Before the
Federal Communications Commission
Washington, DC 20554

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

SUPPLEMENTAL COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

Cable television interests continue to reiterate inaccurate claims about retransmission consent, including erroneous contentions that a broadcaster negotiating a retransmission consent agreement on behalf of more than one local television station harms the public. Although NAB already has shown that these claims are unmeritorious and misleading, cable operators and a cable trade association have persisted in repeating them in recent submissions to the Federal Communications Commission.

Due to their lack of empirical evidence and theoretical rigor, the cable interests' *own* analyses do not support their claim that the joint negotiation of retransmission consent results in dramatically higher retransmission fees. Cable's further assertion that joint negotiation harms consumers is patently misleading. As NAB has demonstrated in multiple economic studies, retransmission consent payments are not responsible for the high and rising consumer prices charged by cable operators. An independent analysis from *Multichannel News* has estimated that only *two cents* of every dollar of cable revenues go to broadcast retransmission consent fees, while *20 cents* of every dollar go to cable programming fees (even though broadcast programs remain the most popular with viewers). The most recent SNL Kagan data show that retransmission consent fees are equivalent to only 2.7 percent of the cable industry's *video-only* revenues (and would be a considerably smaller percentage of total revenues). Clearly, broadcast programming costs do not cause multichannel video programming distributors' ("MVPDs") continually increasing subscriber rates.

Government intervention to reduce the fees that MVPDs pay for local stations' signals would only inflate MVPD profit margins. Without binding requirements, such as regulation of the rates that MVPDs charge subscribers, there is no assurance that any savings would be passed on to consumers. Thus, the claimed public interest justification for regulating retransmission consent payments simply does not exist. In any event, it is absurd and cynical for cable providers to pose as protectors of consumer welfare in the retransmission consent debate. In light of cable's long record of increasing subscriber fees well beyond the rate of inflation – which pre-dates by many years the emergence of cash compensation for operators' retransmission of broadcast signals – operators are more accurately characterized as pocketbook protectors, not consumer protectors.

Cable's complaints about alleged abuses of market power by local broadcasters are simply false. MVPDs today are much more concentrated than broadcasters, with the top ten providers controlling 91.5 percent of the MVPD market nationally (measured in terms of subscribers), up from 67.4 percent in 2002. Local clustering also adds to cable operators' market power by reducing the number of individual cable systems in each local market, thereby increasing operators' relative power against local television stations because they are the access point for a very large portion of stations' audiences. In a number of the Designated Market Areas in which the American Cable Association ("ACA") claims that two separately owned broadcasters jointly negotiate retransmission consent, a single cable operator enjoys a dominant position, controlling as much as *two-thirds* of the households served by MVPDs of all types.

Not only is it ludicrous for cable operators to tell the FCC that they are disadvantaged by having to jointly negotiate retransmission consent for two local stations' signals, it is also hypocritical. NAB members report having cable operators *request* that retransmission consent for multiple stations be negotiated together. Moreover, Time Warner Cable, the nation's second largest operator, routinely negotiates retransmission rights jointly on behalf of itself and Bright House Networks, another sizable cable operator. ACA engages in actions that facilitate cable operators' agreement on common terms in retransmission negotiations with broadcasters.

Undermining broadcasters' statutory retransmission consent negotiation rights ultimately would reduce the quality and diversity of broadcast programing (including local news, sports, weather and emergency information) available both via MVPDs and free over-the-air to all Americans, and move more quality programming solely to increasingly expensive pay services. Such a result would be contrary to viewer interests at a time when "cord cutting" is a growing phenomenon and lower-income Americans and minority groups increasingly rely solely on free, over-the-air television services.

As cable operators and the ACA persist in misinforming the Commission, NAB submits these supplemental comments to once again set the record straight. We call upon cable interests to stop misleading the Commission and cease using the regulatory process to attempt to tilt retransmission consent negotiations in their favor.

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SUPPLEMENTAL COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these Supplemental Comments in response to a series of recent *ex parte* communications by cable television operators and a cable trade association erroneously claiming, *inter alia*, that a broadcaster negotiating a retransmission consent agreement on behalf of more than one television station harms the public.[2] NAB already has shown that this and other retransmission consent-related claims are incorrect, but cable interests repeat them continuously despite their lack of accuracy or merit. It is time for cable to stop misleading the Commission.

[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *See, e.g.*, Letter from Matthew A. Brill to Marlene Dortch, MB Docket Nos. 09-182, 10-71 (Apr. 4, 2013)(hereafter the "*TWC Ex Parte*"); Letter from Ross J. Lieberman, American Cable Association, to Marlene Dortch, MB Docket Nos. 09-182, 10-71 (Mar. 18, 2013); Letter from 25 Members of the American Cable Association to FCC Chairman Julius Genachowski, MB Docket Nos. 09-182, 10-71 (Feb. 4, 2013)(hereafter the "*ACA Ex Parte*"). *See also* Letter from Rocco B. Commisso, Mediacom, to Chairman Jay Rockefeller and Ranking Member John Thune, Senate Commerce Committee, MB Docket Nos. 09-182, 10-71 (Apr. 18, 2013); Letter from Rocco B. Commisso, Mediacom, to Senator John McCain, MB Docket No. 10-71 (May 13, 2013).

I. CABLE IS MISLEADING THE COMMISSION ABOUT THE IMPACT OF RETRANSMISSION CONSENT

Cable comments and *ex parte* notices frequently reiterate the claims that (1) negotiations by broadcasters for more than one television station result in dramatically higher retransmission consent payments, and (2) the public will benefit by the limitation or elimination of broadcasters' statutory right to seek compensation for the value their signals bring to cable operators. Neither is true.

Cable interests repeatedly assert that joint negotiation of retransmission consent "leads to price increases of at least 22%."[3] As NAB has previously shown, however, ACA's own economist admits that he is aware of "only one data point" supporting this conclusion, an *ex parte* filing by one cable system.[4] This single report is a woefully insufficient basis on which to reach any conclusions about the effects of shared station negotiations generally; and, even it may be explained by other factors, such as the relative attractiveness of the stations involved in that one negotiation, rather than the effects of the stations' supposedly increased market power.[5] It is also revealing that the *ACA Ex Parte* states the purported retransmission price increase allegedly stemming

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[3] *ACA Ex Parte* at 2. TWC goes further and claims rate differentials of up to 161%. *TWC Ex Parte* at 2. Its claims are based on the same "studies" as ACA's and are equally invalid.

[4] Reply Comments of the Broadcaster Associations, MB Docket No. 10-71 (June 3, 2010) at 23 (hereafter "Broadcasters June 2010 Reply"), *citing* Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees* (May 18, 2010), Appendix B to the Comments of ACA, MB Docket No. 10-71 (May 18, 2010) ("Rogerson 2010 Report").

[5] *See* Broadcasters June 2010 Reply at 23-24.

from joint negotiations in percentage terms, rather than actual dollar amounts – most likely due to the fact that the claimed price increase would be quite small.[6]

ACA's economist also belies its further argument that, even in the absence of empirical evidence, economic theory supports an assumption that joint negotiations lead to higher prices. In his report, Professor William Rogerson admits that his theoretical construct "does not prove that we would necessarily expect to find such a result."[7]

In a subsequent report, Professor Rogerson attempted to make up for the shortcomings in his initial report by pointing to what he said were additional data showing that stations negotiating jointly obtain higher retransmission fees than stations negotiating individually.[8] The MVPD *ex parte* letters he cites, however, explicitly state that the group of stations that the three cable systems compared to the jointly negotiated rates *included stations carried pursuant to must carry*.[9] Must carry stations, of course, are carried *without any compensation at all*, and inclusion of those stations

[6] As NAB previously pointed out, multichannel video programming distributors' ("MVPDs") practice of expressing retransmission rate increases in percentage figures can be highly misleading. *See, e.g.*, Comments of NAB, MB Docket No. 10-71 (June 27, 2011) at 15-17 (observing, for example, that one MVPD claimed a 229% increase in its retransmission fees between 2008 and 2011, but did not provide actual dollar amounts or any information about the base upon which that percentage increase was figured).

[7] Rogerson 2010 Report at 11. *See also* Reply Declaration of J.A. Eisenach and K. W. Caves, attached to Reply Comments of NAB, MB Docket No. 10-71 (June 27, 2011) at 11-15 (explaining that neither economic theory nor evidence supports claims that joint arrangements between two broadcast stations in the same market are anticompetitive or result in higher retransmission fees).

[8] Rogerson, *Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market* (May 27, 2011), Appendix A to Comments of ACA, MB Docket No. 10-71 (May 27, 2011) at 21 & n.13.

[9] *See Ex Parte* Communications in MB Docket No. 10-71 of Cable America (May 28, 2010); USA Companies (May 28, 2010); and Pioneer Telephone Cooperative (June 4, 2010).

would fatally distort any comparison. Another station negotiating individually with those cable systems could have been paid a *higher* rate than the stations negotiating together, and the cable systems could still have reported that the stations jointly negotiating were paid more than other stations in the market. Thus, the record in this proceeding does not show that joint negotiation of retransmission consent agreements by broadcasters increases the rates that MVPDs pay for retransmission. ACA should stop distorting the record.

Even if the Commission were to assume without factual or theoretical support that negotiation of retransmission consent agreements for more than one station could result in increased rates, any claim that those increases harm consumers is still patently misleading. As NAB has demonstrated in multiple economic studies, retransmission consent payments "are not responsible for rising" consumer prices charged by cable operators.[10] In an independent analysis, Multichannel News estimated that only *two cents* of every dollar of cable revenue go to broadcast retransmission consent fees, while *20 cents* of every dollar go to cable programming fees.[11] The most recent SNL Kagan data show that retransmission consent fees are equivalent to only 2.7 percent of the cable industry's *video–only* revenues (and would be a considerably smaller

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[10] Declaration of J.A. Eisenach and K.W. Caves, Attachment A to Comments of NAB, MB Docket No. 10-71 (May 27, 2011) at 11-24 ("data simply do not support the claim that increases in MVPD prices are caused" by retransmission consent fees, as these fees represent a tiny fraction of MVPD costs); Eisenach & Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010), Appendix A to the Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) at 13-17, 21-22 (demonstrating that even a "flawed analysis" conducted for MVPD interests "shows little effect of retransmission consent fees on consumers," and that retransmission fees make up a small fraction of MVPD programming costs and an even smaller percentage of MVPD revenues).

[11] *Where Your Cable Dollar Goes*, Multichannel News (Mar. 28, 2011) at 10-11.

percentage of total revenues).[12] Clearly, broadcast programming costs do not cause MVPDs continually increasing subscriber rates.

In actuality, cable interests are seeking government intervention to reduce the wholesale rates they pay for local stations' signals, which contain the most popular programming on MVPD systems, so that they can glean more profit from the retail rates they charge consumers. But with increasingly rare exceptions, retail cable rates are not regulated by the Commission or by local authorities.[13] Thus, there is no basis for the Commission to conclude that restraining rates for retransmission consent would reduce consumer bills. In the absence of some binding requirements, there is no assurance that any savings would be passed on to consumers. The claimed public interest justification for examining retransmission consent payments simply does not exist.[14]

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[12] © 2013 SNL Kagan, a division of SNL Financial LC, estimates.

[13] The number of cable operators relieved from rate regulation and tier buy-through requirements through findings of effective competition is growing quickly. The FCC's 2008 cable price survey reported that only 18.1 percent of all cable subscribers were in the 3,205 cable communities where the agency had made findings of effective competition. *See* Report on Cable Industry Prices, 24 FCC Rcd 259 (2009) at Attachment 1-b. As of January 1, 2011, the FCC had made findings of effective competition in 8,508 communities, representing 38.5 percent of all cable subscribers, and this number is certainly much larger now. *See* Report on Cable Industry Prices, 27 FCC Rcd 9326 (2012) at Attachment 1. Many MVPD subscribers, moreover, are served by MVPDs that have never been subject to any rate regulation/tier buy-through requirements (e.g., DBS).

[14] Because a much larger portion of MVPD programming costs are the payments they make to cable networks, those payments potentially have much greater impact on consumer rates than the proportionally much smaller retransmission consent payments to local broadcasters. The Commission could not and should not contemplate regulation of retransmission payments to local broadcasters in the name of consumer welfare without addressing even greater payments to non-broadcast programmers. Doing so would not only be unfair, but would harm the public interest by encouraging the movement of high-value programming away from universally-available over-the-air services, exactly the result Congress sought to avoid when it enacted retransmission consent.

Cable interests are also wrong when they claim that changes in the marketplace – primarily, the emergence of competition within the MVPD market that Congress and the FCC long sought to create – undermine the justification for retransmission consent.[15] As cogently explained in the Senate Report, Congress included retransmission consent provisions in the Cable Television Consumer Protection and Competition Act of 1992 for the following reasons:

> Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems. . . . It follows logically, therefore, that a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. . . . [H]owever, cable systems use these signals without having to seek the permission of the originating broadcaster or having to compensate the broadcaster for the value its product creates for the cable operator. . . . [This] has created a distortion in the video marketplace . . . . [The Committee] does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors. . . . Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services on a broadcast channel should not be treated differently.[16]

These reasons are as valid and important today as they were in 1992. Local broadcast signals remain the most watched signals on cable systems.[17] Cable operators continue to charge their subscribers to receive these signals, profiting handsomely from the value broadcasters create. It would still be unfair and anticompetitive to allow cable operators to do this without the permission of local

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[15] *See, e.g.*, Mediacom April 18 letter at 1-2.

[16] S. REP. NO. 92, 102d Cong., 1st Sess. 35 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 ("Senate Report").

[17] During the 2011-2012 television season, 96 of the top 100 prime time programs were aired by broadcast stations. Television Bureau of Advertising, *TV Basics Report* (June 2012) at 11.

stations. Cable systems pay for the other, non-broadcast programming they offer to attract subscribers (and in fact pay more for that programming on a per viewer basis).[18] As Congress recognized, there is no reason that broadcasters should be uniquely disfavored and not be allowed to negotiate for others' use of their signals. The fact that additional types of MVPDs have emerged since 1992 does not weaken the justification for retransmission consent; rather, it facilitates precisely the negotiation over value that Congress envisioned. In short, the marketplace development that cable interests point to – the change in their position as complete monopolists – does not justify changes to the retransmission consent regime, especially since the relative market power of cable operators vis-à-vis broadcasters has not significantly diminished. *See infra* Section II.

Although MVPD interests always strongly oppose any regulation of their rates charged to subscribers, they nonetheless continue to argue that Congress intended the Commission to regulate retransmission consent rates, citing language in the Senate Report that "the Committee intends for the FCC to ensure that these [retransmission consent] costs do not result in excessive basic cable rates."[19] What these arguments ignore is that the Committee made this comment in discussing *rate regulation* and was suggesting that, as cable rates already included the value of local broadcast signals, cable operators should not be allowed to increase those rates if broadcasters reclaimed the value they had been forced to provide without compensation. Importantly, not one

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[18] *See, e.g.,* Reply Comments of NAB, MB Docket No. 10-71 (June 27, 2011) at 17-18; Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) at 33-39 (demonstrating that broadcast retransmission fees are modest in comparison to fees MVPDs pay for less popular programming); *see also Where Your Cable Dollar Goes*, Multichannel News (Mar. 28, 2011) at 10-11 (estimating that *20 cents* of every dollar of cable revenues go to cable programming fees, while only *two cents* of every dollar go to broadcast retransmission consent fees).

[19] Senate Report at 74, *reprinted in* 1992 U.S.C.C.A.N. at 1207.

MVPD urging regulation of broadcast retransmission consent rates has indicated that retail rate regulation should be reinstituted; thus, there is no justification for suppressing the wholesale rates MVPDs pay without at the same time ensuring that the retail rates consumers pay reflect those reductions. There is no possible public benefit to Commission action that would only inflate cable companies' profit margins.

II. CABLE OPERATORS, NOT BROADCASTERS, ARE MISUSING MARKET POWER

Cable interests repeatedly tell the Commission and other government officials that they are faced with abuses of market power by local broadcasters. Given the enormous size advantage that leading cable companies have over even large broadcast groups, this claim is absurd. MVPDs are far more concentrated than broadcasters, and cable clustering has resulted in the same level of dominance in many local markets that Congress attempted to remedy in the 1992 Cable Act.

The top ten MVPDs today control 91.5 percent of the MVPD market nationally (measured in terms of subscribers), up from only 67.4 percent in 2002.[20] Just the top four MVPDs serve 68.3 percent of all MVPD subscribers nationally, a significant increase from 51.5 percent in 2002.[21] Television broadcast groups are not nearly so concentrated, as NAB has previously demonstrated.[22]

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[20] *See 2013 SNL Kagan Media Census Estimates,* Fourth Quarter 2012; Declaration of J.A. Eisenach and K.W. Caves, Attachment A to Comments of NAB, MB Docket No. 10-71 (May 27, 2011) at 6.

[21] *Id.*

[22] *See* Comments of NAB, MB Docket No. 12-203 (Sept. 10, 2012), at 17-18 (showing that, as of year-end 2011, the top four television station groups collectively earned only 16.6 percent of advertising revenues in the 25 largest markets, and the top ten station owners earned only 25.9 percent of ad revenues in those markets); Declaration of J.A. Eisenach and K.W. Caves, Attachment A to Comments of NAB, MB Docket No. 10-71

Local clustering also adds to cable operators' market power by reducing the number of individual cable systems in each local market. This reduction increases both: (1) the clustered operators' ability to compete with local television stations for local advertising revenues,[23] and (2) cable operators' relative power against local television stations in retransmission consent negotiations because they are the access point for a very large portion of stations' audiences. For example, in Dayton, Ohio (one of the "joint negotiation" markets identified in the appendix to the *ACA Ex Parte*), a single cable operator controls 66 percent of all households served by MVPDs.[24] In other Designated Market Areas ("DMAs") in which ACA claims that separately owned broadcasters jointly negotiate retransmission consent, cable operators enjoy a similarly dominant position.[25]

Time Warner Cable alone has a 66 percent or greater share of the entire MVPD market in eight DMAs and a 50 percent or greater share in 27 DMAs – and a whopping 90.9 percent of the video market in one DMA (Honolulu).[26] More modestly-sized cable

(May 27, 2011) at 8 (similarly showing lack of concentration in television broadcast industry, and explaining that, because a broadcaster's advertising revenues are a function of audience size, ad revenues are an appropriate measure of size for purposes of gauging concentration).

[23] *See, e.g.*, Attachment C to Comments of NAB, MB Docket Nos. 09-182, 07-294 (Mar. 5, 2012).

[24] 2012 SNL Kagan Media Census.

[25] In Gainesville, FL, one operator controls 61.6 percent of all MVPD households. In a number of other markets identified by ACA, including Baton Rouge, LA, Columbus, OH, Wilmington, NC, Peoria-Bloomington, IL, Casper-Riverton, WY and San Angelo, TX, a single cable operator serves over 50 percent of all MVPD subscribers. *Id.*

[26] Comments of NAB, MB Docket No. 12-203 (Sept. 10, 2012) at 15-16 (identifying dominant positions of various MVPDs in markets across the country).

operators similarly enjoy dominant positions in the MVPD market in a number of DMAs.[27]

Moreover, even when more than one cable operator serves a DMA, they commonly reach agreements to sell advertising across multiple video distributors in the market.[28] This adds to cable's market power because, even if there are separate cable systems in a DMA, they generally operate as one in the advertising marketplace, and, in some cases, in conjunction with their other MVPD "competitors."

Unlike broadcasters, concentrated cable operators face no restrictions on their ownership of cable systems, nationally, regionally or locally. These operators negotiate

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[27] For example, Suddenlink controls 62.7 percent of the MVPD market in the Victoria, TX DMA, 56.8 percent in the Parkersburg, WV DMA and between 50-51 percent in four other DMAs. CableOne, Inc. controls 66 percent of the video market in the Biloxi, MS DMA. *Id*.; 2012 SNL Kagan Media Census. NAB has previously documented in this proceeding the powerful position that a single cable operator occupies in many local markets vis-à-vis local broadcast stations. *See, e.g*., Comments of NAB, MB Docket No. 10-71 (May 27, 2011) at 28-32.

[28] *See, e.g.,* Letter from John K. Hane to Marlene H. Dortch, MB Docket No. 09-182 (Jan. 16, 2013) at 1 ("In most television markets, many or most of the largest MVPDs cooperate to sell advertising jointly via these 'interconnects,'" which "allow one MVPD to sell adverting across entire DMAs on behalf of multiple MVPDs, including not just cable operators, but also in some cases satellite television and 'telco' video providers"); Letter from Jack N. Goodman to Marlene H. Dortch, MB Docket No. 09-182 (Dec. 19, 2012) at 3 (observing that cable and satellite systems are free to sell advertising together and reporting that "in most markets, advertising on all multi-channel video programming distribution systems is sold together"); Cable Advertising Bureau, *Local Cable, Major Market Interconnects* page, available at: http://www.thecab.tv/main/cablenetworks/index.shtml (visited May 29, 2012)("Interconnects, which combine two or more local cable systems and distribute a program or commercial signal simultaneously, allow the advertiser to reach their target with only one buy, one commercial tap and one invoice"); NAB Comments, MB Docket Nos. 09-182, 07-294 at 14 (filed Mar. 5, 2012) (citing Wayne Friedman, NCC's "I+" Extends Cable Ad Reach, Media Daily News, Mar. 7, 2011) (discussing how NCC Media, which is owned by cable operators, partners with its head to-head competitors in local markets, such as Verizon FiOS, AT&T U-Verse, and DIRECTV, to sell local ad spots). Cable operators' claims made in meetings with the Commission that such market-wide joint sales arrangements do not exist are yet another example of efforts to deceive.

for multiple broadcast signals in a local market, and the notion that they would be disadvantaged by having to negotiate with one station for two of those signals is ludicrous.[29]

As cable constantly reiterates,[30] the *variety* of MVPDs operating in local markets (e.g., satellite, telco) has risen since 1992. But for the reasons described above, this does not imply that the relative market power of cable operators vis-à-vis broadcasters has diminished. On the contrary, the *number* of entities negotiating for the right to retransmit broadcast signals has likely decreased in most DMAs, since the advent of retransmission consent in 1992. At that time, multiple cable systems typically operated in local markets, each serving some fraction of the market. Now, as a result of local, regional and national concentration, there are often only one or two dominant cable systems, each serving a high proportion of the relevant market and viewers and each thus having a strong position when negotiating retransmission consent agreements. The real concern in retransmission consent negotiations is not alleged broadcaster market power, but the fact that MVPDs that are rapidly concentrating and gaining market power.[31]

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[29] NAB has shown that the downstream market for retransmission of broadcast signals – the market occupied by cable systems and other MVPDS – is far more concentrated than the upstream market for programming occupied by television stations. *See* Declaration of J.A. Eisenach and K.W. Caves, Attachment A to Comments of NAB, MB Docket No. 10-71 (May 27, 2011) at 5-10.

[30] *See, e.g.*, Mediacom April 18 Letter at 1.

[31] The Commission itself previously observed that, between 1992 and 2007, the “competitive balance” between cable operators and broadcasters shifted in cable’s favor. Third Report and Order, CS Docket No. 98-120, 22 FCC Rcd 21064 (2007) at ¶ 49. *See also id*. at ¶¶ 50-52 & note 192.

III. CABLE'S CLAIMS OF IMPROPER BROADCASTER BARGAINING ARE MISLEADING

The cable *ex parte* notices continue to claim that broadcasters abuse the retransmission consent bargaining process. Cable interests repeatedly contend that the Commission should prevent broadcasters from negotiating for more than one station in a market, even though cable cannot explain how joint broadcaster negotiations harm the public interest. But while complaining about joint broadcast relationships to the FCC, many of these same cable operators have asked broadcasters to negotiate retransmission jointly and some cable operators themselves negotiate retransmission agreements on behalf of other operators. The Commission cannot accept comments of parties who say one thing in Washington, D.C., and another in actual negotiations; it must disregard these complaints and instead investigate MVPD abuses in retransmission consent negotiations.

The *ACA Ex Parte* lists 48 instances of alleged joint negotiation of retransmission consent.[32] This chart is a red herring. It is true that some stations on ACA's list are participants in joint arrangements, such as local marketing agreements or joint sales and shared services agreements ("JSA/SSAs"). And, as NAB has documented, such sharing arrangements, especially in small and medium television markets, have benefitted the public through enhanced transmission facilities, increased local news, sports and other programming and improved news-gathering capabilities.[33] As part of

[32] The *TWC Ex Parte* (at 2) cites to a different ACA list which alleged a different number of stations involved in sharing agreements. That list suffers from the same defects as that in the *ACA Ex Parte.*

[33] *See*, *e.g.*, NAB *Ex Parte*, MB Docket No. 09-182 (Dec. 3, 2012) at 4-6; Comments of NAB, MB Docket No. 12-203 (Sept. 10, 2012) at 20-23; Reply Comments of Coalition to Preserve Local TV Broadcasting, MB Docket No. 09-182 (July 26, 2010). *See also*

its approval of station assignments and transfers, the FCC has reviewed a number of these sharing agreements in which joint negotiation of retransmission consent was a material term;[34] for those agreements that were not submitted to the FCC, there is no reason to believe that the joint negotiation provisions would raise any questions if they were reviewed. Simply put, there is nothing in the fact of sharing arrangements or joint negotiation that shows a *per se* problem.

While the *ACA Ex Parte* complains of joint negotiations by broadcasters, cable operators – including signatories to the *ACA Ex Parte* – often do not object to joint negotiations and even request that negotiations for multiple stations be conducted together. In a 2009 incident involving a cable operator that signed the *ACA Ex Parte*, the operator asked that retransmission consent negotiations for two stations participating in a JSA/SSA relationship be handled separately, a request that was granted. Three years later, the same offer was extended, but the cable operator asked that one station handle the negotiations for both.[35] Other NAB members also have had cable operators request common negotiations for stations involved in local marketing agreements or JSA/SSAs. The Commission should give little weight to complaints of cable operators about negotiations on terms that they in fact request.

Reply Declaration of J.A. Eisenach and K.W. Caves, attached to Comments of NAB, MB Docket No. 10-71 (June 27, 2011) at 16 (joint arrangements between stations allow broadcasters "to realize economies of scale and scope" and "thus continue to operate where it would otherwise be uneconomic to do so.")

[34] *See, e.g., Piedmont Television of Springfield License LLC*, 22 FCC Rcd 13910 (MB 2007); WBMM, Tuskegee, AL, Application for Transfer of Control, FCC File No. BALCDT-20110714ACW (granted Sept. 6, 2011).

[35] *See Ex Parte* Letter from Jack N. Goodman to Marlene H. Dortch, MB Docket No. 09-182 (Dec. 19, 2012) at 3-4.

Indeed, cable's objections to broadcasters' joint negotiation of retransmission agreements are hypocritical on their face. As the record in this proceeding shows, Time Warner Cable, the nation's second largest cable operator, "routinely negotiates retransmission rights jointly on behalf of itself and Bright House Networks," another sizable cable multiple system operator.[36] ACA, moreover, engages in actions that facilitate the cable industry's agreement on common terms in retransmission negotiations with broadcasters.[37]

In any event, although they complain bitterly about these arrangements, MVPDs cannot explain how they harm competition or the public interest. The only harm alleged is the claim that joint negotiations result in higher retransmission consent fees, a claim that, as we demonstrated above, is unsupported by facts or theory. Even assuming that could be viewed as harmful to MVPDs, it is not a threat to competition or the public interest.

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[36] Comments of LIN Television Corporation, MB Docket No. 10-71 (May 27, 2011) at 19, *citing* NCTA, Top 25 Multichannel Video Programming Distributors as of Dec. 2010. *See also* Mike Reynolds, *Media General, TWC Reach Retrans Agreement in Principle*, Multichannel News (Jan. 1, 2013) (reporting on new retransmission consent deal between Media General and Time Warner Cable and stating that "Time Warner Cable negotiates programming deals for Bright House").

[37] For example, ACA provides its members with boilerplate retransmission consent agreements to use in negotiations with local stations. *See* http://www.americancable.org/files/images/ACA-RTC_Sample_Agreement_111005.doc (last visited May 22, 2013). In addition, an NAB member station reported to us that after making an offer to one of the companies signing the *ACA Ex Parte*, it received the following response: "I am a member of the legal team at ACA and these requests are troubling to my team." It therefore appears that ACA and its members share information about the actual terms of retransmission negotiations and that there is a cable "team" evaluating retransmission agreement terms for ACA members.

The fact that some television stations may negotiate together and others do not raises no competitive issues because stations do not compete against each other for retransmission consent fees. Unless one assumes that the total amount to be paid by a cable system for retransmission consent fees is fixed, so that greater amounts paid to one station necessarily reduces the amount that can be paid to other stations, the allegedly higher fees obtained by stations negotiating together would not directly affect the amounts another station could obtain in its retransmission consent negotiations. There is no evidence or other basis to believe that retransmission negotiations are such a "zero-sum" game.[38]

Nor can cable interests manufacture any valid argument – let alone any cognizable legal claim – that joint negotiation of retransmission consent is somehow contrary to antitrust law.[39] The Commission itself expressly concluded in 2000 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."[40]

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[38] As explained in the record, economic analyses also 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. Reply Declaration of J.A. Eisenach and K.W. Caves, attached to NAB Comments, MB Docket No. 10-71 (June 27, 2011) at 14, *citing* Christopher S. Reed, "Regulating Relationships Between Competing Broadcasters," *Hastings Communications and Entertainment Law Journal* 33 (Fall 2010) 1, 35.

[39] *See, e.g.*, Comments of Time Warner Cable, Inc., MB Docket No. 10-71 (May 27, 2011) at 35-36.

[40] First Report and Order, CS Docket No. 99-363, 15 FCC Rcd 5445, 5469 (2000).

In a 2012 case dealing with arrangements between cable programming channels, the Ninth Circuit exhaustively considered whether those arrangements violated antitrust law and concluded that they did not. In *Brantley v. NBC Universal, Inc., et al.*, 675 F.3d 1192 (9th Cir.), *cert. denied,* 133 S.Ct. 573 (Nov. 5, 2012), the court, *inter alia*, rejected a claim that requiring a cable/satellite distributor to purchase a low-rated cable network along with a higher-rated network was an illegal tying arrangement. The court made two key points: (1) where the seller is the sole authorized provider of the less-desired product, there cannot be an injury to competition for that product since no one else could sell it;[41] and (2) if the purchase of the less-desired product does not prevent the purchaser from also buying an alternative product, competition is not harmed.[42] The Ninth Circuit expressly pointed out that "allegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition. *Both effects are fully consistent with a free, competitive market.*"[43]

Applying the *Brantley* standard, there can be no argument that joint negotiation of retransmission consent agreements by two television stations in a market raises any antitrust issue. Under long-established agreements approved by both Congress and the Commission, local network affiliates have exclusive rights to distribute network programming in their markets and, of course, they have the exclusive rights to their own news and other programming. This meets the first part of the *Brantley* test. Second, an agreement by a cable operator to carry two broadcast signals does not preclude that

[41] 675 F.3d at 1199.

[42] *Id.* at 1201, *citing United States v. Loew's*, 371 U.S. 38, 45 (1962).

[43] *Id*. at 1202 (emphasis added).

operator from carrying any other signal (whether another local television station's signal or a cable programming network) and therefore does not have an adverse impact on competition. Cable should stop saying that joint negotiations violate the antitrust laws when controlling case law says exactly the opposite.[44]

While cable interests additionally have argued that the Commission should bar broadcast network/affiliate contractual provisions providing for exclusivity,[45] these private agreements are in fact no different than any other agreement granting exclusive rights in programming. For example, if a production company grants the Food Network or another cable programming network the exclusive right to carry its program, no one would argue that a cable system that did not want to pay the Food Network should be able to import the program from another cable system. But that is exactly how cable operators want to treat broadcast programs. Such treatment would be unfair, anticompetitive and contrary to congressional intent.[46]

Finally, while MVPDs also point the finger at broadcasters for allegedly depriving consumers of broadcast signals during retransmission disputes,[47] broadcasters' signals are always accessible to local viewers for free, over-the-air via en antenna. In fact, it is often MVPDs, not local stations, which effectively shut down retransmission consent negotiations. For example, during a 2011 negotiation between LIN Television and DISH

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[44] As discussed above, moreover, broadcasters do not require cable operators to negotiate retransmission consent jointly. If requested, broadcasters in joint arrangements will negotiate retransmission consent for the two stations separately.

[45] *See, e.g*., Comments of Time Warner Cable, Inc., MB Docket No. 10-71 (May 27, 2011), at 22-24.

[46] *See* Senate Report at 35.

[47] *See, e.g*., Mediacom April 18 Letter at 2.

Network, DISH refused LIN's offer to extend their retransmission consent agreement on its existing terms for an additional month. Instead, DISH offered only a day-to-day extension, provided that LIN did not give any notice to viewers that carriage might be disrupted, a blatantly anti-consumer condition that LIN was unwilling to accept.[48] If the Commission were to take action in this proceeding to protect consumers, then it should consider such anti-consumer behavior of MVPDs in the course of retransmission negotiations.

IV. MVPD EFFORTS TO UNDERMINE RETRANSMISSION CONSENT WILL HARM THE PUBLIC INTEREST

The stream of erroneous claims and distortions repeatedly submitted by MVPDs is intended to convince the Commission to pressure broadcasters directly or indirectly to allow retransmission of their signals with little or no compensation. Doing so would not benefit the public because, as we have shown, there is no basis for the Commission to believe that MVPD retail rates would decrease. It is absurd and cynical for pay television providers to pose as protectors of consumer welfare.[49] In light of the discussion above, and their long record of increasing subscriber fees well beyond the

[48] *See* Letter from Rebecca Duke, LIN Media, to William Lake, Chief, Media Bureau, FCC (Feb. 28, 2011), Attachment B to Comments of NAB, MB Docket No. 10-71 (May 27, 2011).

[49] *See, e.g.*, Mediacom May 13 Letter at 2 (describing a series of Mediacom letters to FCC Chairman Genachowski and congressional leaders "calling upon them to protect American consumers" from "extortionate demands for retransmission consent payments").

rate of inflation,[50] MVPDs are more accurately characterized as pocketbook protectors, not consumer protectors.

Undermining broadcasters' retransmission consent negotiation rights would harm the public interest. It would upset the balance created when Congress established retransmission consent as a marketplace negotiation, with minimal government involvement. More importantly, it would reduce the quality and diversity of broadcast programming (including local news, sports, weather and emergency information) available both via MVPDs and free over-the-air to all Americans, and move more quality programming solely to increasingly expensive pay services.[51] Such a result would be contrary to consumer interests at a time when "cord cutting" is a growing phenomenon[52]

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[50] *See* Report on Cable Industry Prices, MM Docket No. 92-266, DA 12-1322 (MB 2012) at ¶ 25 (reporting that expanded basic cable prices increased by 5.4 percent for the 12 months ending January 1, 2011, and at a compound average annual rate of 6.1 percent over the 16-year period from 1995-2011, compared to a 1.6 percent increase in general inflation as measured by the Consumer Price Index for the same one-year period and a 2.4 percent compound average for the CPI over the 16-year period). These consistent increases in cable consumer prices began years before cable operators started providing cash compensation to broadcasters. As late as 2005, the FCC found that "cash still has not emerged as a principal form of consideration for retransmission consent" and that "virtually all retransmission consent agreements" involve "in-kind consideration." FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) at ¶ 10.

[51] Eisenach & Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* (June 2011), Appendix A to Comments of NAB, MB Docket No. 10-71 (June 27, 2011), at 2-4 (regulatory limits on retransmission consent compensation would damage broadcasters' ability to attract investment capital generally and would reduce local news programming specifically, given the strong relationship between station revenues and news output).

[52] *See, e.g.,* GfK-Knowledge Networks, Home Technology Monitor, *2012 Ownership Survey and Trend Report* (Spring 2012/Mar. 2012) ("*Home Technology Report*") (finding increase in the number of households relying solely on over-the-air broadcast television); Jeff Baumgartner, *U.S. Pay TV Thrown for Net Loss: Study*, Multichannel News (May 20, 2013) (study by Leichtman Research group found that MVPDs suffered

and lower-income Americans and minority groups increasingly rely solely on free, over-the-air television services.[53] While reducing the quality and variety of competing broadcast services would certainly benefit cable operators and other MVPDs, it would harm the viewing public.[54]

As cable interests persist in misinforming the Commission about retransmission consent, NAB submits these supplemental comments to once again set the record straight. For all the reasons set forth herein and in the record in this proceeding, the

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a "first-ever net subscriber loss . . . over a four-quarter period," in part because some consumers are opting for a "lower-cost mixture of over-the-air TV" and "over-the-top viewing options").

[53] *See* Comments of NAB, MB Docket No. 12-203 (Sept. 10, 2012) at 2-3, *citing Home Technology Report* (showing that households relying solely on over-the-air television are predominantly lower income and include relatively greater numbers of racial/ethnic minorities, such as Asian-Americans, Hispanics and African-Americans).

[54] NAB has submitted extensive comments and economic studies showing that "retransmission consent is achieving Congress' intended purpose of allowing broadcasters to receive an economically efficient level of compensation for the value of their signals, and that this compensation ultimately benefits consumers by enriching the quantity, diversity, and quality of available programming, including local broadcast programming." Eisenach & Caves, *Retransmission Consent and Economic Welfare*, at Executive Summary. *See also* Comments of NAB, MB Docket No. 10-71 (May 27, 2011) at 3-9; Comments of NAB, MB Docket No. 10-71 (June 27, 2011) at 7-10; Eisenach & Caves, *The Effects of Regulation on Economies of Scale and Scope* at 2-4; 45-47.

Commission must treat MVPD claims about retransmission consent as what they are – misleading, self-serving efforts to use the regulatory process to tilt retransmission consent negotiations in their favor.

Respectfully submitted,

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