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

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	MB Docket No. 07-29
Act of 1992	)	
	)	
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	)	MB Docket No. 07-198
Arrangements	)	

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF BROADCASTERS
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To: The Commission

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits this reply to certain comments on the Commission's *Notice of Proposed Rulemaking* in this proceeding.[2] In its *Notice*, the Commission sought comment on broadcast station negotiations for carriage of additional programming (*e.g.*, broadcaster-affiliated cable networks or other broadcast stations affiliated with or owned by

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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*").

the licensee) as part of the retransmission consent process. Some multichannel video programming distributors ("MVPDs") have inappropriately attempted to convert the Commission's narrow inquiry into a wide-ranging attack on the retransmission consent negotiation process established by Congress. The Commission should reject these MVPDs' complaints as beyond the scope of this limited proceeding and also as groundless, repetitive, and legally and factually insupportable.

INTRODUCTION AND SUMMARY

In response to the Commission's narrow inquiry into requests by broadcast stations for carriage of additional program services as one form of possible negotiated compensation for retransmission consent, some MVPDs responded with repetitive, factually inaccurate and legally insupportable attacks on the entire retransmission consent process. As an initial matter, the Commission should find these requests to fundamentally alter the market for retransmission consent established by Congress as inappropriate and beyond the scope of this limited proceeding.

Moreover, as NAB and other commenters have shown in this proceeding and in previous submissions to the Commission, MVPDs' complaints about retransmission consent are groundless. Contrary to the generic unattributed statements of certain MVPDs, broadcasters do not engage – as attested under penalty of perjury by certain broadcast entities – in unyielding "take it or leave it" bargaining tactics by insisting upon the carriage of affiliated stations or programming. Further, empirical evidence regarding MVPD carriage of various broadcast and cable program services shows that MVPDs, including smaller ones, typically do not carry all (or even a majority) of the multiple program services offered by broadcast and cable programmers. This extensive empirical evidence demonstrates that MVPDs are not compelled by "tying" or in any other way to carry particular program services and that individual MVPDs are free to negotiate for only those channels that they desire to purchase. NAB again stresses that no broadcaster has ever been found by the Commission to have breached its obligation to negotiate retransmission consent in good faith with MVPDs.

Also contrary to MVPD complaints, broadcasters do not have undue or unfair leverage in retransmission negotiations. It is counterintuitive to suggest that a local broadcast station has market power over any MVPD when a large portion of the broadcaster's audience uses the MVPD to receive broadcast programming, along with dozens or even hundreds of other video programming channels. And it is simply counterfactual to contend that marketplace developments since Congress enacted retransmission consent have tilted bargaining power toward broadcasters. As numerous commenters and the Commission itself has shown, in recent years MVPDs have increased in national and regional concentration and broadcasters have experienced greater competition from an ever-growing number of cable/satellite channels, increasingly fragmented audiences, and the loss of viewers and local and national advertising revenues to MVPDs. Other repetitive complaints about retransmission consent generally -- for example, that it taxes the capacity of cable systems or that it increases cable rates for consumers -- have been refuted by NAB and many broadcasters in previous submissions and in this proceeding. The Commission should accordingly reject these myriad repetitive and unsupportable complaints about the retransmission consent marketplace established by Congress.

Those MVPDs complaining about retransmission consent generally, and broadcasters' negotiation for the carriage of additional programming specifically, further fail to explain how the Commission could, consistent with its statutory authority, limit broadcasters' ability to negotiate freely private retransmission consent agreements. As shown by NAB and numerous other commenters, Congress clearly established retransmission consent to create a marketplace in which broadcasters could negotiate for various forms of compensation for MVPDs' use of valuable broadcast signals, including the carriage of additional programming services. It is particularly ironic that some MVPDs now complain so vociferously about this particular form of compensation, as broadcasters began negotiating for carriage of additional program services because cable operators steadfastly refused to pay cash for their retransmission and resale of local broadcast signals.

For all these reasons, the Commission should not depart from its consistent 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 process. As Congress recognized when enacting retransmission consent, 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. Certain MVPDs' suggestions for fundamentally altering the retransmission consent regime would create a government-enforced regulatory structure favoring MVPDs at the expense of local stations under all circumstances, rather than a marketplace in which broadcast stations and MVPDs freely negotiate carriage issues. This plea to tip the negotiating leverage permanently in favor of MVPDs must be rejected, especially given the Commission's previous conclusions that both MVPDs and broadcasters -- and, most importantly, consumers -- benefit from the current retransmission consent process.

I. Some Broadcasters Offer To Negotiate For Carriage Of Additional Programming As Part Of Retransmission Consent But They Do Not Engage In Unreasonable Or Illegal "Tying."

American Cable Association ("ACA") accuses a number of broadcasters of "tying" their broadcast stations with programmer-affiliated satellite-delivered cable networks in retransmission consent negotiations. *See* ACA Comments at 7-8 (filed Jan. 3, 2008). These accusations are wholly unsupported and, indeed, are expressly refuted by NAB and other commenters, as discussed in detail below.

Broadcasters with affiliated satellite-delivered cable networks will offer a package to MVPDs consisting of the cable networks together with one or more of the broadcast stations. But standard industry practice is for broadcasters to offer to negotiate retransmission consent for the broadcast stations separately. No evidence has ever been presented to the Commission, by ACA or other MVPDs, establishing the contrary. By definition, this is not "tying" or even "pure bundling."

Upon inquiry, NAB has learned that numerous MVPDs, small and large alike, have elected to negotiate retransmission consent for broadcast stations *without* the broadcaster's affiliated cable networks.

Furthermore, the evidence submitted by broadcasters shows that cable operators, including small ones, seldom carry all, or even most, of the programming services provided by broadcasters with affiliated cable networks. Thus, only 4% of *all* cable systems carry all 11 cable networks provided by Disney, only 1% carry all 6 cable networks provided by Scripps, 0% carry all 9 cable networks provided by Fox, 4% carry all 7 cable networks provided by NBC Universal, 0% carry the 3 cable networks provided by Trinity Broadcasting, and 0% carry the 4 cable networks provided by Univision. When only *small* cable operators are considered (*i.e.*, those with less than 400,000 subscribers), only 1% of cable systems carry all 11 cable networks provided by Disney and only 1% carry the 3 cable networks provided by Trinity; otherwise, 0% carry all of the cable networks offered by the other broadcaster-affiliated cable programming providers.[3] The data lead to the only obvious conclusion: broadcasters do not coerce MVPDs, including small cable operators, to take bundles of cable networks, together with broadcast stations, on a "take-it-or-leave-it" basis. In a 500+ channel programming universe, no programmer, broadcaster-affiliated or otherwise, possesses the market power necessary to force MVPDs to take

[3] *See* Bruce M. Owen, *Wholesale Packaging of Video Programming*, at 22-23, Figs. 11 & 12 (percentages are rounded), submitted in conjunction with the separate Comments of Viacom, Inc.; Fox Entertainment Group, Inc. and Fox Television Holdings, Inc.; and NBC Universal, Inc. and NBC Telemundo License Co. (filed Jan. 4, 2008) ("Owen Video Programming Study").

anything.[4] ACA and others have not—and cannot—prove the contrary.

ACA also asserts that certain broadcast station groups, especially those with duopolies, "tie" retransmission consent carriage for multiple television stations. *See* ACA Comments at 8-9. Again, ACA offers no proof of this claim.[5] In any event, the Commission has expressly approved the practice of a broadcast station negotiating for the carriage of an additional station as "consistent with competitive marketplace considerations and the good faith negotiation requirement."[6] Since television markets with duopolies must contain at least eight other independent television voices, it is also obvious that no duopoly owner can possess the requisite market power to engage in improper "tying" within any individual DMA. And if the charge is that a broadcast station in one market is being "tied" with another station in a separate market, any such hypothetical market power would be even less.

Neither ACA nor any other commenter in this proceeding has provided any credible evidence that any broadcaster engages in "tying" or any other practice warranting Commission attention, let alone Commission intervention in

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[4] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 17-18 (1984) (defining "market power" as such power as "enables him to force customers to purchase a second, unwanted product in order to obtain the tying product"); *Illinois Tool Works Inc. v. Independent Ink, Inc*., 547 U.S. 28, 46 (2006) (holding that "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product").

[5] NAB understands that several of these broadcast station groups will be filing reply comments specifically addressing ACA's allegations.

[6] *First Report and Order* in CS Docket No. 99-363, 15 FCC Rcd 5445, 5469 (2000) ("*Retransmission Consent Negotiation Order*") (approving "[p]roposals for carriage conditioned on carriage of any other programming, such as . . . another broadcast station either in the same or a different market").

the free marketplace. In fact, the extensive evidence submitted by Disney, Fox, NBC Universal, and NAB all points the other way. Moreover, broadcasters have submitted declarations, under penalty of perjury, that they do not engage in the practices that ACA accuses them of.[7]

In addition, the Commission is well aware that many tens of thousands of retransmission consent agreements have been negotiated since 1993, that only a dozen good faith negotiation complaints have ever been filed, and that no broadcaster has ever been found to have violated the Commission's good faith negotiation requirements or to otherwise have abused the retransmission consent process.[8] Nor has any MVPD ever successfully litigated an antitrust

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[7] *See, e.g.*, Comments of The Walt Disney Company (filed Jan. 4, 2008), at Ex. B, Declaration of Benjamin N. Pyne; Comments of NBC Universal, Inc. and NBC Telemundo License Co. (filed Jan. 4, 2008), at Ex. C, Declaration of Henry C. Ahn.

[8] In all but three instances, the parties either reached a private settlement or the Commission dismissed or found moot the retransmission consent issue. *See EchoStar Satellite Corp. v. Clear Channel Communications*, Public Notice, Report No. 3742 (July 24, 2000) (complaint dismissed upon request of parties); *EchoStar Satellite Corp. v. Chris-Craft Broadcasting*, Public Notice, Report No. 3743 (July 28, 2000) (complaint dismissed upon request of parties); *EchoStar Satellite Corp. v. Landmark Communications*, DA 00-2102 (Sept. 15, 2000) (complaint dismissed upon request of parties); *Paxson Communications Corp. v. DirecTV*, DA 02-102 (Jan. 14, 2002) (issue moot); *Monroe, Georgia, Water, Light, and Gas Comm'n v. Morris Network, Inc.*, DA 04-2297 (July 27, 2004) (issue dismissed by Media Bureau); *Horry Telephone Coop. v. GE Media, Inc.*, DA 05-136 (Jan. 26, 2005) (complaint dismissed upon request of parties); *CoxCom, Inc. v. Nexstar Broadcasting, Inc.*, DA 05-2996 (Nov. 21, 2005) (complaint dismissed upon request of parties); *Metrocast Cablevision of New Hampshire, LLC v. Viacom, Inc.*, DA 06-140 (Jan. 25, 2006) (complaint dismissed upon request of parties); *Cebridge Acquisition, LLC v. Sinclair Broadcast Group, Inc.,* DA 06-1624 (Aug. 14, 2006) (complaint dismissed upon request of parties).

In the three adjudicated cases, the Commission found that the broadcaster in each case had not violated the regulatory scheme or the good faith negotiation lawsuit alleging illegal tying by a broadcaster.

Evidently, even some of ACA's own members believe ACA has gone too far in this proceeding. According to press reports, Atlantic Broadband, Bresnan Communications, and Midcontinent Communications, three of the largest ACA members, have all left that organization due to objections to ACA's filing with the Commission on program bundling and retransmission consent.[9]

Because there is and can be no evidence of illegal or anticompetitive tying by broadcasters since they lack the requisite market power, the real dispute over retransmission consent policy comes down to one thing: *money*. ACA and certain other commenters make no bones that the real issue here is the amount of compensation that broadcasters seek for retransmission consent.[10] However,

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requirement. Instead, the Commission found that the complainant MVPD, in one case, had abused the FCC's processes. *See EchoStar Satellite Corp. v. Young Broadcasting, Inc*., 16 FCC Rcd 15070 (2001) (finding EchoStar had abused the Commission's processes). In another case, the Commission found that the MVPD had failed to negotiate in good faith. *See Jorge L. Bauermeister*, DA 07-1264 (Mar. 13, 2007) (finding Choice Cable T.V. had failed to negotiate in "good faith"). *See also Mediacom Communications Corp. v. Sinclair Broadcast Group*, DA 07-3 (Jan. 4, 2007) (finding that the broadcaster had negotiated in "good faith") ("*Mediacom Retransmission Order*").

[9] *See* Linda Moss, *Midcontinent Becomes Third Op to Ankle ACA; Joins Atlantic Broadband, Bresnan in Defecting Over Program Issue*, MULTICHANNEL NEWS (Jan. 18, 2008), available at <http://www.multichannel.com/article/CA6524043.html.>.

[10] *See, e.g.,* ACA Comments at 13 (stating that programmer offers of channels on a standalone basis are a "half-truth" and that what is missing are the "prices they demand for their standalone 'offers'" (emphasis in original); *id*. at 21 (stating that if broadcasters sell individual channels on a standalone basis "the rates are set unreasonably high so as to coerce the purchase of the bundle"); Cablevision Systems Corp. Comments at 19 (filed Jan. 4, 2008) (stating that "broadcasters have abused [their] leverage to demand compensation for carriage far in excess of what Congress contemplated"); DISH Network Comments at 20 (filed Jan. 4,

not only does the Commission lack statutory authority, let alone expertise, to set retransmission consent compensation levels, but it already recognized just one year ago in the *Mediacom* decision—appropriately and correctly—that it is

> 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.

Mediacom Retransmission Order at ¶ 18.

As Hearst-Argyle Television shows in its reply comments, many local television stations are *20 times* more popular than some of the most popular satellite-delivered cable networks, yet broadcasters only ask for a fraction of the relative value of what MVPDs willingly pay in arm's length transactions for far less popular cable programming. There is simply no credibility to the complaints of ACA and others about market-based prices when all they really want is for the Commission to favor certain competitors, rather than the principles of competition.

ACA also argues that broadcasters are engaging in price discrimination by targeting "vulnerable small systems for substantially higher retransmission consent fees." ACA Comments at 17-18. This appears to be a new argument, not raised by the *Notice* and unrelated to this proceeding. However, as a matter

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2008) (stating that "broadcasters have repeatedly abused the right" to seek compensation for carriage); National Telecommunications Cooperative Association ("NTCA") Comments at 22 (filed Jan. 4, 2008) (stating that broadcasters seek additional revenues by charging high retransmission consent rates).

of law, no price discrimination claim can be premised on the sale of television broadcasting rights.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ("the Act"), prohibits price discrimination that could hinder competition in the marketplace. That section makes it

> unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

15 U.S.C. § 13(a). By its terms, the Act prohibits only price discrimination between purchasers of "commodities." "Courts have strictly construed this term, holding that it denotes only 'tangible products of trade.'" *Innomed Labs, LLC v. ALZA Corp*., 368 F.3d 148, 156 (2d Cir. 2004) (citations omitted). It is settled that the term "commodities" does not encompass intangibles such as contract rights and the provision of services.[11]

In keeping with this settled rule, the federal courts have found that rights related to television and radio broadcasts are not "commodities" within the

[11] *See, e.g., Ambook Enters. v. Time Inc*., 612 F.2d 604, 609-10 & n.6 (2d Cir. 1979) (newspaper and magazine advertisements are not commodities; citing numerous cases taking "a strict view" of the meaning of "commodities"); *Baum v. Investors Diversified Services, Inc*., 409 F.2d 872, 874 (7th Cir. 1969) (concluding that "Congress intended to limit the scope of the Act to . . . a product as distinguished from a service"); *National Tire Wholesale, Inc. v. Washington Post Co*., 441 F. Supp. 81, 84-86 (D.D.C. 1977) ("The term 'commodity' is commonly defined by courts to include 'goods, wares, merchandise, machinery and supplies'" (citing cases)).

meaning of Section 2(a). In *Tri-State Broadcasting Co. v. United Press Intern., Inc.*, 369 F.2d 268, 270 (5th Cir. 1966), the Fifth Circuit concluded that a radio station's contractual right to broadcast a "news report service" furnished by United Press was not a "commodity" for purposes of the Act. The court was unmoved by the station's argument that its "decision could conceivably have the effect of allowing [United Press] to charge to a 250 watt radio station operating in a small community a weekly rate of any size and charge to a larger supplier such as a 50,000 watt radio station or a chain of radio stations a smaller rate," because the Act simply has no application to such intangibles as radio broadcast rights. *Id*. at 271.[12]

Similarly, in *Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961), the Seventh Circuit affirmed the dismissal of a Section 2(a) price discrimination claim arising from "agreements for the production and broadcasting of a television program by CBS under Amana's sponsorship over certain broadcasting stations affiliated with the CBS television network." *Id*. at 376. The court concluded that the parties' agreements did not involve a commodity within the meaning of Section 2(a). And in *American Telephone and Telegraph Co. v. Delta Communications Corp.*, 408 F. Supp. 1075 (S.D. Miss. 1976), *aff'd*, 579 F.2d 972 (5th Cir. 1978), *opn. modified on*

[12] *See also, e.g., National Tire Wholesale*, 441 F. Supp. at 85 (observing that "it is well-settled that broadcast advertising is not included within the term 'commodity' under the Robinson-Patman Act" and noting that "newspaper advertising, like broadcast advertising, is essentially an intangible service") (citing cases); *County Theatre Co. v. Paramount Film Distributing Corp*., 146 F. Supp. 933, 934 (E. D. Pa. 1956) (concluding that "licensing of motion picture films . . . is not subject to the provisions of [the] Act").

other grounds, 590 F.2d 100 (5th Cir. 1979), the district court granted summary judgment in favor of defendants (including three television networks) on Section 2(a) claims brought by a start-up television station alleging that the defendants discriminated against the new station in both setting of prices and delivery of products. The court found the Act inapplicable to the transactions at issue, because "[n]o sale or purchase of any tangible commodity" was involved in the service of delivering program and advertising packages and in transporting network signals. *Id*. at 1114.

These cases make it abundantly clear that a price discrimination claim cannot be premised on a broadcast station agreeing to one retransmission consent fee structure with one MVPD but a different retransmission consent fee structure with a different MVPD, regardless of the respective sizes of the two MVPDs. Of course, the Commission already properly recognized the soundness of this position when it affirmed in its *Retransmission Consent Negotiation Order* that "[p]roposals for compensation above that agreed to with other MVPDs in the same market" are "consistent with competitive marketplace considerations and the good faith negotiation requirement." *Id*., 15 FCC Rcd at 5469.

In sum, broadcasters do not engage in either improper or illegal "tying" or "price discrimination." ACA and certain other MVPD interests simply want the Commission to fix prices, preferably before the next round of negotiations commences with the upcoming must carry/retransmission consent election cycle. But it has been amply demonstrated in this proceeding that nothing in the Communications Act confers any authority upon the Commission to act as a rate regulator for retransmission consent. For this and the additional reasons set forth below, the Commission should decline the invitation of ACA and others to intervene in a well-functioning marketplace that has brought a bounty of programming choices to television viewers.

II. MVPDs' Myriad Complaints About Retransmission Consent Are Groundless.

In their comments, certain MVPDs make myriad complaints about the entire retransmission consent regime, once again arguing, in essence, that broadcasters should not have the opportunity to negotiate for compensation in exchange for MVPDs' retransmission and resale of broadcast signals. Not only are these various complaints groundless and repetitive of multiple earlier filings with the Commission, many are outside the scope of the present proceeding in which the Commission has only inquired about broadcast station negotiations for carriage of additional programming as part of the retransmission consent process.

A. Local Broadcast Stations Do Not Possess Undue Or Unfair Leverage In Retransmission Negotiations.

Some MVPDs complain that local broadcast stations have undue or unfair leverage in retransmission negotiations or that broadcasters do not have sufficient incentives to reach "reasonable" agreements with MVPDs.[13] These claims are counter-intuitive on their face.

[13] *See, e.g.*, Small Cable System Operators for Change Comments at 3 (filed Jan. 4, 2008); The Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), *et al*. Comments at 11 (filed Jan. 4, 2008); ACA Comments at 2-3; NTCA Comments at 22; Cablevision Systems Corp. Comments at 19.

MVPDs in fact enjoy substantial leverage in retransmission negotiations because, if local stations do not obtain carriage, they will lose a significant portion of their viewing audience that relies on the MVPD to receive the broadcast programming. That result provides a powerful incentive for an advertiser-supported medium dependent on reaching the largest possible audience to agree to terms desired by MVPDs. NAB certainly does not dispute that broadcast programming is popular and that MVPDs' offerings are significantly more attractive to viewers if they contain a full complement of broadcast programming. However, even if a single broadcast station's signal were unavailable to an MVPD for a limited period of time, that MVPD would still be able to offer viewers at least dozens (and more likely hundreds) of other channels of video programming and would still earn both advertising revenues and subscription fees from its video programming and other service offerings.[14] Indeed, in 2006 the Commission identified 565 satellite-delivered national programming networks and an additional 101 regional networks.[15] With the continuing growth in the number and viewership of non-broadcast networks, the ability of a single local

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[14] MVPDs are increasingly offering non-video services, including broadband and voice. These profitable services would be unaffected by the failure of an MVPD and a local broadcast station to reach a retransmission consent agreement for a limited period of time.

[15] News Release, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* at 4 (Nov. 27, 2007).

broadcast station to exert leverage over MVPDs in retransmission consent negotiations continues to decline.[16]

MVPDs' claims that they are at a disadvantage in retransmission negotiations have not been accepted by either the Commission or independent financial analysts. In its 2005 report to Congress, the Commission found that the "retransmission consent process provides incentives for both" MVPDs and broadcast stations "to come to mutually beneficial arrangements."[17] The Commission concluded that local television broadcasters and MVPDs "negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side." FCC Retransmission Report at ¶ 44. Financial

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[16] In light of this vast and increasing number of programming networks and the growing numbers of viewers they attract, the entire concept of "must have" programming, as repetitively asserted by commenters such as ACA, lacks validity. *See* ACA Comments at 5-6; ACA Petition for Rulemaking, RM No. 11203, at 18, 23 (filed March 2, 2005) ("ACA 2005 Petition"). These commenters essentially contend that broadcasters' possession of certain "must have" programming somehow confers such power as to allow stations to force MVPDs to take additional less desirable programming as part of a bundle to obtain the "must have" programming (or perhaps to pay unreasonable retransmission consent fees). As NAB has previously explained, given these ever-increasing substitutes for any particular channel of traditional broadcast programming, assertions about the "must have" nature of broadcast programming provide no basis for finding that retransmission consent rules are fundamentally unfair to MVPDs or harm competition in the video marketplace. *See* NAB, *et al.*, Opposition to ACA Petition for Rulemaking, RM No. 11203 at 5, 8-11 (filed April 18, 2005) ("NAB Opposition to ACA 2005 Petition"). An economic study submitted in this proceeding further examined the concept of "must have" programming and concluded that it was "economic nonsense." Owen Video Programming Study at 2, 29-32.

[17] Federal Communications Commission, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* at ¶ 44 (Sept. 8, 2005) ("FCC Retransmission Report")

analysts have even more recently concluded that retransmission negotiating leverage is “steeply asymmetrical” in favor of cable operators and that broadcast stations lack bargaining power vis-à-vis cable operators in these negotiations.[18] Thus, several independent sources have declined to accept certain MVPDs’ assertions that they lack leverage in retransmission consent negotiations.[19] Clearly, the Commission should reject MVPDs’ requests, in this and earlier proceedings, for regulatory assistance in retransmission negotiations, given cable operators’ “dominance of local markets.” Criterion Economics Study at 42, citing Bernstein Research.

Some commenters also erroneously (and repetitively) imply that the entire retransmission consent process is tilted against MVPDs because “powerful media conglomerates” (especially the broadcast networks) can dominate smaller MVPDs, especially those in rural areas. ACA Comments at 2-3. *Accord* NTCA Comments at 22-23; ACA 2005 Petition at 19, 22. But in fact, as NAB has pointed out, nearly two-thirds of cable subscribers in Designated Market Areas (“DMAs”) 101+ are served by one of the five largest cable MSOs, while only about 3% of the television stations in these markets are owned by one of the top

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[18] Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming* at 42 (“Criterion Economics Study”), attached as Ex. A to Walt Disney Co. Comments (filed Jan. 4, 2008), citing Bernstein Research, *Cable and Satellite: Asymmetrical “Retrans” Leverage Favors Cable over Satellite and Telcos* at 1 (March 21, 2006) and Merrill Lynch, *Brief Thoughts on Media* at 2 (March 16, 2006).

[19] NAB has also described various disadvantageous provisions included in retransmission consent agreements, and pointed out that broadcasters would not accept these provisions unless MVPDs possessed sufficient market power to enable them to insist on such provisions. *See* NAB Comments at 21-23 (filed Jan. 4, 2008).

ten (by revenue) television station groups. *See* NAB Comments at 20 and Attachment A. Thus, in many instances in these 101+ markets, small local broadcasters must deal with large and increasingly consolidated MVPDs in retransmission negotiations. *See, e.g*., McKinnon Group and Virginia Broadcasting Corp. Comments at 11 (filed Jan. 4, 2008) (small family-owned broadcasters in Texas and Virginia stated that they "largely" deal with "major cable MSOs and the two national DBS" operators in retransmission consent).[20]

Contrary to the claims of NTCA, many broadcast television stations -- especially those in smaller markets -- do not make "enormous profits from advertising revenues." NTCA Comments at 22. In making this inaccurate assertion, NTCA seems to imply that broadcasters are simply greedy in seeking "additional revenues" (*i.e*., cash) from MVPDs in retransmission consent negotiations, in addition to their "enormous" advertising profits. *Id.* However, as NAB has already demonstrated in this and other proceedings, many broadcast stations, particularly those in medium and small markets, are suffering financially and experiencing declining profits and frequently outright losses.[21]

[20] Given that these local broadcasters in such small markets as Corpus Christi, TX, Beaumont, TX and Charlottesville, VA must deal with the largest MVPDs, it seems highly ironic that one of these MVPDs – DISH Network, the third largest MVPD in the nation – sees fit to inveigh against "big media companies" in its comments and seeks regulatory assistance in retransmission negotiations. *See* DISH Network Comments at fn. 1, 8-20.

[21] *See* NAB Comments at 20-21. *See also Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rule Making, FCC 07-170 at fn. 192 (rel. Nov. 30, 2007) ("DTV Viewability Order") (noting the weakening economic health of local stations, especially those "in smaller markets" with "more restricted revenue opportunities").

Moreover, as stated in their comments, the broadcast networks negotiate retransmission consent agreements only on behalf of their owned-and-operated stations. *See, e.g.,* Walt Disney Comments at Ex. B, Declaration of Benjamin N. Pyne; NBC Comments at Ex. C, Declaration of Henry C. Ahn. The vast majority of retransmission consent agreements are therefore not negotiated by the "powerful media conglomerates" whose specter pervades the comments of ACA and others. Thousands of retransmission agreements have in fact been negotiated between broadcast station owners of all sizes, with varying competitive positions in their local markets, and MVPDs of all sizes with varying competitive positions. That is certainly no reason to conclude that the entire retransmission consent regime is somehow unfair to either MVPDs or broadcast stations.

B. Marketplace Developments In Recent Years Have Only Tilted Negotiating Leverage In Favor Of MVPDs.

Certain commenters also erroneously contend that marketplace changes in recent years justify wholesale revisions to the retransmission consent regime because these marketplace developments have "tilted bargaining power" toward broadcasters.[22] While NAB agrees with these commenters that technological

[22] NTCA Comments at 23; *Retransmission Consent, Must Carry and the Public: Current Economic and Regulatory Realities of Multichannel Video Providers*, White Paper by the Ball State University Digital Policy Institute, Commissioned by the National Telecommunications Cooperative Ass'n at 2 (Oct. 3, 2007) ("NTCA Retransmission Paper"). ACA similarly argued in its 2005 petition that "changed market conditions" warranted significant revisions to the entire retransmission consent regime. ACA 2005 Petition at 18. NAB previously refuted these contentions in some detail. *See* NAB Opposition to ACA 2005 Petition at 2-13.

and economic developments have altered the video landscape, these changes have, if anything, tilted retransmission negotiating leverage in favor of regionally concentrated MVPDs, not broadcasters. Thus, there is no need for the Commission to intervene in the free market retransmission negotiations between MVPDs and broadcast stations by altering the retransmission consent process to further favor MVPDs.

As shown by NAB and others in their initial comments, recent years have seen continuing national and regional consolidation in the cable industry, the proliferation of national and regional non-broadcast programming channels, and the expansion of MVPDs' bandwidth and channel capacity. *See, e.g.*, NAB Comments at 14-15, 19; Criterion Economics Study at 36-41. As of 2005, the top four MVPDs controlled nearly 70 percent of the multichannel video market, up from about 50 percent in 2002, and they increasingly compete with broadcasters for viewers and for national and local advertising revenue.[23] In fact, the Commission itself, noting these trends, very recently concluded that since the

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[23] *See* Criterion Economics Study at 40; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2507, 2521, 2550-51 (2006) ("Twelfth Annual Competition Report"). The Criterion Economics Study detailed the significant and continuing audience fragmentation that broadcast stations have experienced due to the growth of MVPDs and non-broadcast programming options. *See id*. at 36-39. NAB has also previously documented cable operators' rapidly increasing share of television advertising revenues in local markets, as well as the declines in viewing shares earned by local television stations. *See* NAB Comments in MB Docket No. 06-121 (filed Oct. 23, 2006), at Attachment F, *Local Television Market Revenue Statistics* and Attachment C, BIA Financial Network, *A Second Look at Out-of-Market Listening and Viewing: It Has Even More Significance* at 10-12.

1990s there has been a "shift in the competitive balance between broadcast and cable" in the favor of cable operators. DTV Viewability Order at ¶¶ 49-50.

The significantly enhanced market power and bargaining position that flow from, *inter alia*, increased national horizontal reach and regional concentration also mean that local broadcast stations (especially smaller ones) are much less likely to be able to negotiate successfully for carriage, especially of their digital signals and any multicast programming streams.[24] Indeed, the Commission just concluded that "cable operators have even greater incentives today to withhold carriage of broadcast stations" than in the 1990s when the Supreme Court upheld the must carry rules. DTV Viewability Order at ¶¶ 51-52. Independent analysts have similarly concluded, as discussed above, that retransmission negotiating leverage is "steeply asymmetrical" in favor of cable operators.[25] Thus, marketplace developments in recent years have only decreased the

[24] This is particularly relevant given the absence of full carriage rights for local stations' free, over-the-air digital multicast streams. Academic studies have found that concentration in the cable television industry negatively affects carriage of local stations on cable. *See* Michael Z. Yan, *Market Structure and Local Signal Carriage Decisions in the Cable Television Industry: Results from Count Analysis*, 15 J. Media Econ. 175, 188-89 (2002) (empirical study concluded that "horizontal concentration or larger firm size in the cable television industry has a negative effect on the carriage of local broadcast stations on cable systems" and that "noncarriage may be more serious in small rural areas," thereby "rais[ing] a public policy issue about the long-term viability of local broadcast stations in already fragile small markets without the umbrella protection of the must-carry rules").

[25] Criterion Economics Study at 42, citing Bernstein Research*, Cable and Satellite: Asymmetrical "Retrans" Leverage Favors Cable Over Satellite and Telcos* at 1 (March, 21, 2006). *Accord* Merrill Lynch, *Brief Thoughts on Media* at 2 (March 16, 2006).

bargaining power of local stations in the retransmission consent process.[26] Claims that "market transformations" since the enactment of retransmission consent – broadcasters' loss of viewers and advertisers from increasingly consolidated MVPDs and hundreds of cable/satellite channels – have "tilted bargaining power" toward broadcasters and against MVPDs simply defy reality. NTCA Comments at 23; NTCA Retransmission Paper at 2.

This claim that retransmission negotiating leverage now favors broadcast stations is apparently based on the competition offered traditional cable operators in the MVPD marketplace from satellite operators and, in some markets, from other providers such as telephone companies. As the NTCA Retransmission Paper contends, "local cable operators who traditionally have had local market *monopolies* are facing increased competition" from other MVPDS, and this "new market reality" has "tilted negotiating power" in favor of local network-affiliated broadcast stations. *Id*. at 48 (emphasis added). However, the mere fact that cable operators may no longer enjoy a complete monopoly in the MVPD marketplace does not in any way imply that they are now significantly disadvantaged vis-à-vis local broadcast stations in retransmission negotiations. After all, cable operators still offer dozens, and often hundreds, of channels of video programming and, most importantly, still control access to a

[26] NAB notes that Congress believed when it enacted retransmission consent -- even prior to the waves of cable industry consolidation in the 1990s and beyond -- that the cable industry was "highly concentrated" and that such concentration could create barriers to entry for programmers and a reduction in the number of media voices available to consumers. 47 U.S.C. § 521 note (1992 Cable Television Consumer Protection and Competition Act § 2(a)(4)).

majority of viewers that local stations must be able to reach with their programming and advertising. Indeed, the Commission recently observed that "the cable industry by far remains the dominant player in the MVPD market." DTV Viewability Order at ¶ 49.[27] And just because local cable operators no longer possess a total monopoly in the MVPD marketplace is obviously no reason for the Commission or Congress to intervene in private, free market retransmission negotiations by providing these increasingly consolidated operators regulatory assistance that would clearly disadvantage local broadcast stations.

C. Other Various Complaints Made Against The Retransmission Consent Regime Are Similarly Unsupportable.

Various other complaints asserted against retransmission consent are similarly unfounded. For example, a few commenters assert that broadcasters' use of retransmission consent to obtain carriage of multiple program services results in scarce bandwidth being occupied by broadcaster-affiliated programming and presumably prevents other programmers or other services from gaining carriage. *See, e.g*. Community Broadcasters Association Comments at 2 (filed Jan. 4, 2008); Small Cable System Operators Comments at 4. As an initial matter, this complaint – even if it were true, which it is not –

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[27] According to the FCC, cable continues to serve the largest percentage of MVPD subscribers. As of June 2006, 68.2% of MVPD subscribers received video programming from a franchised cable operator. FCC News Release, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* at 3 (Nov. 27, 2007). Broadcast television stations dependent upon the advertising revenues earned by reaching the largest possible audiences obviously must be carried by their local cable operators in order to remain economically viable.

presumes that these other programmers or services are inherently superior or more valued by consumers and therefore deserve carriage instead of broadcaster-affiliated programming.[28]

In any event, NAB observes that cable operators' continual complaints about the alleged burdens that carriage of broadcast stations (whether must carry or retransmission consent) place on their systems are belied by the facts. Technological advances, including advances in digital compression technology and fiber optics, continue to dramatically increase cable systems' ability to carry a wide variety of content and services.[29] Cable operators are now embracing switched digital video and other technologies, thereby making room for faster broadband services, advanced voice products and more video channels.[30]

As shown by NAB in other proceedings, the carriage of digital broadcast signals takes up significantly less capacity than does carriage of the same signals in analog, thereby reducing the amount of spectrum capacity occupied by

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[28] It also presumes that MVPDs are somehow forced to carry these less deserving broadcaster-affiliated program services rather than other programming or services that they would prefer to carry or that they believe their subscribers would prefer to receive. As discussed in Section I. above, such a presumption is unfounded because MVPDs are never forced to carry any channel, whether a local broadcast channel or a package with an affiliated programming channel.

[29] *See, e.g., Large Cable Operators Gear up for Switched Digital Video Rollouts*, Communications Daily at 3 (Dec. 17, 2007); *Cable Engineers Expect Multiple Tech Fixes for Rising Bandwidth Demand*, Communications Daily at 9 (Jan. 18, 2008).

[30] *See, e.g.,* DTV Viewability Order at ¶ 60 ("Cable operators continue to develop ways to use their available capacity more efficiently," and "we have every reason to expect that cable capacity will continue to expand in future years").

both broadcast and cable programming networks.[31] Moreover, as shown by the Criterion Economics Study submitted by Walt Disney in its initial comments, "most MVPDs have excess capacity that they can use to add additional channels" and "few cable operators are truly capacity constrained."[32] Indeed, the Chief Operating Officer of Cablevision recently stated that Cablevision, which already carries 42 HD channels, plans to add more HD networks as soon as possible and has the "capacity to carry as many HD channels as can be launched."[33] Claims that permitting some local broadcast stations to negotiate for carriage of additional program channels as part of the retransmission consent

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[31] *See, e.g.*, Comments of NAB and The Association for Maximum Service Television, Inc. ("MSTV") in CS Docket No. 98-120 at 12-15 (filed July 16, 2007); Petition for Reconsideration of NAB and MSTV, CS Docket No. 98-120 at 13-14 (filed Apr. 21, 2005); NAB, *Ex Parte, Multicast Carriage Will Not Affect Cable's Ability to Carry Other Program Networks*, CS Docket No. 98-120 (filed June 12, 2006).

[32] Criterion Economics Study at 28. In this study, Dr. Eisenach examined data on the channel capacity of all MVPD systems in the United States. Of the 4,515 systems that report channel capacity to Warren's Cable Fact Book, 2,202 (49%) actually report having *excess* channel capacity. An even among "small" MVPDs (*i.e.*, those with the capacity to carry 36 or fewer channels), 765 of the 1,532 reporting systems (50%) report having *excess* capacity. *Id*. at 28-29. Dr. Eisenach also discovered that even small cable systems have the capacity to carry multiple programming services of the same type. For example, of the small systems that carried both ESPN and ESPN2, 99.9% also carried at least one additional (non-ESPN) sports channel. *Id*. at 29. Finally, Dr. Eisenach examined small cable operators that were members of the board of ACA and found that virtually all were in the process of upgrading their systems to increase capacity. *Id.* at 30-31.

[33] *Large Cable Operators Gear up for Switched Digital Video Rollouts*, Communications Daily at 3 (Dec. 17, 2007). *See also Cable Engineers Expect Multiple Tech Fixes for Rising Bandwidth Demand*, Communications Daily at 9 (Jan. 18, 2008) (Motorola executive comparing "bandwidth" to "a waistline" that "keeps expanding").

process somehow results in shortages of cable capacity do not withstand even cursory scrutiny.

Claims by a few MVPDs that the retransmission consent process harms consumers by causing increases in cable subscription rates likewise do not withstand scrutiny. *See, e.g*., ACA Comments at 19; NTCA Comments at 22-23. As an initial matter, it is undisputed that for years cable operators consistently refused to pay cash for retransmission consent of local broadcast signals. *See, e.g.,* FCC Retransmission Report at ¶ 10. Fees that cable operators did *not* pay certainly cannot have caused increases in cable subscription rates. Independent studies by the Government Accountability Office ("GAO") previously found that retransmission consent did not lead to higher cable rates,[34] but that higher cable rates were linked to a lack of competition in the MVPD marketplace.[35] A July 2007 study estimated that the retransmission consent fees paid by cable operators to local television stations were equivalent to approximately 1.5% of the amounts paid to these operators by their subscribers for video programming.[36] The new study by Criterion Economics specifically examined the

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

[35] *See* GOA, *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% 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% lower rates for basic cable and higher quality service).

[36] *See* David C. Leach, *The Effect of Retransmission Consent Negotiations on the Price and Quality of Cable Television Service* (July 10, 2007) at 3-4 and Attachment, submitted as *Ex Parte* in MB Docket No. 06-189 by CBS

question of retransmission consent fees and concluded that, even where broadcasters have succeeded in negotiating monetary compensation, such compensation is "miniscule" in comparison with recent cable rate increases. Criterion Economics Study at 45-46. Thus, in cases where retransmission consent negotiations have involved monetary compensation, they "have not led to significant increases in cable operators' overall costs" and thus cannot have caused cable rate increases or harmed consumers in this regard. *Id*. at 47.[37]

Given these myriad unsupported allegations made about the retransmission consent process, it is hard to escape the conclusion that MVPDs, in essence, object to broadcasters' rights to negotiate for any form of compensation in return for MVPDs' retransmission and resale of local stations' signals. MVPDs complain about broadcasters negotiating for the carriage of additional programming and also about requests for cash compensation – and then suggest that broadcasters are simply asking for too much compensation of whatever sort.[38] As NAB has previously observed, however, there is no legal,

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Corporation, News Corporation, NBC Universal and The Walt Disney Company (July 17, 2007).

[37] Indeed, the Criterion Economics Study showed that *all* programming expenses for cable operators (not just those "trivial" expenses related to retransmission consent) were small in relation to cable operators' overall expenses, revenues, and profits. *See id*. at 47, 53-63.

[38] *See* Cablevision Comments at 19-20. As supposed support for its allegations about the excessive "demands" of broadcasters in retransmission negotiations, NAB notes that Cablevision cites a "good faith" negotiation complaint in which the broadcaster was exonerated and the MVPD complainant was found to have abused the FCC's processes. *See EchoStar Satellite Corp. v. Young Broadcasting, Inc*., 16 FCC Rcd 15070 (Cable Bur. 2001), cited in Cablevision Comments at 20, fn. 58. Obviously, Cablevision has no actual evidence to

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. Indeed, when enacting retransmission consent, Congress observed that MVPDs pay for the non-broadcast programming they offer to customers and that programming services originating on broadcast channels should be treated no differently. S. Rep No. 92, 102d Cong., 1st Sess. at 35 (1991) ("*Senate Report*"). The Commission should accordingly reject commenters' complaints stemming from their dislike of broadcasters' statutory right to negotiate for retransmission of their signals as contrary to congressional intent, as well as outside the scope of this narrowly-focused proceeding.

III. MVPDs Fail To Acknowledge The Benefits Derived From The Retransmission Consent Process.

Those MVPDs attacking the retransmission consent process do not address, let alone refute, evidence that broadcast stations and MVPDs and, most importantly, consumers have benefited from the retransmission consent process. Certainly these MVPDs fail to acknowledge that the Commission less than two and a half years ago concluded in a report to Congress that both local broadcast stations and MVPDs benefit from retransmission consent generally – "the station

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support its allegations that broadcasters seek excessive compensation. NAB further observes that, in free market retransmission negotiations, it is marketplace forces that ultimately determine the level of compensation – the fact that one party to the negotiations would have preferred to pay less (or nothing) does not mean that the other party has somehow demanded too much.

benefits from carriage because its programming and advertising will be carried as part of the MVPD's service, and the MVPD benefits because the station's programming makes the MVPD's offerings more appealing to consumers." FCC Retransmission Report at ¶ 44. Most importantly, according to the FCC, "consumers benefit by having access" to broadcasters' "programming via an MVPD." *Id.* [39]

As NAB pointed out in its initial comments (at 27-29), consumers also benefit specifically from broadcasters' ability to negotiate for carriage of additional programming through retransmission consent. Broadcasters have used retransmission consent to negotiate for the carriage of new and diverse program services, including local news services and stations whose programs are directed to minority viewers, such as the Univision, Telemundo and Azteca affiliated stations. *See* FCC Retransmission Report at ¶ 35; NBC Comments at 12; NAB Comments at 28. Group owners of broadcast stations also created new programming channels, such as Home and Garden, Lifetime and the A&E Television Networks (including A&E and the History and Biography channels). *See* NBC Comments at 12. Clearly, consumers have benefited from the launch of popular and diverse programming channels carried on MVPDs via the retransmission consent process. NAB notes that the introduction of these broadcaster-affiliated programming services increased the diversity of programming offered by MVPDs because these new services were independent

[39] Commenters in this proceeding have further explained in detail that the retransmission consent process generates benefits for consumers, broadcasters and cable systems alike. *See, e.g.*, Fox Comments at 10-16.

of the dominant cable providers and their vertically integrated programming networks.

NAB and other commenters further noted that the retransmission consent process, including negotiating for the carriage of additional programming, increases diversity and localism by allowing local stations to obtain carriage of their digital multicast channels. *See* NAB Comments at 29. As local broadcasters explained, in a number of markets, newer networks (such as CW or MyTV) and many foreign language, religious and other "niche" programming services may be available only on a digital multicast channel. Broadcasters are also using their digital multicast capacity to offer new and innovative public interest programming services. *See* McKinnon/Virginia Comments at 8-9. It is clearly in the public interest to permit local broadcast stations to negotiate in the marketplace for the carriage of this additional, diverse programming, especially in the absence of full carriage rights for local stations' free, over-the-air digital multicast streams.[40]

IV. MVPDs' Calls For Commission Intervention In The Retransmission Consent Marketplace Must Be Rejected As A Matter Of Both Law And Policy.

A. MVPDs Refuse To Recognize That Congress Created A Marketplace In Which Broadcasters Could Negotiate For Various Forms Of Compensation For MVPDs' Use Of Their Signals.

[40] *See Notice*, Statement of Commissioner Michael J. Copps (the Commission should not "inhibit broadcast stations from negotiating for carriage of their multicast signals in exchange for carriage of their main digital signal").

As NAB and other commenters have shown, Congress in the 1992 Cable Television Consumer Protection and Competition Act ("Cable Act") 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.[41] In establishing retransmission consent, Congress created a "marketplace for the disposition of the rights to retransmit broadcast signals," and stressed that it did not intend "to dictate the outcome" of the "marketplace negotiations" between broadcasters and MVPDs. *Senate Report* at 36. Congress also clearly foresaw that broadcasters would seek various forms of compensation for MVPDs' retransmission and resale of local stations' signals, including monetary compensation, "the right to program an additional channel on a cable system," or other consideration. *Id*. Given the clarity of congressional intentions in the Cable Act, the Commission has consistently concluded that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent"[42] and that seeking MVPD carriage of an additional channel or program service was "presumptively

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[41] *See, e.g.*, NAB Comments at 7-11; *The Retransmission Consent Requirement—Why Congress Embraced the Free Market and Put a Stop to Cable System Carriage of Television Stations Without Fair Compensation*, attached to Comments of Fox and NBC.

[42] *Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5450. *Accord Report and Order* in MM Docket Nos. 92-259, 90-4, and 92-295, 8 FCC Rcd 2965, 3006 (1993).

consistent” with broadcasters’ obligation to negotiate retransmission consent in good faith.[43]

Those MVPDs now calling for Commission intervention in the free market process established by Congress fail to explain how the agency has the authority to override clear congressional intent and rewrite the retransmission consent statute to permit governmental intrusion into the negotiation of the specific terms and conditions of private retransmission consent agreements, including by precluding broadcast stations from negotiating for the carriage of multiple program services. Section 325 prohibits MVPDs from retransmitting the signals of broadcast stations without the stations’ consent. Neither the plain terms of the statute nor the legislative history restricts the terms of retransmission consent negotiations between MVPDs and local stations. The legislative history of Section 325 moreover expressly endorses broadcasters’ right to seek to “program an additional channel on a cable system” as one form of compensation for MVPDs’ use of their signals. *Senate Report* at 36.

Faced with this unequivocal statutory language and legislative history, a number of MVPDs urging the Commission to interfere in retransmission negotiations and to restrict broadcasters from negotiating for certain types of compensation essentially ignore the issue of congressional intent and the

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[43] *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). *Accord Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5469. Given these prior decisions, the Commission would have a particularly heavy burden to justify a complete change in course and to now prohibit broadcasters from negotiating for particular forms of compensation, such as carriage of additional programming. *See, e.g.*, NAB Comments at 13; Walt Disney Comments at 18-20; Fox Comments at 7-8.

Commission's authority to intervene in private marketplace negotiations. *See, e.g.*, Small Cable System Operator Comments; OPASTCO, *et al*. Comments. A few commenters made brief, unsupportable arguments about the breadth of the Commission's ancillary jurisdiction and the reciprocal obligation of MVPDs and broadcast stations to negotiate retransmission agreements in good faith as somehow authorizing the Commission to rewrite Section 325 to prohibit local stations from being able to negotiate the terms and conditions of MVPDs' retransmission and resale of broadcast signals. *See* ACA Comments at 52; NTCA Comments at 26. As a number of commenters have already demonstrated in detail, these arguments are untenable. *See, e.g.*, NBC Comments at 16-22; Walt Disney Comments at 4-9, 14-17; Fox Comments at 37-38.

Commenters' attempts to bootstrap the *reciprocal* good faith negotiation obligation into authority for limiting the rights of broadcasters *alone* in free market retransmission negotiations are particularly specious. *See* 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.65(a) (requiring both broadcast stations and MVPDs to negotiate terms and conditions of retransmission agreements in good faith). DISH Network, for example, cites the good faith negotiation requirement, but then goes on to claim, without support, that "[t]here have always been limits" to the compensation that stations can seek for MVPD carriage of their signals, and that broadcasters have allegedly "abused the right -- *assumed in the abstract* – that broadcasters could seek financial compensation or other forms of compensation (*e.g.*, carriage of affiliated cable networks)." DISH Network

Comments at 20 (emphasis added). As much as certain MVPDs would like to believe that local stations' rights to negotiate for compensation for MVPDS' retransmission and resale of their signals are merely "abstract," these rights are, in fact, clear and enforceable legal rights established by Congress by statute. *See* 47 U.S.C. § 325(b)(1)(A) (no MVPD "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station"). MVPDs' wishful thinking that broadcasters do not – or should not – really have such rights fails to provide any legal or factual basis for the Commission to override Congress' establishment of a "marketplace for the disposition of the rights to retransmit broadcast signals" in which the government did not intend to intervene. *Senate Report* at 36. Good faith negotiation cannot be defined as requiring broadcasters to agree to whatever the MVPD wants.

B. Certain MVPD-Supported Changes In The Retransmission Consent Regime Would Create A Government Enforced Regulatory Structure Permanently Favoring MVPDs At The Expense Of Local Stations.

A few commenters representing MVPDs call for fundamentally altering retransmission consent from the free marketplace established by Congress into an intrusive, government-enforced regulatory regime. Beyond being unnecessary and outside the scope of the Commission's authority for the reasons set forth above, certain specific proposals offered by these commenters would result in a web of complex regulations permanently favoring MVPDs at the expense of local television stations. For all these reasons, wide-ranging proposals for radically altering the market-based retransmission consent process created by Congress must be rejected.

For example, NTCA urges the Commission to alter radically not only the retransmission consent regime but also long-standing rules pertaining to network non-duplication and syndicated exclusivity. *See* NTCA Comments at 24-25 (proposing, *inter alia*, to prevent broadcasters who seek any consideration for retransmission consent from asserting network non-duplication and syndicated exclusivity rights or from making effective non-disclosure agreements). As an initial matter, these proposals are clearly outside the narrow scope of the Commission's inquiry in this proceeding on broadcasters' negotiation for one particular type of compensation (*i.e.*, carriage of additional affiliated programming) as part of retransmission consent.

Moreover, NTCA's proposals are largely repetitive of proposals previously made by ACA in its 2005 petition and previously refuted by NAB and others. *See* NAB Opposition to ACA 2005 Petition at 13-19; 22-24. As NAB pointed out then, such proposals would place restrictions on agreements or arrangements broadcasters may legitimately enter into with third parties, including networks, program suppliers and others, and would constitute unwarranted government intrusion into private contractual relations. Preventing local stations from exercising program exclusivity rights if they choose to elect retransmission consent is furthermore a blatant attempt to stack the regulatory cards in MVPDs' favor. MVPDs will have little incentive to negotiate in good faith with local broadcasters electing retransmission consent if the MVPD can, at any time, attempt to secure all the station's non-locally produced programming from a distant provider. It is not the Commission that has granted the local station program exclusivity; rather, it is the station's program suppliers. The Commission's rules merely provide the mechanism to enforce those exclusivity rules, bought and paid for in the marketplace. There is no valid legal or policy reason to emasculate such exclusivity rights because a station negotiates for retransmission consent, as Congress explicitly intended to allow when it created a retransmission marketplace in 1992.

Forcing stations to choose between program exclusivity rights and retransmission consent without any form of compensation is also contrary to long-established congressional and Commission policy recognizing the importance of program exclusivity rules in promoting our locally-based system of television broadcasting. The Commission has on multiple occasions expressly rejected proposals to limit the program exclusivity rights of stations electing to exercise retransmission consent rights as being inconsistent with congressional intent.[44] In late 2005, the Commission specifically observed that the "legislative history of the 1992 [Cable] Act indicates that the network non-duplication and syndicated exclusivity rules were viewed as integral to achieving congressional objectives."[45] The Commission also noted that the network non-duplication and

[44] *See* FCC Retransmission Report at ¶ 50; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 3006 (1993); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723, 6747 (1994).

[45] FCC Retransmission Report at ¶ 50, quoting *Senate Report* at 38 ("amendments or deletions" of the FCC's network non-duplication and syndicated exclusivity rules "which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in

syndicated exclusivity rules support its "long-standing policy favoring the provision of local broadcast service to communities," FCC Retransmission Report at ¶ 50, and consequently declined to recommend to Congress the modifications to those rules supported by the cable industry. *Id*. at ¶¶ 50-51 (concluding that interfering in contractual arrangements that broadcasters make with networks and other programming suppliers would "contradict our own requirements" that broadcasters serve their local communities "and would hinder our policy goals"). There is no basis for the Commission to alter its long-standing position relating to retransmission consent and program exclusivity now, especially in light of the agency's renewed emphasis on ensuring that its rules promote broadcast service to their local communities.[46]

The NTCA Retransmission Paper (at 68) additionally argues that "one option" for disputes over retransmission consent "is to require mandatory arbitration where negotiations fail to result in a mutually agreeable solution." NAB initially observes that retransmission negotiations – while some may be contentious and lengthy – almost always "result in a mutually agreeable solution." NAB has moreover previously pointed out that the "Commission does not have the authority to require the parties" to retransmission negotiations "to submit to

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the Committee's view, be inconsistent with the regulatory structure" created in the Cable Act).

[46] *See* Report on Broadcast Localism and Notice of Proposed Rulemaking, FCC 08-218 (rel. Jan. 24, 2008).

binding arbitration"[47] and that mandatory arbitration is not viable or practical given the complexities of retransmission negotiations. NAB Comments at 25-27.

Furthermore, to support its call for mandatory arbitration, the NTCA Retransmission Paper primarily relies on the fact that the Commission imposed a condition on News Corp.'s merger with DirecTV allowing MVPDs "to elect to submit a dispute with News Corp. over the terms and conditions of carriage of programming subject to retransmission consent to commercial arbitration."[48] Contrary to the implications of NTCA, however, the Commission did not impose the condition because News Corp., as a broadcaster, had disproportionate bargaining power over MVPDs in retransmission consent negotiations. Rather, the Commission imposed the arbitration condition because of News Corp.'s role as an MVPD (after acquiring DirecTV) and, thus, its "incentive and ability to threaten or impose broadcast service interruptions on subscribers of *competing MVPDs* to extract greater price increases" than it could prior to the merger. News Corp. Order at ¶ 220 (emphasis added). Broadcast stations that are not affiliated with MVPDs lack this incentive and ability to foreclose their programming from competing MVPDs, and, therefore, the Commission has no basis for imposing involuntary arbitration on parties to retransmission negotiations as a general rule.

[47] NAB Comments at 25, quoting *Mediacom Communications Corp. v. Sinclair Broadcasting Group, Inc.*, DA 07-3 at ¶ 25 (Media Bur. rel. Jan. 4, 2007).

[48] *Memorandum Opinion and Order* in MB Docket No. 03-124, 19 FCC Rcd 473, 572 (2004) ("News Corp. Order").

Similar to NTCA, ACA urges the Commission to intrude into the private retransmission consent marketplace in such a manner as to favor MVPDs at the expense of broadcast stations. For example, ACA calls upon the Commission to (1) prohibit volume-based price differences in broadcaster retransmission consent fees, unless these differences are cost-based; (2) significantly restrict broadcasters' ability to negotiate with MVPDs for the tier placement of their programming; and (3) become involved in evaluating the reasonableness of the "rates, terms and conditions" of broadcasters' retransmission offers. ACA Comments at 24-25.[49]

As shown in NAB's initial comments (at 10-11), all of these proposals are clearly contrary to congressional intent and Commission precedent.[50] A prohibition on volume-based price differences would in particular appear to violate the plain language of Section 325(b)(3)(C), which expressly allows broadcast stations to enter into retransmission agreements "containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations." 47 U.S.C. § 325(b)(3)(C). In addition, tier placement, channel position and related issues are entirely legitimate terms

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[49] *See also* Liberty Cablevision of Puerto Rico, Ltd. Comments at 3 (filed Jan. 4, 2008) (calling for Commission price controls on retransmission consent rates).

[50] *See, e.g., Senate Report* at 36 (Congress intended to establish a "marketplace for the disposition of the rights to retransmit broadcast signals" but did not intend "to dictate the outcome of the ensuring marketplace negotiations"); *Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5450 ("Congress did not intend that the Commission should intrude in the negotiation of retransmission consent").

and conditions upon which parties may properly negotiate during free market negotiations. There is no need or basis for government intrusion in the marketplace to limit stations' flexibility in retransmission negotiations by restricting broadcasters' ability to negotiate for compensation involving tier and channel placement (or, indeed, any other specific form of compensation, such as the carriage of additional channels). And with regard to regulatory proposals necessitating evaluation of the "reasonableness" of the rates and terms of broadcasters' retransmission offers, NAB observes that, under the "marketplace" created by Congress for retransmission consent, *Senate Report* at 36, it is marketplace forces that should properly determine the rates, terms and conditions offered, and ultimately agreed upon, by negotiating parties, not the government.

In sum, ACA supports the replacement of the current market-based retransmission process established by Congress with a highly regulated structure with Commission involvement in the detailed terms and conditions that broadcasters may offer in retransmission consent. And ACA's calls for the Commission to involve itself in the rates, terms and conditions offered only by the *broadcast* parties to retransmission negotiations is an ill-disguised attempt to tilt this newly regulated retransmission process in MVPDs' favor. After all, given MVPDs' historic and continuing reluctance to pay cash for retransmission consent and their complaints about other forms of compensation requested by broadcast stations, "reasonable rates, terms and conditions," as envisioned by ACA, would undoubtedly mean much more limited compensation for broadcasters than the compensation that would be freely negotiated in private marketplace agreements.[51]

Finally, NAB observes that the NTCA Retransmission Paper contains a number of misstatements of law and fact. For instance, the Paper states (at 29) that [i]f the broadcaster selects retransmission consent, the cable operator is required to provide some form of compensation to the broadcaster." That, of course, is incorrect and overstates broadcasters' rights under the retransmission

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[51] To the extent that ACA, in its proposal to require broadcasters to offer each channel on a standalone basis on "reasonable rates, terms and conditions," is merely restating claims that broadcasters "tie" packages of channels and refuse to negotiate in good faith for other forms of compensation, NAB has already refuted those claims. *See supra* Section I. NAB further notes that the FCC's good faith rules already prohibit broadcasters from putting forth "a single, unilateral proposal and refus[ing] to discuss alternate terms or counter-proposals," *Retransmission Consent Negotiation Order*, 15 FCC Rcd at 5463, and that a complaint procedure exists for MVPDs who believe that local stations have violated their obligation to negotiate in good faith. ACA's calls to alter this retransmission consent complaint procedure would tilt the balance of the complaint process to permanently favor MVPDs at the expense of broadcasters and involve the FCC in the details of the terms and conditions of negotiations. *See* ACA Comments at 26 (proposing, *inter alia*, that broadcasters would bear the burden of proof in complaints alleging that rates, terms or conditions were "unreasonable" and that MVPDs could continue carrying a broadcast station during the pendency of a complaint under the terms of the retransmission agreement in place at the time a complaint is filed). Allowing MVPDs to continue carrying a broadcast station under the terms of an expired contract while a retransmission complaint is pending would greatly reduce the incentive of MVPDs to reach agreements with broadcast stations in a timely manner. The fact that MVPDs were permitted, as a condition of the merger between News Corp. and DirecTV, to continue carrying Fox-owned stations' signals during retransmission disputes not does support ACA's proposal. As explained above, certain conditions were imposed on News Corp. relating to retransmission consent after its acquisition of DirecTV due to News Corp.'s new role as an MVPD, not due to its role as a traditional broadcaster. *See* News Corp. Order at ¶ 221 (News Corp. would have incentive to foreclose temporarily the signals of Fox-owned stations from competing MVPDs so as to make DirecTV more attractive to consumers than its MVPD competitors). Broadcast stations that are not affiliated with MVPDs would lack this incentive and, thus, there is no basis for adopting ACA's proposal as a general rule.

consent statute. In fact, retransmission consent only provides broadcasters with the opportunity to negotiate for compensation from MVPDs for their retransmission and resale of stations' signals – there is no guarantee under the statute that broadcasters will receive fair, or indeed any, compensation. When describing the history of retransmission consent, the Paper also states (at 24) that "local stations have had the opportunity to charge for the carriage of their signals" since passage of the Cable Act "but initially did not," instead "opt[ing] for must carry or impos[ing] relatively minor expectations on cable systems." This completely ignores the fact that broadcasters attempted to negotiate for cash compensation beginning "[d]uring the first round of retransmission consent negotiations," but cable systems consistently refused to pay cash for retransmission consent. FCC Retransmission Report at ¶ 10.

Moreover, the Paper appears biased in its discussion of the retransmission process, referring to broadcasters' "unreasonable" or "unwarranted demands" and stations' ability to "impose[]" their demands on MVPDs or to "extract" ever-increasing amounts from cable systems. *See, e.g*, NTCA Retransmission Paper at 24, 68, 84. As NAB described in its initial comments, broadcasters have had to accept a number of disadvantageous provisions in retransmission agreements because MVPDs possess sufficient market power to enable them to insist on such provisions. *See* NAB Comments at 21-23. Broadcasters cannot merely "impose" their "demands" on MVPDs, and NAB objects that the Paper labels only broadcasters' (and never MVPDs') requests in retransmission negotiations as "unreasonable" or "unwarranted."

Further, remarks like “it is certain that profit maximization is governing broadcasters’ business choices” about retransmission consent appear both biased and nonsensical. NTCA Retransmission Paper at 56. After all, it is also certain that profit maximization governs MVPDs’ business choices about retransmission consent. Indeed, that is why MVPDs object to the retransmission consent regime, as it gives broadcasters the opportunity to negotiate for compensation for MVPDs’ retransmission of local signals, which MVPDs, prior to enactment of the Cable Act, could take and resale for their profit without compensating broadcasters as all.

CONCLUSION

For all the reasons set forth in detail above, the Commission has no legal, policy or factual basis to depart from its prior decisions that properly permitted local broadcast stations to negotiate for various forms of compensation, including the carriage of additional programming services, as part of free market retransmission negotiations. As Congress expressly recognized when enacting retransmission consent, 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.

Certain MVPDs’ suggestions for fundamentally altering the entire retransmission regime would create a government-enforced regulatory structure favoring MVPDs at the expense of local stations, rather than a marketplace in which broadcast stations and MVPDs freely negotiate carriage issues. This plea to tip the negotiating leverage permanently on the side of MVPDs must be rejected, especially given the Commission's earlier conclusions that both MVPDs and broadcasters – and, most importantly, consumers – benefit from the current retransmission consent process in which local stations and MVPDs "negotiate in the context of a level playing field." FCC Retransmission Report at ¶ 44. MVPDs' myriad complaints about the entire retransmission consent regime are not only groundless, repetitive and legally and factually insupportable, they are also beyond the scope of this narrow proceeding examining only the limited question of broadcasters negotiating for one particular type of compensation (the carriage of additional program services) as part of retransmission consent.

Respectfully submitted,

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