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

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| In the Matter of | ) | |
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| Implementation of the Cable Television Consumer Protection and Competition Act of 1992 | ) | MB Docket No. 07-29 |
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| Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act | ) | |
| | ) | |
| Sunset of Exclusive Contract Prohibition | ) | |
| | ) | |
| Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements | ) | MB Docket No. 07-198 |

# COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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To: The Commission

## COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in this proceeding.[2] Among other issues, in response to a petition filed by certain cable operators, the Commission seeks comment on retransmission consent negotiations between local broadcast stations and multichannel video programming distributors ("MVPDs"). More specifically, the agency is seeking comment on broadcast station negotiations for carriage

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[1] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

[2] *Notice of Proposed Rulemaking* in MB Docket Nos. 07-29 and 07-198, FCC 07-169 (rel. Oct. 1, 2007) ("*Notice*").

of additional programming (*e.g.*, non-broadcast programming or other broadcast stations affiliated with or owned by the licensee) as part of the retransmission consent process.

## Introduction and Summary

As NAB has shown in previous submissions to the Commission, complaints by MVPDs about the retransmission consent process are groundless. Complaints by some cable companies about requests by broadcast stations for carriage of additional program services are also without merit. As the Commission has recognized, cable operators for many years consistently refused to pay cash compensation for the right to retransmit and resell on a paid subscription basis the valuable signals of local broadcast stations. As a result, broadcasters have been left to negotiate -- at the urging of cable operators -- for other forms of non-cash consideration, including carriage of additional program services. MVPDs, historically, have seemed to prefer alternative forms of consideration to enable them to preserve their long-standing claim that they do not pay “cash” for broadcast retransmission rights.

Consistent with existing Commission rules, broadcasters do not engage, nor to our knowledge have they ever engaged, in the unyielding “take it or leave it” bargaining tactics referenced in the *Notice* (at ¶ 120) by insisting upon the carriage of affiliated stations or programming. Broadcasters, typically, offer a menu of consideration options in retransmission consent negotiations, including cash payment, MVPD promotion of the station, the purchase of additional advertising by the MVPD, payment by the MVPD for video on demand rights, carriage of other commonly owned stations, carriage of other cable program services, and/or carriage of digital multicast streams. Notwithstanding its review of this issue in several proceedings over the past five years, the Commission has never found a single example of a "take it or leave it" retransmission proposal by a broadcast station that unconditionally required carriage of additional programming. To our knowledge, there never has been a non-negotiable proposal of this nature advanced by a broadcast station, which, of course, distinguishes these proposals from conventional, anticompetitive "tying" arrangements.

In this proceeding, the Commission must also remember that Congress established retransmission consent in 1992 to create a marketplace in which broadcasters could negotiate for consideration from MVPDs for the right to pick up, retransmit, and resell to their subscribers popular broadcast signals. Indeed, the legislative history of the retransmission statute shows that Congress clearly envisioned that broadcasters would be permitted to negotiate for various forms of compensation, including, of course, the right to negotiate for MVPD carriage of one or more additional commonly owned stations or non-broadcast program services.

There is no basis for the assertion by some cable operators that the retransmission consent process envisioned by Congress is somehow tilted in favor of broadcasters to the detriment of cable systems. In fact, in many markets, small and medium-sized broadcast stations must negotiate against the nation's largest cable operators. The dynamics of these private negotiations will vary, but it seems counterintuitive to suggest that a local television station with, at best, four digital program channels can assert "market power" over even a small cable system that controls several hundred channels. MVPDs -- cable, satellite, and now telephone companies -- are the video gatekeepers in virtually every community in the nation. The Commission should not now reverse it prior findings and conclusions about the success of the retransmission consent process or tip the negotiating leverage further in favor of MVPDs.

Perhaps most importantly, the Commission has previously concluded that consumers have benefited from the retransmission consent process (including from the launch and carriage of local news channels). And given the absence of a requirement for MVPDs to carry the full digital signal of local broadcast stations, including multicast programming streams, consumers will further benefit from broadcasters' use of retransmission consent negotiations to obtain carriage of additional digital multicast program offerings.

For all these reasons, the Commission should not depart from its prior decisions that permit broadcasters to negotiate for various types of compensation, including carriage of additional channels, as part of the free market retransmission consent negotiation process. As Congress recognized in 1992 and the Commission has reaffirmed on several occasions, the government should refrain from taking actions that unduly impact the outcome of these private marketplace negotiations.

## I. Broadcasters Began Negotiating For Carriage Of Additional Program Services Because Cable Operators Refused To Pay Cash In Marketplace Retransmission Negotiations.

As is clear from the legislative history of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), Congress adopted retransmission consent to ensure that broadcasters had the opportunity to negotiate in the marketplace for compensation from MVPDs in exchange for the retransmission and resale by MVPDs of broadcast signals. From the outset, broadcasters sought cash compensation in exchange for retransmission consent.[3] However, "most cable operators – particularly the largest multiple system operators ("MSOs") – were not willing to enter into agreements for cash, and, instead, sought to compensate broadcasters through the purchase of advertising time, cross-promotions, and/or carriage of affiliated channels." *FCC Retransmission Report* at ¶ 10. Press reports at the time noted that "[n]early all of the nation's largest cable operators have vowed to forego paying cash to local television stations."[4] The President of Time Warner Cable in New York publicly announced there were "no circumstances" where the company "would pay cash" for carriage of broadcast signals.[5] Similarly, TCI (then the nation's largest cable company) "refused to pay cash to any of the big networks," but indicated it "might be willing to make room on its systems for a new cable channel a broadcaster might like to start."[6] Indeed, as of late 2005, the Commission found that "cash still ha[d] not emerged as a principal form of consideration for retransmission consent" and that "virtually all retransmission consent agreements involve[d] a cable operator providing in-kind consideration to the broadcaster," such as carriage of additional program channels. *FCC Retransmission Report* at ¶ 10.

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[3] 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 (Sept. 8, 2005) ("*FCC Retransmission Report*").

[4] Mark Robichaux, *Tele-Communications Says It Will Fail To Meet Deadline on TV Stations' Fees*, Wall Street Journal at B8 (Aug. 18, 1993). This stand even prompted the scrutiny of Senator Inouye of Hawaii, who asked the Justice Department and the Federal Trade Commission to look into whether the cable companies improperly colluded in dealing with broadcasters. *Id*.

[5] Michael Burgi, *TV Ratings Companies Brace For Retransmission Fallout*, Media Week (June 28, 1993).

[6] Mark Robichaux, *Cable Cowboy: John Malone and the Rise of the Modern Cable Business* at 130 (2002).

Given this history, complaints from certain MVPDs about some broadcasters attempting in retransmission consent negotiations to obtain carriage for additional programming channels are ironic, to say the least. *See Notice* at ¶¶ 119, 124. NAB, moreover, stresses that, consistent with FCC requirements, broadcasters with additional programming channels do not engage in "take it or leave it" bargaining tactics by conditioning retransmission consent *only* on carriage of affiliated stations or programming.[7] It is common practice for broadcasters to offer a menu with options of different values. These options may include carriage of additional stations and/or programming services -- but they do not require it. It is not the practice of broadcasters with affiliated stations or programming to "tie" a package of stations or channels with a "take all or none" proposition and to decline to offer or consider forms of compensation other than the carriage of affiliated stations or programming.[8]

These practices are also entirely consistent with congressional expectations expressed at the time the 1992 Cable Act was passed. As shown below, Congress made clear then, as the Commission has consistently recognized since, that retransmission

[7] *See* 47 C.F.R. § 76.65(b)(iv) (refusal by a television station or MVPD "to put forth more than a single, unilateral proposal" violates the "duty to negotiate retransmission consent agreements in good faith").

[8] Broadcasters' practices in this regard are consistent with FCC decisions. The FCC has stated that a "broadcaster may not put forth a single, unilateral proposal and refuse to discuss alternate terms or counter-proposals," as this "[t]ake it or leave it bargaining is not consistent with an affirmative obligation to negotiate in good faith." *Retransmission Consent Negotiation Order,* 15 FCC Rcd at 5463. For instance, "a broadcaster might initially propose that, in exchange for carriage of its signal, an MVPD carry a cable channel owned by, or affiliated with, the broadcaster." *Id*. This offer might be rejected by the MVPD on reasonable grounds, with a "request to compensate the broadcaster in another way." *Id*. "Good faith negotiation requires that the broadcaster at least consider some form of consideration other than carriage of affiliated programming," *id*., although a broadcaster is not required "to reduce the amount of consideration it desires for carriage of its signal." *Id*. at 5463-64.

negotiations may properly involve the carriage of additional stations and program channels and that the government should not intrude in these private marketplace negotiations.

## II. Congress Established Retransmission Consent To Create A Marketplace In Which Broadcasters Could Negotiate For Various Forms Of Compensation For MVPDs' Use Of Their Signals.

It is important to recall that, prior to passage of the Cable Act, cable operators were not required to seek the permission of the broadcast station before carrying its signal and were not required to compensate the broadcaster for the value of its signal. Indeed, in the early days of the cable industry, at a time when cable systems had few channels, they were, by and large, performing a "master antenna" function by improving the reception of nearby broadcast station signals. However, the video marketplace changed dramatically in the 1970s and 1980s. Cable systems began to include not only local station signals, but also distant broadcast signals and ultimately the programming of vertically integrated cable networks and premium services. Cable operators started to compete directly with broadcasters for viewers and for national and local advertising revenues. It then became apparent that allowing cable systems to retransmit popular local broadcast signals -- without permission or compensation -- to attract subscribers to cable's own, but less popular, competitive program services was manifestly unfair.

By the early 1990s, Congress concluded that this failure in the law to recognize broadcasters' rights in their signals had "created a distortion in the video marketplace." S. Rep. No. 92, 102d Cong., 1st Sess. at 35 (1991) ("*Senate Report*"). Using the revenues obtained from carrying broadcast signals, cable systems were able to finance and develop vertically integrated cable program network services and to sell advertising in their own vertically integrated program services in head-to-head competition with broadcasters. Given this dramatic change in the nature of cable systems, program services and advertising practices, Congress determined that the then-existing law was not only unfair to local broadcast stations, it was anticompetitive.

Congress expressly concluded that public policy should not allow "a system under which broadcasters in effect subsidize the establishment of their chief competitors." *Id*. 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 from watching broadcast signals. *Id*. 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. *See* 47 U.S.C. § 325.

In establishing retransmission consent, Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals." *Senate Report* at 36. Congress stressed that it did not intend "to dictate the outcome of the ensuing marketplace negotiations" between broadcasters and MVPDs. *Id*. Congress correctly foresaw that some broadcasters might determine that the benefits of carriage were sufficient compensation for the use of their signals by cable systems. *Id*. at 35. Some broadcasters would likely seek monetary compensation, while others, Congress explained, would "negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system." *Id*. at 36.

Thus, even at the outset, Congress correctly recognized that, in marketplace negotiations between MVPDs and broadcasters, stations could appropriately negotiate various forms of consideration for the carriage of their signals, including cash and/or carriage of other programming. Clearly, if Congress had intended to limit or prohibit outright the use of retransmission consent to negotiate for the carriage of additional programming it would have done so expressly. As the Supreme Court has made clear, Congress "does not . . . hide elephants in mouseholes."[9] Congress' decision not to statutorily prohibit broadcasters from negotiating for carriage of additional programming, coupled with its explicit endorsement of such negotiations, confirms that the Commission lacks authority to prohibit such practice in the absence of further action from Congress amending Section 325. *See Notice* at ¶ 126 (inquiring about FCC's "jurisdiction to preclude tying arrangement by broadcasters, without modification of the retransmission consent regime by Congress").

It is axiomatic that, when Congress has "spoken to the precise question at issue," then "the agency," as well as a reviewing court, "must give effect to the unambiguously expressed intent of Congress."[10] It is clear that "employing traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 fn. 9, including "examination of the statute's text, *legislative history*, and structure," Congress has "spoken to the precise question" of broadcasters negotiating for the carriage of an additional programming channel, as well

[9] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). *See also First Report and Order* in CS Docket No. 99-363, 15 FCC Rcd 5445, 5454 (2000) ("when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity").

[10] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

as various other types of compensation, in retransmission consent.[11] The Commission must accordingly "give effect" to this congressional intent by continuing to permit broadcasters to negotiate for a variety of types of compensation in retransmission consent, including the right to program an additional channel. *Chevron*, 467 U.S. at 842.[12]

In sum, broadcasters do not expect retransmission consent rules to guarantee that they will receive compensation of any kind from MVPDs for retransmission of their signals. However, consistent with congressional intent, broadcasters do expect the opportunity to negotiate for compensation without the government "dictat[ing]" the terms of the "marketplace negotiations" between broadcasters and MVPDs. *Senate Report* at 36 (Congress intended to establish a "marketplace for the disposition of the rights to retransmit broadcast signals"). Given this clear expression of congressional intent, the Commission has since 1993 consistently concluded that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent."[13] Forbidding

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[11] *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (emphasis added).

[12] The Commission, moreover, does not have authority "to preclude tying arrangements by broadcasters," *Notice* at ¶ 126, simply because the statute fails to "expressly foreclose" the agency from taking that course of action. *Aid Association for Lutherans v. U.S. Postal Service*, 321 F.3d 1166, 1174 (D.C. Cir. 2003). As the D.C. Circuit has made clear, statutes are "not written in 'thou shalt not' terms." *Railway Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. 1994) (en banc) (if courts were "to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well") (emphasis in original).

[13] *First Report and Order* in CS Docket No. 99-363, 15 FCC Rcd 5445, 5450 (2000) ("*Retransmission Consent Negotiation Order*"). *See also Report and Order* in MM Docket Nos. 92-259, 90-4, and 92-295, 8 FCC Rcd 2965, 3006 (1993) (finding that Congress did not intend Commission to be involved in direct regulation of retransmission consent negotiations).

broadcasters from even negotiating for particular compensation, such as the carriage of additional programming, would constitute an unwarranted "intru[sion] in the negotiation of retransmission consent." *Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5450.

### III. The FCC Examined Retransmission Consent Policies In 2005, Including Broadcasters' Practice Of Negotiating For Carriage Of Additional Programming, And Recommended No Revisions Be Made.

After some years of experience with retransmission consent, Congress in late 2004 asked the Commission to evaluate the relative success or failure of the marketplace created in 1992 for the rights to retransmit broadcast signals. In its September 2005 report to Congress about the impact of retransmission consent on competition in the video marketplace, the Commission concluded that the retransmission consent rules did not disadvantage MVPDs and have, in fact, fulfilled Congress' purposes for enacting them. The Commission, accordingly, recommended no revisions to either statutory or regulatory provisions relating to retransmission consent. *See FCC Retransmission Report* at ¶ 34.

In the report, the Commission concluded that local television broadcasters and MVPDs conduct retransmission consent negotiations on a "level playing field." *Id*. at ¶ 44. The Commission observed that the retransmission consent process provides incentives for both broadcasters and MVPDs to reach mutually beneficial arrangements and that both parties in fact benefit when carriage is arranged. *Id*. Most importantly, according to the Commission, consumers benefit by having access to the broadcasters' programming carried via MVPDs. *Id.* Overall, the retransmission consent rules have, as

Congress intended, resulted in broadcasters being compensated for the retransmission of their stations by MVPDs and MVPDs obtaining the right to carry broadcast signals. *Id*.

Given these conclusions, the Commission recommended no changes to current law providing for retransmission consent rights. Moreover, the Commission explained that the retransmission consent rules are part of a "carefully balanced combination of laws and regulations governing carriage of television broadcast signals." *Id*. at ¶ 45. Thus, if Congress were to consider proposals to restrict broadcasters' retransmission consent compensation, the Commission cautioned Congress that review of other rules, including must carry and copyright compulsory licensing, would be necessary as well "to maintain a proper balance." *Id*. at ¶¶ 33, 45. In particular, the Commission specifically stated in 2005 that, "[i]f broadcasters are limited in their ability to accept in-kind compensation, they should be granted full carriage rights for their digital broadcast signals, including all free over-the-air digital multicast streams." *Id*. at ¶ 45.

Beyond recommending in 2005 that no changes should be made to the retransmission consent regime, the Commission has on multiple occasions specifically determined that broadcasters should be permitted to negotiate for the carriage of affiliated channels as part of retransmission consent negotiations. For example, in implementing the "good faith" negotiation provision of the Satellite Home Viewer Improvement Act of 1999, the Commission in 2000 identified several "examples of bargaining proposals presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement." *Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5469. One of these examples included "[p]roposals for carriage conditioned on carriage of any other programming." *Id*. Indeed, the Commission stressed that it did "not find anything to suggest that . . . requesting an MVPD to carry an affiliated channel, another broadcast signal in the same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace consideration." *Id*. Thus, despite earlier requests by some MVPDs to prohibit these arrangements in retransmission consent, the Commission has declined to adopt rules prohibiting such arrangements. *See id*. at 5462. Similarly, in 2001, the Commission specifically found that a proposal for carriage of a broadcaster's signal "conditioned on carriage of any other broadcaster-owned programming stream" was "presumptively consistent with the good faith negotiation requirement," and declined requests from the cable industry to prohibit alternative program carriage arrangements.[14]

Given the Commission's prior decisions expressly approving broadcasters' use of retransmission consent to negotiate for carriage of affiliated programming, the Commission would have a particularly heavy burden to decide now that such well-established practices should be flatly prohibited. As the Supreme Court has determined, "an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[15] It would be particularly challenging for the Commission to show that a decision to "intrude in the negotiation of retransmission consent," contrary to clear

[14] *First Report and Order and Further Notice of Proposed Rule Making* in CS Docket Nos. 98-120, 00-96 and 00-2, 16 FCC Rcd 2598, 2613 (2001) ("*First R&O*").

[15] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983). *See also ACT v. FCC,* 821 F.2d 741, 746 (D.C. Cir. 1987) (court found that FCC had failed to establish "the requisite 'reasoned basis' for altering its long-established policy" on certain television commercial limits).

congressional intent,[16] and to prohibit a particular type of retransmission compensation was based on such requisite "reasoned analysis."

A departure from Commission rulings on this issue in the context of broadcast retransmission consent negotiations would also be inconsistent with the Commission's long-standing rulings in the context of MVPD retransmission of non-affiliated cable program services. To make a *prima facie* case against a MVPD under Section 616, a non-affiliated cable program complainant must show more than the mere fact that the MVPD asked for, negotiated for, and obtained alternative forms of consideration. The Commission must find evidence of "ultimatums, intimidation, conduct that amounts to the exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal."[17]

Certainly, market circumstances have not changed in terms of the competitive balance between local broadcast stations and MVPDs since the Commission's broadcast retransmission consent decisions of 2000, 2001 and 2005 such that a reversal of policy could now be justified. The burden of justifying a change should be placed on those advocating a departure from the Commission's recent decisions. Indeed, as shown below, the most significant changes in the video marketplace in the past several years have been the continuing consolidation in ownership of the cable industry, the proliferation of cable program services, and the expansion of cable operators' bandwidth and channel capacity. For example, Adelphia, one of the largest cable MSOs in 2005, no

[16] *Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5450 (citing *Senate Report* language that Congress intended to "establish a marketplace" but not to "dictate the outcome" of private retransmission negotiations).

[17] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 at ¶ 17 (1993).

longer exists today. Its systems have been largely divided up between Comcast and Time Warner -- the nation's largest and second largest cable operators. The allocation of Adelphia's systems to these two large operators has been primarily in areas where each of them already operated systems, thus increasing the "clustering" and local concentration of ownership of Comcast and Time Warner in local markets and giving each company enhanced economic leverage against local broadcast stations in retransmission negotiations. The increased concentration of ownership, both within local markets and nationally among cable MSOs, obviously cannot justify taking regulatory action that would adversely affect the bargaining position and reduce the negotiating flexibility of local broadcast stations vis-à-vis cable operators.

## IV. MVPDs' Complaints About Retransmission Consent Are Groundless.

Especially in light of the Commission's 2005 report to Congress, the various predictable and repetitive complaints of some MVPDs about the alleged unfairness of retransmission consent ring hollow. *See Notice* at ¶¶ 119, 124.[18] Beyond complaints about broadcasters requesting carriage of affiliated programming, some MVPDs also complain about broadcasters' requests for cash and other forms of compensation. It is hard to escape the conclusion that these MVPDs would prefer -- as was the case before 1992 -- to use broadcasters' signals without any form of compensation.

[18] *See also* American Cable Association ("ACA"), Petition for Inquiry into Retransmission Consent Practices (filed Oct. 1, 2002); ACA Petition for Rulemaking, RM No.11203 (filed March 2, 2005) ("ACA 2005 Petition"). NAB hereby incorporates by reference in this proceeding all submissions made in response to ACA's 2005 Petition. *See, e.g.*, Opposition to American Cable Association Petition for Rulemaking, RM No. 11203 (filed April 18, 2005) and Reply to American Cable Association Petition for Rulemaking, RM No. 11203 (filed May 3, 2005) by NAB, CBS Television, The Walt Disney Company, NBC Telemundo License Co., CBS Television Network Affiliates Association, NBC Television Affiliates Association, ABC Television Affiliates Association, and FBC Television Affiliates Association.

For instance, some cable operators, including the small operators referred to in the *Notice*, have complained about the retransmission consent fees purportedly extracted from them by broadcasters. *See* ACA 2005 Petition at 24. These complaints are puzzling because, as the Commission found in its 2005 report to Congress, cable operators have in the past consistently refused to pay cash for retransmission consent, but have instead provided "in-kind consideration" to broadcasters, including the carriage of affiliated nonbroadcast channels or other consideration, such as the purchase of advertising time and cross-promotions. *FCC Retransmission Report* at ¶¶ 10, 35.

Given that cable companies have in the past rarely paid cash for retransmission consent of local broadcast signals, the Commission should reject any MVPD claims that broadcasters' retransmission consent fee requests are unreasonable or are somehow the cause of continually increasing cable rates. First, as a matter of logic, it is self-evident that the mere *request* for cash compensation in retransmission negotiations -- which cable operators routinely refused for years – cannot have caused increases in cable rates (and certainly not consistent increases above the rate of inflation).[19]

In fact, only a relatively small number of broadcast stations have succeeded in obtaining any cash compensation for retransmission consent. Even in those few cases where cash has been paid to local stations, the amount paid has been but a fraction of the cash consideration routinely paid by cable companies for other significantly less popular cable network program services. There is no evidence of any cable company having paid

[19] *See, e.g.*, Testimony of Gene Kimmelman, Vice President, Federal and International Affairs, Consumers Union, U.S. Senate Committee on Commerce, Science and Transportation, Hearing regarding Video Franchising (Jan. 31, 2006) (cable rates have increased 64%, or two and a half times the rate of inflation, since 1996).

more in retransmission consent fees for broadcast stations whose ratings were less than those of cable program services paid for by cable companies. And as the Commission has acknowledged:

> It seems reasonable that the fair market value of any source of programming would be based in large part on the measured popularity of such programming. Therefore, seeking compensation commensurate with that paid to other programmers of equal, or lower, ratings is not *per se* inconsistent with competitive marketplace considerations.[20]

Moreover, in late 2003, a Government Accountability Office ("GAO") study did not find that retransmission consent had led to higher cable rates.[21] Other GAO studies have clearly linked higher cable rates to a lack of competition in the MVPD marketplace, not the retransmission consent regime.[22] A July 2007 study estimated that retransmission consent fees represented only 1.5 percent of a cable operator's average total programming-related revenue (on a per-subscriber basis).[23] Thus, broadcasters' requests for cash compensation during retransmission negotiations cannot be viewed as

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[20] *Mediacom Communications Corp. v. Sinclair Broadcasting Group, Inc.*, DA 07-3 at ¶ 18 (Media Bur. rel. Jan. 4, 2007).

[21] *See* GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 28-29; 43-44 (Oct. 2003).

[22] *See* GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 9-11 (Oct. 2003) (competition to an incumbent cable operator from a wireline provider resulted in cable rates that were 15 percent lower than in markets without this competition); GAO, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004) (communities with overbuild competition experienced an average of 23 percent lower rates for basic cable and higher quality service).

[23] *See* David C. Leach, *The Effect of Retransmission Consent Negotiations on the Price and Quality of Cable Television Service* (July 10, 2007) at Attachment, submitted as *Ex Parte* in MB Docket No. 06-189 by CBS Corporation, News Corporation, NBC Universal and The Walt Disney Company (July 17, 2007).

contributing to rapidly increasing cable rates or as harmful to cable operators or to consumers in this regard.

Certainly, any claims that cable operators somehow have been forced to carry unwanted programming as the result of retransmission consent are without support. *See Notice* at ¶ 120 (citing complaints of ACA). There is no evidence that any cable operator has been compelled to carry *any* channel, whether a local broadcast channel or an allegedly "bundled" affiliated programming channel, in exchange for retransmission consent. And if a cable operator prefers not to carry any program channel beyond a broadcaster's local signal, other various options, including cash alternatives, are routinely offered in retransmission consent negotiations, as noted earlier. *See supra* Section I. As the Commission has specifically stated, "Congress left the negotiation of retransmission consent to the give and take of the competitive marketplace." *Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5469-70. A broadcaster's retransmission offer involving the carriage of additional programming, in the Commission's words, is merely a "bargaining proposal[] which an MVPD is free to accept, reject or counter with a proposal of its own." *Id*. at 5470.[24]

Clearly, MVPDs want to have their retransmission cake and eat it too. In one breath, MVPDs complain that broadcasters are unreasonable in requesting cash payment for carriage of their local signals; in the next, they assert that negotiating for carriage of additional programming is also unfair. In essence, MVPDs argue that retransmission

[24] NAB accordingly disagrees with the characterization of the retransmission negotiation process set forth in paragraph 120 of the *Notice*, which implies that MVPDs essentially have no choice but to agree to the carriage of additional programming that they do not wish to carry. The Commission's previous characterization of the "give and take" of the free market retransmission process is much more reflective of reality.

consent is somehow inherently invalid because broadcasters should give their consent to MVPDs without compensation of any form. But there is no legal, factual or policy reason that broadcasters -- unique among programming suppliers -- should be singled out not to receive compensation for the programming provided to MVPDs or to be uniquely limited in the forms of compensation they may even request. This is especially true when one considers that broadcast programming remains the most popular programming on MVPD systems. Moreover, today, given MVPDs' increasing competition with broadcasters for viewers and national and local advertising revenue,[25] it would be manifestly unfair to deny broadcasters the ability to negotiate freely for compensation. Indeed, when enacting retransmission consent, Congress observed 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. *Senate Report* at 35.

Some cable operators have also presented an inaccurate picture of the video marketplace by contending that, especially in rural areas and smaller markets, powerful broadcast companies have undue leverage in retransmission consent negotiations with local cable operators. *See, e.g.*, ACA 2005 Petition at 21-23; *Notice* at ¶ 120. This is not the case. The cable industry as a whole is concentrated nationally and clustered regionally and is dominated by a smaller and smaller number of larger and larger entities, even in smaller markets. *See, e.g.*, *Twelfth Annual Competition Report*, 21 FCC Rcd at 2507. In contrast, a strict duopoly rule continues to prohibit any broadcast television

[25] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2521, 2550-51 (2006) ("*Twelfth Annual Competition Report*").

station combinations in medium and small markets and to limit such combinations even in the largest markets.[26]

In fact, nearly two-thirds of cable subscribers in Designated Market Areas 101+ are served by one of the five largest cable MSOs, while only 2.8 percent of the television stations in these markets are owned by one of the top ten (by revenue) television station groups.[27] Thus, in many instances in these 101+ markets, small broadcasters must deal with large nationally and regionally consolidated MVPDs in retransmission consent negotiations.[28] Moreover, smaller market broadcast television stations, especially ones that are not the highest-performing in their markets, are suffering financially and

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[26] The FCC determined just last month to maintain this duopoly rule. News Release, *FCC Adopts Revision to Newspaper/Broadcast Cross-Ownership Rule* at 3 (Dec. 18, 2007). Although a local television broadcaster cannot acquire a second television channel in most DMAs, a cable MSO that controls hundreds of video programming channels is no longer prohibited from owning a broadcast television station in any local market where the MSO operates a cable system.

[27] *See* Attachment A, *Cable Subscriber Data/Top 5 Cable Systems in Markets 101+* and BIAfn Media Access Pro.

[28] For instance, Time Warner is the dominant cable operator in DMAs such as Beaumont, TX (#141), Bangor, ME (#152), Corpus Christi, TX (#129), Laredo, TX (#188), Lima, OH (#185), Lincoln, NE (#104), Utica, NY (#169), Youngstown, OH (#106) and Yuma, AZ (#165). Comcast is the leading cable operator in a number of small markets, including Augusta, GA (#115), Ft. Wayne, IN (#107), Hattiesburg, MS (#168), Meridian, MS (#186), Tallahassee, FL (#108) and Zanesville, OH (#202). Charter Communications is the dominant cable provider in Alpena, MI (#208), Bluefield, WV (#155), Marquette, MI (#179), Medford, OR (#140), North Platte, NE (#209), Parkersburg, WV (#190), Reno, NV (#110), Traverse City, MI (#116), Wausau, WI (#134), Yakima, WA (#126) and other small markets. Cox Communications is the leading cable operator in small markets such as Abilene, TX (#164), Alexandria, LA (#180), Amarillo, TX (#131), Eureka, CA (#195), Gainesville, FL (#162), Lafayette, LA (#123), Lake Charles, LA (#176), Lubbock, TX (#148), San Angelo, TX (#197), Topeka, KS (#139) and Victoria, TX (#204).

experiencing declining profits and, in many cases, outright losses.[29] In sum, local broadcasters in medium and small markets are no match, in terms of negotiating leverage, with these highly clustered and consolidated cable companies.[30]

Despite complaints of the cable industry, nationally and regionally consolidated MVPDs have been able to exert considerable market power in retransmission consent negotiations, at the expense of local broadcasters, in small and large markets alike. In actual retransmission consent agreements, broadcasters have frequently had to accept a number of egregious terms and conditions, especially terms related to digital carriage.

For example, it is not uncommon for MVPDs in retransmission agreements to refuse to carry a station's digital multicast channel that contains certain programming,

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[29] The lower 25 percentile of stations in medium and small markets (DMAs 51+) have suffered declining profitability for all years 1996-2005, as well as actual losses in most of these years. *See* NAB *Ex Parte* in MB Docket 06-121 at 30-31 and Attachment A (filed Nov. 1, 2007). These findings are consistent with other NAB submissions of television financial data and earlier studies comparing the differing financial condition of high-rated and low-rated network affiliates in medium and small markets. *See The Declining Financial Position of Television Stations in Medium and Small Markets* (Sept. 2007), Attachment B to NAB *Ex Parte* in MB Docket No. 06-121 (filed Sept. 25, 2007) (showing that low-rated network affiliates in markets 50+ are generally declining financially, especially in comparison to high-rated stations); Attachments E & F to NAB Sept. 25 *Ex Parte* (showing that the lower 25 percentile of stations in markets 50+ overall experienced declining profitability from 1997-2005 and actual losses in most of the years examined).

[30] Obviously, in some markets, stations that are owned by a large broadcast group may negotiate for retransmission consent with cable operators that are not among the largest in the country. However, that does not mean that the retransmission consent process is somehow automatically unfair to the cable operator in such situations. As the Commission has noted, "the dynamics of specific retransmission consent negotiations will span a considerable spectrum" because the "size and relative bargaining power of broadcasters and MVPDs range from satellite master antenna television ('SMATV') operators and low power television broadcast stations to national cable entities and major-market, network affiliate broadcast television stations." *Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5470. The Commission did not in the past and should not now see this marketplace fact as a basis for "intrud[ing] in the negotiation of retransmission consent," contrary to the intention of Congress. *Id*. at 5450.

including any religious programming, any programming that solicits contributions (such as telethons or other charitable fundraising programming), or other types of programming or services (including datacasting, ancillary or supplementary services). MVPDs will also strictly limit the number of digital multicast channels they will carry. MVPDs further often refuse to carry any digital multicast channel that is broadcasting less than 24 hours a day, seven days a week. These requirements are very difficult for most digital stations (including big four network affiliated stations in large and small markets) to meet and therefore make it virtually impossible for many stations to obtain carriage of their digital multicast channels. The economics of digital multicast broadcasting are marginal at best. Requiring these multicast channels to broadcast 24/7 and/or prohibiting certain types of content on them is tantamount to foreclosure of carriage -- and without carriage, new digital multicast program services cannot be launched. Of course, that is precisely the point. These artificial barriers to entry constructed by MVPDs in retransmission negotiations are designed to favor MVPD program services and to protect MVPDs and their owned content from competition by broadcast stations, especially their over-the-air digital services. The ultimate effect is to keep free digital broadcast services from being developed as competition to subscription based MVPD program services, thus pushing consumers to more and more paid MVPD services.

In other retransmission negotiations, MVPDs have agreed to carry only the high definition ("HD") portion of a broadcast station's digital signal, and the carriage of any portion of the broadcaster's non-HD digital signal (including even the primary non-HD digital signal) remains entirely at the discretion of the MVPD. Other MVPDs have declined to carry the primary digital signals of non-big four network affiliated stations, unless these stations achieved certain viewer rankings in their local markets. Thus, the digital signals of many stations, including CW and MNT affiliates, Hispanic-oriented stations, religious stations, and other independent stations, would not be carried by these MVPDs.

It seems highly unlikely that broadcasters would accept such disadvantageous provisions in retransmission agreements unless MVPDs possessed sufficient market power to enable them to insist on these provisions. MVPDs possess that marketplace power because they are the nation's video gatekeepers. In light of these real-world examples, the Commission should reject requests from MVPDs for regulatory assistance in retransmission negotiations.

NAB observes that the current retransmission consent rules already protect all MVPDs by (1) expressly prohibiting television broadcasters from granting retransmission consent on an exclusive basis,[31] and (2) imposing an affirmative obligation on broadcasters to negotiate in good faith. *See* 47 C.F.R. § 76.65. The history of complaints at the Commission alleging violations of the good faith negotiating requirement reveals no evidence of abuse by broadcast stations or failure by any broadcast station to negotiate in good faith. During the past 15 years, thousands of individual retransmission consent negotiations have occurred, with only about a dozen or so complaints arising from this process having been filed with the Commission. NAB is aware of only three of these "good faith" retransmission complaints being decided on the merits by the agency. In the first case, the broadcaster was exonerated and the complaint denied, while the MVPD

[31] *See* 47 C.F.R. § 76.64(l) (stating that "[n]o television broadcast station shall make or negotiate any agreement with one multichannel video programming distributor for carriage to the exclusion of other multichannel video programming distributors").

complainant (EchoStar) itself was found to have abused the Commission's processes.[32] In the second case, the broadcaster was found not to have breached its obligation to negotiate in good faith, and the MVPD's complaint was again denied, with the decision recognizing that "disagreement over the rates, terms and conditions of retransmission consent – even fundamental disagreement – is not indicative of a lack of good faith."[33] In the third case, the broadcast complainant prevailed, with the Media Bureau finding that the cable operator had "breached its duty to negotiate in good faith" with the television licensee.[34]

Furthermore, the Commission has made abundantly clear that "any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement." *Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5470. The Commission has identified several examples of bargaining proposals presumptively not consistent with the good faith negotiation requirement. These include "proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station . . . the effect of which is to hinder significantly or foreclose MVPD competition." *Id*.[35] Because any broadcast retransmission practices that would "frustrate

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[32] *EchoStar Satellite Corp. v. Young Broadcasting, Inc*., 16 FCC Rcd 15070 (Cable Bur. 2001).

[33] *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc*., DA 07-3 at ¶¶ 6, 24 (Media Bur. rel. Jan. 4, 2007) ("*Mediacom Retrans Order*") (also noting that "[e]ven with good faith, impasse is possible" in marketplace retransmission negotiations).

[34] *See* Letter from Steven Broeckaert, Deputy Chief, Policy Division, Media Bureau to Jorge L. Bauermeister, DA 07-1264 (rel. March 13, 2007).

[35] *See also* 47 C.F.R. § 76.65(b)(1) (identifying a number of specific practices that would violate a broadcast television station's or MVPD's duty to negotiate retransmission agreements in good faith).

the functioning of a competitive market" are clearly prohibited by the Commission, *id*., MVPDs are already well protected by existing rules from possible competitively abusive conduct by local stations in retransmission consent negotiations.[36]

Certain parties have previously suggested that various kinds of mandatory, government-imposed arbitration (such as "baseball style" arbitration) should be instituted for retransmission consent negotiations between broadcasters and MVPDs. The Commission should reject these suggestions.

As an initial matter, the Commission lacks the authority to mandate involuntary arbitration in broadcast retransmission consent disputes. The *Mediacom Retrans Order* (at ¶ 25) expressly stated that the "Commission does not have the authority to require the parties to submit to binding arbitration." This ruling in *Mediacom* is consistent with agency policy in non-broadcast carriage disputes and with federal law generally.[37]

Moreover, given the complexity of retransmission consent negotiations, mandatory arbitration is not a viable or practical option. An arbitration suggestion implicitly assumes that retransmission consent negotiations are only about money, and that one should be able to choose the offer of one side or the other. That is hardly the case. In fact, these negotiations may involve such issues as video on demand, the

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[36] NAB notes that the antitrust laws also apply to the retransmission consent marketplace and provide further protection to MVPDs. *See also Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5470 (explaining that conduct "violative of national policies favoring competition" is not within the good faith negotiation requirement).

[37] *See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, 6 FCC Rcd 5669 (1991). *See also* S. Rept. No. 543, 101st Cong., 2d Sess. at 13 (1990) (Section 585 of the Administrative Dispute Resolution Act "prohibits a federal agency from requiring any person to consent to arbitration as a condition of receiving a contract or benefit," and this "prohibition is intended to help ensure that the use of arbitration is truly voluntary on all sides").

purchase of broadcast advertising by the MVPD, the purchase of MVPD advertising by the broadcast station, broadcast station promotion by the MVPD, MVPD promotion by the broadcast station, fiber connections between the station's transmitter and MVPD headend, channel position and tier placement, digital and multicast channel carriage, system expansion options, studio/personnel/equipment sharing, electronic program guide placement, news insertion options, after acquired clauses, carriage of non-broadcast programming, duration of the term of the agreement, and technical standards, to list but a few. Given this complexity, Congress was wise to establish a retransmission regime that did not attempt to choose winners or losers among broadcast stations and cable operators, but one that maintained a fair and open process so that the marketplace could freely work. Intervening in these complex marketplace negotiations by imposing government-enforced arbitration would not only exceed the Commission's authority, but would also disrupt Congress' "carefully balanced combination of laws and regulations governing carriage of television broadcast signals." *FCC Retransmission Report* at ¶ 45.

Indeed, NAB notes that cable operators have, in the context of carriage for non-broadcast programming, expressly opposed government-imposed arbitration. For instance, the NFL has favored using binding arbitration to settle the dispute with major cable MSOs over carriage of the NFL Network. Cable companies, however, have resisted calls for arbitration and reaffirmed their preference for private negotiations. Glenn Britt, the CEO of Time Warner Cable, stated in a letter to NFL Commissioner Roger Goodell that "over the years we've been able to successfully reach agreements with hundreds of programming networks without the use of arbitration," and that "[w]e continue to believe that the best way to achieve results is to privately seek a resolution and not attempt to negotiate through the press or elected officials."[38] NAB similarly believes that imposition of mandatory arbitration is inappropriate and unnecessary to resolve private program carriage disputes arising out of the broadcast retransmission consent process.

For all the reasons described above, unwarranted MVPD complaints about retransmission consent cannot undermine the Commission's recent conclusions that MVPDs are not disadvantaged by the existing retransmission consent process, *see FCC Retransmission Report* at ¶ 44, and that broadcaster proposals for carriage of additional affiliated programming are presumptively consistent with the good faith negotiation requirement. *See Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5469; *First R&O*, 16 FCC Rcd at 2613.

## V. Consumers Benefit From The Retransmission Consent Process.

Finally, NAB reemphasizes the Commission's conclusion in its 2005 report that retransmission consent has benefited the viewing public, as well as broadcasters and MVPDs. As the Commission specifically noted, broadcasters' ability to negotiate carriage of additional programming through retransmission consent benefits viewers by increasing consumers' access to programming, including local news channels. *See FCC Retransmission Report* at ¶¶ 35, 44. One excellent example is Allbritton Communications Company's NewsChannel 8 here in the Washington metropolitan area. NewsChannel 8 is a local cable news network that has expanded as a result of retransmission consent negotiations over the carriage of Allbritton's television station

[38] USA Today, *NFL Offers Arbitration to Cable for NFL Network* (Dec. 20, 2007). *Accord* Mike Reynolds, *NFL Network Play Call: Time Warner Cable Arbitration*, Multichannel News (Dec. 20, 2007).

WJLA-TV. It provides local news, weather and public affairs programming, along with coverage of local public events. Further, this local programming is zoned separately to better serve viewers in Washington, D.C., the Maryland suburbs and Northern Virginia.

Similarly, Belo used retransmission consent to obtain carriage of its regional cable news channel NorthWest Cable News (NWCN) on cable systems serving over two million households in Washington, Oregon, Idaho, Montana, Alaska and California. NWCN provides regional up-to-the minute news, weather, sports, entertainment and public affairs programming to viewers across the Northwest. These efforts are coordinated with Belo's television stations in Seattle, Portland, Spokane and Boise.

In addition to local news channels, broadcasters have used retransmission consent to provide local weather information on separate channels carried by cable systems. For example, LIN Television provides these local weather channels in several markets, including ones with a history of frequent weather emergencies such as Indianapolis. Local NBC affiliates have used retransmission consent to launch cable carriage of their digital multicast channel for "Weather Plus," a national/local weather channel now available in dozens of local markets across the country.

Further, when some MVPDs have declined to carry them on a stand-alone basis, a number of broadcasters have used retransmission consent to secure MVPD carriage of co-owned stations whose programs are directed to Hispanic viewers such as the Univision, Telemundo, and Azteca Networks. And beyond this use of retransmission consent to gain carriage for local news/weather and minority-oriented programming, broadcasters have used retransmission consent negotiations to obtain carriage of their digital signals, thereby both benefiting viewers and, according to the Commission, furthering the digital transition. *See FCC Retransmission Report* at ¶ 45.[39]

Broadcasters now also use retransmission consent to negotiate for carriage of their digital multicast programming streams. As NAB has previously described, this multicast programming includes news, weather, sports, religious and ethnic-oriented programming.[40] Especially in the absence of full carriage rights for local stations' free, over-the-air digital multicast streams, the Commission should not, as Commissioner Copps stated in this proceeding, "inhibit broadcast stations from negotiating for carriage of their multicast signals in exchange for carriage of their main digital signal." *Notice*, Statement of Commissioner Michael J. Copps ("precluding negotiations about multicast programming that could ultimately serve the public interest may foreclose options that we may not really want to foreclose"). To rule otherwise would impair the fullest development and use of the valuable digital spectrum that Congress set aside for free over-the-air broadcasting and would deny viewers the additional program choices and diversity the transition to digital now offers.

[39] Thus, NAB disputes the assumption in the *Notice* (at ¶ 120) that broadcasters attempt to use retransmission consent to obtain the carriage of "undesired" programming. The above examples show that retransmission consent has been utilized to obtain the carriage of programming that clearly serves the public interest. Perhaps whether programming is "undesired" is in the eye of the beholder (*i.e.*, the cable operator), which would likely prefer not to carry broadcasters' programming that competes for viewers and advertising revenues with cable programming. *See* 1992 Cable Act at §§ 2(a)(14) & (15) (noting that cable systems and broadcast television stations "increasingly compete for television advertising revenues" and that a cable system "which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator"). Programming that cable operators may not desire to carry could well be desired by viewers.

[40] *See* Comments of NAB in MB Docket No. 06-189 at 7 (filed Nov. 29, 2006).

Moreover, as described earlier, broadcasters do not offer these valuable alternative program services on a “take it or leave it” basis in retransmission negotiations. Typically, MVPDs are provided various alternatives and a menu of carriage options from which to negotiate and elect. As emphasized above, these alternative program options are *not* offered in a conventional “tying” arrangement. Meaningful choices are available to MVPDs. In fact, in several cases, some of which have been reported by the national trade press, MVPDs have rejected the “bundled” program services options and have instead elected to negotiate on an “unbundled” program service basis.

**Conclusion**

For all the reasons set forth in detail above, the Commission has no basis to depart from its prior decisions that correctly permitted broadcasters to negotiate for various types of compensation, including the carriage of additional programming channels, as part of free market retransmission consent negotiations. As Congress recognized in 1992 and the Commission has reaffirmed on several occasions, the government should refrain from taking actions that unduly impact the outcome of these private marketplace negotiations. Especially in light of the Commission’s recent conclusion that retransmission consent negotiations are conducted on a “level playing field,” there are no grounds for governmental intrusion into private negotiations by preventing local stations from even making an offer of carriage involving an additional programming stream as part of retransmission consent. Such intrusions would be clearly contrary to congressional intent and would not serve the interests of consumers.

Respectfully submitted,

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# ATTACHMENT A

## Cable Subscriber Data*

## Top 5 Cable Systems in Markets 101+

**Number of Cable Subscribers in Markets 101+**
**Based on Top 5 Cable Systems** in Each Market**

**Total Subscribers, All Owners in Markets 101+***: 7,575,006**
**Total Subscribers, Top 5 U.S. Cable Systems in Markets 101+: 4,925,354**

| Cable System Rank | Owner Name | Total Subscribers | % of All Owners in Markets 101+ |
|---|---|---|---|
| 1 | Time Warner Cable | 1,474,079 | 19.5% |
| 2 | Charter Communications | 1,139,755 | 15.0% |
| 3 | Comcast Cable | 1,025,644 | 13.5% |
| 4 | Cox Communications | 860,050 | 11.4% |
| 5 | Cable One | 425,826 | 5.6% |
| | | | |
| **Total** | | | **65.0%** |

*Source: Cable Data Corporation, June 2007.
**System as defined by the Copyright Office.
***Based on top 5 cable systems in each of those markets.