of local news programming – involves economies of scale and scope, and the significance of these efficiencies is growing as the result of both market and technological changes.

Based on 2001-2009 data, we estimate a cost function for television broadcast stations which confirms that traditional broadcast station operations are subject to strong economies of scale, with output rising about 22 percent faster than costs. In addition, we note that some scale and scope economies are likely much stronger for some non-traditional and ancillary services.

Relying in part on our cost function estimates, we estimate the effect of potential regulatory changes to broadcasters' rights to negotiate retransmission consent. We demonstrate that the effect of such changes would be to lower the return on investment for the median broadcaster below the cost of capital, a situation which, if allowed to persist, would ultimately lead to a significant reduction in the number of television stations.

We also note that existing evidence demonstrates that limitations on broadcasters' ability to realize scale and scope economies through ownership of multiple television stations and/or cross-ownership of radio stations and newspapers have reduced the output of local programming. We estimate that the newspaper cross-ownership prohibition alone reduces local news programming, on average, by 22 minutes per station per week. We also estimate that regulatory changes curtailing retransmission consent revenues would result in further reductions in local news output, by an average of 11 minutes per station per week. Taken together, then, current and potential regulatory restrictions on the realization of scale and scope economies are estimated to reduce local television news programming by approximately half an hour per week at each of the 1,300 commercial television stations in the United States.

APPENDIX:
EMPIRICAL EVIDENCE ON THE DETERMINANTS OF LOCAL NEWS PROGRAMMING

Given policymakers' sustained interest in promoting local content, many researchers have studied the empirical relationships between local programming and a range of variables of interest. In this Appendix, we provide a review of the existing body of empirical work on the determinants of local news programming, specifically as it pertains to scope and scale economies. This literature spans a variety of time periods, data sets, and methodologies. Most studies employ regression models of one form or another, with the majority of these relying on data sets of moderate size (typically comprising a cross section or short panel of 100 to 300 observations). Recently, some of this work has become more data-intensive, exploiting much larger panel data sets with thousands of observations, and allowing researchers to control a variety of fixed effects and other covariates.

Many empirical researchers have examined the relationship between local programming output by broadcast stations, particularly local news programming, and the *scope* of operations, as measured by cross-media ownership. The key finding that emerges from this research that common ownership of newspapers and television stations is positively and significantly related to local news output.[74] (Note that, in addition to the *quantity* of local programming, empirical

[74] The empirical literature has also investigated radio ownership and cross-ownership characteristics, and has found some evidence of scale and scope economies. *See, e.g.,* Asai (2006), *supra*; see also Kenneth Lynch, "Ownership Structure, Market Characteristics and the Quantity of News and Public Affairs Programming: An Empirical Analysis of Radio Airplay," FCC Media Ownership Study #4, Section II (2007), at II-1 ("The existence of economies of scope in production and distribution is supported by the findings that stations owned by parents having more pervasive radio operations are more likely to air informational programming.") However, the bulk of this literature has examined the availability of musical program formats, as opposed to non-music content, and while researchers have found evidence that radio station consolidation has increased the number of available of music formats, there is less evidence regarding non-musical formats such as news programming. For a discussion, *see* Tasneem Chipty, "Ownership Structure, Market Characteristics and the Quantity of News and Public Affairs Programming: An Empirical Analysis of Radio Airplay," FCC Media Ownership Study #5 (2007), at 2.

work has also found a relationship between newspaper/television cross-ownership and various metrics for programming *quality*. We do not discuss these findings in detail here.)[75]

An overlapping set of empirical studies have also examined the extent to which local programming output increases with station revenue – a proxy for the *scale* of operations. Empirical researchers have consistently found a positive and significant relationship between these variables as well.

Finally, some researchers have also attempted to capture the effect another metric for the scale of operations, examining the impact of co-ownership of multiple television stations in the same market (i.e., "duopoly" status). While some of this research suggests that duopoly status is associated with higher levels news output, the empirical literature on this topic is less developed, and the results less conclusive (and sometimes contradictory).

In one early study, Commission staff examined the impact of newspaper cross-ownership on the quantity of local news provided by the broadcaster. The analysis controlled for a variety of factors, including network affiliation, group ownership, station revenue, the number of commercial stations in the station's market, and total minutes broadcast. The study found that co-located newspaper-owned TV stations programmed six percent more local news, nine percent more local non-entertainment, and 12 percent more total local content including entertainment

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[75] For example, Parkman (1982) found that local television news ratings are positively and significantly related to co-ownership with local newspapers (among other ownership variables). See Allen M. Parkman, "The Effect of Television Station Ownership on Local News Ratings," 64 *Review of Economics and Statistics* 289 (1982). In 2003, the Project for Excellence in Journalism reported the results of a five-year investigation into the determinants of the quality of newscasts (where quality was determined by teams of news professionals, academics, and professional content analysts) which concluded that cross-ownership was associated with higher-quality newscasts. See Project For Excellence In Journalism, "Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality," (Updated April 2003). Busterna (1980) reported a positive correlation between newspaper cross-ownership and the resources devoted to local television news (as measured by expenditures). See John C. Busterna, "Ownership, CATV and Expenditures for Local Television News," 57 *Journalism Quarterly* 287, 289 (1980). In addition, Spavins *et al* (2002) found that the quality of programming, measured by both ratings and awards received, was higher for cross-owned stations. Finally, Pritchard *et al* (2008) found that cross-ownership was not associated with politically biased news coverage. See David Pritchard, Christopher Terry, and Paul Brewer, "One Owner, One Voice? Testing A Central Premise of Newspaper-Broadcast Cross-Ownership Policy," *Communications Law and Policy* 13 (2008), at 1–27.

than other TV stations. All of these results were statistically significant. In addition, the study found that higher station revenues were positively and significantly related to local news programming, local non-entertainment programming, and total programming including entertainment.[76] Early academic research by Wirth and Wollert (1979) also found a positive and significant relationship between station revenues and news programming.[77]

More recently, Spavins, Denison, Roberts, and Frenette (2002)[78] performed a series of within-market comparisons, focusing on markets containing at least one station owned and operated by one of the "big four" networks—NBC, Fox, CBS, ABC (i.e., O&O stations)—and at least one network affiliate. The authors compared stations based on the quantity of news and public affairs programming (measured by hours broadcast during the November 2000 sweeps period), and also on the quality of programming (measured by both ratings and awards received). The authors did not use regression analysis, and instead attempted to control for market-specific factors through within-market comparisons. In addition, the authors did not perform separate comparisons for news and public affairs programming and instead focused on metrics that aggregated these two categories. Spavins, *et al.* used their quality and quantity metrics to compare the performances of affiliates co-owned by newspapers with other affiliates, and found that the affiliates with newspaper holdings outperformed other affiliates in the same market in every category, a finding consistent with economies of scope across print and broadcast media.

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[76] The authors found that co-located newspaper owned TV stations broadcast 21.94 additional minutes of local news per week, equal to 6.3 percent of the sample mean of 344.75 minutes. In addition, a one million dollar increase in station revenues was associated with an increase in local news programming of approximately 23.4 minutes per week. *See* Federal Communications Commission (FCC) (1975), "Staff Study of 1973 Television Station Annual Programming Reports," Appendix C, pp. 1094-98, *In The Matter Of Amendment Of Sections 73.34, 73.240, And 73.636 Of The Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations: Second Report and Order*, 50 F.C.C.2d 1046, Docket 18110.

[77] *See,* M. Wirth & J. Wollert, "Public Interest Programming: Taxation by Regulation" *Journal of Broadcasting* 23, 319–330 (1979).

[78] Spavins, Thomas C., L. Denison, Scott Roberts, and Jane Frennette, "The Measurement of Local Television News and Public Affairs Programs," Federal Communications Commission (2002).

A similar set of paired-market comparisons was conducted by Litcher (2001), and later replicated and updated by Baumann (2006). Both studies found that non-entertainment programming, defined as news, public affairs, instructional, children's educational, religious, or agricultural programming, was more prevalent in designated market areas ("DMAs") with common ownership of a daily newspaper and a television station.[79]

Napoli (2004) performed a regression analysis using the same core dataset as Spavins *et al* (2002) but incorporated a larger set of explanatory variables, including station revenues, cable penetration, the number of commercial and non-commercial television stations, and the number of television households.[80] Under the hypothesis that different types of programming are governed by different processes, Napoli performed separate regressions for news programming and public affairs programming. Controlling for these additional factors, Napoli found that the positive relationship between the ownership variables and public affairs programming reported by Spavins, *et al.,* (2002) broke down. However, his regressions continued to indicate that television news programming is positively and significantly related to newspaper holdings. Napoli also found a positive but statistically insignificant relationship between station revenue and local news programming, as well as a positive and statistically significant relationship between station revenue and public affairs programming.[81]

Yan (2006) analyzed the impact of newspaper-television cross-ownership on the production of local news and public affairs programming utilizing a two-stage model. In the first

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[79] *See* Samuel Robert Lichter, Ph.D., "Review of the Increases in Markets with Newspaper-Owned Television Stations," Prepared for Media General, Inc. (Dec. 2001) MM Docket No. 01-235; *see also* Michael Bauman, "Review of the Increases in Non-Entertainment Programming Provided in Markets With Newspaper-Owned Television Stations: An Update," Prepared for Media General, Inc. (October 2006), MB Docket Nos. 06-121, 02-277, 01-235.

[80] Philip Napoli, "Television Station Ownership Characteristics and News and Public Affairs Programming: An Expanded Analysis of FCC Data," *Info: The Journal of Policy, Regulation, and Strategy for Telecommunications, Information, and Media*, 6 (2004) 112-121.

[81] *Id.* Table IV.

stage, Yan (2006) estimated the probability that a station will provide *any* local news programming; in the second stage, he examined the determinants of local news quantity conditional on a station's offering at least some local news. The author found a positive and statistically significant relationship between cross-ownership and the probability of offering local news programming; the probability relationship was also positive and statistically significant for station revenues. However, conditional on a station's offering at least some news programming, Yan found no statistically significant relationship between local news production and either cross-ownership or station revenues. Finally, Yan found that a station's duopoly status was positively but insignificantly related to the probability of offering local news; conditional on offering at least some local news, duopoly status was negatively and significantly related to the amount of local news provided.[82]

Napoli and Yan (2007) studied the effect of ownership factors on local news provision using a random sample of 285 full-power television stations; their sample included both public and commercial stations.[83] Because roughly 25 percent of the stations in their data set did not provide any local news programming, the authors employed a two-stage sample selection model.

According to the results of the first-stage analysis, station revenues have a positive and significant impact on the probability that a given broadcast station provides local news. In the second stage, the authors found that station revenues were also positively and significantly related to the amount of local news programming provided. The authors concluded that a broadcast station's "financial strength" has a significant and positive effect on local news

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[82] Michael Yan, "Newspaper-Television Cross-Ownership and Local News and Public Affairs on Television Stations: An Empirical Analysis," Donald McGannon Communication Research Center Working Paper (2006).

[83] Philip Napoli and Michael Yan, "Media Ownership Regulations and Local News Programming on Broadcast Television: An Empirical Analysis," *Journal of Broadcasting and Electronic Media*, 51;1 (2007) 39-57.

production.[84] Napoli and Yan (2007) do not attempt to measure the effect of broadcaster-newspaper cross-ownership on local news production because they did not collect data on newspaper holdings.[85] Finally, Napoli and Yan's findings with respect to the effect of duopoly status were ambiguous: Duopoly status was found to be positively and insignificantly related to the probability of local news provision; however, for those stations that produced at least some local news, duopoly status was found to be negatively and significantly correlated with the amount of local news programming.

In a follow-on study, Yan and Napoli (2008) analyzed the determinants of the provision of local news and public affairs programming. In contrast to their previous paper, the authors analyzed a sample that excluded public stations and focused only on commercial broadcast stations. The analysis indicated that "big four" ownership had a negative and statistically significant effect on public affairs programming while station revenues had no statistically significant effect. The authors also found that both revenues and "big four" ownership were positively and significantly associated with the provision of local news; duopoly status was found to be negatively but insignificantly associated with local news. The authors conclude that a station's "financial resources" are much more significant determinants of local news programming than of public affairs programming, and they conclude that there is scant evidence of any relationship between station ownership characteristics and local news programming or public affairs programming. (As before, data availability prevented the authors from investigating the effect of broadcaster-newspaper cross-ownership on stations' programming output).[86]

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[84] *Id.* at 1.

[85] *Id.* note 2.

[86] Michael Yan and Philip Napoli, "Market Competition, Station Ownership, and Local News & Public Affairs Programming on Local Broadcast Television," Fordham University McGannon Center Working Paper (2008).

Using a large, four-year panel data set covering virtually all full power analog broadcast television stations in the U.S., FCC economist Daniel Shiman (2007) analyzed the relationship between news programming, revenue, broadcaster-newspaper cross-ownership, and duopoly status.[87] Specifically, the author utilized a three-way-group-fixed-effects model that controls for population, income, and several demographic variables, as well as unobserved, market-specific, broadcast-network-specific, and time-specific fixed effects.

Shiman (2007) found a positive and significant relationship between parent revenues and news output in his main specification, controlling for market, network, and time period using fixed effects. However, if station-specific fixed effects are added to the regression, this positive relationship breaks down. However, it is also the case that most of the other statistically significant effects found in Shiman's main specification do not survive in the specification with station fixed-effects. This result is unsurprising, because a regression with station fixed effects—which requires the inclusion of over 1,700 dummy variables—eliminates much of the variation in the data. This has important econometric consequences: In addition to imprecise statistical effects, inclusion of channel fixed effects imposes the restriction that all parameters are identified solely by variation within a given station over time.[88]

Shiman's regression results also show a positive and significant relationship between news programming and newspaper cross-ownership. Specifically, Shiman finds that cross-ownership with a newspaper leads to an 11-percent increase in daily news programming. The

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[87] Daniel Shiman, "The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming," Section I, FCC Media Ownership Study #4 (2007).

[88] In other words, when station-level fixed effects are added to the regression, the effect of parent revenues on news output can be measured only through changes in a given parent corporation's revenues over time. Thus, cross-sectional variation across different parent companies is not used to measure this effect. Similarly, with station fixed effects, the effect of cross-ownership on news output cannot be identified by comparisons between station *A*, whose parent owns a newspaper, and station *B*, whose parent does not. Rather, if this effect is to be identified at all, the identification must come from, e.g., a change in station *A*'s cross-ownership status over time. This is a well-known tradeoff in econometric analysis.

author also finds a positive and significant relationship between the amount of news programming and duopoly status, which is associated with a 15 percent increase in news minutes.[89]

Shiman's finding of a positive and significant effect of duopoly status differs markedly from those obtained by Yan (2006), Napoli and Yan (2007), and Yan and Napoli (2008), since the latter three studies fail to consistently detect a positive and significant effect. Several differences between the studies could account for the differences, most notably the fact that Shiman utilized a large panel data set, which enabled him to control for unobserved factors specific to a given market, broadcast network, and time period, while the datasets utilized in the various Yan and Napoli studies were much smaller, making it infeasible to include these fixed effects in the regression analysis.[90] Thus, the results of the various studies by Yan and Napoli may be a byproduct of spurious correlation between, for example, market-specific factors and ownership variables.

Shiman's results with respect to duopoly status also appear to contradict two recent studies that, like the various Yan and Napoli studies, also claim to present evidence that duopoly stations are no more likely to produce news output than non-duopoly stations. However, the datasets employed by these studies, like those utilized in the various Yan and Napoli analyses, are much smaller than Shiman's dataset, and therefore cannot control for the types of fixed effects that Shiman does. Moreover, these recent studies also uncover at least some evidence consistent with Shiman's findings on the duopoly effect.

For example, based on a regression with just 17 observations, Yanich (2010) concludes that "the proportion of duopoly stations…negatively affected the proportion of local content..."

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[89] Shiman (2007) at I-1.

[90] For example, Yan (2006) utilized a single cross section of 233 stations; Shiman's dataset tracked over 1,700 stations for a period of four years, for a total of over 6,700 data points.

Yet in the same regression, the author also estimates a positive and statistically significant relationship between the presence of a duopoly and the amount of local news broadcast in the market.[91] Similarly, Yan and Park (2009), analyzing a sample of just over 100 stations, found that duopoly stations increased their local news programming by a statistically significant 4.2 hours from 1997 to 2003, while their non-duopoly counterparts occupying comparable markets (that is, non-duopoly stations in markets with duopoly stations) experienced a statistically insignificant increase of 1.4 hours. The authors indicate that they ran a statistical test rejecting the hypothesis that duopoly stations experienced a larger increase in local news programming than other station types, which they describe in qualitative terms.[92] However, because the authors do not report the quantitative results or details of their test, this finding it is difficult to assess.

Baumann and Mikkelsen (2007) study the effect of duopoly status on the probability that a given station provides various types of programming. Their regression analysis indicates that a station that shares common ownership or operation (via a Local Marketing Agreement or a Local Service Agreement) with another commercial station in the same market is significantly more likely to carry news, public affairs, or current affairs programming.[93] The Baumann and Mikkelson study updates and corroborates the findings of Owen *et al* (2003).[94]

Crawford (2007) analyzes the relationship between the ownership structure of television stations and programming output using a panel dataset that spans the years 2003 to 2006 and

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[91] Danilo Yanich, "Does Ownership Matter? Localism, Content, and the Federal Communications Commission," *Journal of Media Economics* 23 (2010), at Table 5.

[92] Michael Yan and Yong Jin Park, "Duopoly Ownership and Local Informational Programming on Broadcast Television: Before-After Comparisons," *Journal of Broadcasting & Electronic Media* 53(3) (Sept. 2009), at Table 2, and at 393 ("When tested for the interaction effect between station type and the time trend, no such effect was found. Therefore, the duopoly stations did not enjoy a greater increase than other types of stations in the sample.")

[93] Michael Baumann and Kent Mikkelsen, "Effect of Common Ownership or Operation on Television News Carriage: An Update," Economists Incorporated (November 2007). An additional and possibly related finding is that duopolies resulting from acquisitions tend to enjoy substantial increases in both audience shares and revenue shares. See Mark Fratrik, "Economic Viability Of Local Television Stations In Duopolies," BIA Financial Network (October 2006).

[94] Bruce Owen, Kent Mikkelsen, Rika Mortimer, & Michael Baumann, "Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality," Economists Incorporated (January 2003).

incorporates information on almost 1,600 broadcast television stations and almost 200 cable television networks across every DMA in the country.[95] Although Crawford considers various programming metrics – local news programming, minority programming, children's programming, etc. – his strongest finding is that television stations owned by a parent also owning a newspaper in the area offer more local news programming.[96] Specifically, cross-ownership is associated with a 3.0 percentage-point increase in the amount of local news programming.[97] This positive relationship is detected in regressions that control for a multitude of factors, including market size (measured by DMA households), a commercial-station dummy variable, dummy variables for various network affiliations (ABC, CBS, NBC, Fox, CW, Independents, PBS, Spanish-Language, etc.), various ownership dummy variables (locally owned, minority owned, female owned, etc.), and DMA and year fixed effects.

Using this same specification, Crawford also finds that an increase in the parent company's annual revenue is positively and significantly associated with an increase in the amount of local news. Specifically, if parent revenues increase by $500 million (or one standard deviation), Crawford's model projects local news programming increases by approximately 1.65 percentage points.[98]

Crawford (2007) also estimates a specification with station-specific fixed effects, and, like Shiman (2007), finds that the results noted above are not robust to this specification: The cross-ownership coefficient, while positive, is statistically insignificant in the station-fixed effects specification, while the coefficient on parent revenue becomes negative and statistically significant. As Crawford observes, caution is required in drawing inferences with respect to the

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[95] Gregory Crawford, "Television Station Ownership Structure and the Quantity and Quality of TV Programming," FCC Media Ownership Study #3 (2007).

[96] *Id.* at 4 ("Our strongest findings are for Local News: television stations owned by a parent that also owns a newspaper in the area offer more local news programming.")

[97] *Id.* at 23.

[98] *Id.* at 23 (n. 63).

interpretation of this specification.[99] First, the channel fixed-effects specification, which involves estimating nearly 1,700 parameters, likely eliminates much of the variation in the data and can lead to statistical artifacts. Even beyond this problem, the station-fixed-effects regression relies entirely on variation within stations over time to identify the parameters of interest and thus severely limits the researcher's ability to utilize the information contained in the data. As noted above, this means that this specification prevents the regression from utilizing variation across stations to identify the effect of parent revenue or cross-ownership on the amount of local news programming.

Finally, Milyo (2007) examines the effects of newspaper cross-ownership on local news output. The author controls for various factors, including network affiliation, fixed effects for the time slot of the broadcast, for DMA, and for date. The regression results indicate that local television newscasts for cross-owned stations contain four to eight percent more overall (local and non-local) news coverage than non-cross-owned stations. In addition, cross-owned stations show seven to ten percent more local news and broadcast about 25 percent more coverage of state and local politics than non-cross-owned stations do. All of these results are statistically significant.[100]

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[99] *Id*. at 22-23.
[100] Jeffrey Milyo, "The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News" FCC Media Ownership Study #6 (2007).