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

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

OPPOSITION OF THE BROADCASTER ASSOCIATIONS

NATIONAL ASSOCIATION OF BROADCASTERS

ABC TELEVISION AFFILIATES ASSOCIATION

CBS TELEVISION NETWORK AFFILIATES ASSOCIATION

FBC TELEVISION AFFILIATES ASSOCIATION

NBC TELEVISION AFFILIATES

May 18, 2010

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> Congress did not intend either to "dictate the outcome of the . . . marketplace negotiations"[1] or for "the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[2]

Summary

Ten of the nation's 13 largest multi-channel video programming distributors ("MVPDs")—some of which are the largest media companies in the world—are among those filing a Petition urging the Commission to interfere in the free market retransmission consent process. Specifically, Petitioners are asking the Commission to force local stations to give retransmission consent to MVPDs while retransmission consent negotiations continue and to impose mandatory arbitration or other forcing mechanisms if negotiations are at an impasse. As explained herein, both as a matter of law and public policy, Petitioners' request should be denied.

Congress's decision to enact the retransmission consent requirement for MVPDs is grounded in fundamental notions of equity and fair competition. With the realization that by 1992 cable systems were no longer merely retransmitting local television stations' signals, but were competing head-to-head with those stations for programming, advertising dollars, and viewers, Congress concluded that—just as no broadcast station could retransmit or resell the signal of another broadcast station without its consent—a cable system should no longer be

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[1] S. REP. NO. 102-92 (1991), at 36.

[2] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000), at ¶ 23.

permitted to do so. Congress expressly stated its intent to eliminate the regulatory "subsidy"[3] that the lack of retransmission consent had created for MVPDs in competing against local stations. As the Senate Commerce Committee at the time observed: "Cable operators pay for the cable programming services they offer to their customers; *the Committee believes that programming services which originate on a broadcast channel should not be treated differently*."[4]

Petitioners now argue for "reform" of the retransmission consent process predicated on the notion that the market for local television service has changed since 1992. But the change they cite, the emergence of competition among MVPDs, does not provide a basis for the anti-competitive proposals Petitioners have advanced.

The "reform" that Petitioners seek is, in reality, an attempt to tilt the retransmission negotiating process in favor of MVPDs and against local television stations. The changes they suggest would have devastating consequences for competition, for the program services provided by local stations, and, more importantly, for the nation's television viewers. Without the ability to negotiate for fair retransmission consent compensation, local stations would have fewer financial resources with which to compete with MVPDs in the acquisition of quality programming, ultimately relegating the free, over-the-air television service to a non-competitive programming service. That result would be a disservice not only to the nation's 34 million[5] television households that depend on free, over-the-air reception on their primary or secondary

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[3] H.R. CONF. REP. NO. 102-862 (1992), at 58.

[4] S. REP. NO. 102-92, at 35 (emphasis added).

[5] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009), at ¶ 108.

television sets to receive local stations' high-quality local news, sports, weather, public affairs, political, and public safety programming and information, but also for Petitioners' own subscribers who depend on local stations for the very same programming service.

Presenting themselves as motivated by concern for consumers, Petitioners contend that competition in the MVPD market has enabled local stations to negotiate for retransmission consent fees that will lead to higher pay TV rates. As several economic studies confirm, that would not be the case. Indeed, the Chief Operating Officer of one of Petitioners recently acknowledged that retransmission consent fees *will not* affect that MVPD's overall cost structure.[6]

Retransmission consent payments to local stations average, in the aggregate, some $0.70 per subscriber for *all* local stations—and range, on the average, from $0.14 to $0.175 per subscriber per month for each station affiliated with a Big 4 Network, i.e., the ABC, CBS, FOX, or NBC Television Networks. Retransmission consent fees for local stations whose programming service—national and local—is the most popular of *all* programming services represent but a fraction of the rates paid by MVPDs for other, less popular programming channels. Retransmission consent fees paid to broadcast stations in 2008 constituted a mere 2.7% of MVPD programming costs and less than 1% (0.71%) of the average $99 per month paid by subscribers to MVPDs for television service. It cannot be seriously maintained that retransmission consent fees have led to higher cable rates.

Nor can Petitioners seriously maintain that reform is needed to protect viewer access to local television programming. Contrary to Petitioners' assertions, viewers will not "lose access"

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[6] *See* Mike Farrell, *Rutledge: Cablevision Can Manage Retransmission Consent*, (continued . . .)

to a broadcast station's programming if retransmission consent negotiations with an MVPD break down. Each television station's signal is available *at all times to all consumers* over the air and for *free*, and it is also available from other competing MVPDs.

In *tens of thousands* of retransmission consent negotiations, there have been few showdowns and even fewer shutdowns. In the very few instances where it has adjudicated complaints, the Commission *has never found* that a single broadcast station has failed to negotiate in good faith or has otherwise abused the Commission's retransmission consent rules or processes—neither of which, unfortunately, can be said for MVPDs.[7] The 12 reported instances since 2006 in which a carriage interruption has resulted from an impasse in retransmission consent negotiations has affected only *one-one hundredth of one percent* (0.01%) of annual television viewing hours.[8] As the attached *Navigant Report* notes, consumers are far more likely to lose television service as a result of an electricity or cable system outage than from an impasse in retransmission consent negotiations!

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MULTICHANNEL NEWS (Nov. 3, 2009).

[7] *See EchoStar Satellite Corp. v. Young Broadcasting, Inc*., Memorandum Opinion and Order, 16 FCC Rcd 15070 (2001) (broadcaster met good faith standard while complaining MVPD was admonished for abuse of Commission processes and lack of candor); *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc*., Memorandum Opinion and Order, 22 FCC Rcd 47 (2007) (broadcaster met good faith standard); *Letter from Steven F. Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable TV*, 22 FCC Rcd 4933 (2007) (cable operator failed to meet good faith standard); *ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc*., Memorandum Opinion and Order, 24 FCC Rcd 1645 (2009) (broadcaster met good faith standard).

[8] *See* Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (Apr. 2010) ("*Navigant Report*"), at 20, attached hereto as Appendix A.

Adoption of Petitioners' "reforms" would disrupt the "level playing field"[9] in retransmission consent negotiations and ensnarl the Commission in thousands of disputes—disputes that the parties would have resolved, more quickly and at less cost, on their own—had the Commission only allowed the competitive market to function. Arbitration would simply result in a battle between dueling economists and lawyers that will, frankly, bleed the economic resources that small, local stations could ill afford—and resources that all local stations could better use to invest in high-quality programming and public service stewardship. Ironically, one of Petitioners has expressly rejected the concept of arbitration in disputes in another context involving cable programming services, stating that it would "force higher retail rates on our customers." On another occasion that Petitioner's Chief Executive Officer added that "over the years we've been able to successfully reach agreements with hundreds of programming networks without the use of arbitration" and that "[w]e continue to believe that the best way to achieve results is to privately seek a resolution and not attempt to negotiate through the press or elected officials."[10]

The reality is that an MVPD would never have an incentive to reach agreement with a television station if it believed it could enhance its leverage by government intervention. And, it is patently wrong to suggest that forced interim carriage would somehow "maintain[] the *status*

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[9] 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 ¶ 44.

[10] *Cablevision Removes 2 Channels from Time Warner in Fee Dispute*, Bloomberg.com (Mar. 8, 2005); *NFL Offers Arbitration to Cable for NFL Network*, USA TODAY (Dec. 20, 2007) (quoting Glenn Britt, Chief Executive Officer of Time Warner Cable).

quo."[11] The negotiating parties previously entered a contract with a fixed term and a fixed expiration date. Forced carriage *beyond* that date—putting aside the legal constraints of 47 U.S.C. § 325(b)(1)—would grant the MVPD more than it bargained for, enabling it to profit from forced carriage by having the ability to continue to resell the station's signal.

Indeed, the mere pendency of the instant proceeding has created an incentive for MVPDs to "game" the negotiating process and engage in brinksmanship, in the hope the Commission will enact the proposed "reforms." The sooner the Commission denies the Petition, the sooner Petitioners will get back to the negotiating table with local stations and conclude all pending retransmission consent negotiations.

The basis for denial is clear. Section 325 of the Communications Act unequivocally prohibits the retransmission by an MVPD of a television broadcast station's signal without its consent: No MVPD "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station." 47 U.S.C. § 325(b)(1)(A). MVPDs have no right, and cannot be given the right by the Commission under the statute, to retransmit a commercial broadcast signal in its local market without the consent of the originating station. The unambiguous statutory language, without more, puts an end to the Petition's interim carriage request. As the Supreme Court has "stated time and again," "[we] must presume that a legislature says in a statute what it means and means in a statute what it says there."[12]

These comments explain the history of and basis for the retransmission consent statute, the necessary protections afforded by the Commission's network non-duplication and syndicated

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[11] Petition at 37.

[12] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

exclusivity rules, and the multiple flaws in the Petition. They show that broadcaster requests for retransmission consent fees are entirely reasonable, disprove Petitioners' claims of harm to consumer welfare, discuss why television stations are incented to strike deals, and demonstrate that the Commission lacks the statutory authority to adopt Petitioners' proposed "reforms."

Accordingly, it is respectfully requested that the Commission, with all due speed, deny the Petition for Rulemaking.

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> Congress did not intend either to "dictate the outcome of the . . . marketplace negotiations"[1] or for "the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[2]

OPPOSITION OF THE BROADCASTER ASSOCIATIONS

The National Association of Broadcasters, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates (collectively, the "Broadcaster Associations")[3] hereby oppose the Petition for Rulemaking in the above-captioned proceeding.[4]

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[1] S. REP. NO. 102-92 (1991), at 36.

[2] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000), at ¶ 23.

[3] 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. The ABC Television Affiliates Association is a nonprofit trade association representing television stations affiliated with the ABC Television Network. The CBS Television Network Affiliates Association is a nonprofit trade association representing television stations affiliated with the CBS Television Network. The FBC Television Affiliates Association is a nonprofit trade
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I. Introduction

Ten of the 13 largest multichannel video programming distributors ("MVPDs") in the nation, collectively serving more than 61.5 million subscribers[5] or nearly two-thirds of all MVPD subscribers, are among those petitioning the Commission to "reform" the retransmission consent system.[6] The basis for Petitioners' complaints is that, because of increased *competition with each other*,[7] MVPDs no longer possess—in their words—"'monopoly' power"[8] to demand "effectively free carriage of local broadcast stations,"[9] and, consequently, now have to negotiate

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association representing television stations affiliated with the FOX Television Network. The NBC Television Affiliates is a nonprofit trade association representing television stations affiliated with the NBC Television network. Collectively, the four network affiliate trade associations represent approximately 750 television stations affiliated with the four major broadcast television networks.

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

[5] Basic video subscribership, as of December 2009, compiled from data available at <http://www.ncta.com/Stats/TopMSOs.aspx>. In descending order of subscribership, the MVPDs are DIRECTV, DISH Network, Time Warner Cable, Charter Communications, Cablevision Systems, Verizon, Bright House Networks, Suddenlink Communications, Mediacom Communications, and Insight Communications.

[6] The ten large MVPDs are joined in their Petition for Rulemaking ("Petition") by the American Cable Association, OPASTCO, Public Knowledge, and New America Foundation (collectively, "Petitioners").

[7] *See* Petition at 15 ("Because MVPDs now compete with one another . . . broadcasters now . . . demand excessive retransmission consent fees . . . .").

[8] Petition at 18 ("[T]he idea of a single MVPD in a given market with 'monopoly' power over distribution has become a thing of the past . . . .").

[9] Petition at 8.

for payments to retransmit the signals of local television stations that contain the most "popular,"[10] "attractive,"[11] and "must have"[12] programming that is exhibited on their systems. This, they repeatedly suggest, is "causing consumer harm."[13]

Petitioners are members of a pay TV industry that, according to Commission calculations, has increased the weighted average price of cable television service by 163.1% between 1995 and 2008—while the CPI has increased only 38.4% over the same 13 years[14]; a pay TV industry which requires consumers to pay 82.4% more on a per-viewing-hour basis—the industry's own preferred measurement yardstick—in 2008 than they were in 1997[15]; a pay TV industry in which, according to the Commission, the only time an incumbent cable operator

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[10] Petition at 24.

[11] Petition at 18.

[12] Petition at 19, 35, & 37.

[13] Petition at 1. *See also id.* at 5 ("plac[ing] consumers in a no-win position"), 14-15 ("harming consumers"), 15 ("resulting in concrete and widespread harms to consumers"), 20 ("depriving consumers of the benefits of programming quality and diversity"), 24 ("creat[ing] an untenable situation in which consumers face increased cable rates"), 27 ("leav[ing] consumers vulnerable to rising prices"), 36 ("harm[ing] consumers by driving up rates"), 40 ("harming consumers with higher cable rates").

[14] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 24 FCC Rcd 259 (2009) ("*2008 Cable Industry Prices Report*"), at ¶¶ 28, 2. Petitioners are correct, then, that there have been "skyrocketing consumer costs," Petition at 5, but, as demonstrated below in Section VII, stations and retransmission consent fees are not responsible for those "skyrocketing" costs.

[15] *See 2008 Cable Industry Prices Report* at ¶¶ 36, 32 (explaining that the National Cable & Telecommunications Association asked the Commission to report data on a price-per-viewing-hour basis because it would account for changes in the "quality" of services provided to subscribers).

charges less is when it *faces competition* from another wireline competitor[16]; and a pay TV industry that the Commission notes "continued to report double-digit or near double-digit revenue and operating cash flow or operating income growth rates on both a quarterly and an annual basis."[17]

The simple fact is that cable rates are high because, according to the Commission's own economists, "cable operators with high market shares wield unilateral market power to charge higher prices"[18]—not, as Petitioners contend, because some local television stations have obtained modest payments for their signals. In fact, retransmission consent fees, as shown below, amounted in *total* for all television stations to about $0.70 per subscriber per month in 2009, which works out to around $0.14 to $0.175 per subscriber per month for *each* separate station affiliated with either the ABC, CBS, FOX, or NBC Television Network.[19] These fees are but a fraction of the fair market value for the quality and attractiveness of the service broadcasters provide through their signals in comparison with what MVPDs pay to national cable programming channels that deliver significantly less popular programming. Broadcast station retransmission consent fees in 2008 amounted to just 2.7% of MVPD programming expenses—even though programming on broadcast signals accounts for no less than 38% of

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[16] *See 2008 Cable Industry Prices Report* at ¶ 14 & Appendix B at ¶ 20 (reporting econometric analysis and observing that an incumbent cable operator charges less in the face of competition from another wireline competitor not because it is accommodating entry, but rather because it is "responding aggressively, perhaps as a signaling mechanism to discourage entry in other communities").

[17] *2008 Cable Industry Prices Report* at ¶ 2 n.4.

[18] *2008 Cable Industry Prices Report*, Appendix B at ¶ 16.

[19] *See infra* Section V.

audience viewing—and about 0.71% of the $99 per month in revenues that MVPDs collected, on average, from each subscriber.[20]

The fact remains, as it did in 1992 when Congress enacted the basis of the current system, that it is the MVPDs that wield market leverage over local broadcast stations—not the reverse. MVPDs control distribution of television programming to 87% of television households.[21] More significantly, they compete directly with local television stations for viewers and advertisers. And it is that *very competition* with television broadcasters that motivated Congress to establish the retransmission consent process.[22]

In the end, the Petition is really about the fact that the pay TV industry preferred it when they could force television stations to give away their signals at a discounted rate or, in many cases, for free. MVPDs have historically been empowered to "deflect cash demands," as Petitioners themselves put it.[23] But now, Petitioners are suggesting there is a need for the government to intervene and skew the market. It is remarkable that the pay TV industry, which

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[20] *See infra* Section VII.

[21] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009), at ¶ 8.

[22] *See* S. REP. NO. 102-92, at 35 (recognizing that the lack of a retransmission consent right "has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting. Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.").

[23] Petition at 14.

now dwarfs the local television station industry, would ask the government to favor it in the negotiation process with local television stations.[24]

Petitioners claim that they are concerned about harm to consumers: If the Commission doesn't do something, consumers will "lose access to popular network programming,"[25] face "recurring losses of programming,"[26] and "lose access to broadcast television signals when retransmission consent negotiations break down."[27] None of that, of course, is true. *No one* is more concerned about access by viewers to local television programming than the local television stations themselves. Local television stations provide thousands of hours every year of local news, weather, and sports programming to their viewers along with vital and timely emergency information.[28] And it is local television stations that provide annually some $10

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[24] The seven public MVPD Petitioners (DIRECTV, DISH Network, Time Warner Cable, Charter, Cablevision, Verizon, and Mediacom) had total 2009 revenue of $115.9 billion and total 2009 net income of $12.1 billion. In comparison, the seven largest public television broadcasters, in terms of audience reach (CBS Corp., Fox Television, NBC Universal, Sinclair Broadcasting Group, ABC Television Stations Group, Gannett Broadcasting, and Belo Corp.) had total 2009 revenue of $29.9 billion and total 2009 net income of $3.1 billion. The comparison ignores Comcast Corporation and AT&T U-verse, both of which would rank among the top seven public MVPDs in terms of subscribership, but neither of which is a petitioner here. (Note: These figures were calculated based upon information in the companies' 2009 10-Ks filed with the Securities and Exchange Commission. Data for Verizon is for Verizon FiOS as reported. Data for CBS Corp., NBC Universal (taken from General Electric's 10-K), and Belo Corp. are for the entire companies and not simply for their television broadcasting operations.)

[25] Petition at 5.

[26] Petition at 25.

[27] Petition at 26-27 (internal quotation marks and citation omitted).

[28] *See* NAB Comments, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25 (filed May 7, 2010), Appendix B at 10-11 (citing data that in 2009 local stations broadcast an average of more than 27 hours of emergency and special news programming per year).

billion to public service initiatives and charities in their communities.[29] Broadcasters rely on their viewers and, in turn, advertisers, to generate advertising revenue—the primary source of all their revenue. Approximately 90% of television station revenues are derived from advertising.[30]

Simply put, Petitioners' doomsday scenarios of negotiation "brinksmanship"[31] are not supported by the facts. In *tens of thousands* of retransmission consent negotiations, there have been few showdowns, even fewer shutdowns, less than a handful of complaint adjudications by the Commission—just four, in total—and *zero* findings by the Commission that a broadcast station has failed to negotiate in good faith or has otherwise abused the Commission's rules or processes (the same, unfortunately, cannot be said with respect to MVPDs).[32] The total of the 12 reported instances since 2006 in which there was a carriage interruption resulting from an impasse in retransmission consent negotiations has affected only *one-one hundredth of one*

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[29] *See* NAB Broadcasters' Public Service Web Site, *available at* <http://www.broadcastpublicservice.org>.

[30] *See Local TV*, Pew Research Center Project for Excellence in Journalism, THE STATE OF THE NEWS MEDIA 2010: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2010), at 9, *available at* <http://www.stateofthemedia.org/2010/printable_local_tv_chapter.htm>.

[31] *See, e.g.*, Petition at 31 ("pervasive brinksmanship"), 31 ("escalating . . . brinksmanship"), 40 ("brinksmanship"), 21 ("down-to-the-wire negotiations"), 24 (describing retransmission consent as "just another weapon in the networks' arsenal"), 35 ("mutually assured destruction").

[32] *See EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070 (2001) (broadcaster met good faith standard while complaining MVPD was admonished for abuse of Commission processes and lack of candor); *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47 (2007) (broadcaster met good faith standard); *Letter from Steven F. Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable TV*, 22 FCC Rcd 4933 (2007) (cable operator failed to meet good faith standard); *ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 1645 (2009) (broadcaster met good faith standard).

percent (0.01%) of annual television viewing hours.[33] In other words, U.S. television households have experienced an average annual service interruption from a retransmission consent dispute—i.e., the inability to tune in to a local television station *from their MVPD*—for about 19 minutes.[34] Consumers are far more likely to lose television service as a result of an electricity or cable system outage.[35]

And, more significantly, Petitioners' claim that consumers will actually "lose access" to broadcast station programming is simply false. Television station signals, of course, remain available to all consumers all the time, over the air and for *free*. We are not aware of any consumer having lost all access to his or her favorite television programming or any vital emergency information as a result of a retransmission consent negotiation impasse.

The "reforms" Petitioners request—automatic interim carriage without station consent and compulsory dispute resolution/arbitration—will clearly tilt to Petitioners' competitive advantage what the Commission described as recently as 2005 as a "level playing field."[36] Petitioners proposed "reforms" are modest only in a Swiftian sense and reasonable only if the Commission wishes to become ensnarled in thousands of disputes that the parties would otherwise resolve more quickly and more cost effectively on their own.

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[33] *See* Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (Apr. 2010) ("*Navigant Report*"), at 20, attached hereto as Appendix A.

[34] *See Navigant Report* at 19.

[35] *See Navigant Report* at 19.

[36] 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) ("*2005 FCC Retransmission Consent Report*"), at ¶ 44 (concluding that MVPDs and broadcasters "negotiate in the context of a level playing field").

As an MVPD industry economist has put it: "A negotiation over retransmission rights can thus be thought of as a negotiation over how to divide the pool of incremental profits created by the retransmission of the broadcaster's signal to the MVPD's subscribers. . . . Under standard economic models of bargaining, those shares *are driven by the relative bargaining abilities of the two parties* . . . ."[37] Petitioners' "reforms" seek to shift all the bargaining leverage to the MVPD. The result would be to create a "wholly artificial construct that has little in common with an actual marketplace"—precisely the regime that Petitioners claim to abhor.[38]

Why would an MVPD ever strike a bargain with a television station knowing it can force continued carriage, and it could do so without an "affirmative showing of 'bad faith' by the broadcaster"?[39] Of course, it would not—and, as a result, MVPDs would protract negotiations, force an impasse, and rely upon the Commission to bail them out. Petitioners' argument that forced interim carriage somehow "maintain[s] the *status quo*"[40] is not true. The parties previously bargained for a retransmission contract with a fixed term and, therefore, a fixed expiration date. Forced carriage beyond that date—putting aside the fact that the Commission is without legal authority to do so under 47 U.S.C. § 325(b)(1)—would grant the MVPD *more* than it bargained and paid for with the station originally. It would enable the MVPD to continue to

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[37] Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, filed by National Cable & Telecommunications Association, DIRECTV, Inc., and DISH Network in MB Docket No. 07-269 (filed Dec. 16, 2009) ("*Lexecon Report*"), at 12, 14 (emphasis in first sentence removed, emphasis in second sentence added).

[38] Petition at 3.

[39] Petition at 36-37.

[40] Petition at 37.

resell, at a profit, the station's signal to its subscribers, generating additional advertising revenue and subscriber fees to use in competing directly against the local station in the sale of advertising and acquisition of programming.

With respect to compulsory arbitration, not only do Petitioners fail to point to evidence of abuse by broadcast stations of any existing law, they also fail to provide any evidence or proof that the multiple legal and regulatory remedies now available to them are inadequate. The Commission has a comprehensive complaint process that provides relatively rapid adjudication. A greater panoply of relief is also available from federal and state courts. Mandating arbitration of retransmission consent negotiations would, perversely, result in driving costs up—costs that ultimately *would* be borne by television viewers. Petitioner Time Warner Cable itself previously stated in another context that "[b]inding arbitration has proven to be the fuel contributing to the skyrocketing costs of professional sports. It would be irresponsible of us to engage in a process that would force higher retail rates on our customers."[41]

Petitioners fail to acknowledge that so-called "reforms" and other proposals to obtain a negotiating advantage were thoroughly scrutinized and expressly rejected by the Commission less than five years ago.[42] Petitioners talk repeatedly about changes that have taken place since

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[41] *Cablevision Removes 2 Channels from Time Warner in Fee Dispute*, Bloomberg.com (Mar. 8, 2005), quoted in Reply Comments of the ABC, CBS, FBC, and NBC Television Affiliate Associations, *Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, MB Docket No. 05-28 (filed Mar. 31, 2005), at 8 & n.16; *see also NFL Offers Arbitration to Cable for NFL Network*, USA TODAY (Dec. 20, 2007) (quoting Glenn Britt, Chief Executive Officer of Time Warner Cable, as stating that "over the years we've been able to successfully reach agreements with hundreds of programming networks without the use of arbitration," and that "[w]e continue to believe that the best way to achieve results is to privately seek a resolution and not attempt to negotiate through the press or elected officials").

[42] *See generally 2005 FCC Retransmission Consent Report.*

1992, ignoring altogether the fact that the Commission considered market changes occurring between 1992 and the time it issued its Report to Congress in September 2005.

The comments that follow summarize the history of and basis for retransmission consent and the Commission's network non-duplication and syndicated exclusivity rules and point out the multiple flaws in the Petition. The comments also show that broadcaster requests for retransmission consent fees are entirely reasonable, reflecting but a fraction of broadcast signals' fair value, disprove Petitioners' claims of harm to consumer welfare, discuss why television stations are incented to strike deals, and demonstrate that the Commission lacks the statutory authority to adopt Petitioners' proposed "reforms" in any event.

II. Retransmission Consent, As Congress Intended, Enables Local Television Stations To Negotiate For The Fair Economic Value Of Their Signals, Thereby Supporting The Free, Over-The-Air Broadcast System

Petitioners claim that retransmission consent is a "wholly artificial construct that has little in common with an actual marketplace."[43] In fact, however, the retransmission consent law was enacted to address what had become an artificial, dysfunctional, and asymmetrical regulatory framework that had impaired the natural, competitive local market for the distribution of local television programming.

The Commission's current retransmission consent rules,[44] for all MVPDs and broadcast stations, are grounded in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").[45] The concept of retransmission consent, however, predates the

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[43] Petition at 3.

[44] *See* 47 U.S.C. § 325(b); 47 C.F.R. §§ 76.64-76.70.

[45] Pub. L. No. 102-385 (1992).

1992 Cable Act by many years. From the early days of the Radio Act of 1927, Congress allowed broadcasters to control and limit the use and retransmission of their signals by certain third parties.[46] With a station having invested in the cost of construction and operation of a broadcast station and in the cost of production and acquisition of programming, the indiscriminate, unauthorized retransmission of a station's signal by other stations was thought to be unfair, unreasonable, and contrary to the scheme of broadcast facility allocation to *local* communities, which had been carefully devised by Congress and implemented by the Commission.

In 1959, however, the Commission, upon consideration, declined to extend the retransmission consent requirement of section 325(a) of the Communications Act of 1934 to cable systems.[47] At that time, the average cable system provided only three channels and served between 500 and 1000 subscribers[48]—they were, in fact, "community antenna systems," as they were then called. These early cable systems were created to retransmit broadcast signals via "cable" to improve reception of local stations within their authorized service areas. Despite their small size and limited service, the Commission, nevertheless, recognized the economic impact that these nascent cable systems could have on local television stations and the Commission's carefully crafted plan of localism and allocation of television channels to local communities.

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[46] The relevant language codified in 47 U.S.C. § 325(a)—"nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station"—was taken from Section 28 of the Radio Act of 1927, 44 Stat. 1172. *See, e.g.*, S. REP. NO. 73-781 (1934), at 8 (stating "Section 325(a) is copied from section 28 of the Radio Act").

[47] *See Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting*, 26 FCC 403 (1959) ("*CATV and TV Repeater Services*"), at ¶¶ 65-68.

[48] *See CATV and TV Repeater Services* at ¶ 10.

The Commission determined that it would recommend to Congress that cable systems be required to obtain the consent of the originating station as a condition precedent to retransmission of the station's signal in order to respect the station's property rights in its signal, correct the obvious competitive unfairness, and preserve the integrity of the Commission's channel allocation scheme.[49]

Since then, cable television has evolved from a mechanism for simply relaying broadcast station signals into a multichannel video programming distribution service capable of providing dozens of programming channels—such as HBO, CNN, Nickelodeon, MTV, The Weather Channel, Bravo, A&E, and Discovery—and later hundreds of programming channels. All of these channels directly compete with local television stations for viewers and the vast majority directly compete with local television stations for advertising revenue—national and, in the case of many cable services, local advertising as well.

The public policy underlying the retransmission consent requirement for MVPDs is grounded in fundamental notions of equity and fair competition. To the same extent a television station is not permitted to retransmit and resell the signal of another station without its consent, a cable system should not be permitted to retransmit or resell the signal of a television station without its consent. By the time of the 1992 Cable Act, Congress recognized that the cable

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[49] *See, e.g.*, *CATV and TV Repeater Services* at ¶ 92. Congress failed to act on the Commission's recommendation at that time, and, in 1968, as cable television continued to develop, the Commission proposed—despite its 1959 holding—a modified retransmission consent regime that would apply to cable only in certain circumstances. But the Commission intentionally refrained from acting on its proposal to give Congress additional time to act or otherwise provide guidance, *see Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna TV Systems*, Notice of Proposed Rulemaking and Notice of Inquiry, 15 FCC 2d 417 (1968), and it was subsequently abandoned as a workable

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system exception to retransmission consent

> has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting. Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.[50]

As the House Conference Report further observed:

> Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the two industries.[51]

Thus, it was the development of competition *between* MVPDs and broadcasters that motivated Congress to terminate the regulatory "subsidy" for MVPDs and establish a retransmission consent requirement. Congress concluded that without the ability to control the retransmission—and resale—of their signals, television stations could not compete on fair terms with MVPDs. In particular, Congress was especially concerned that broadcasters had been

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proposal, *see id.*, Second Further Notice of Proposed Rule Making, 24 FCC 2d 580 (1970); *Commission Proposals for Regulation of Cable Television*, 31 FCC 2d 115 (1971).

[50] S. REP. NO. 102-92 (1991), at 35.

[51] H.R. CONF. REP. NO. 102-862 (1992), at 58.

competitively encumbered and that the absence of a retransmission consent requirement "will continue to harm the system of free, universally available, local broadcasting which was central to the scheme created by the 1934 Act."[52] In eliminating the retransmission consent exception for MVPDs, Congress sought to "establish a marketplace for the disposition of the rights to retransmit broadcast signals" but cautioned that it did not intend to "dictate the outcome of the ensuing marketplace negotiations" for retransmission of broadcast stations.[53]

When Congress established the current retransmission consent regime to re-balance the then-unlevel competitive playing field, it expressly relied upon the protections afforded to local broadcast stations by the Commission's program exclusivity rules as crucial mechanisms that would permit television stations to exercise their rights to the fullest extent possible.[54] In fact, Congress observed that amendments or deletions of the program exclusivity rules in a manner that would usurp localism would be "inconsistent with the regulatory structure" crafted by the 1992 Cable Act.[55] And Congress itself further expressly contemplated that broadcast stations, in

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[52] S. REP. NO. 102-92, at 55-56; *see also* H.R. CONF. REP. 102-862, at 57. The Commission also recognized that one of the principal goals of the 1992 Cable Act was "to place local broadcasters on a more even competitive level and thus help preserve local broadcast service to the public." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994) ("*Broadcast Signal Carriage Order*"), at ¶ 104.

[53] S. REP. NO. 102-92, at 36.

[54] These rules enable stations to enforce local program exclusivity rights negotiated with networks and other program suppliers with respect to carriage of duplicative programming by cable and satellite. *See* 47 C.F.R. §§ 76.92-76.130.

[55] S. REP. NO. 102-92, at 38; *see also Broadcast Signal Carriage Order* at ¶ 114 (noting that the policies of both retransmission consent and program exclusivity "promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view").

exchange for retransmission consent, would seek compensation, would enter into joint marketing efforts with cable operators, or would seek to program an additional channel on a cable system.[56] In particular, Congress observed: "Cable operators *pay* for the cable programming services they offer to their customers; the Committee believes that *programming services which originate on a broadcast channel should not be treated differently*."[57]

These Congressional findings at the time are far different than Petitioners' revisionist view that somehow the 1992 Cable Act "strongly tipped the scales in favor of broadcasters in dealing with MVPDs, chiefly by granting broadcasters new rights to seek compensation, to prevent MVPDs from carrying their signals to consumers, and to limit the ability of MVPDs to obtain from other sources network and other programming when unable to reach a carriage agreement with the local broadcaster."[58] The fact is, as Petitioners themselves concede, "broadcasters faced extremely limited distribution options and negotiated almost exclusively" in a context of "market power in the hands of distributors," indeed where MVPDs had "'monopoly' power over distribution."[59] In fact, Petitioners observe that cable operators of the time were so strong that they were "able to deflect cash demands"[60] for compensation.

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[56] *See* S. REP. NO. 102-92, at 35-36.

[57] S. REP. NO. 102-92, at 35 (emphasis added).

[58] Petition at 6-7 (citing the Commission's network non-duplication and syndicated exclusivity rules with respect to cable systems).

[59] Petition at 12, 16, 18 (respectively).

[60] Petition at 14.

Each of Petitioners' complaints about how powerful MVPDs were hamstrung by the attempt of Congress to establish a functioning marketplace ignores the fact that Congress considered each of these complaints and rejected them. Thus, as seen above, Congress plainly contemplated and fully expected that television stations would seek cash compensation from those who retransmitted their signals. Congress re-established a right, abrogated three decades earlier, of a local television station *to grant* or—because Congress intentionally did not seek to "dictate the outcome of the ensuing marketplace negotiations"—*to withhold* consent for retransmission of its broadcast signal. And, just as importantly, Congress relied upon the Commission's program exclusivity rules to protect localism so that MVPDs could not do an end-run around the local station.

Since the current retransmission consent requirement was originally enacted, Congress has had multiple opportunities to adopt Petitioners' "reforms"—even as recently as this month. But Congress has steadfastly declined to do so. Congress—and the Commission, itself—have found no need to adopt the "reforms" and, with minor exception, have not changed the retransmission consent regime. In the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),[61] Congress sought to foster competition between cable operators and satellite carriers, while at the same time preserving broadcast localism, by, *inter alia*, providing a compulsory copyright license for the retransmission by satellite of local television signals.[62] To

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[61] Pub. L. No. 106-113 (1999).

[62] *See, e.g.*, H.R. CONF. REP. NO. 106-464, at 92 (1999) (stating that "the Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism" and, "perhaps most importantly, the Conference Committee is aware that in creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders [requiring it] to act as narrowly as possible to minimize the effects of the government's intrusion on the broader
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ensure that this new competitive scheme would be given the opportunity to work effectively, Congress required that television stations negotiate retransmission consent with MVPDs in "good faith" and prohibited television stations from entering into exclusive retransmission consent agreements with MVPDs. By this "good faith" requirement, Congress envisioned that a

> television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The FCC may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations.[63]

The Commission itself recognized that SHVIA did not "contemplate an intrusive role for the Commission with regard to retransmission consent" or "grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions" or "intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[64] In fact, as the Commission observed, "[R]etransmission consent negotiations are *the market* through which the relative benefits and costs to the broadcaster and MVPD are established."[65]

Subsequently, in 2004, Congress revisited the retransmission consent statute for a third

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market in which the affected property rights and industries operate"); *see also* H.R. REP. NO. 106-79(I), at 15 (1999).

[63] H.R. CONF. REP. NO. 106-464, at 105; *see also Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), at ¶ 56 (listing bargaining proposals that presumptively are consistent with competitive marketplace considerations and the good faith negotiation requirement).

[64] *Good Faith Order* at ¶¶ 13, 23.

[65] *Good Faith Order* at ¶ 53 (emphasis added).

time. By that point, direct broadcast satellite ("DBS") operators had become successful competitors to cable operators—indeed, they flourished after SHVIA was passed.[66] In the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"),[67] Congress made the good faith negotiating requirement reciprocal and applied it to all MVPDs as well as to broadcasters.[68] But that is the *only* change Congress concluded was necessary to the retransmission consent statute.

Nevertheless, as part of SHVERA, Congress requested the Commission to evaluate the relative success or failure of the "marketplace" created by the 1992 Cable Act, including the impact of retransmission consent on competition in the video marketplace.[69] In September 2005, the Commission, in an exhaustive examination of retransmission consent and the program exclusivity rules, reported to Congress not only that the retransmission consent rules did not disadvantage MVPDs, but also reported that the rules are fulfilling the purposes for which they were enacted. Accordingly, the Commission recommended to Congress that *no* change be made

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[66] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd 26901 (2002), at ¶ 61 (stating that EchoStar reported that the ability to retransmit local television signals "has made DBS more competitive with incumbent cable providers and has led to an increase in DBS subscribership").

[67] Pub. L. No. 108-447, Div. J., Tit. IX (2004).

[68] *See* SHVERA, § 207 (amending 47 U.S.C. § 325(b)(3)(C)). In SHVERA, Congress also, and once again, recognized that the satellite industry's compulsory copyright license effectively gives these broadcast industry competitors a "Government subsidy." H.R. REP. NO. 108-660, at 53 (2004) (statement of Rep. Berman). This compulsory copyright license, as Congress observed, provides "valuable accommodations that benefit the DBS industry." *Id*. at 9 (Judiciary Committee report).

[69] *See* SHVERA, § 208.

to the statutory or regulatory provisions relating to retransmission consent.[70] Remarkably, Petitioners fail to mention this Commission report or acknowledge its existence in their 40-page pleading.

The Commission, in its *2005 Retransmission Consent Report*, concluded (i) the retransmission consent marketplace has created a "level playing field" on which local television broadcasters and MVPDs conduct negotiations, (ii) the retransmission consent regime creates incentives for both broadcasters and MVPDs to reach mutually beneficial arrangements, and (iii) both parties, in fact, benefit when carriage of broadcast programming is arranged.[71] And, "[m]ost importantly, consumers benefit by having access to such programming via an MVPD."[72] The *2005 Retransmission Consent Report* reflected the Commission's conclusion that, "overall, the regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals."[73] Following naturally from these conclusions, the Commission recommended in the 2005 Report, as noted above, that no changes to current law governing retransmission consent rights were warranted.

Congress, evidently, took the Commission's recommendation to heart. Just this month, for the fourth time, Congress revisited the retransmission consent statute in connection with the

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[70] *See* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) ("*2005 FCC Retransmission Consent Report*"), at ¶ 34.

[71] *2005 FCC Retransmission Consent Report* at ¶ 44.

[72] *2005 FCC Retransmission Consent Report* at ¶ 44.

[73] *2005 FCC Retransmission Consent Report* at ¶ 44.

passage of the Satellite Television Extension and Localism Act of 2010 ("STELA").[74] Despite heavy congressional lobbying efforts by MVPDs over the past 15 months to "reform" the retransmission consent regime, STELA plainly speaks to Congress's intent: Congress extended the mutual good faith negotiation requirement and the prohibition on exclusive retransmission consent agreements for another five years, until January 1, 2015, but made *no other changes* to the retransmission consent framework.[75] *Significantly, this Congressional action occurred during the pendency of this very Commission proceeding*. It would be difficult, if not impossible, to square agency intervention in the retransmission consent marketplace with Congress's obvious and timely desire to allow that marketplace to function as it has intended since 1992.

In assessing the merits of the repetitive arguments of Petitioners to revisit the retransmission consent rules, the Commission "must supply a reasoned analysis explaining [a] departure from its prior policies."[76] In short, there must be an adequate factual predicate to

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[74] S.3333 has been passed by both chambers of Congress and was presented to the President on May 17, 2010.

[75] *See* STELA, § 202. STELA, like SHVERA and SHVIA before it, also extended the expiration date of the "unserved household" exception to retransmission consent. This exception, however, applies only to satellite retransmission of distant network signals to "unserved households" which, by definition, are households that cannot receive an over-the-air signal from the local network station. It is the "distant" signal that can be retransmitted without consent, not the local signal. This scheme was designed, beginning in 1988, both to provide lifeline television service to viewers who otherwise cannot receive a broadcast signal and to protect the integrity of broadcast localism.

[76] *Monroe Commc'ns Corp. v. FCC*, 900 F.2d 351, 357 (D.C. Cir. 1990). *See also FCC v. Fox Television Stations., Inc.*, 129 S. Ct. 1800, 1811 (2009) (agency changing stance must "provide reasoned explanation for its action" and "show that there are good reasons for the new policy"). "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past . . . ." *Id.* at 1824 (Kennedy J., concurring).

demonstrate a need for a change in the rules. The Petition fails, however, to provide any basis in fact or law to support a change in the Commission's retransmission consent rules.

Indeed, there is no basis for changing the rules. During the past 18 years, consisting of six 3-year retransmission consent election cycles for cable and three election cycles for satellite, as well as *tens of thousands* of individual retransmission consent negotiations that have occurred between broadcasters and MVPDs, it has been necessary for the Commission to adjudicate a good faith retransmission consent dispute in only *four* instances. In these four adjudicated cases, the Commission not only found that the broadcaster in each case *had not* violated the regulatory scheme or the good faith negotiation requirement but found, instead, that the complainant MVPD, in one case, *had* abused the FCC's processes and that the MVPD in another case had failed to negotiate in good faith.[77] The record of retransmission consent negotiations, therefore, speaks for itself. Broadcasters have neither failed to negotiate retransmission consent in good faith nor have they abused the retransmission consent rules or processes.

III. The Program Exclusivity Rules Work In Tandem With Retransmission Consent To Protect Localism And Private Contract Rights

Petitioners' attack on retransmission consent also attacks the Commission's program

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[77] *See EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070 (2001) (broadcaster met good faith standard while complaining MVPD was admonished for abuse of Commission processes and lack of candor); *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47 (2007) (broadcaster met good faith standard); *Letter from Steven F. Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable TV*, 22 FCC Rcd 4933 (2007) (cable operator failed to meet good faith standard); *ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 1645 (2009) (broadcaster met good faith standard).

exclusivity rules.[78, 79] Petitioners fail, however, to acknowledge the historical context of these rules, why the rules exist, why they are important, why Congress relied upon them in fashioning the retransmission consent regime in the 1992 Cable Act, or why they, too, like retransmission consent, promote competition in the creation and distribution of television programming.[80]

Absent from Petitioners' argument, and a fact often missed in debate over the network non-duplication and syndicated exclusivity rules, is that the rules themselves *do not* provide program exclusivity. In fact, the rules actually *limit and restrict* program exclusivity by limiting the geographic area in which television stations may enter into program exclusivity agreements with network and syndicated program suppliers. The Commission's rules only (a) provide a forum for adjudication of program exclusivity disputes, (b) limit and restrict the geographic scope of a program exclusivity arrangement between a program supplier and a local television station, and (c) impose certain formal notice requirements on local television stations as a condition to enforcement. The *actual* program exclusivity terms for network non-duplication and syndicated program exclusivity are a matter of *private contractual agreement* between the

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[78] *See, e.g.*, Petition at 4 (complaining of limitation of MVPDs to obtain duplicative programming from other sources), 7 (complaining of "advantage" conferred on broadcast stations by program exclusivity rules), 12 (complaining that "powerful local network affiliates can protect their monopoly position by blocking cable systems from importing another affiliate of the same network"), 13-14 (complaining that because networks do not affiliate with more than one local station, the station "enjoy[s] almost complete exclusivity" over its programming), 14 (complaining that broadcasters are "arm[ed]" with programming exclusivity protections).

[79] The program exclusivity rules include the network nonduplication rules, *see* 47 C.F.R. §§ 76.92-76.95, 76.120-76.122, and the syndicated program exclusivity rules, *see* 47 C.F.R. §§ 76.101-76.110, 76.120, 76.123-76.125.

[80] Appendix B summarizes the history of the program exclusivity rules and further demonstrates that their purpose and structure are to promote localism and protect the private contractual rights of broadcasters and program suppliers. *See A Short History Of The Program Exclusivity Rules* (attached hereto as Appendix B).

program supplier and the local television station. Neither the Commission nor its rules provide or enforce program exclusivity provisions or arrangements not agreed to by the program supplier and the local station.

The reality is that, subject only to antitrust law, in the absence of the Commission's network non-duplication and syndicated exclusivity rules, program suppliers and local television stations could enter into exclusivity arrangements covering geographic areas of hundreds of miles. What Petitioners actually request is that the Commission adopt mandatory "broadcast signal access" rules in abrogation of the program exclusivity provisions of competitive program contracts—all for the single purpose of gaining a competitive advantage over local television stations.

Exclusivity—as Congress and the Commission have consistently recognized—constitutes an essential component of America's unique system of free, over-the-air television stations licensed to serve local communities.[81] Local affiliates always have negotiated with networks and syndicated programming sources for exclusive programming within their markets. Advertisers on local broadcast stations expect and, indeed, pay for that exclusivity; these advertising revenues support stations' local programming, including news, and their ability to serve their communities. Exclusivity, which is limited by Commission rules to narrowly defined geographic zones near stations' home communities, enhances competition by strengthening local stations' ability to compete against the hundreds of non-broadcast and non-local programming networks

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[81] *See, e.g.*, 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) ("*2005 FCC Retransmission Consent Report*"), at ¶ 50; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), at ¶ 114; S. REP. NO. 102-92 (1991), at 38.

offered by cable and satellite. As noted above, the Commission's rules do not mandate exclusivity, but merely enable broadcasters to protect the contractual arrangements they "have entered into for the very purpose of securing programming content that meets the needs and interests of their communities."[82] Programming exclusivity, and the system of local service it permits, is not a weakness of our broadcast system, as Petitioners claim. It is a unique and highly valued strength.

The purpose of the program exclusivity rules is to protect the freedom of program suppliers to determine the reasonable geographic scope of their program distribution license. This, in turn, allows broadcasters to acquire (as other program distributors do) a reasonable measure of program exclusivity so that their capital may be deployed to create and distribute the best and most diverse local and national television programming possible, thereby maximizing consumer welfare. The history of this scheme confirms that it has worked since the reinstitution of syndex protection in 1988, and there is no evidence of marketplace failure. Indeed, the Commission had temporarily repealed the syndex rules in 1980, but reinstituted those rules eight years later, concluding that they were needed to maintain competition in the video programming marketplace.[83] Thus, as with retransmission consent, there is no warrant for Congress or the Commission to impose additional government intrusion into this realm of purely private contractual negotiations.[84]

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[82] *2005 FCC Retransmission Consent Report* at ¶ 50.

[83] *See* Appendix B for a detailed discussion of the reinstitution of the syndex rules.

[84] *See 2005 FCC Retransmission Consent Report* at ¶ 50 (concluding that interference into contractual arrangements between broadcasters, networks, and syndicated programming suppliers would "contradict our own requirements of broadcast licensees and would hinder our policy goals").

Each of the Petition's complaints about the program exclusivity rules in fact shows that they are working just as the Commission intended. Petitioners' complaint that MVPDs are limited in obtaining duplicative programming from other sources outside the local market[85] misses the whole point: Exclusivity is valued in the marketplace and ultimately induces the provision of greater programming choice and quality for consumers.

Petitioners' complaint that the program exclusivity rules confer an "advantage" on broadcast stations[86] ignores the "advantage" that MVPDs would otherwise have in exercising their own freedom to enter into exclusive programming contracts (a notable example being DIRECTV's NFL Sunday Ticket). The so-called "advantage" is nothing but giving effect to a privately negotiated right and a corresponding leveling of the playing field in an otherwise distorted market.

In light of the independent economic reasons supporting the programming exclusivity rules, and the rules' integral role in promoting competition and the proper functioning of the retransmission consent marketplace, it is no surprise that the Commission's 2005 Report to Congress expressly rejected various MVPDs' proposals to allow MVPDs to abrogate and bypass the local program exclusivity rights of stations if they could not reach agreement on retransmission consent with local stations.[87]

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[85] *See* Petition at 4.

[86] Petition at 7.

[87] *See 2005 FCC Retransmission Consent Report* at ¶¶ 50-51.

IV. In Addition To Its Historical Inaccuracy, The Petition Mischaracterizes The Retransmission Consent Marketplace And Is Logically Flawed

Petitioners suggest the pay TV industry confronts dire choices in the retransmission consent marketplace: "[B]roadcasters' substantially escalating demands for cash compensation have created an untenable situation in which consumers face increased cable rates *or* the loss of popular programming."[88] But this characterization is a false Hobson's choice: Retransmission consent fees are but a small fraction of MVPD programming costs and an even smaller fraction compared to MVPD revenues and profits whose growth has far outstripped the rise in retransmission consent fees.[89] Moreover, it bears emphasis that consumers do not face the loss of popular programming should a retransmission consent negotiation reach an impasse. Consumers can receive the programming from the local station over the air and for *free*—or from another MVPD.

Petitioners' mischaracterization is valuable in that it reveals their true motivation: to tilt retransmission consent negotiations even more in their favor. But, as discussed below, the Commission lacks statutory authority, let alone expertise, to set retransmission consent terms or

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[88] Petition at 24 (emphasis added); *see also* Petition at 5 ("[T]he broadcast networks and their affiliated stations present MVPDs and their subscribers with two options: either submit to significantly higher rates *or* lose access to popular network programming." (emphasis added)); Petition at 1 ("As broadcasters now demand significant cash for carriage of their signals, consumers are held hostage as MVPDs must choose between a rock and a hard place: pay spiraling carriage fees and raise consumer rates, *or* be forced by broadcasters to drop local signals." (emphasis added)); Petition at 32 (contending that MVPDs are "faced with the prospect of either having to acquiesce to broadcasters' ever-increasing compensation demands *or* risking service disruptions to subscribers").

[89] *See infra* Section VII.

compensation levels.[90] Moreover, the Commission has held—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.[91]

What Petitioners really want, then, is for the Commission to favor certain competitors, namely pay TV providers, rather than the principles of competition. But the Commission has been down this path before, and it already knows that the marketplace can only function if the agency does not take a seat on a particular side of the negotiating table.[92]

A second mischaracterization frequently repeated throughout the Petition is the alleged harm to consumers caused by television stations' "incentive and ability to deprive consumers of network programming"[93] and "withdraw[al of] programming from millions of customers."[94] *First*, television stations never deprive viewers of programming—it is provided over-the-air and *for free* on a *continuous* basis to all consumers. And, *second*, television signals are not

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[90] *See infra* Section IX.

[91] *Mediacom/Sinclair Order* at ¶ 18.

[92] *See, e.g.*, *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299 (1988), at ¶ 23 (determining, in reinstituting syndex rules in 1988, that it had previously—and incorrectly—focused on competitors rather than on competition).

[93] Petition at 5.

[94] Petition at 15.

"withdrawn" or "with[e]ld"[95] by stations—expiring retransmission consent agreements simply, by their own terms, *expire*, on the day and at the time agreed upon by the sophisticated parties that bargained for and struck the agreement years prior.

In virtually all locations, consumers have access to local broadcast station signals over-the-air. And they have this access whenever and for whatever reason they want it—whether because one or more television sets in the home are not connected to an MVPD, or because there is a cable outage, or because a thunderstorm interferes with satellite reception. Television stations will not intentionally cause viewers to lose access to their signals—viewers are the lifeblood of the advertising system that supports their very ability to broadcast at all.[96]

Moreover, the references to broadcasters' "brinksmanship,"[97] "threat[s] to 'go dark,'"[98] "threats to pull signals,"[99] "withhold[ing] their signals at selective times,"[100] "holding up the MVPD,"[101] and "constant threat of blackouts"[102] ignore the fact that the date on which an

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[95] Petition at 7.

[96] Approximately 90% of television station revenues are derived from advertising. *See Local TV*, Pew Research Center Project for Excellence in Journalism, THE STATE OF THE NEWS MEDIA 2010: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2010), at 9, *available at* <http://www.stateofthemedia.org/2010/printable_local_tv_chapter.htm>.

[97] Petition at 1, 29, 31, 36, 37, 40.

[98] Petition at 15.

[99] Petition at 38.

[100] Petition at 27 n.89. The claim of "selective" withholding of signals defies logic and reality. Both parties, MVPD and broadcaster alike, agree during an arm's-length negotiation on precisely when the MVPD's right to retransmit the television station's signal will expire. There is nothing "selective," *a fortiori*, about the expiration of that right.

[101] Petition at 36.

MVPD's contractual right to retransmit a station's signal ends is known to—and expressly agreed to by—the MVPD one, three, six, or even ten years in advance of the day on which it occurs. All the "showdown,"[103] "down-to-the-wire,"[104] "manipulation,"[105] and "breakdown"[106] language that populates the Petition is based on rhetorical hyperbole—not facts. The predictable end of a private agreement between sophisticated business entities and the ensuing good faith discussions about the terms under which they are willing to continue their relationship cannot be contorted into a rationale for Commission intervention to advantage pay TV providers.

Petitioners' third mischaracterization erroneously relies on the Commission's basic cable tier rate regulation rules as a basis to justify a change in the retransmission consent regime and the authority for the Commission to make such a change.[107] This argument is disingenuous for at least three reasons: *First*, as Petitioners acknowledge only in a footnote, *only cable systems* (and not satellite companies) are subject to the basic cable service tier rate regulation and tier buy-through requirements.[108] But since cable systems serve only about 62% of MVPD subscriber

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[102] Petition at 40.

[103] Petition at 1.

[104] Petition at 21.

[105] Petition at 8, 20. The Petition's reference to "broadcaster misconduct," Petition at 31, and "abuses," Petition at 4, and characterization of broadcaster negotiation techniques as "abusive," Petition at 39 n.126, are simply not borne out by reality. As discussed above, no broadcaster has *ever* been found by the Commission to have violated its obligation to bargain in good faith. *See, e.g.*, *supra* note 32 and accompanying text.

[106] Petition at 30.

[107] *See* Petition at 16, 31-32, 38.

[108] *See* Petition at 16 n.47.

households,[109] that means that 38% of MVPD subscriber households subscribe to a service that is *not* subject to cable rate regulation or the tier buy-through requirement.

Second, at last official count, cable operators have been relieved from rate regulation and tier buy-through requirements in 3,205 cable communities as a result of cable-initiated Commission findings of effective competition in those communities.[110] These cable communities represent 18.1% of all cable subscribers,[111] and the Commission believes that effective competition exists in many additional communities in which the cable operator has simply not yet asked to be relieved of the rate regulation requirements.[112]

Combining those cable and non-cable MVPD subscriber households subscribing to a service that is not subject to the cable rate regulation and tier buy-through requirements means that about half, and probably more, of all MVPD subscribers subscribe to a service not subject to the requirements—a percentage growing weekly as additional cable communities are found to face effective competition.[113] Clearly, then, there can be no rationale, in logic, to rely on those

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[109] This figure is derived from the data provided by NCTA on its website for the Top 25 MVPDs, *see* NCTA, *Top 25 Multichannel Video Programming Distributors*, *available at* <http://www.ncta.com/Stats/TopMSOs.aspx>, together with the fact that there are approximately 96 million MVPD households, *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009), at ¶ 8 ("*Thirteenth Video Competition Report*").

[110] *See Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 24 FCC Rcd 259 (2009) ("*2008 Cable Industry Prices Report*"), at Attachment 1-b.

[111] *See 2008 Cable Industry Prices Report* at Attachment 1-b.

[112] *See 2008 Cable Industry Prices Report* at ¶ 16 & n.13, ¶ 17 n.16.

[113] During the first week of May 2010, for example, the Commission approved effective competition petitions affecting some 60 communities. *See Charter Communications, Petitions for Determination of Effective Competition in Various Illinois and Wisconsin Communities*,

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rules to justify Commission intervention in the retransmission consent regime—even assuming the Commission had the authority to do so.[114]

Third, Petitioners have provided no empirical data to support any contention that broadcaster retransmission consent fees have caused the Commission to find cable systems in violation of their obligation to charge reasonable rates under the rate regulation rules. The Broadcaster Associations are not aware of any Commission determination linking a cable system's violation of the rate regulations to retransmission consent fees.

In short, none of the Petition's historical inaccuracies, false Hobson's choices, misleading claims about loss of programming or brinksmanship about expiration dates negotiated and known years in advance, or limited cable-specific regulatory requirements support Petitioners' arguments for the Commission to intervene and artificially manipulate the retransmission consent marketplace. Nor, as demonstrated next, does that marketplace itself.

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Memorandum Opinion and Order, CSR Nos. 8215-E et al., DA 10-788 (rel. May 7, 2010) (four communities); *Cox Communications Kansas, LLC, Petitions for Determination of Effective Competition in Various Kansas Communities*, Memorandum Opinion and Order, CSR Nos. 8222-E et al., DA 10-789 (rel. May 7, 2010) (51 communities); *Comcast Cable Communications, LLC, Petition for Determination of Effective Competition in Baltimore County, Maryland*, Memorandum Opinion and Order, CSR No. 8013-E, DA 10-790 (rel. May 7, 2010) (one community); *Cablevision Systems Corporation, Petitions for Determination of Effective Competition in Communities in New York State*, Memorandum Opinion and Order, CSR Nos. 7826-E et al., DA 10-791 (rel. May 7, 2010) (four communities). During this time, only one cable community was returned to basic tier regulation. *Petition of the Town of Topsail, North Carolina, for Recertification to Regulate the Basic Cable Service Rates of Charter Communications, Inc., d/b/a/ Falcon Cable Media*, Memorandum Opinion and Order, CSR No. 6403-E, DA 10-792 (rel. May 7, 2010).

[114] *See* Section IX below, discussing this statutory authority issue.

V. Retransmission Consent Fees Are Modest In Comparison To The License Fees That MVPDs Pay For Far Less Popular Programming

Petitioners contend broadcasters are "demand[ing] excessive retransmission consent fees,"[115] at the same time that they acknowledge that local broadcasters continue to provide what they variously refer to as "popular programming,"[116] "must have" channels,[117] and "attractive network and syndicated programs in their local areas."[118]

Simply put, there is no evidence that any broadcaster request is "excessive." Instead, information on fees paid by MVPDs for nonbroadcast channels shows that the broadcasters' compensation is significantly less than "that paid to other programmers of equal, or lower,

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[115] Petition at 15.

[116] Petition at 24.

[117] Petition at 19, 35, 37. In light of the vast number of video programming options available to MVPD subscribers, the concept that local broadcast stations are "must have" channels may be less true than has previously been the case. Petitioners contend that broadcasters' possession of certain "must have" stations somehow "confers significant bargaining leverage" on broadcasters so as to allow them to force MVPDs to pay unreasonable retransmission consent fees. Petition at 19. Given the ever-increasing number of non-broadcast channels available to subscribers, each of which may provide a substitute for some portion of traditional broadcast programming, it is a fallacy to assert that the purported "must have" nature of broadcast programming provides broadcast stations with an unfair advantage under the retransmission consent rules. Comcast, the nation's largest MVPD, appears to agree, stating NBC network programming "is not the type of 'must have' channel that would induce sufficient switching to make even temporary foreclosure profitable." General Electric Company and Comcast Corporation, *Applications of Comcast Corporation, General Electric Company, and NBCU Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, Applications and Public Interest Statement, MB Docket No. 10-56 (filed Jan. 28, 2010), at 118-19.

[118] Petition at 18.

ratings."[119] Table 1 shows what MVPDs pay both in the aggregate and on average for the Top 4, the Top 10, and the Top 20 cable networks in each of the three ranked categories (rank by license fee, rank by ratings, and rank by extent of distribution), and Table 1 also shows the ratings, in the aggregate and on average, for these same categories.[120] Thus, an MVPD paid $8.32 per subscriber per month to retransmit the four most expensive cable networks, and those four cable networks delivered total ratings of 5.772 during the November 2009 sweeps period. That works out to an average per Top 4 cable network of $2.08 per subscriber per month to achieve ratings of 1.443. At the same time, an MVPD paid $5.95 per subscriber per month to retransmit the four most heavily viewed cable networks that month, which collectively delivered ratings of 8.743. On average, that is $1.49 per subscriber per month to achieve ratings of 2.186.

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[119] *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47 (2007) ("*Mediacom/Sinclair Order*") at ¶ 18 (holding that it is reasonable for the fair market value of any source of programming to be based in large part on the programming's popularity).

[120] SNL Kagan's license does not permit the disclosure of ratings data for individual cable programming networks. Thus, all ratings data is shown in the aggregate with respect to, or averaged over, multiple cable networks.

Table 1
Composite Cable Programming License Fees and Ratings 2009

		By License Fee		By Ratings		By Distribution	
		Fee	*Ratings*	*Fee*	*Ratings*	*Fee*	*Ratings*
Top 4 Cable Networks	*Total*	$8.32	5.772	$5.95	8.743	$1.37	4.274
	Average	$2.08	1.443	$1.49	2.186	$0.34	1.069
Top 10 Cable Networks	*Total*	$11.82	10.978	$8.87	16.693	$3.91	10.957
	Average	$1.18	1.098	$0.89	1.669	$0.39	1.096
Top 20 Cable Networks	*Total*	$16.10	17.163	$10.65	25.859	$10.64	21.324
	Average	$0.81	0.858	$0.53	1.293	$0.53	1.066

Source: Underlying data from SNL Kagan, *Economics of Basic Cable Networks 2009*, and SNL Kagan, *Nielsen November 2009 Prime-Time Live Coverage*. License fees are per subscriber per month.

The ratings achieved by television stations, however, dwarf the ratings of the cable networks.[121] The aggregate ratings of the Big 4 Networks, i.e., the ABC, CBS, FOX, and NBC Networks, during prime time in November 2009 were 20.738—multiples higher than the aggregate ratings of the Top 4 cable networks within any of the three categories.[122] The average

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[121] According to the Television Bureau of Advertising, in the 2008-2009 television season, 197 of the top 200 programs were aired on broadcast television; the highest ranked program on a cable network came in at No. 80. *See* TVB, *Full Season Broadcast vs. Subscription TV Primetime Ratings: 2008-2009*, *available at* <www.tvb.org/nav/build_frameset.aspx>.

[122] Ratings for television stations are confined to prime time on a national basis so that they are fully comparable to the ratings for the cable networks. This gives a very *conservative* picture of the relative popularity of local television stations to cable programming networks because, on an all-day local market basis, many local television stations have ratings at the 10+ and 15+ levels, and some even at the 20+ level. These ratings are themselves multiples higher than the average ratings of just a Big 4 Network during prime time on a national basis because they account for the popularity of local news programming and choice syndicated programming that local stations offer outside of prime time in competition with substantially less attractive programming offered by cable networks during those other dayparts. *See, e.g.*, Comments of
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rating for the Big 4 Network programming schedule during prime time in November 2009 was 5.185, again, many times higher than the average rating for even the most popular cable networks during that period.

Extending beyond just the Big 4 Networks, the popularity of other broadcast network fare is similarly impressive compared to cable networks. With respect to the Top 10 broadcast networks (ABC, CBS, FOX, NBC, CW, MyNetwork, Univision, Telemundo, ION, and Telefutura), the aggregate ratings for November 2009 were 25.997, far higher than the aggregate ratings of the Top 10 cable networks in any of the three categories.

The Commission has recognized that audience ratings are measures of the level of audience acceptance and may be relevant, in turn, to the commercial value, of the channels. Indeed, the Commission has said 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.[123]

Within this same framework, retransmission consent fees, which petitioners claim are "excessive,"[124] absolutely pale by comparison to the subscriber fees cable operators readily pay

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National Association of Broadcasters, Attachment K, Duopoly Analysis Report, MB Docket No. 06-121 (filed Oct. 23, 2006) (containing average all-day share data from July 2005 to May 2006 for every commercial television station in America); Reply Comments of Hearst-Argyle Television, Inc., MB Docket No. 07-198 (filed Feb. 12, 2008) (analyzing all-day share data for various owned television stations in comparison with comparable data for cable networks).

[123] *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47 (2007), at ¶ 18.

[124] Petition at 15.

for less valuable cable networks in the open marketplace. SNL Kagan estimates that MVPDs paid $739 million in retransmission consent fees in 2009.[125] Given that there are approximately 95.8 million MVPD subscribers nationally,[126] this means that MVPDs pay approximately $0.70 per subscriber per month to retransmit every commercial television station, i.e., all commercial stations in the aggregate.[127] If Big 4 Network affiliates were responsible for this entire amount, each Big 4 affiliate would be receiving around $0.175 per subscriber per month in retransmission consent fees. And, is seems unlikely that all Univision, CW, and MyNetwork stations (the three next most popular types of stations) receive nothing for their channels. Therefore, assuming that Big 4 Network affiliates are responsible for 80% of retransmission consent fees and the other stations the remaining 20%,[128] Big 4 Network affiliates would receive, in the aggregate, just

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[125] *See* Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, filed by National Cable & Telecommunications Association, DIRECTV, Inc., and DISH Network in MB Docket No. 07-269 (filed Dec. 16, 2009) ("*Lexecon Report*"), at 36 (reporting SNL Kagan estimate); *see also* Petition at 26.

[126] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009), at ¶ 8.

[127] According to the *Lexecon Report*, at 36-37 & Table 4, SNL Kagan estimates the average month's retransmission consent fees paid by MVPDs per subscriber in 2009 to be $0.74. This calculation is slightly higher than the $0.70 per subscriber per month figure shown in the text because, according to the *Lexecon Report*, not all consumers subscribe to an MVPD that pays retransmission consent fees. However, if no retransmission consent fees are paid, that is equivalent to an effective rate of $0.00 and this amount should be taken into account in considering a broad industry average. Regardless, the difference of $0.04 per subscriber per month is not material to the point made in the text that, on a per station basis, actual retransmission consent fees are very modest.

[128] This ratio was determined by the relative audience ratings of the broadcast networks in November 2009 (20.738 (Big 4) / 25.997 (Top 10) = 79.8%).

$0.56 per subscriber per month, or $0.14 per subscriber per month each, on average, and Univision, CW, and MyNetwork stations would each receive, on average, $0.047 per subscriber per month.

By comparison, MVPDs already pay *ten times* more than these estimated retransmission consent fees in monthly subscriber fees for the Top 4 most heavily viewed cable networks,[129] even though those cable networks produce only a little more than a third of the audience that the Big 4 Networks attract.[130] If anything, retransmission consent fees should be expected to be at least comparable to, if not greater than, the fees paid for those cable networks. Indeed, a strict viewing comparison, without more, would suggest retransmission consent fees of as much as $3.50 per subscriber per month for each station affiliated with a Big 4 Network.[131, 132]

In light of the evidence, there is no basis to accept Petitioners' claim that broadcasters are

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[129] This proportion was calculated by dividing the Top 4 (by ratings) cable network average monthly subscriber fee of $1.49 (Table 1) by the estimated Big 4 Network affiliate average retransmission consent fee of $0.14 per subscriber per month. The cable network subscriber fees presumably cover both the equivalent of retransmission consent rights and copyright licenses in the cable network programming, but copyright rights in all the programming on television stations that are retransmitted by MVPDs within their local markets are provided royalty-free under the statutory copyright licenses, 17 U.S.C. §§ 111 (cable) & 122 (satellite), and the two are thus comparable on a total cost basis.

[130] This proportion was calculated by dividing the Top 4 (by ratings) cable networks' aggregate prime time ratings of 8.743 (Table 1) by the Big 4 Networks' aggregate prime time ratings of 20.738.

[131] This projection was calculated by multiplying the Top 4 (by ratings) cable network average monthly subscriber fee of $1.49 (Table 1) by the ratio of the Big 4 Networks' aggregate prime time ratings of 20.738 to the Top 4 (by ratings) cable networks' aggregate prime time ratings of 8.743 (Table 1).

[132] A similar strict viewing comparison with respect to the Top 4 cable networks in terms of license fees would suggest retransmission consent fees for each Big 4 Network affiliate of as much as $7.47 per subscriber per month.

"demand[ing] excessive retransmission consent fees."[133] Indeed, these fees are "modest" by any reasonable yardstick, including by what Petitioners assert was Congress's expectation in 1992.[134]

VI. MVPDs Retain Substantial Market Leverage To Keep Retransmission Consent Fees In Check

Petitioners put great emphasis on the need for reform because the "idea of a single MVPD in a given market with 'monopoly' power over distribution has become a thing of the past."[135] But, the Petition's preoccupation with the advent of limited competition among MVPDs is a logical fallacy: While cable operators no longer enjoy a *complete* monopoly in the MVPD marketplace, it does not follow automatically that MVPDs are now significantly disadvantaged vis-à-vis local broadcast stations in retransmission consent negotiations. Cable operators still offer dozens, and often hundreds, of channels of video programming and, most importantly, still control access to a majority of viewers that local stations must be able to reach with their programming and advertising.[136] Moreover, national and regional consolidation in the

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[133] Petition at 15.

[134] Petition at 4 (claiming that Congress expected that broadcasters' demands for compensation would be "modest").

[135] Petition at 18.

[136] While the percentage of American households that subscribe to cable has been slowly decreasing in the past eight years (from 61.2% in 2002 to an estimated 57.3% in 2010), the total number of cable subscribers has in fact increased by more than a million (from 64.5 million subscribers in 2002 to an estimated 65.8 million in 2010). *See Thirteenth Video Competition Report*, Appendix B, Table B-1 (2009); Nielsen Local Television Markets Universe Estimates (2009); Nielsen Local Television Markets Universe Estimates (2008); *Estimated Growth of the Cable Industry*, TELEVISION AND CABLE FACTBOOK (2010), at F-1. It should also be noted that the percentage of American households that subscribe to an MVPD continues to increase—up to 87% in 2006. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009) ("*Thirteenth Video Competition Report*"), at ¶ 8.

cable industry continues. As of 2005, the top four MVPDs controlled nearly 70% of the multichannel video market, up from about 50% in 2002, and they increasingly compete with broadcasters for viewers and for national and local advertising revenue.[137] Indeed, the cable industry trend has been toward increased "clustering" and local concentration of ownership in local markets, giving each company enhanced economic leverage against local television stations in retransmission consent negotiations. The increased concentration of ownership, both within local markets and nationally among cable MSOs, cannot justify regulatory action that would adversely affect the bargaining position and reduce the negotiating flexibility of local television stations vis-à-vis MVPDs.[138] And, as discussed in Appendix C, under standard antitrust analysis, market leverage rests in the highly concentrated MVPD industry, not with local broadcast stations.[139]

The Commission should not be persuaded by Petitioners' assertions that "powerful local network affiliates" "protect their monopoly position" by "credibly threatening to 'go dark'" and by withholding their "popular," "attractive," "must-have" channels, containing such "exclusive sports programming" as the "Sugar Bowl, the Cotton Bowl, and the NFL playoffs."[140] The

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[137] *See* Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming*, attached as Exhibit A to The Walt Disney Company Comments in MB Docket No. 07-198 (filed Jan. 4, 2008) ("*2008 Disney/Eisenach Report*"), 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 (2006), at ¶¶ 8-9, 91-93.

[138] *See also* Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (Apr. 2010), at 4-7 (discussing how national MVPD concentration and regional clustering harms broadcasters' bargaining position).

[139] *See* Appendix C, *Standard Antitrust Analysis Confirms The Concentration Of Market Leverage By Multichannel Video Programming Distributors.*

[140] Petition at 12, 12, 15, 24, 18, 35, 25, 25 (respectively).

Lexecon Report, filed by NCTA, DIRECTV, and DISH in the broadband proceeding and upon which the Petition repeatedly relies,[141] asserts that

> local broadcasters retain their historic [sic] position as the exclusive providers of uniquely attractive network and syndicated programs in their local markets. Although broadcast stations most certainly face increased competition for advertising dollars from other cable programming channels, such an increase in competition for advertising dollars does not necessarily reduce their negotiating power.[142]

The *Lexecon Report*, therefore, acknowledges the increased competition broadcasters face but asserts it has not reduced broadcasters' negotiating power primarily because, in reliance on the Commission's 2003 review of the News Corp./DIRECTV transaction involving the vertical integration of a programmer and a distributor, "a significant number of viewers will switch to rival MVPDs to obtain access to that station's unique content."[143]

But reliance on the Commission's 2003 view that News Corp.'s vertical integration with DIRECTV would enable it to successfully implement a temporary foreclosure strategy is misplaced.[144] First, the overall discussion, and even the conditions the Commission imposed

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[141] *See* Petition at 25-27. Indeed, the Petition frequently paraphrases the *Lexecon Report* even when it does not cite it. *Compare* Petition at 14 ("Cable operators were generally able to deflect cash demands by providing valuable in-kind compensation.") *with Lexecon Report* at 33 ("Cable operators did not face much, if any, competition in the provision of MVPD services in their local markets and were able to deflect cash demands by providing valuable in-kind compensation.").

[142] Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, filed by National Cable & Telecommunications Association, DIRECTV, Inc., and DISH Network in MB Docket No. 07-269 (filed Dec. 16, 2009) ("*Lexecon Report*") at 26.

[143] *Lexecon Report* at 26.

[144] *See Lexecon Report* at 26-27 (citing and quoting *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee,*
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upon the merger applicants, pertaining to retransmission consent hinged entirely on the fact of *vertical integration* between the two applicants.[145] Obviously, the reasons for those conditions do not apply in the context of Petitioners' requests here where the television stations about which Petitioners are complaining are not vertically integrated with MVPDs.

Additionally, observers of both the broadcast and MVPD industries have recognized that stations have the most to lose in the event of an impasse that disrupts retransmission of their signals. Comcast, the nation's largest MVPD, in connection with its proposed transaction with NBC Universal, has recently submitted an economic study in which it finds that temporary foreclosure strategies would be unsuccessful:

> [E]ven if retransmission rights are valuable to an MVPD, it is unreasonable simply to assume that the loss of retransmission rights by one MVPD will significantly increase rival MVPD's shares of subscribers. . . .
>
> Our empirical results reveal no statistical evidence to support the proposition that large numbers of consumers would switch to Comcast if a rival MVPD were temporarily unable to provide them with access to the signal of a single network broadcast station. . . . [O]ur conclusion is that, although there is surely at least some switching away from an MVPD that loses the retransmission rights to a network broadcast station's signal, the amount of such switching overall, and to Comcast in particular, is sufficiently small as to be undetectable in Comcast's share data.[146]

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for Authority to Transfer Control, Memorandum Opinion and Order, 19 FCC 473 (2004) ("*DIRECTV-News Corp. Order*"), at ¶¶ 87, 202).

[145] *See DIRECTV-News Corp. Order* at ¶¶ 206-211, 215-226 (rejecting conditions that are unrelated to the transaction or relate to harms the Commission determined were unlikely to occur).

[146] Mark Israel and Michael L. Katz, *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction*, filed by Comcast Corporation, General Electric Company, and NBC Universal, Inc. in MB Docket No. 10-56 (filed Mar. 5, 2010), at 75, 77. Interestingly, the same economist, Michael Katz, is an author of
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Broadcasters are well aware that because MVPD subscribers may be reluctant to switch (and, in some cases, are contractually penalized from switching providers or terminating the service), local broadcast stations are more likely to suffer the immediate consequences of a disruption in carriage than are MVPDs. "[S]ubscribers leave distributors . . . only slowly, while advertising revenues [to programmers] are lost right away."[147] As one independent industry analyst has concluded:

> At the end of the day, if retrans negotiations reach an impasse, the TV station owners can choose to pull their signal from the cable system. However, financially this is profoundly damaging to the TV station's P[rofit] & L[oss] given that its sole revenue stream is driven by viewers and given that cable MSOs account for an average of 60% of distribution and even higher in some markets (i.e., urban markets). Given the fixed cost nature of the TV station business model, the margin on this lost advertising revenue is nearly 100%.[148]

(continued . . .)
both the Comcast study (the amount of switching is sufficiently small as to be undetectable) and the *Lexecon Report* (significant numbers will switch).

[147] *See* Jeffrey A. Eisenach, *Video Programming Costs and Cable TV Prices*, filed by The Walt Disney Company in MB Docket Nos. 10-71, 09-191, 07-52 (filed Apr. 23, 2010) ("*2010 Disney/Eisenach Report*") at 28 (quoting Bernstein Research, *Cable and Satellite: Asymmetrical "Retrans" Leverage Favors Cable over Satellite and Telcos* (Mar. 21, 2006) ("*Bernstein Report*"), at 1).

[148] *Bernstein Report* at 2 (quoted in Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, filed by NAB in MB Docket No. 07-269 (filed June 22, 2009) ("*Empiris Report*")). When NAB filed the *Empiris Report* less than one year ago, it emphasized the following key findings of that Report: (1) broadcasters are more vulnerable to economic losses from retransmission consent disputes than MVPDs; (2) programming costs account for a relatively small proportion of cable operators' revenues, and this proportion continues to decrease; (3) retransmission consent fees are trivial when compared with cable operators' revenues and costs and are not responsible for rising cable rates; and (4) negotiating impasses that cause interruptions in access to broadcast signals are extremely rare. According to the empirical conclusions of the *Empiris Report*, the current retransmission consent framework is an economically efficient regime that "ultimately benefits consumers by enriching the quantity, diversity, and quality of available programming." *Empiris Report* at 41. This conclusion is in
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In an environment of ever-increasing numbers of programming channel options and audience fragmentation,[149] the pressure on broadcasters today is even greater than in the past. Because the risks are "steeply asymmetrical"[150] *in favor of MVPDs*, there is no basis to believe that broadcasters possess market leverage to enforce supra-competitive rates.

The worst that can be said of the market leverage of local broadcasters is what the Commission has already concluded: "[T]he local television broadcaster and the MVPD 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."[151] Under such circumstances, there is no need for the Commission to interfere.

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accordance with the Commission's own conclusion that "consumers benefit" when MVPD carriage of broadcast programming is arranged through retransmission consent. *See* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) ("*2005 FCC Retransmission Consent Report*"), at ¶ 44. In the comments above, of course, the Broadcaster Associations demonstrate yet again why and how Dr. Eisenach's conclusions remain true.

[149] *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order, 22 FCC Rcd 21064 (2007) ("*DTV Viewability Order*"), at ¶ 49 ("As cable capacity and the number of cable programming networks have grown, the fragmentation of the market for video programming has accelerated, further weakening broadcast stations.").

[150] Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming*, attached as Exhibit A to The Walt Disney Company Comments in MB Docket No. 07-198 (filed Jan. 4, 2008) ("*2008 Disney/Eisenach Report*"), at 42 (citing *Bernstein Report*, at 1; Merrill Lynch, *Brief Thoughts on Media* (Mar. 16, 2006), at 2). Indeed, the Commission recently concluded that "cable operators have even greater incentives today to withhold carriage of broadcast stations" than during the period when the Supreme Court upheld the must carry rules. *See DTV Viewability Order* at ¶¶ 51-52.

[151] *2005 FCC Retransmission Consent Report* at ¶ 44.

VII. Retransmission Consent Fees Are Not Responsible For Rising MVPD Subscription Rates And Are But Small Fractions Of MVPD Programming Expenses And Revenues

The Petition repeatedly asserts that, because "increased [retransmission consent] costs are passed directly on to consumers," consumers are faced with "increased cable rates" and "higher basic cable prices."[152] These assertions are without merit and have been definitively refuted by economists Jeffrey Eisenach and Kevin Caves.

First, Dr. Eisenach and Dr. Caves have demonstrated that the MVPDs' underlying model in the *Lexecon Report*, from which the MVPDs draw their claimed conclusions, is inherently self-contradictory and cannot support their view that retransmission consent rates negatively affect consumer prices. Drs. Eisenach and Caves explain that the central premise of Lexecon's bargaining power model is that the level of retransmission consent fees has *no effect* on consumer welfare and, thus, on MVPD subscription rates.

> [T]he Lexecon game-theoretic model analyzes the bargaining that takes place between a broadcaster and one (or two) MVPD(s), as the two sides determine how a fixed pie of surplus will be divided. Remarkably, Lexecon's model is predicated on the assumption that retransmission fees *do not harm consumers*. To the contrary, the only way consumers in the model can be harmed is when there are no retransmission fees because broadcasters and MVPDs fail to reach mutually beneficial agreements to retransmit the broadcaster's signal.[153]

As a consequence, Lexecon's about-face analysis of alleged consumer welfare harm is wrong, both conceptually and technically.[154]

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[152] Petition at 16, 24, 25 (respectively).

[153] Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (Apr. 2010) ("*Navigant Report*"), at 11.

[154] *See Navigant Report* at 11-17.

Second, even if retransmission consent rates have no effect on consumer prices but consumers are theoretically harmed by disruptions in carriage, which could follow from Lexecon's model, any carriage disruptions are a miniscule fraction of television viewing. Drs. Eisenach and Caves analyze the 12 reported retransmission consent dispute impasses occurring between 2006 and April 2010 that resulted in service interruptions and found that only one-one hundredth of one percent (0.01%) of annual viewing hours was affected by the impasses.[155] In other words, U.S. television households experienced an average annual service interruption due to a retransmission consent dispute—i.e., the inability to tune in to their first-choice local television station via their MVPD—for about 19 minutes.[156] Of course, even during this miniscule period, viewers could still watch the affected local television station over the air with an antenna. Any harm to consumer welfare as a result of carriage disputes is, accordingly, inconsequentially small. For purposes of comparison, the average household experiences annual electricity outages of about 381 minutes, and cable systems strive for reliability of 99.97%, implying average annual cable outages of about 158 minutes.[157] In either case, the average household is far more likely to be unable to watch television as a result of an electricity or cable outage than it would be to experience the loss of a television station via an MVPD due to a retransmission consent dispute.

Seen in this light, it is clear that the remedies Petitioners suggest are akin to swatting a fly with a sledgehammer. Concerns about possible viewer disruptions can be handled far more

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[155] *See Navigant Report* at 20.

[156] *See Navigant Report* at 19.

[157] *See Navigant Report* at 19.

effectively through consumer education about their viewing options and awareness that negotiations regarding signal carriage are nearing a decision point. There is no need to "reform" the retransmission consent negotiation process to achieve these results.

Third, and finally, there is no substantive evidence that MVPD subscription prices are rising as a result of retransmission consent fees. In fact, "programming costs are rising slower than MVPD revenues, slower than other components of MVPD costs, and slower than MVPD profits, while retransmission fees make up a small fraction of programming costs, and an even smaller percentage of MVPD revenues."[158] Drs. Eisenach and Caves calculate that, with respect to six large publicly-traded MVPDs for which up-to-date programming cost data are consistently available between 2003 and 2008:

* the share of cost of revenue accounted for by programming costs *declined* from 67% to 59%;

* the share of cost of revenue, plus selling, general, and administrative costs ("SG&A") accounted for by programming costs *declined* from 44% to 41%;

* monthly revenues per subscriber rose by $35.13 while programming expenses rose only $8.84; stated differently, *for every dollar increase in programming expenses, MVPDs raised monthly subscription rates by $3.97*; and

* although programming expenses per subscriber increased by 51%, MVPD gross profits per subscriber *increased* by 57%, and operating profits per subscriber *increased* by 78%.[159]

The simple fact is that retransmission consent fees account for only a small fraction of

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[158] *Navigant Report* at 21.

[159] *See Navigant Report* at 22; *see also* Jeffrey A. Eisenach, *Video Programming Costs and Cable TV Prices*, filed by The Walt Disney Company in MB Docket Nos. 10-71, 09-191, 07-52 (filed Apr. 23, 2010), at 5-15 (conducting similar analysis with similar results).

programming expenses and a virtually evanescent amount of MVPD revenues. In 2008, for example, the average MVPD programming expense per subscriber per month was approximately $26 and average MVPD revenue was more than $99 per subscriber per month.[160] In contrast, as noted above, in 2009 MVPDs paid retransmission consent fees totaling only $0.70 per subscriber per month. Thus, retransmission consent fees are just 2.7% of programming expenses and about 0.71% of revenues. A March 2009 study estimated that cable revenues per subscriber are predicted to rise *45 times* more than retransmission consent fees through 2015.[161]

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[160] *See Navigant Report* at 22.

[161] *See* Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, filed by NAB in MB Docket No. 07-269 (filed June 22, 2009) ("*Empiris Report*"), at 33. Petitioners' claim that the retransmission consent process harms consumers by causing increases in cable subscription rates is not supported by the evidence. As an initial matter, it is undisputed that for years cable operators consistently refused to compensate broadcasters in cash for the right to retransmit their signals. *See, e.g.*, 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. 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, *see* GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (Oct. 2003), at 28-29, 43-44, but that higher cable rates were linked to a lack of competition in the MVPD marketplace, *see id*. at 9-11 (competition to an incumbent cable operator from a wireline provider resulted in cable rates that were 15% lower than in markets without this competition). *See also* 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). 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. *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 & Attachment, submitted as *Ex Parte* in MB Docket No. 06-189 by CBS Corporation, News Corporation, NBC Universal, and The Walt Disney Company (filed July 17, 2007). Another study, filed in 2008 by The Walt Disney Company, (Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming*, attached as Exhibit A to The Walt Disney Company Comments in MB Docket No. 07-198 (filed Jan. 4, 2008) ("*2008 Disney/Eisenach Report*")) specifically examined the question of retransmission consent fees and concluded that, even where broadcasters have succeeded in negotiating monetary

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Obviously, programming expenses—let alone retransmission consent fees, which are but a small fraction of those expenses—cannot be responsible for any meaningful portion of MVPDs' rapidly increasing subscription fees—fees that are rising, as widely reported, substantially in excess of the rate of inflation.[162] The cable industry has defended its rising prices by arguing that cable operators have "enhance[ed] the quality and value of cable service by giving customers many more choices, digital-quality pictures and sound, and new services."[163] At the same time, the Chief Operating Officer of Petitioner Cablevision told investors in November 2009 that television stations' retransmission consent fees would not affect Cablevision's overall cost structure:

> [W]hen you look at the totality of the programming cost structure of the cable business, it's still growing although not as much as it was. There's actually some downward pressure on the rate of growth. While we have concerns about retransmission consent, we think we can manage our overall cost structure.[164]

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compensation, such compensation is "miniscule" in comparison with cable rate increases. *2008 Disney/Eisenach Report* 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. *2008 Disney/Eisenach Report* at 47. Indeed, the *2008 Disney/Eisenach Report* 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 2008 Disney/Eisenach Report* at 47, 53-63.

[162] *See Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 24 FCC Rcd 259 (2009) ("*2008 Cable Industry Prices Report*"), at ¶¶ 28, 2.

[163] Comments of NCTA in MB Docket No. 07-269 (filed May 20, 2009), at 24.

[164] *See* Mike Farrell, *Rutledge: Cablevision Can Manage Retransmission Consent*, MULTICHANNEL NEWS (Nov. 3, 2009) (quoting Cablevision COO Tom Rutledge), *available at* <http://www.multichannel.com/article/367493-Rutledge_Cablevision_Can_Manage_

Retransmission_Consent.php?rssid=20292>.

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Although the cable industry argues that its "price increases hardly reflect a lack of competition,"[165] the natural conclusion is that MVPDs are raising their subscription rates, not because of programming expenses, and certainly not because of retransmission consent fees, but simply because "they can."[166] Because oligopolists are price makers, not price takers, and the evidence appears to suggest that MVPD prices are greater than their marginal costs, MVPDs have been able to increase their output, consistent with the cable industry's claims of enhanced quality and value, yet still increase their profits.

VIII. Various Benefits Of The Retransmission Consent Process Provide Incentives To Broadcasters To Reach Agreement With MVPDs For Carriage

Petitioners' mischaracterization of both the video programming marketplace and the nature of the retransmission consent negotiation process conveniently elides several factors that not only provide additional color and context to the current retransmission consent landscape, but also directly and naturally function to keep the retransmission consent marketplace in equilibrium, where, as the Commission has recognized, it has been for a number of years.[167]

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[165] Comments of NCTA in MB Docket No. 07-269 (filed May 20, 2009), at 24.

[166] *See 2008 Cable Industry Prices Report*, Appendix B at ¶ 16 (Commission economists observing that "cable operators with high market shares wield *unilateral market power* to charge higher prices" (emphasis added)).

[167] In 2005, the Commission concluded that stations and MVPDs "negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side," 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) ("*2005 FCC Retransmission Consent Report*"), at ¶ 44, and nothing in the Petition substantively rebuts (continued . . .)

Contrary to Petitioners' suggestions, broadcasters' incentives to reach agreement with MVPDs remain strong.

A. Retransmission Consent Revenue Is Critical To Local News Operations

Local broadcasters are increasingly relying on revenue from retransmission consent to expand and improve their local news programming, especially in the face of declining advertising revenue.[168] Thus, the inability of a broadcaster to strike carriage deals with MVPDs could adversely impact a station's local news operations—the lifeblood of local service.

According to data compiled for NAB, across all markets, the median local station derives 6.3% of its total revenues from retransmission consent fees. This is the second largest single source of revenue for stations, behind only advertising. The steady, non-advertising revenue stream that retransmission consent fees bring may help explain why local stations in 2009, despite extremely tight budgets,[169] *increased* the amount of local news programming they ran by an average of 24 minutes per weekday.[170]

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that conclusion.

[168] *See* NAB Comments, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25 (filed May 7, 2010).

[169] According to the Pew Research Center, station revenue fell 22% between 2008 and 2009. *See Local TV*, Pew Research Center Project for Excellence in Journalism, THE STATE OF THE NEWS MEDIA 2010: AN ANNUAL REPORT ON AMERICAN JOURNALISM at 9 (2010) (citing BIA/Kelsey Group estimates), *available at* <http://www.stateofthemedia.org/2010/printable_local_tv_chapter.htm>.

[170] *See* Robert Papper, *TV and Radio Staffing and News Profitability Survey 2010*, RTDNA/Hofstra University Survey (forthcoming) ("*2010 Papper/RTDNA Study*").

Indeed, local news programming is at the core of how many local broadcasters fulfill their public mission.[171] Any change to the retransmission consent regime that might jeopardize broadcasters' ability to negotiate for retransmission consent compensation would have a corresponding impact on the quality and amount of news programming that local stations can produce and broadcast, which would, in turn, directly affect consumers and the public interest.

B. Broadcasters Need Viewership To Maintain Advertising Revenue

In reality, MVPDs enjoy substantial leverage in retransmission consent negotiations because a local station that fails to maintain carriage potentially loses that portion of its viewing audience that chooses to subscribe to the MVPD to receive the station's programming.[172] Indeed, as has been the case for the entire history of the retransmission consent regime, the potential loss of viewership, by itself, provides a powerful incentive for any broadcast station—an advertiser-supported medium dependent on reaching the largest possible audience—to agree to terms desired by MVPDs. That incentive is even more acute today than ever before since

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[171] MVPDs' desire to carry television broadcast signals stems, in part, from broadcast stations' ability to remain vibrant sources of unique programming content, especially high quality local news that is typically not available in the same quantity or of the same quality from any other programming source.

[172] Indeed, the Commission's observation that "the cable industry by far remains the dominant player in the MVPD market," *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order, 22 FCC Rcd 21064 (2007), at ¶ 49, means that 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. According to the Commission, 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. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009) ("*Thirteenth Video Competition Report*"), at ¶ 8.

more viewers subscribe to an MVPD today than at any time since the retransmission consent law was enacted in 1992.[173] Indeed, more viewers subscribe to the ten large MVPD Petitioners today (61.5 million) than subscribed to *all* MVPDs in 1992 (57.5 million).

Even in the most contentious of negotiations, the threat of losing viewers motivates stations to continue to negotiate until the parties compromise on the terms of carriage, i.e., to "get a deal done." In notable contrast, however, even if an MVPD were to temporarily lose the right to retransmit a local station's signal, the MVPD would still provide viewers with scores or hundreds of other channels—thereby continuing to attract "eyeballs"[174]—and would still earn both advertising revenues and subscription fees from its video programming and other service offerings.[175]

Moreover, competitive pressure *between television stations* in a market incentivizes broadcasters to get a deal done. The only thing worse than a station losing viewers generally is losing them to a competitor broadcast station. Station ratings, especially local newscast ratings, make and break advertising rates for stations, and those advertising dollars directly affect investment in newsgathering and reporting talent and tools. A station literally cannot afford to

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[173] *Compare Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060 (1995), Appendix G, Table 1 (stating that there were 57,530,000 MVPD subscribers, or 61.8% of all television households, in 1992) *with Thirteenth Video Competition Report* at ¶ 8 (stating that there were 95.8 million MVPD subscribers, or 87% of all television households, in 2006).

[174] Petition at 36.

[175] Moreover, MVPDs are increasingly offering non-video services, including broadband and voice—profitable services that are regularly used by MVPD customers yet which are unaffected by the short-term loss of retransmission consent rights.

allow its carriage to be disrupted, because of the risk that its viewers will look to another local station to serve their needs.

Thus, the specter of losing "eyeballs," and, in turn advertising revenue—losses which are immediate when carriage agreements expire[176]—provides a strong incentive for broadcasters to negotiate for continued carriage and not to allow the expiration of current agreements, even temporarily.

C. The Retransmission Consent Process Provides Stations With Valuable Non-Cash Benefits, Which Also Benefit Consumers

Not only do some stations not seek cash for carriage, but many stations negotiate using a menu of offerings, which may include, among other things, carriage by the MVPD of other programming provided by the broadcaster. The opportunity to "mix and match" benefits of carriage provides additional incentive to stations to reach agreement with MVPDs.

For example, prior to the end of analog broadcasting, many stations negotiated for carriage of their digital signal in addition to their analog signal, a practice that the Commission commended as "furthering the digital transition."[177] Some broadcasters have used the

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[176] *See* Jeffrey A. Eisenach, *Video Programming Costs and Cable TV Prices*, filed by The Walt Disney Company in MB Docket Nos. 10-71, 09-191, 07-52 (filed Apr. 23, 2010), at 28 ("advertising revenues [to programmers] are lost right away") (quoting Bernstein Research, *Cable and Satellite: Asymmetrical "Retrans" Leverage Favors Cable over Satellite and Telcos* (Mar. 21, 2006), at 1).

[177] *2005 FCC Retransmission Consent Report* at ¶ 45 ("For example, since the Commission's decision to deny broadcasters the ability to assert dual and multicast must-carry, broadcasters have begun using their retransmission consent negotiations to negotiate carriage of their digital signals, thus furthering the digital transition by increasing the number of households with access to digital signals.").

retransmission consent process to secure MVPD carriage of co-owned Spanish-language formatted stations such as Univision and Telemundo stations.[178]

Stations also have successfully negotiated as part of retransmission consent carriage of digital multicast programming streams, including local news, weather, sports, religious, entertainment, ethnic-oriented, and other niche programming channels.[179] MVPDs have also previously argued that television stations should not be permitted to request carriage of multicast streams during retransmission consent negotiations.[180] When one combines Petitioners' recurring calls to (i) limit cash compensation, (ii) prohibit compensation in the form of carriage of other programming, and (iii) prohibit withdrawal of broadcast signals during retransmission negotiations, it becomes clear that Petitioners' goal is to return to the "free" market, i.e., the environment where retransmission of broadcast signals was truly "free" because MVPDs had to offer nothing and agree to nothing to be able to carry, resell, and profit from broadcast station signals.[181]

Clearly, Petitioners object to broadcasters' rights to negotiate for *any* form of compensation in return for permission to retransmit and resell local broadcast signals. There is, however, no legal, factual, or policy reason that broadcasters—unique among programming suppliers—should not receive compensation for the signals that MVPDs are reselling to their

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[178] *See, e.g.*, Comments of NAB in MB Docket No. 07-198 (filed Jan. 4, 2008), at 28.

[179] *See, e.g.*, Comments of NAB in MB Docket No. 07-198 (filed Jan. 4, 2008), at 29; *See* NAB Comments, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25 (filed May 7, 2010), at 17-28.

[180] *See, e.g.*, *2005 FCC Retransmission Consent Report* at ¶ 39 n.131.

[181] Petition at 8 (reminiscing about an earlier era of "effectively free carriage of local broadcast stations").

subscribers, or to be uniquely limited in the amount of compensation they may even request. Indeed, as discussed above, 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.[182]

The fact that broadcasters compromise with MVPDs for carriage of their signals by offering a menu of options—including both cash and carriage of other programming—not only benefits stations and provides them with additional incentive to reach agreement but also, ultimately, benefits consumers by making additional program choices available.

D. MVPD Efforts To Black Out Various Programmers Creates Additional Incentive For Broadcasters To Compromise On Carriage

The idea that broadcasters have *undue* negotiating power stemming from their local presence and appeal to their communities is not grounded in market realities or economic theory, is contrary to the Commission's own conclusions about the functioning of the retransmission consent marketplace,[183] and is belied by MVPD consolidation and exercise of market leverage.[184]

If, as Petitioners strenuously assert, carriage blackouts resulting from retransmission consent disputes are so prevalent as to constitute a harm to consumers (as the Broadcaster Associations have demonstrated above, they are not), MVPD hands are far from clean in creating such a harm, and MVPDs' willingness to black out various program streams sends a strong

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[182] *See* S. REP. NO. 102-92 (1991), at 35.

[183] *See, e.g.*, *2005 FCC Retransmission Consent Report* at ¶ 44 (MVPDs and broadcasters "negotiate in the context of a level playing field").

[184] *See supra* Section VI. *See also* Appendix C, *Standard Antitrust Analysis Confirms The Concentration Of Market Leverage By Multichannel Video Programming Distributors.*

message to broadcast stations that MVPDs might do the same to them. In recent years there have been numerous instances in which a major carriage dispute between a cable operator and a non-broadcast cable/satellite program network service resulted in a blackout.[185] These instances do not account for the times that cable operators threatened to black out programming from a cable network as a negotiating tactic,[186] threatened to refuse to carry a cable network's

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[185] *See, e.g.*, Jon Weisman, *Versus, DirecTV End Dispute*, Variety (Mar. 15, 2010), *available at* <http://www.variety.com/article/VR1118016467.html?categoryid=1237&cs=1> (dispute between Versus and DIRECTV resulting in 7-month blackout); Brian Stelter, *In a Clash over Cable, Consumers Lose*, N.Y. Times (Jan. 6, 2010), *available at* <http://www.nytimes.com/2010/01/07/business/media/07cable.html> (dispute between Cablevision and Scripps resulting in January 2010 blackout); Linda Moss & Mike Reynolds, *DISH Drop Kicks GolTV in Contract Dispute*, Multichannel News (Aug. 3, 2008), *available at* <http://www.multichannel.com/article/83327-Dish_Drop_Kicks_GolTV_In_Contract_Dispute .php> (DISH network blackout of GolTV); Mike Reynolds, *Lifetime-DISH Dispute Drags On*, Multichannel News (Jan. 8, 2006), *available at* <http://www.multichannel.com/article/121662 -Lifetime_Dish_Dispute_Drags_On.php> (dispute between Lifetime and DISH resulting in 2006 blackout); R. Thomas Umstead, *In Spat, N.Y. Sports Nets Yanked*, Multichannel News (Mar. 13, 2005), *available at* <http://www.multichannel.com/article/82560-In_Spat_N_Y_Sports _Nets_Yanked.php> (dispute between Cablevision, MSG, and Fox Sports Net New York resulting in 2 blackouts in the same year); Linda Moss & Monica Hogan, *Disney, Dish End Family Feud*, Multichannel News (Apr. 7, 2002), *available at* <http://www.multichannel.com/article/54856-Disney_Dish_End_Family_Feud.php> (dispute between DISH and Disney resulting in DISH dropping ESPN Classic).

[186] *See, e.g.*, Mike Farrell, *Fox Gets Tough with TWC*, Multichannel News (Dec. 21, 2009), *available at* <http://www.multichannel.com/article/441200-Fox_Gets_Tough_With_ TWC.php> (Time Warner threatened to drop Fox); Cynthia Littleton, *TW, Viacom Settle Cable Dispute*, Variety (Jan. 1, 2009), *available at* <http://www.variety.com/article/VR1117997894. html?categoryid=14&cs=1> (Time Warner threatened to drop Viacom); R. Thomas Umstead & Linda Haugsted, *700 Club in Middle of DirecTV-Family Dispute*, Multichannel News (Mar. 23, 2003), *available at* <http://www.multichannel.com/article/73998-700_Club_in_Middle _of_DirecTV_Family_Dispute.php> (DIRECTV threatened to drop ABC Family).

programming,[187] or otherwise engaged in negotiating tactics that adversely impacted consumers.[188]

Similarly, consumers are also harmed when, through MVPD manipulation and misuse of the must-carry process and rules, MVPDs look for excuses, even if correct on a hyper-technical level, to refuse a station's must-carry election, thereby denying their subscribers the benefits of access to the station. Just since February 2009, the FCC has issued seven orders concerning must-carry complaints by local television stations alleging that they were wrongly denied

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[187] *See, e.g.*, John Eggerton, *Comcast, MASN Resolve Carriage Dispute*, BROADCASTING & CABLE (Dec. 23, 2009), *available at* <http://www.broadcastingcable.com/article/441678-Comcast_MASN_Resolve_Carriage_Dispute.php> (Comcast had previously refused to carry MASN); John Eggerton, *FCC Enforcement Bureau: MSOs Didn't Discriminate Against Wealth TV*, MULTICHANNEL NEWS (July 8, 2009), *available at* <http://www.multichannel.com/article/307853-FCC_Enforcement_Bureau_MSOs_Didn_t_Discriminate_Against_Wealth_TV.php> (MVPDs refused to carry Wealth TV); Richard Sandomir, *Comcast and NFL Network Agree to 9-year Deal*, N.Y. TIMES (May 19, 2009), *available at* <http://www.nytimes.com/2009/05/20/sports/football/19nflnetwork.html> (Comcast had previously refused to carry NFL Network); Richard Sandomir, *Baseball: Cablevision Agrees to Carry YES Network*, N.Y. TIMES (Mar. 13, 2003), *available at* <http://www.nytimes.com/2003/03/13/sports/baseball-cablevision-agrees-to-carry-the-yes-network.html> (Cablevision had previously refused to carry YES Network).

[188] *See, e.g.*, Mike Reynolds, *Updated: Tennis Channel, Cablevision Fire Latest Volleys in Distribution Dispute*, MULTICHANNEL NEWS (Sept. 11, 2009), *available at* <http://www.multichannel.com/article/346157-Updated_Tennis_Channel_Cablevision_Fire_Latest_Volleys_In_Distribution_Dispute.php> (carriage tier dispute between Cablevision and Tennis Channel); Todd Spangler, *Dish Sues ESPN Over Classic, ESPNU Carriage Terms*, MULTICHANNEL NEWS (Aug. 5, 2009), *available at* <http://www.multichannel.com/article/326537-Dish_Sues_ESPN_Over_Classic_ESPNU_Carriage_Terms.php?rssid=20059> (carriage tier dispute between DISH and ESPN networks); Linda Moss, *Massillon Cable-FSN Ohio Dispute Heads to Arbitration*, MULTICHANNEL NEWS (May 3, 2007), *available at* <http://www.multichannel.com/article/86610-Massillon_Cable_FSN_Ohio_Dispute_Heads_to_Arbitration.php> (fee dispute between Massillon Cable and Fox Sports Net Ohio).

carriage by an MVPD.[189]

This recent history belies Petitioners' extraordinary claim that it is always broadcasters' actions in the retransmission consent process that are harming consumers. Moreover, the Commission has *never* held that any broadcaster, on its own, wields market leverage over *any* individual MVPD or class of MVPDs sufficient to justify any remedial FCC action.

E. Some Of Petitioners' Own Negotiating Tactics Are Intended To Create Consumer Frustration And Generate Calls To Congress And The Commission

As discussed above, Petitioners repeatedly reference the "consumer harm" from carriage interruptions to justify their call for injecting government into the private marketplace.[190] As explained, however, the loss of access via the MVPD to a local television station during a retransmission consent dispute is the rare exception rather than the rule. Service interruptions caused by an impasse in retransmission consent negotiations constitute less than 0.01% of all broadcast hours annually, and, as noted earlier, a television viewer is more likely to experience a

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[189] *See, e.g.*, *Copeland Channel 21, LLC v. Charter Commc'ns, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 2616 (2010) (granting station's must-carry complaint); *Red Lion Broad. Co., Inc., Licensee of WGCB-TV, Red Lion, Pa. v. DIRECTV, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 1272 (2010) (denying station's must-carry complaint); *Board of Trustees of the Univ. of Ala., Licensee of WUOA, Tuscaloosa, Ala. v. Cablestar, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 410 (2010) (granting station's must-carry complaint); *Carriage Complaints Against Trust Cable of Miss., Inc., James Cable LLC, Southern Cable Servs. LLC, KFW Commc'ns, and Envision Media, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 414 (2010) (granting station's five must-carry complaints); *Channel 38 Christian Television KSCE (TV), El Paso, Tex. v. DIRECTV, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 9419 (2009) (denying station's must-carry complaint); *Lincoln Mem'l Univ. v. Telecomm. Management, LLC d/b/a New Wave Commc'ns*, Memorandum Opinion and Order, 24 FCC Rcd 7842 (2009) (granting station's must-carry complaint); *KJLA, LLC v. Coxcom, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 1410 (2009) (denying station's two must-carry complaints).

[190] *See supra* note 13.

power or cable outage than a loss of service due to a negotiation impasse.[191]

But, on a more fundamental level, Petitioners' purported concern about carriage interruptions during a retransmission consent negotiation does not demonstrate any flaw in the *marketplace*. Rather, it demonstrates a flaw in some MVPDs' own negotiation strategy. Many MVPDs routinely delay substantive negotiations until days (or, in some cases, even hours) before the expiration of an existing retransmission consent agreement to test the will of the local station to allow a carriage agreement to lapse without continuing consent for carriage of the station's signal.

The MVPDs' negotiation technique may give them a tactical advantage, but it carries a higher risk that the parties will not reach a new agreement before expiration of the existing agreement—and, as a result, consumers could experience a carriage interruption. The ability to grant or withhold the right to carry top-rated broadcast programming is a television station's most valuable right in the retransmission consent marketplace. Indeed, it is the only source of real economic leverage that a television station possesses in these negotiations. If an MVPD does not face the prospect of losing access to television signals that contain top-rated broadcast programming on its platform, the MVPD has little incentive to complete an agreement with the broadcaster before the expiration of an existing agreement. An MVPD that balks at the broadcaster's market-driven proposal forces the television station into the unenviable position of agreeing to below-market rates or facing the prospect of withholding consent and losing access to the MVPD's subscribers' preferred means of viewing the station. As discussed above, local stations have every incentive to strike a deal. However, the latter choice may be a station's only

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[191] *See supra* Section VII.

means of maintaining any semblance of leverage in the negotiations. In the very rare circumstance in which a station does exercise its right to withhold carriage after an agreement expires, many MVPDs aggressively encourage their subscribers to call Members of Congress, the Commission, and other public officials to bolster their claims for "reform." Clearly, MVPDs have a First Amendment right to do so—but it belies Petitioners' claims that local stations engage in "brinksmanship" to apply leverage in the negotiations.

Petitioners' attempt to exploit, politically, the predictable product of these tactics—the potential for a service interruption—to call for "reform" of the private marketplace is cynical at best. This is especially true when Petitioners cite consumer calls to Congress and the Commission as evidence that the marketplace is broken. It is Petitioners themselves who are creating an artificial "problem" and then asking the government to solve it.

Many television stations plan ahead to avoid the kind of eleventh-hour negotiations that may threaten a carriage interruption. Indeed, many stations initiate retransmission consent negotiations months in advance of the expiration of an existing agreement to give the parties sufficient time to (1) negotiate mutually agreeable terms and (2) notify consumers about their options for local broadcast service in the event it appears a new agreement is not likely to be reached before the expiration of the old agreement. Some MVPDs, however, ignore the broadcaster's proposals until the expiration date of the existing agreement approaches—preferring to test the station's willingness to go "down-to-the-wire"[192] and then applying political and regulatory pressure on the station.

In short, Petitioners can easily solve their self-manufactured "consumer harm." MVPDs

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[192] Petition at 21.

can promptly respond to a broadcaster's offer and continue to engage in substantive negotiations to complete an agreement based on market-driven terms. Such negotiations should—and can—be completed well before the expiration of an existing agreement. Indeed, when the parties are forced into eleventh-hour negotiations, they may work through the night to complete an agreement within a short window of time precisely so there will be no chance that consumers would be harmed or lose access, even temporarily, to the station's signal being retransmitted by the MVPD. MVPDs also can act on their professed concerns about consumer harm by fully complying with their existing obligations to give notice to subscribers of any removal of a broadcast station from carriage.[193]

IX. Petitioners' Call For Commission Intervention In The Retransmission Consent Marketplace Must Be Rejected As A Matter Of Both Law And Policy

Not only is Petitioners' plea for Commission intervention in the well-functioning retransmission consent marketplace unjustified as a matter of both logic and historical and present-day fact, it also is unsupportable as a matter of both law and policy. The 1992 Cable Act makes clear that the marketplace for the disposition of retransmission consent rights is intended to function without Commission intervention or interference, and Congress in fact unambiguously *prohibited* the retransmission of a local station's signal without the broadcaster's consent. Put simply, the Commission lacks the authority to give Petitioners what they seek—nor should it, as a matter of public policy.

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[193] *See* 47 C.F.R. §76.1601 (stating that "a cable operator shall provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system."). Relevant additional requirements for notifying both subscribers and cable franchise

(continued . . .)

A. Granting The "Right" To Carry A Broadcast Signal Without The Broadcaster's Consent Would Be Both Unlawful And Contrary To The Public Interest

Petitioners propose that the Commission permit MVPDs to continue to retransmit the signal of a television broadcast station *without the station's consent* while retransmission consent negotiations are ongoing or a good faith negotiation complaint is pending.[194] This argument has been proffered by various MVPDs before, and rejected by the Commission each time. It should be rejected again. In fact, the Commission considered and rejected virtually identical proposals when it first implemented the good faith negotiation requirement.[195]

Section 325 of the Communications Act unequivocally prohibits the retransmission by an MVPD of a television broadcast station's signal without its consent: No MVPD "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station."[196] The statutory language could hardly be clearer: MVPDs have no right, and cannot be given the right by the Commission under the statute, to retransmit a commercial broadcast

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(continued . . .)
authorities appear at §§76.1602-76.1603.

[194] *See* Petition at 36.

[195] *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), at ¶ 60 ("[W]e see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission").

[196] 47 U.S.C. § 325(b)(1)(A).

signal in its local market without the consent of the originating station.[197] The unambiguous statutory language, without more, puts an end to the Petition's interim carriage request. As the Supreme Court has "stated time and again," "[we] must presume that a legislature says in a statute what it means and means in a statute what it says there."[198]

Allowing carriage of signals without consent not only would violate the unambiguous statutory command but also (if more were needed) would be inconsistent with the statute's legislative history. That legislative history makes clear that Congress granted broadcast stations the right to control others' retransmission of their signals and to negotiate the terms of such retransmission through private agreements.[199] As the Commission has consistently and correctly concluded, Congress did not intend for it to intrude in retransmission consent negotiations[200] but for the terms and conditions of carriage to be negotiated by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith. And even more pointedly, as noted above,

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[197] The statute, of course, excepts from the prohibition stations *electing* must carry, but that election itself can be seen as the consent. The statute also excepts satellite retransmission of *distant* network signals to "unserved households" as a lifeline service, but not local signals. *See supra* note 75.

[198] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

[199] As noted above, the legislative history of Section 325 demonstrates that Congress intended to create a free "marketplace for the disposition of the rights to retransmit broadcast signals" and did not intend the government to "dictate the outcome of the ensuing marketplace negotiations." S. REP. NO. 102-92 (1991), at 36.

[200] *See Good Faith Order* at ¶ 13. *Accord Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965 (1993) ("*Broadcast Signal Carriage Order*"), at ¶ 178.

the Commission has found repeatedly that it has "no latitude . . . to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission."[201]

In short, no authority suggests that Congress intended the Commission to suspend broadcasters' statutory retransmission consent rights for *any* length of time. Any proposal that would place the Commission in the position of enforcing a so-called "*status quo*"[202] that has not been negotiated by the affected parties would directly contravene the statute, its legislative history, and the Commission's decisions interpreting and applying the statutory scheme. Petitioners' suggestion that such an interim carriage rule would be a "small step"[203] is nonsensical.

Contrary to Petitioners' suggestion, the Commission's ruling in the *DIRECTV-News Corp*. proceeding establishes neither the wisdom nor the legality of an interim carriage rule. 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 consent disputes does not support the Petition's proposal. The *DIRECTV-News Corp. Order* reflects

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[201] *Good Faith Order* at ¶ 60; *see also id.* at ¶ 84 ("upon expiration of an MVPD's carriage rights under . . . an existing retransmission consent agreement, an MVPD may not continue carriage of a broadcaster's signal while a retransmission consent complaint is pending at the Commission"); *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47 (2007) ("*Mediacom/Sinclair Order*"), at ¶ 25 (stating that the Commission "would not have authority to order continued carriage" of a television station's signal absent the station's consent).

[202] Petition at 37.

[203] *See* Petition at 37.

nothing more than the Commission's decision to impose certain conditions 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 long-held role as a traditional broadcaster. The interim carriage requirement imposed on News Corp. reflected the Commission's concerns about News Corp.'s incentive *as an MVPD* 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.[204]

Moreover, mandating interim carriage would be harmful to the public interest. As noted above, Petitioners' proposal would create incentives counterproductive to the ultimate goal of reaching a retransmission consent agreement and thus would be harmful to viewers. Permitting carriage of broadcast signals pending resolution of every good faith negotiation complaint would give MVPDs an incentive *not* to remain at the negotiating table but, instead, to file complaints with the Commission, even non-meritorious ones, at the earliest opportunity as a negotiating ploy. A complaining MVPD would have even less incentive to reach a new agreement, because it would enjoy a government-granted authorization to continue carrying a station's signal on the terms and for the compensation provided for in past agreements, regardless of any changes in marketplace conditions, thereby effectively extending the terms of the prior agreement *ad infinitum*. There is *no* statutory authority or public interest justification for the Commission to skew the negotiation process in this way.

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[204] *See General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004) ("*DIRECTV-News Corp. Order*"), at ¶ 221.

There is no need for the government to place its "thumb on the scale" in favor of MVPDs. The Commission's good faith rules already prohibit broadcasters from putting forth "a single, unilateral proposal and refus[ing] to discuss alternate terms or counter-proposals,"[205] and a complaint procedure is available to MVPDs who believe that local stations have violated their obligation to negotiate in good faith (belying the Petition's suggestion that MVPDs have "no reliable means of obtaining . . . relief" if disputes with broadcasters over compensation arise).[206] In fact, broadcasters continue to satisfy their statutory obligation to carry out retransmission consent negotiations in good faith, even though, on occasion, certain MVPDs have failed to do so and have abused the good faith complaint process.[207] Petitioners' call to alter the retransmission consent complaint scheme would tilt the balance of the complaint process to favor MVPDs at the expense of broadcasters and would improperly involve the Commission in the details of the terms and conditions of retransmission consent negotiations.

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[205] *Good Faith Order* at ¶ 43.

[206] Petition at 32. Of course, the fact that a broadcast station seeks more compensation in exchange for the right to retransmit its signal is not *ipso facto* evidence of bad faith, contrary to the intimation of Petitioners. *See, e.g.*, *Mediacom/Sinclair Order*, at ¶¶ 6, 24 ("disagreement over the rates, terms and conditions of retransmission consent—even fundamental disagreement—is not indicative of a lack of good faith").

[207] *See, e.g.*, *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070 (2001) (broadcaster met good faith standard while complaining MVPD was admonished for abuse of Commission processes and lack of candor); *Mediacom/Sinclair Order*, at ¶¶ 6, 24 (holding that broadcaster met good faith standard); *Letter from Steven F. Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable TV*, 22 FCC Rcd 4933 (2007) (cable operator failed to meet good faith standard); *ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 1645 (2009) (broadcaster met good faith standard).

But even if the Communications Act did not prohibit the Commission from compelling carriage without a station's consent, the Petition should be denied altogether for a separate, simple, and dispositive reason: What Petitioners ask the Commission to do would be directly contrary to the most fundamental premise of the statutory retransmission consent negotiation scheme established by Congress. When Congress created the retransmission consent regime in the 1992 Cable Act, it intended for local television stations to have the opportunity to negotiate in the marketplace for compensation from MVPDs in exchange for the right to retransmit and resell their broadcast signals.[208] Congress made it quite plain that the Act created a "marketplace for the disposition of the rights to retransmit broadcast signals" and that the retransmission consent process is to function without government intervention. In particular, Congress emphatically rejected the notion that it or the Commission should or would "dictate the outcome" of the negotiations between broadcasters and MVPDs.[209] In light of the clarity with which Congress expressed its intent in the 1992 Cable Act, the Commission has consistently and correctly concluded that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent."[210] The relief Petitioners seek is the very antithesis of the principle of non-interference in the free market process established by Congress and adhered to by the Commission for years.

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[208] *See, e.g.*, *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 as Exhibit A to Comments of NBC Universal Inc. and NBC Telemundo License Co., MB Docket No. 07-198 (filed Jan. 4, 2008)); *supra* Section II.

[209] S. REP. NO. 102-92, at 36.

[210] *Good Faith Order* at ¶ 14. *Accord Broadcast Signal Carriage Order* at ¶ 178. *See also Good Faith Order* at ¶ 23 ("[W]hen Congress intends the Commission to directly insert itself in the marketplace for video programming, it [says] so with specificity.").

Petitioners' attempt to invoke Section 325(b)(3)(A) as a basis for Commission authority to override the clear congressional intent and rewrite the retransmission consent statute is without merit. That provision merely directs the Commission to ensure that retransmission consent rules "do not conflict" with its obligation to "ensure that rates for the basic service tier are reasonable."[211] It does not provide an independent basis to limit broadcasters' exercise of retransmission consent or any presumption that exercise of retransmission consent will "interfere with 'reasonable' rates for the basic tier."[212]

Significantly, when the Commission adopted rules implementing the 1992 Cable Act, some segments of the cable industry advocated a cap on retransmission consent rates in light of Section 325(b)(3)(A), while others contended that it required the Commission to ensure that retransmission consent terms were not unreasonable.[213] The Commission responded by holding that Congress did not intend for retransmission consent rates to be directly regulated.[214] Moreover, it stated that the record before it "provide[d] *no evidence* that the effect [of retransmission consent on basic service tier rates] may be significant, *no credible analysis* suggesting that the effect cannot be dealt with in the [cable] rate regulation proceeding, and, hence, *no basis* for considering such effect in the decisions we make herein."[215] Accordingly,

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[211] 47 U.S.C. § 325(b)(3)(A) (cited in Petition at 30-35).

[212] Petition at 32.

[213] *See Broadcast Signal Carriage Order* at ¶ 177.

[214] *Broadcast Signal Carriage Order* at ¶ 178 (citing S. REP. NO. 102-92, at 36).

[215] *See Broadcast Signal Carriage Order* at ¶ 178 (emphasis added).

the Commission declined to adopt the cable industry proposals.[216]

The same Commission analysis and conclusions apply with equal force today, in the context of the Petition. Petitioners continue to fail to demonstrate any relationship between the prices they charge consumers and retransmission consent fees.[217] Instead, the record reflects that MVPD revenues and profits are increasing at a rate that outpaces all of their programming costs, and that retransmission consent fees represent only a small fraction of programming costs.[218]

Additionally, the "basic tier rate" provision, which speaks directly and specifically to Commission authority to protect against increases in *basic tier costs* that are potentially harmful to consumers, *does not*, *and cannot*, trump the Commission's statutory obligation to preserve a market-based system of arm's-length negotiation free from government intrusion. Basic principles of statutory construction teach as much. *See, e.g.*, *United States v. Nader*, 542 F.3d 713, 720 (9th Cir. 2008) ("It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose." (citation and parentheses omitted)); *see also Department of the Air Force v. Federal Labor Relations Authority*, 294 F.3d

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[216] *See Broadcast Signal Carriage Order* at ¶ 178.

[217] Indeed, even if the government itself established an exact formula or cap on retransmission consent fees, there would be no guaranteed impact on MVPD consumer pricing. Unless and until the Commission also regulates the consumer prices charged by MVPDs, any cost savings realized by MVPDs could be used for anything from executive bonuses, to non-video business lines (such as telephony), to office supplies.

[218] *See* Section VII, *supra, citing Navigant Report* at 21-22 ("programming costs are rising slower than MVPD revenues, slower than other components of MVPD costs, and slower than MVPD profits, while retransmission fees make up a small fraction of programming costs, and an even smaller percentage of MVPD revenues") and Jeffrey A. Eisenach, *Video Programming Costs and Cable TV Prices*, filed by The Walt Disney Company in MB Docket Nos. 10-71, 09-191, 07-52 (filed Apr. 23, 2010), at 5-15 (conducting similar analysis with similar results).

192, 196 (D.C. Cir. 2002) (agency's interpretation of its enabling statute "is entitled to deference only if it is reasonable and consistent with the statute's purpose"). And, as noted earlier, the basic tier rate provision certainly cannot be read to authorize the Commission to override or nullify the explicit statutory prohibition on carriage of a television station's signal without the station's consent. Elementary canons of statutory interpretation teach that statutes must be read, whenever possible, to give effect to all of their provisions[219] and that no provision of a unified statutory scheme should be treated as superfluous or nullified altogether.[220] In plain contradiction of those fundamental principles, Petitioners would read the Commission's authority to regulate basic tier rates to nullify Section 325(b)'s command entirely. The statute simply cannot be read as Petitioners suggest.

Petitioners invoke a handful of provisions that confer general or ancillary jurisdiction on the Commission, but none of those provisions authorizes the Commission to grant the relief the

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[219] *See, e.g.*, *United States ex rel. Eisenstein v. City of New York*, 556 U.S. ---, ---, 129 S. Ct. 2230, 2234 (2009) (invoking "well-established principles of statutory interpretation that require statutes to be construed in a manner that gives effect to all of their provisions" (citing cases)); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (describing as a "cardinal principle of statutory construction" the "duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section" (citations omitted)); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, [court] must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous" (citations omitted)); *Regular Common Carrier Conference v. United States*, 820 F.2d 1323, 1331 (D.C. Cir. 1987) (rejecting agency's proffered construction of statute in part for failure "to give full effect to all relevant provisions of the statute").

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

Petition seeks. Although it is true that Congress has delegated to the Commission authority to act under Sections 4(i) and 303(r) of the Communications Act, any action taken pursuant to either section must be consistent with other provisions of the Act, including Section 325.[221] And the D.C. Circuit Court of Appeals recently confirmed that the Commission's authority under Section 4(i) is not endlessly expansive but is instead confined to matters "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[222] In that decision, the D.C. Circuit made clear that courts analyzing the agency's ancillary authority must closely and carefully review the express statutory mandates relied upon for its exercise. It follows that the Commission's ancillary authority does not authorize it to grant the relief sought here: Petitioners fail to point to *any* affirmative grant of statutory authority that would permit the Commission to override Section 325 and authorize the retransmission of a local station's signal without its consent (or otherwise limit the ability of local stations to negotiate the terms and conditions of MVPDs' retransmission and resale of broadcast signals).[223]

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[221] Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (emphasis added). Similarly, Section 303(r) empowers the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law*, as may be necessary to carry out the provisions" of Section 325. *Id.* § 303(r) (emphasis added). Petitioners invoke both provisions. *See* Petition at 33, 38.

[222] *See Comcast Corp. v. FCC*, 600 F.3d 642, 651-61 (D.C. Cir. 2010) (concluding that the Commission lacked statutory authority over the network management practices of Internet service providers).

[223] The Commission's general mandate to ensure that broadcast licensees operate in a manner consistent with "the public interest, convenience, and necessity," 47 U.S.C. § 309(a) (cited in Petition at 30-31), does not permit the Commission to grant the relief sought in the Petition, for precisely the same reasons: It cannot be read to authorize the Commission to take action that would directly contradict the congressional directive to establish a retransmission consent marketplace in which private negotiations, not government regulation, establish the

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To be clear, broadcasters do not expect retransmission consent rules to guarantee that they will receive compensation of any kind from MVPDs for retransmission of their signals or to otherwise "tip the scales" in their favor. Consistent with congressional intent, however, broadcasters do expect the opportunity to negotiate for compensation without the government "dictat[ing]" the terms of the "marketplace negotiations" between broadcasters and MVPDs.[224] Granting Petitioners' plea for Commission intrusion into the well-functioning marketplace for retransmission consent would needlessly disrupt a system that has, for years, effectively supplied broadcast programming to MVPD subscribers and enhanced the quantity, diversity, and quality of available programming.[225] For all these reasons, the Commission should reject Petitioners' request to tilt the free market for retransmission consent in favor of MVPDs, as such

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terms and conditions of retransmission consent agreements. It is, moreover, a fundamental principle of statutory construction that the "[s]pecific terms" of a statute "prevail over the general in the same or another statute." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957); *accord Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). The *general* mandate that the Commission act in "the public interest" cannot override the specific statutory provisions that prohibit the relief sought by the Petition (including, but not limited to, the unambiguous prohibition of retransmission of broadcast signals by MVPDs without consent of the broadcast stations).

[224] S. REP. NO. 102-92, at 36.

[225] *See, e.g.*, 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) ("*2005 FCC Retransmission Consent Report*"), at ¶ 44 (the current retransmission consent system generates multiple public interest benefits for viewers, broadcasters, and MVPDs and should not be revised); Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, filed by NAB in MB Docket No. 07-269 (filed June 22, 2009), at 41 (the retransmission consent process benefits viewers by "enriching the quantity, diversity, and quality of available programming, including local programming," and proposals to modify the system would harm consumers).

governmental intrusion is not only flatly contrary to the statutory scheme put in place by Congress but would be seriously detrimental to the public interest.

B. Petitioners' Proposal For Mandatory Arbitration Is Supported By Neither Statutory Authority Nor Common Sense

Petitioners propose that the Commission create "one or more dispute resolution mechanisms, such as compulsory arbitration, an expert tribunal, or similar mechanisms" for retransmission consent negotiations between broadcasters and MVPDs if the "negotiations ha[ve] broken down."[226] The Commission must reject that proposal now—just as it has done on previous occasions.

First and foremost, the Commission lacks the authority to mandate involuntary arbitration in broadcast retransmission consent disputes. The *Mediacom/Sinclair Order* expressly acknowledged as much. That Order stated unequivocally that the "Commission does not have the authority to require the parties to submit to binding arbitration."[227] That ruling is consistent both with agency policy in non-broadcast carriage disputes and with federal law generally.[228]

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[226] Petition at 32. Petitioners do not discuss how such an undefined "expert tribunal" would work or what "similar mechanisms" they would consider appropriate. Because the only concrete proposal mentioned is mandatory arbitration, the Broadcaster Associations have focused our discussion on that point. We anticipate that, if these vague "mechanisms" are ever revealed, they would be contrary to law and public policy for many of the same reasons as is mandatory arbitration.

[227] *Mediacom/Sinclair Order* at ¶ 25.

[228] *See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in Which the Commission Is a Party*, Initial Policy Statement and Order, 6 FCC Rcd 5669 (1991); 5 U.S.C. § 575(a)(3) ("An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit."). *See also* S. REP. NO. 101-543 (1990), at 13 (observing that the Administrative Dispute Resolution Act "prohibits a federal agency from requiring any person to consent to arbitration as a condition of receiving a contract or benefit," and this "prohibition is intended to help ensure that the use of arbitration is

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Once again, Petitioners cite the *DIRECTV-News Corp*. proceeding in support of a mandatory arbitration rule.[229] But, again, that proceeding is inapposite. It is true that the Commission required, as a condition of approval of News Corp.'s merger with DIRECTV, that the MVPD could "elect to submit" retransmission consent disputes involving FOX stations "to commercial arbitration."[230] The Commission did not impose that condition because News Corp., as a broadcaster, had disproportionate bargaining power over MVPDs in retransmission consent negotiations. Rather, the Commission found that News Corp. (which became a vertically integrated MVPD after acquiring DIRECTV) had both the "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.[231] Broadcast stations that are not affiliated with MVPDs do not possess either the incentive or the ability to foreclose access to their programming by competing MVPDs, and, therefore, there is no basis in law or in logic for the Commission to impose involuntary arbitration on parties to retransmission negotiations as a general rule.[232]

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truly voluntary on all sides").

[229] *See* Petition at 33-34.

[230] *DIRECTV-News Corp. Order* at ¶ 220.

[231] *DIRECTV-News Corp. Order* at ¶ 220 (emphasis added).

[232] In any event, the Commission has since relieved News Corp. of the obligation to comply with the retransmission consent arbitration conditions, finding that they were no longer needed once News Corp. divested its interest in DIRECTV: "The divestiture of DIRECTV restores News Corp.'s pre-transaction bargaining position. There is thus no further need for the conditions. Moreover, as News Corp. points out, withholding its programming from MVPDs would cause News Corp. to lose programming revenues that could not be offset by any increase in DIRECTV's subscription revenues." *General Motors Corporation and Hughes Electronics*
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More broadly, for the reasons discussed above, Petitioners cannot point to *any* express statutory grant of the authority it asks the Commission to exercise in imposing a mandatory arbitration or other similar involuntary dispute resolution scheme.[233] As discussed in detail in Section II, Commission intrusion into the contract negotiations of these marketplace participants was never envisioned or authorized by Congress.

The proposed mandatory arbitration rule is equally unsupportable as a policy matter. The complexity of retransmission consent negotiations makes mandatory arbitration or a similar dispute resolution mechanism neither viable nor practical. The proposal for mandatory arbitration implicitly assumes that retransmission consent negotiations are only about money—and that a decision-maker should be able to choose the offer of one side or the other. That is hardly the case. In fact, retransmission consent negotiations typically involve many complex and multifarious issues such as video on demand, the purchase of broadcast advertising by the MVPD, the purchase of MVPD advertising by the broadcast station, broadcast station promotion by the MVPD, MVPD promotion by the broadcast station, fiber connectivity between the station's studio or transmitter and the MVPD's headend or local receive facility, channel position and tier placement, digital and multicast channel carriage, system expansion options, studio/personnel/equipment sharing, electronic program guide placement, news insertion options, carriage of non-broadcast programming, duration of the term of the agreement, technical

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Corporation, Transferors and The News Corporation Limited, Transferee, Authority to Transfer Control, Memorandum Opinion and Order, 24 FCC Rcd 8674 (2009).

[233] And "[i]t is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress." *American Library Ass'n. v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

standards, after-acquired system provisions, after-acquired station provisions, non-discrimination clauses, indemnity provisions, venue, jurisdiction, and manner of dispute resolution, to list but a few. Given this complexity, Congress wisely established a retransmission consent regime that does not attempt to choose winners or losers among broadcast stations and MVPDs but instead maintains a fair and open process so that the marketplace can operate freely. Interfering in these complex marketplace negotiations by imposing government-enforced arbitration would not only exceed the Commission's authority, it would also disrupt Congress's "carefully balanced combination of laws and regulations governing carriage of television broadcast signals."[234]

Indeed, it is noteworthy that cable operators have, in the context of carriage for non-broadcast programming, expressly *opposed* government-imposed arbitration. For instance, the NFL favored binding arbitration to settle disputes with major MSOs over carriage of the NFL Network. Cable companies, however, resisted calls for arbitration and reaffirmed their preference for private negotiations. Glenn Britt, the Chief Executive Officer of Time Warner Cable (a Petitioner here), stated in a letter to NFL Commissioner Roger Goodell that "over the years we've been able to successfully reach agreements with hundreds of programming networks without the use of arbitration," and that "[w]e continue to believe that the best way to achieve results is to privately seek a resolution and not attempt to negotiate through the press or elected officials."[235] The Broadcaster Associations similarly believe that mandating arbitration is

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[234] *2005 FCC Retransmission Consent Report* at ¶ 45.

[235] *NFL Offers Arbitration to Cable for NFL Network*, USA TODAY (Dec. 20, 2007). *Accord* Mike Reynolds, *NFL Network Play Call: Time Warner Cable Arbitration*, MULTICHANNEL NEWS (Dec. 20, 2007).

inappropriate and unnecessary to resolve private programming carriage disputes arising out of the broadcast retransmission consent process.

C. Petitioners' Demand For A Regulatory Prohibition Of "Mandatory Tying" Is Without Merit

Petitioners insist that the Commission prohibit what it mischaracterizes as "mandatory tying of retransmission consent with the sale of other programming services" in order for their proposed "reforms" to be meaningful and effective[236]—except, that is, when the MVPDs find "tying" useful or convenient for their own purposes.[237] The Petition goes so far as to suggest that the Commission should make "mandatory tying" a *per se* violation of the good faith negotiation requirement. The Commission should reject that suggestion outright, as it has every time such a proposal has been presented by past petitioners.

The Broadcaster Associations note (as NAB has noted in previous filings[238]) that Petitioners' "mandatory tying" label is misleading. Broadcasters typically offer a menu of consideration options in the course of retransmission consent negotiations, among them cash payment, MVPD promotion of the station, purchase of additional advertising by the MVPD, payment by the MVPD for video-on-demand rights, and carriage of other commonly-owned stations, other program services, or digital multicast streams. In fact, MVPDs historically have encouraged and favored non-cash forms of consideration in retransmission consent negotiations.

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[236] Petition at 34-35.

[237] *See* Petition at 35 n.114 (arguing that "the Commission should take care to preserve the ability of broadcasters and MVPDs to enter into efficient arrangements that include multiple networks or services if they so choose").

[238] *See, e.g.*, NAB Comments in MB Docket No. 07-269 (filed July 29, 2009), at 14-16; NAB Reply Comments in MB Docket No. 07-198 (filed Feb. 12, 2008), at 5-10.

The willingness of local stations to offer such a variety of consideration options (with express congressional sanction, as discussed herein) differs from anticompetitive "tying" arrangements. Indeed, as discussed above, the opportunity to obtain a variety of benefits by offering menus of options in retransmission consent negotiations creates additional incentive for broadcast stations to agree to carriage deals with MVPDs.

Moreover, Congress expressly anticipated and sanctioned broadcast stations seeking various forms of compensation in exchange for the rights to retransmit and resell local stations' signals, including monetary compensation, "the right to program an additional channel on a cable system," or other consideration.[239] In light of that unambiguous expression of congressional intent, the Commission has concluded that seeking carriage of an additional channel or program service is "presumptively consistent" with broadcasters' obligation to negotiate retransmission consent in good faith.[240]

Petitioners fail to cite any legal authority under which the Commission could 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. Neither Section 325 nor its legislative history restricts the *terms* of retransmission consent agreements between MVPDs and local stations; in fact, as noted above,

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[239] S. REP. NO. 102-92, at 36.

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

the legislative history of Section 325 expressly contemplates the right to "program an additional channel on a cable system" as one form of compensation for retransmission rights. If Congress had instead intended to limit the type or amount of consideration available to broadcast stations in exchange for their grant to MVPDs of retransmission consent, it would have done so expressly. As the Supreme Court has made clear, Congress "does not . . . hide elephants in mouseholes."[241]

Congress's decision not to prohibit broadcasters from negotiating for carriage of additional programming, coupled with its explicit endorsement of such negotiations, confirm that the Commission lacks authority to prohibit such practice in the absence of further action from Congress amending Section 325. It is axiomatic that, when Congress has "spoken to the precise question at issue," then "the agency," as well as a reviewing court, "must give effect to the unambiguously expressed intent of Congress."[242] "[E]mploying traditional tools of statutory construction,"[243] including "examination of the statute's text, *legislative history*, and structure," it is clear that Congress has "spoken to the precise question" of broadcasters negotiating for the carriage of additional programming, as well as various other types of compensation, in exchange for retransmission consent.[244] The Commission accordingly must "give effect" to this plain expression of congressional intent by continuing to permit broadcasters to negotiate for a variety of types of compensation in retransmission consent, including the right to program an additional

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[241] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

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

[243] *Chevron*, 467 U.S. at 843 n.9.

[244] *Bell Atl. Tel. Co. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (emphasis added).

channel.[245]

In short, forbidding broadcasters from negotiating for particular compensation, such as the carriage of additional programming, would constitute an unwarranted "intru[sion] in the negotiation of retransmission consent."[246] The Commission is simply without authority to grant the relief Petitioners request.

Conclusion

For the reasons set forth herein, the Broadcaster Associations respectfully request that the Commission deny the Petition for Rulemaking to interfere in the television programming and retransmission consent marketplace.

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[245] *Chevron*, 467 U.S. at 842. Moreover, the statute's failure to "expressly foreclose" the agency from prohibiting "tying" arrangements does not mean that the Commission has the power to do so. *See Aid Ass'n for Lutherans v. U.S. Postal Service*, 321 F.3d 1166, 1174 (D.C. Cir. 2003). As the D.C. Circuit has made clear, statutes are "not written in 'thou shalt not' terms." *Railway Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (if courts were "to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well" (emphases in original)).

[246] *Good Faith Order* at ¶ 14.

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May 18, 2010

APPENDIX A

RETRANSMISSION CONSENT AND ECONOMIC WELFARE: A REPLY TO COMPASS LEXECON

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April 2010

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EXECUTIVE SUMMARY

Congress created retransmission consent in 1992 to ensure that broadcasters would be able to negotiate in a free marketplace for fair compensation for pay television providers' use of their signals. Prior to 1992, pay TV providers could and did retransmit and resell broadcasters' signals without their permission, and without providing any compensation.

The evidence shows 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.

A November 2009 Report by Compass Lexecon tries but fails to rebut this evidence.

- Lexecon's "consumer welfare" analysis is simply wrong. Lexecon's one-sided analysis counts the purported costs to consumers of retransmission consent, but ignores the benefits of broadcasting to the consumers and the economy. Based on Lexecon's methodology, one could also show that consumer welfare is reduced because utilities charge the cable companies for electricity while truck manufacturers refuse to provide free bucket trucks!

- Lexecon's analysis of broadcasters' bargaining power in retransmission consent negotiations is both incomplete and irrelevant. Lexecon points to the entry of new multichannel video programming providers (MVPDs), such as direct broadcast satellite (DBS) providers and telephone companies, as evidence of a more competitive MVPD market, but it fails to take into account cable company clustering, consolidation among cable companies, or the falling market share of over-the-air broadcasters, all of which work in the opposite direction. Moreover, Lexecon never even alleges that broadcasters have "too much" bargaining power, or that retransmission consent fees are "too high" from the perspective of economic efficiency.

- Lexecon's "game theory" model of bargaining power explicitly contradicts its consumer welfare analysis. Remarkably, a central premise of Lexecon's bargaining power model is that the level of retransmission consent fees has no effect on consumer welfare.

- Lexecon dramatically overstates the costs of retransmission consent. Lexecon overstates the impact of retransmission consent on consumer prices by a factor of two-to-one, and overstates the effect on MVPD subscribership by a factor of more than five-to-one.

- Lexecon fails to contradict evidence that negotiating impasses are extremely rare. Lexecon presents no evidence whatsoever to suggest that negotiating impasses have any significant impact on economic welfare. An analysis of impasses through 2009 shows that consumers are more than 20 times more likely to be deprived of television viewing by an electricity outage than by a bargaining impasse between broadcasters and MVPDs. Aggregate service interruptions from retransmission consent negotiating impasses represent approximately one one-hundredth of one percent of annual U.S. television viewing hours.

- Finally, Lexecon provides no evidence that programming costs, in general, or retransmission consent fees, specifically, have any significant impact on prices paid by MVPD subscribers. In fact, retransmission fees make up a small fraction of programming costs, and an even smaller percentage of MVPD revenues. Moreover, the evidence shows that programming costs are rising slower than MVPD revenues, slower than other components of MVPD costs, and slower than MVPD profits.

MVPDs have strong incentives to try to get policymakers to tilt market outcomes in their favor. Because most MVPDs have some downstream market power, they would retain as profit at least a portion of any reductions in retransmission consent fees. It is thus easy to understand why the National Cable & Telecommunications Association, DIRECTV and DISH Network commissioned the Lexecon report. Lexecon, however, cannot and does not demonstrate that, when it comes to retransmission consent, "what's good for pay television providers is good for consumers."

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Appendix

I. INTRODUCTION

In March 2009, I authored a report on *The Economics of Retransmission Consent* ("March 2009 Report") which was subsequently filed with the Federal Communications Commission ("FCC" or "Commission").[1] The report found that retransmission consent is a market-based mechanism that results in economically efficient prices for broadcast signals, and ultimately benefits consumers by enriching the quantity, diversity, and quality of available programming. I have been asked by the National Association of Broadcasters to comment on a report by Michael Katz, Jonathan Orszag, and Theresa Sullivan of Compass Lexecon, which was commissioned by the National Cable & Telecommunications Association, DIRECTV, and DISH Network, and filed with the Commission (the "Lexecon Report" or "Lexecon").[2] The Lexecon Report finds that "the extant [retransmission consent] system significantly harms consumer welfare through higher subscription fees and the periodic (and to consumers, unpredictable) loss of access to retransmitted broadcast signals."[3]

Lexecon's analysis is profoundly flawed and fundamentally incorrect. At the most basic level, Lexecon's allegation of consumer harm amounts to nothing more or less than the assertion that pay television providers would charge consumers less for video service if they could get access to one of their key inputs (broadcast signals) for free, and that consumers would be better off as a result. Of course, precisely the same thing could be said about electricity and bucket trucks. The obvious fallacy is that forcing electricity producers and truck manufacturers to give

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[1] Jeffrey A. Eisenach, "The Economics of Retransmission Consent," Empiris, LLC (March 2009) (hereafter, *March 2009 Report*).

[2] Michael Katz, Jonathan Orszag and Theresa Sullivan, "An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime" (November 12, 2009) (hereafter, *Lexecon Report*). The *Lexecon Report* claims to rebut some of the findings of the *March 2009 Report*.

[3] See *Lexecon Report* at 1.

pay television operators their products for free would reduce the quantity (and quality) of electricity and bucket trucks supplied, and both pay television operators and, ultimately, consumers would suffer as a result. The same is true for broadcasting.[4]

More broadly, while Lexecon's findings are clothed in seemingly sophisticated analyses of bargaining power and demand elasticities, and supported with a healthy dose of "factual" evidence, its analyses are flawed or inapposite, and its facts are often irrelevant or misleading. To summarize briefly, the Lexecon Report asserts that there is a trend in the marketplace away from in-kind (or zero) compensation by MVPDs for broadcast signals, to cash compensation. This is an uncontested fact. It also notes that there are more varieties of MVPDs than there were in 1992 – another uncontested fact.[5] Relying on a highly stylized model of bargaining power, it argues that the advent of cash compensation is explained by the increasing bargaining power of broadcasters relative to MVPDs, which in turn results from increasing competition among MVPDs for programming. Finally, it claims that cash compensation for retransmission consent is *per se* harmful to consumers.

There are several problems with this analysis. First, Lexecon ignores changes in the marketplace, such as the advent of cable system clustering, a reduction in the share of viewers watching television over the air, and the increase in the availability and audience shares of non-broadcast programming, all of which have *reduced* broadcasters' bargaining power relative to MVPDs. Thus, Lexecon provides no basis for concluding that broadcaster bargaining power has increased (relative to MVPD bargaining power), and therefore cannot credibly argue that the

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[4] Lexecon "admits" to limiting its analysis to the effects of retransmission consent on consumers, ignoring the impact on broadcasters and MVPDs. See *Lexecon Report* at 4 ("We do not consider the economic welfare of the parties directly involved in retransmission consent bargaining: broadcasters and MVPDs.") What it fails to mention is that its analysis also ignores the dynamic or "second order" effects of retransmission consent on consumers. That is, in the absence of retransmission consent, consumers would be harmed by the reduction in the quantity and quality of broadcast programming that would result.

[5] *Lexecon Report* at 2.

shift from in-kind to cash compensation is the result of a shift in bargaining power in the first instance.[6] Second, Lexecon fails to demonstrate that current (or anticipated future) levels of retransmission consent compensation are in any economically meaningful sense "too high" (any more than the price of bucket trucks is too high because it is greater than zero). When absent in such a finding, Lexecon's assertion of consumer harm is economically meaningless. Moreover, Lexecon ignores altogether the empirical evidence that (1) MVPDs' programming costs are rising less rapidly than their revenues, costs, and profits; and (2) retransmission fees make up only a tiny fraction of programming costs.

Beyond these fundamental flaws, Lexecon's analysis errs in other important respects. Lexecon's model of bargaining power is based on assumptions which explicitly contradict many of its other findings; the report makes a fundamental error in its choice of demand elasticities, which causes it to significantly overstate the relationship between MVPD prices and subscribership; it evidences confusion over the choice of relevant geographic markets; and, it incorrectly claims that negotiating impasses are more prevalent than prior research has shown.

In short, Lexecon fails to refute the conclusion of the March 2009 Report, that "[R]etransmission consent is achieving precisely what Congress intended it to achieve when it passed the 1992 Cable Act: Establishing a market based mechanism to ensure that broadcasters receive the economically efficient level of compensation for the value of their signals. Such compensation ultimately benefits consumers by enriching the quantity, diversity, and quality of available programming, including local programming."[7]

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[6] There are many alternative explanations. For example, it might be that the value of in-kind compensation, such as carriage of affiliated cable programming, has fallen, leading broadcasters to place a relatively higher value on cash.

[7] *March 2009 Report* at 41.

The remainder of this paper is organized as follows. Section II explains why Lexecon's game-theoretic model of bargaining power is based on unrealistic factual assumptions about the market for broadcast signals, and also explains that the model is inconsistent with Lexecon's assertion of consumer harm. Section III explains the fallacies behind Lexecon's consumer welfare analysis, shows how the report errs in its estimation of price effects and the elasticity of demand, and demonstrates that the impact of retransmission consent compensation on MVPD subscribership is far less than Lexecon claims. Section IV updates the March 2009 Report's analysis of the frequency and impact of negotiating impasses, and finds that such impasses remain significantly less disruptive to consumer viewing than either electricity outages or cable system outages. Section V presents a brief conclusion.

II. LEXECON'S BARGAINING MODEL IGNORES KEY FACTS AND IS INCONSISTENT WITH ITS FINDING OF CONSUMER HARM

Lexecon proffers a game-theoretic model of bargaining power, the upshot of which is the obvious notion that the number of competitors on each side of a market affects the division of the "gains from trade" generated by transactions in that market. Specifically, the Lexecon model predicts that broadcasters' relative bargaining power is increased when multiple MVPDs compete to carry their signals, other things equal. Thus, it argues, entry by DBS providers and telephone companies since retransmission consent was enacted in 1992 has increased the amounts broadcasters can charge for retransmission consent.

As noted above, there are two fundamental problems with this analysis. First, the model looks only at one changed condition in the marketplace, but ignores others (such as cable system clustering and rising MVPD concentration). Second, the model is inconsistent with Lexecon's claim that increased retransmission consent fees reduce consumer welfare. Indeed, a central premise of Lexecon's bargaining model is that prices and output in the retail market, and hence consumer welfare, are completely unaffected by the size of retransmission fees.

The first problem is an empirical one: Lexecon's analysis of relative bargaining power focuses on the increase in the types of MVPDs operating in most markets since 1992 as a result of DBS and telco entry. However, it ignores other factors – including cable system clustering, rising concentration in the national MVPD market, falling concentration in the video programming market, increasing competition between broadcasters and other content providers, and the declining audience share of over-the-air broadcasting – that *reduce* broadcasters' bargaining power.

As the March 2009 Report explained,[8] clustering reduces the number of cable systems in each local market, thereby increasing each remaining system's market share (and hence its bargaining power relative to a local broadcaster).[9] Thus, while there may be more *types* of MVPDs operating in each market (e.g., DBS, telco as well as cable), it is not at all clear that the actual *number* of MVPDs has increased, since, in 1992, there typically were *several* cable operators in each market (each serving a portion of the broadcaster's service area), whereas today (thanks to clustering) there are likely to be only one or two.[10]

The Lexecon Report also ignores the impact on bargaining power of the fact that concentration in the national market for distribution has increased over time, while concentration

[8] See *March 2009 Report* at 20-21.

[9] Note that the size of the market is defined by the size of the broadcaster's service territory, a fact implicitly acknowledged by the *Lexecon Report* in its assumption that the surplus generated by reaching a retransmission consent agreement is the same in both the one-MVPD and two-MVPD scenarios. See *Lexecon Report* at 16 ("*As before*, suppose that carriage of the broadcaster's signal over all of the MVPDs in the market (now two instead of one) generates a total of $6 million in incremental profits…." (*emphasis in original*)).

[10] The *Lexecon Report's* assertion (at 25. n. 48) that "the increase in clustering does not shift the balance of negotiating power; increased clustering just raises the stakes for *both* the broadcaster and the distributor," is simply wrong. If an impasse occurs, an MVPD loses the ability to distribute one of many channels to its customer base. This is true whether it serves 100 percent of the broadcaster's service area or 10 percent. On the other hand, a broadcaster risks losing distribution of its one and only signal to whatever portion of its service territory is served by the MVPD with which the impasse occurs. The proportion of a broadcaster's revenues at risk in a retransmission consent negotiation is thus a direct function of the market share of the MVPD with which it is negotiating. See also *March 2009 Report* at 21-23 (explaining why "when a local broadcast signal is pulled from a cable operator's channel lineup, the evidence suggests that broadcasters lose more"); see also Ken Binmore, Ariel Rubinstein, & Asher Wolinsky, "The Nash Bargaining Solution in Economic Modelling," *The RAND Journal of Economics* 17(2) (1986) 176-188 (explaining the role of variations in time and risk aversion among bargainers on bargaining outcomes).

in the market for programming has decreased.[11] Lexecon argues that national concentration is irrelevant, because "retransmission consent negotiations occur for local programming. Thus, local market shares are the most appropriate metrics to examine."[12] But this ignores the fact that that retransmission consent agreements are often negotiated between broadcasters and MVPDs that operate in multiple markets. As the March 2009 Report explains, "[w]hile broadcast programming is inherently local, retransmission negotiations often involve broadcasters who own stations in multiple markets (e.g., Fisher Communications) negotiating with MVPD operators who distribute programming in many of those same markets (e.g. Dish Network)."[13] National concentration ratios are one way of measuring the relative bargaining power of the parties in such regional or national negotiations.[14]

Lexecon also ignores the effect on bargaining power of the rise in MVPD subscribership since the passage of the 1992 Cable Act. As Figure One below illustrates, less than two-thirds of TV households subscribed to MVPD service in the early 1990s. By 2008, this figure had climbed to nearly 90 percent. As a result, the importance of multichannel distribution as a means of retransmitting broadcast signals to a broad audience is substantially greater than it was when Congress enacted retransmission consent.

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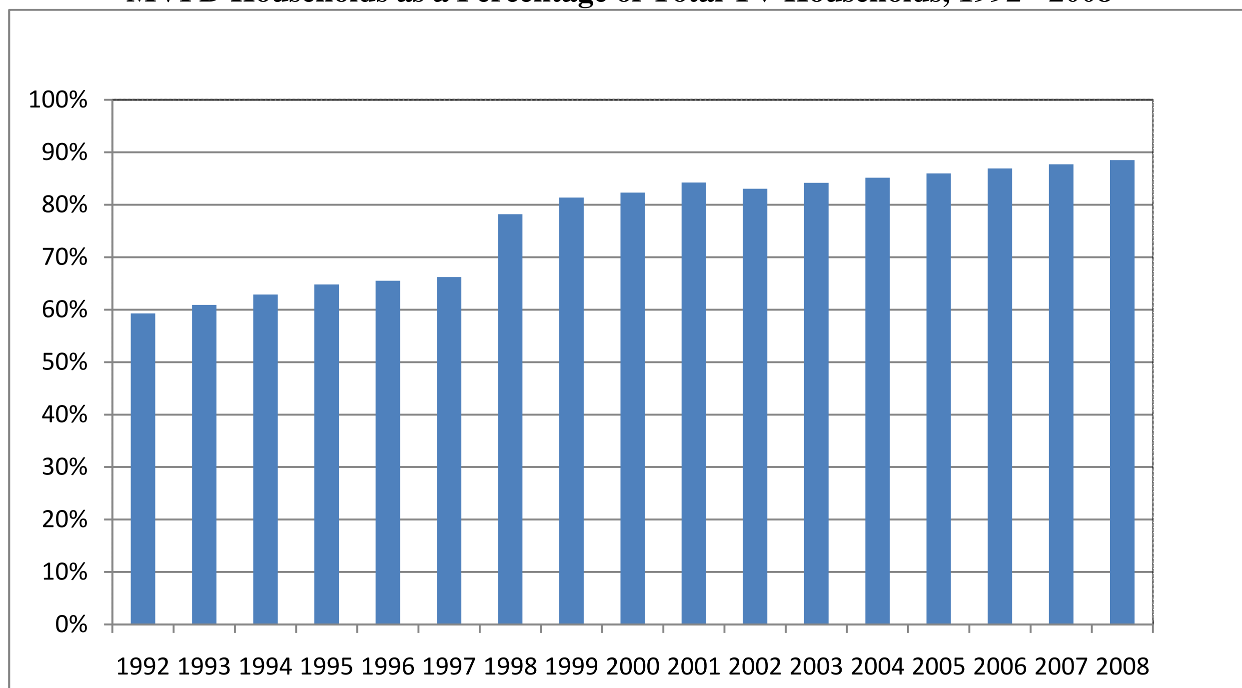
[11] *March 2009 Report*, Section III.
[12] *Lexecon Report* at 25, n. 48
[13] March 2009 Report at n. 30.
[14] See *March 2009 Report* at 19-20 (demonstrating this increased concentration in the national MVPD marketplace).

Figure One:
MVPD Households as a Percentage of Total TV Households, 1992 - 2008[15]



In sum, there is no empirical basis for the central assumption behind Lexecon's bargaining model, i.e., for the proposition that broadcasters' relative bargaining power has increased since retransmission consent was authorized by Congress in 1992.

Moreover, even if Lexecon had demonstrated a *shift* in bargaining power, the larger question is whether broadcasters have sufficient power to impose uneconomic terms on MVPDs. The March 2009 Report addresses this question directly, presenting empirical evidence that "broadcasters have, if anything, less bargaining power in retransmission consent negotiations than do cable operators."[16] The Lexecon Report does not refute, or even attempt to refute, this

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[15] *See* Federal Communications Commission, *Annual Report on Competition in Video Markets* (various years), available at: http://www.fcc.gov/mb/csrptpg.html. FCC figures span the years 1992 – 2006. Figure for 2008 is Nielsen's "Broadcast Only" percentage. Figure for 2007 is calculated as the average of 2006 and 2008 statistics. Note that the jump downward from 1997 - 1998 reflects the fact that, prior to 1998, the FCC data reflect only cable subscribers. From 1998 forward, all MVPD services are taken into account. Compare, e.g., Table B-1 in the FCC's 8th *Annual Report* with Appendix Table B-1 in the FCC's 9th *Annual Report*.

[16] *March 2009 Report* at 12.

finding: Quite simply, *Lexecon never even argues that broadcasters have, in any meaningful economic sense, "too much" bargaining power.*

A second fundamental problem with the Lexecon bargaining model is its inconsistency with Lexecon's contention that retransmission fees reduce consumer welfare.

The Lexecon model posits a highly simplified view of retransmission consent negotiations. Retransmission is negotiated for a single signal. In Lexecon's first example, only two parties are involved in the negotiation: One MVPD and one broadcast station owner. In the second example, there are three parties: Two MVPDs (labeled MVPD *A* and MVPD *B*), and one broadcast station owner. The retransmission of the broadcaster's signal via one or more MVPDs generates economic value. Part of the value is derived from increased advertising revenues, and part is derived from increased subscription fees. The sum of these two components comprises the incremental profits associated with retransmission.

The purpose of the model is simply to predict how this fixed "pie" of incremental profits is divided. As the Lexecon Report emphasizes, "[a] negotiation over retransmission rights can thus be thought of as a negotiation over *how to divide the pool of incremental profits created by the retransmission of the broadcaster's signal to the MVPD's subscribers*."[17] It bears emphasis that the incremental profits are assumed to be fixed, and do not vary with retransmission fees. As the Lexecon Report observes, "[b]argaining situations are commonly described as negotiations to divide some *fixed amount of surplus*."[18]

The model yields a simple, intuitive prediction: retransmission fees earned by the broadcaster will be higher when there are two MVPDs than when there is only one MVPD. Specifically, in the first model, there is $6 million in fixed surplus to be gained from

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[17] *Lexecon Report* at 12 (emphasis in original).
[18] *Lexecon Report* at 12 (n. 27, emphasis added).

retransmission. In equilibrium, this surplus is divided evenly between the broadcaster and the MVPD, with each gaining $3 million as a result of retransmission.[19] In the second model, the total surplus from retransmission on both of the two MVPDs is also fixed at $6 million. In equilibrium, the broadcaster earns $4 million as a result of retransmission, while each of the two MVPDs earns $1 million.[20] Thus, when the broadcaster is negotiating with only one MVPD, the broadcaster is able to obtain only half of the fixed surplus. But when the broadcaster is negotiating with two MVPDs, the broadcaster is able to keep two-thirds of the fixed surplus.[21]

Thus, the Lexecon game-theoretic model yields the unsurprising prediction that broadcasters earn higher retransmission fees, and a higher share of the fixed surplus, when there are multiple MVPDs competing for the right to transmit their signals, other things equal. The important point, however, is that regardless of whether there is one MVPD or two MVPDs, and regardless of whether the broadcaster keeps half of the fixed surplus or two-thirds of the surplus, the surplus itself is *fixed*.

As an inevitable consequence of Lexecon's assumption about the fixed nature of the surplus, the prices paid by consumers, and the amounts of MVPD services consumers purchase, are also fixed – that is, they are unaffected by retransmission consent fees.[22] Put differently, a central premise of the Lexecon model is that if MVPDs did not pay retransmission consent fees,

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[19] *Lexecon Report* at 16.

[20] *Lexecon Report* at 18.

[21] The Lexecon model also contemplates a scenario in which the broadcaster is permitted to sign an exclusive contract with one of the MVPDs. Not surprisingly, the authors find that retransmission fees are even larger when exclusive contracts are permitted. However, this analysis is wholly irrelevant as a practical matter, because broadcasters are prohibited by law from entering into exclusive retransmission agreements with MVPDs. *See* 47 C.F.R. § 76.64(l) ("exclusive retransmission consent agreements are prohibited"); 47 U.S.C. § 325(b)(3)(C)(ii).

[22] The assumption that the surplus is not affected by retransmission consent fees necessarily implies that broadcasters' and MVPDs' combined revenues and costs do not change, which in turn implies that both the quantity sold to consumers and the prices they pay do not change.

they would simply keep the savings entirely to themselves, and pass none of them on to consumers in the form of lower prices.[23]

Moreover, according to the Lexecon model, consumers suffer harm only out of equilibrium – that is, in scenarios wherein the broadcaster and MVPD(s) fail to reach an agreement. Specifically, in the first model, involving one broadcaster and one MVPD, there are only two possible outcomes: A retransmission agreement is either reached or not reached. If it is not reached, retransmission fees are zero, and consumers subscribing to the MVPD are harmed, because they are unable to view the broadcaster's signal on that system.[24] In equilibrium, an agreement involving positive retransmission fees is reached, because it is in the interest of both parties to do so. This is also the outcome that maximizes consumer welfare.

In Lexecon's second model, involving one broadcaster and two MVPDs, there are four possible outcomes. In the first outcome, no retransmission agreement is reached, and the subscribers to both MVPDs are harmed. In the second outcome, a retransmission agreement is reached between the broadcaster and MVPD *A*, but not MVPD *B*. In order to gain access to the broadcaster's signal, some consumers switch from MVPD *B* to MVPD *A*, but some do not (or cannot). The third outcome is the mirror image of the second: A retransmission agreement is reached between the broadcaster and MVPD *B*, but not MVPD *A*, and some (but not all) subscribers switch from MVPD *A* to MVPD *B*. Thus, some consumers are harmed in the second and third scenarios. In the fourth and final outcome, the broadcaster reaches retransmission agreements with both MVPDs (and both pay positive retransmission fees to the broadcaster). Again, this is the outcome that occurs in equilibrium, because it is in the interest of all parties

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[23] Hence, Lexecon's statement (see n. 4 *infra*) that it ignores the effect of retransmission consent on MVPDs and broadcasters, and focuses only on the effect on consumers, is precisely backwards: To the contrary, its game-theoretic model is, by design, *incapable* of assessing the impact on consumers, and focused *solely* on the division of profits between broadcasters and MVPDs.

[24] It bears emphasis that the broadcast signal is always available, albeit by antenna rather than via MVPD service.

involved in the negotiations; and, it is also the outcome that maximizes consumer welfare, because it ensures that all consumers gain access to the broadcaster's signal via their respective MVPDs. As explained in the March 2009 Report and reiterated below, it is also the outcome which regularly occurs, with only the rarest exceptions, in today's marketplace.[25]

To reiterate, the Lexecon game-theoretic model analyzes the bargaining that takes place between a broadcaster and one (or two) MVPD(s), as the two sides determine how a fixed pie of surplus will be divided. Remarkably, Lexecon's model is predicated on the assumption that retransmission fees *do not harm consumers*. To the contrary, the only way consumers in the model can be harmed is when there are no retransmission fees because broadcasters and MVPDs fail to reach mutually beneficial agreements to retransmit the broadcaster's signal.

III. THE LEXECON CONSUMER WELFARE ANALYSIS IS WRONG BOTH CONCEPTUALLY AND TECHNICALLY

After presenting a game-theoretic model in which consumer welfare is unaffected by retransmission consent fees, Lexecon proceeds to reverse course and present a contradictory analysis of the alleged "consumer harm from the current retransmission consent regime."[26] Specifically, according to Lexecon, retransmission consent harms consumers through higher prices and reduced output.

At the outset, Lexecon's analysis is conceptually incorrect at the most fundamental level. As explained above, Lexecon makes the rudimentary error of failing to account for the impact of retransmission consent on the supply of broadcasting: That is, if broadcasters could not be compensated for their signals through retransmission consent, they would produce less (and

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[25] Of course, in reality, broadcasters frequently agree to have their signals retransmitted without cash compensation. Nevertheless, regardless of whether or not compensation comes in the form of cash, in-kind arrangements, or simply the benefits of a larger broadcast audience, the important point is that broadcasters and MVPDs virtually always reach mutually beneficial agreements.

[26] *Lexecon Report* at 29.

possibly lower quality) broadcasting, and consumers (and MVPDs) would suffer harm as a result.[27] From an economic perspective, retransmission fees are "too high" only if they are the result of monopolistic price-setting, in which supply is restricted artificially, resulting in higher prices. Yet Lexecon provides no argument or analysis *of any kind* to suggest that retransmission consent agreements – which are voluntary transactions between economic agents acting in their own best interests, and hence are presumptively economically efficient – result in monopolistic prices, or the underproduction of broadcasting, or monopoly profits for broadcasters.[28] Indeed, the very fact that MVPDs choose to pay retransmission consent fees proves that *MVPDs* believe the value consumers place on broadcast signals exceeds their price (in the form of whatever portion of retransmission consent fees MVPDs pass through).

With these caveats in mind, there is nothing inherently wrong with attempting to estimate the amount of retransmission consent fees passed on to consumers, or the impact of retransmission consent fees on MVPD. Lexecon does so, and finds both effects to be quite small. Even the modest effects estimated by Lexecon, however, turn out to be significantly inflated as a result of Lexecon's methodological errors.

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[27] Lexecon's understanding of such effects improves somewhat when it is faced with the notion of "regulat[ing] MVPD rates so that increases in retransmission consent costs are not passed through to MVPD subscribers." (See n. 70.) Such a policy, Lexecon avers (without explanation), would "cause far more significant harms to consumer welfare than the harms associated with increased retransmission costs." So, according to Lexecon, lower prices are good when they result from imposing *de facto* price controls on retransmission fees, but not when they result from retail price controls on MVPDs. In fact, price controls would harm consumer welfare, for essentially the same reasons, in both cases.

[28] Nor could such a showing be made. To the contrary, there is a widespread recognition that broadcasters are facing financial difficulties. See, e.g., Federal Communications Commission, *Connecting America: The National Broadband Plan* (March 2010) at 91 ("Since 2005, broadcast TV station revenues have declined 26%, and overall industry employment has declined as well.") (footnotes omitted). Cable companies, on the other hand, are prospering. As Comcast CEO Brian Roberts said following the release of Comcast's first quarter 2010 earnings, "For many, many years, cable had to invest, and now we're starting to see returns on some of that investment…. We've been on a trend for, gosh, six, eight straight quarters where free cash flow has been increasing to record levels, and so this was the highest we've had in a first quarter." (See CNBC, "Comcast CEO on Earnings, Outlook" (April 28, 2010) (available at http://www.cnbc.com/id/15840232?video=1479708426&play=1, last viewed April 28, 2010)).

A. Even Lexecon's Flawed Analysis Shows Little Effect of Retransmission Consent Fees on Consumers

Lexecon presents an analysis purporting to show that MVPDs raise prices to consumers by as much as $0.74 per month due to retransmission consent, and that, as a result, as many as 2.26 million people choose not to subscribe to MVPD services. As explained below, both estimates are dramatically inflated. However, even if Lexecon's estimates were accurate, they are quite modest when compared to the overall price of cable or the overall number of MVPD subscribers.

Lexecon relies on data from SNL Kagan showing that the average monthly retransmission fee paid by MVPDs that paid retransmission fees in 2009 was $0.74 per subscriber.[29] Next, Lexecon assumes MVPDs pass through between 50 and 100 percent of retransmission fees to consumers. Thus, Lexecon alleges that consumers pay between $0.37 and $0.74 per month to be able to watch broadcast programming on their MVPD services, or between about 0.75 percent and 1.5 percent of the average monthly price for expanded basic cable.[30] Even if this proportion were accurate, it hardly seems excessive, especially when one considers that broadcast programming accounts for about 38 percent of television viewing.[31]

Next, based on these estimates of the price effects of retransmission consent, Lexecon seeks to estimate the impact on the number of MVPD subscribers, using estimates of demand elasticity ranging from -1.0 to -1.75 (indicating that a one percentage point increase in the price of MVPD services results in a reduction in the number of subscribers of between 1.0% and

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[29] *Lexecon Report* at 35. Lexecon's estimate is based on spreading the total amount of retransmission fees SNL Kagan estimates were paid in 2009 ($739 million) across the subscribers to MVPDs which pay retransmission fees, However, as Lexecon notes, about 17 percent of MVPD subscribers subscribe to MVPDs that do not pay cash retransmission fees. Thus, a more appropriate estimate of average cash retransmission fees would be approximately $0.61 per subscriber per month ($0.74*83%).

[30] *See* Federal Communications Commission, *Report on Cable Industry Prices* (January 16, 2009) at 2.

[31] See *March 2009 Report* at 18 (citing data from SNL Kagan).

1.75%).[32] Based on these parameters, Lexecon estimates that retransmission consent fees cause as many as 2.26 million households not to subscribe. As demonstrated below, this figure is overstated by a factor of about 5-to-1 – but again, even if it were accurate, it would represent less than two percent of all MVPD subscribers, or less than the annual rate of subscriber growth.

B. Lexecon's Impact Estimates are Dramatically Inflated

Lexecon's estimates of consumer impact are based on three key parameters: The magnitude of transmission fees; the rate at which MVPDs pass transmission fees through to consumers; and, the elasticity of demand. Lexecon's assumptions regarding both the pass-through rate and the elasticity of demand are unrealistic (or simply incorrect). As a result, the Lexecon Report substantially inflates the impact of retransmission consent.

First, Lexecon assumes, for some of its estimates, an unrealistic pass through rate of 75 or even 100 percent. Yet, the empirical evidence cited by Lexecon shows a pass-through rate of 50 percent; and, as Lexecon points out, only firms in perfectly competitive industries pass through 100 percent of cost increases to consumers.[33] Thus, there is no basis for assuming a pass-through rate of more than 50 percent – implying that the impact of retransmission consent on consumer prices, rather than $0.74 per month, is $0.37 per month, or less than one percent of the average monthly subscription fee for expanded basic and less than three tenths of one percent of cable operators' average revenue per customer.

Lexecon's next, and more egregious, error is in its assumptions regarding the price elasticity of demand for MVPD service, which form the basis for its estimate of the reduction in MVPD subscribership associated with retransmission consent. The only recent elasticity estimate that Lexecon relies on is an estimate of the elasticity of demand of approximately -1.5,

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[32] See *Lexecon Report* at 36, n. 68.
[33] *Lexecon Report* at 37, n. 71.

which it takes from Goolsbee and Petrin (2004).[34] Lexecon uses this elasticity as the basis for its calculations of the number of households that forgo MVPD service as a result of the effect of retransmission consent fees on MVPD prices. In other words, Lexecon treats the elasticity of -1.5 as a measure of consumers' tendencies to substitute away from *all MVPD services* in the face of an across-the-board increase in the price of *all MVPD services*.

A careful reading of Goolsbee and Petrin, however, makes clear that their -1.5 estimate for the elasticity of demand measures the tendency of *basic* cable customers to substitute away from *basic* cable service in the face of an increase in the price of *basic* cable, holding other MVPD prices constant.[35] As common sense would suggest, however, the demand for basic cable service (holding other MVPD prices constant) is more elastic than the demand for all MVPD services: Consumers faced with an increase in the price of basic cable service have close substitutes (e.g., they can switch to a DBS provider), while consumers faced with an increase in the price of all MVPD services do not.[36] Simply put, Lexecon uses the wrong elasticity estimate, and the effect is to significantly inflate the effect of retransmission consent on MVPD subscribership.

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[34] Austan Goolsbee and Amil Petrin, "The Consumer Gains From Direct Broadcast Satellite and the Competition With Cable TV," *Econometrica* 72(2), 351 – 381 (March 2004), (hereafter, *Goolsbee & Petrin*). Lexecon also cites a dated elasticity estimate of -1.5 for cable services, from a study published in the early 1990s, when cable faced virtually no competition from alternate MVPDs. *See Lexecon Report* at 38 (n. 72). It is unsurprising that this older study indicates that demand is *elastic*, while Goolsbee & Petrin's more recent estimates (as explained below) imply *inelastic* demand. This is due to the fact that a profit-maximizing monopolist will always operate on the elastic portion of the demand curve. Thus, the apparent shift in price elasticities over time – from elastic to inelastic – is perfectly consistent with the evolution of the MVPD industry from a monopolistic setting to one with multiple MVPD competitors.

[35] *Goolsbee & Petrin* at 369, Table VIII. Goolsbee and Petrin use three price variables: The price of basic enhanced service ("monthly cable price"); the price of basic enhanced service plus premium service ("premium cable price"); and the price of DBS service. They also consider over-the-air viewers. Thus, the effect of an increase in the price of basic cable could be to cause subscribers to (a) switch to premium service (which is now *relatively* less expensive), (b) switch to DBS, or (c) switch to over-the-air only. See Goolsbee & Petrin at 357-8.

[36] Similarly, for example, if the price of Ford mid-sized sedans rose by 10 percent, many consumers would choose a different model, or switch to Chevrolets and Hondas. If the price of *all* cars went up by 10 percent, consumers would still have alternatives – some would buy motorcycles, and some would forego purchases altogether – but most would still buy a car. Thus, a 10 percent increase in the price of Ford mid-sized sedans, holding all other car prices constant, would have a larger impact on the demand for Ford mid-sized sedans than a 10 percent increase in the price of all cars.

To obtain an estimate of the elasticity that Lexecon should have used, I used data from Goolsbee and Petrin to estimate the elasticity of demand for all MVPD services with respect to the price of all MVPD services. As explained in the Appendix, Goolsbee and Petrin's elasticity matrix implies an MVPD elasticity estimate of approximately -0.66, meaning that a one percent across-the-board increase in the price of MVPD services causes demand for MVPD services to decline by only 0.66 percent. Thus, Lexecon's estimate of the responsiveness of subscribers to price changes, at -1.5, is more than double the correct figure, of -0.66. As seen in Table One below, Lexecon's estimates of the number of households that forgo MVPD service are substantially diminished once the elasticity has been corrected. Based on the incorrect market elasticity of demand of -1.5, Lexecon claims that retransmission fees cause MVPD subscribership to fall by between 948,000 and 1.93 million households, depending on the pass-through rate. When the corrected elasticity of -0.66 is used instead, estimates drop by more than half, to between 410,000 and 827,000, or far less than one percent of U.S. MVPD subscribers. Based on its most aggressive overestimates of the pass-through rate (100 percent) and elasticity of demand (-1.75) (not shown in the table), Lexecon claims that retransmission consent reduces MVPD subscribership by up to 2.26 million. The correct figure, based on an appropriate elasticity estimate and a realistic 50 percent pass through rate, is about 410,000. Thus, Lexecon inflates its estimate by a factor of slightly more than five to one.

**Table One:
Revised Version of Lexecon Table 5, With Corrected Elasticities
(Based on Retransmission Fees of $0.74 per Subscriber per Month)**

Pass-through Rate	Incorrect Elasticity	Corrected Elasticity	Change In Subscribers (Incorrect Elasticity)	Change In Subscribers (Corrected Elasticity)
100%	-1.5	-0.66	-1,932,050	-826,944
75%	-1.5	-0.66	-1,435,152	-617,871
50%	-1.5	-0.66	-947,686	-410,368

IV. LEXECON PROVIDES NO EVIDENCE THAT SERVICE INTERRUPTIONS REPRESENT MORE THAN AN INFINITESIMALLY SMALL PORTION OF TELEVISION VIEWING

Lexecon provides a brief list of retransmission disputes and programming interruptions, which it claims (without explanation or support) demonstrates that the March 2009 Report's analysis of negotiating impasses was "incomplete."[37] However, Lexecon fails to identify a single programming interruption not identified in the sample period spanned by the prior analysis. Moreover, an update of the March 2009 analysis shows that the basic results have not changed: retransmission consent impasses are extraordinarily rare and typically short lived, and do not substantially impact consumer welfare.

A. Lexecon Fails to Identify Any Instance of Service Interruption Not Accounted for in the Prior Analysis

In an attempt to demonstrate that the list of service interruptions found in the March 2009 Report was incomplete, Lexecon provides a table containing a list of "Selected Instances of Service Interruptions" spanning the years 2000 through 2009.[38] For purposes of comparing the Lexecon list of service interruptions to the list of service interruptions found in the March 2009 Report, the relevant years are 2006 – 2008, since these are the years summarized in Tables 2 and

[37] *Lexecon Report* at 40 (n. 75).
[38] *Lexecon Report* at Table 6.

3 of the March 2009 Report.[39] The Lexecon list contains a total of six disputes from 2006 – 2008. Five of these six disputes are listed in the prior report. The remaining dispute does not appear in the prior report, for the simple reason that it did not result in any service interruption.[40]

B. The Impact of Retransmission Consent Related Carriage Interruptions on Television Viewing in the U.S. is Infinitesimally Small

Because Lexecon fails to identify a single instance of service interruption not accounted for in the prior analysis, while simultaneously neglecting to identify several programming interruptions that *were* identified in the prior analysis, the conclusions from the March 2009 Report remain unaltered. Specifically, the report concluded that aggregate service interruptions from 2006 – 2008 represented a grand total of approximately one one-hundredth of one percent of annual television viewing hours in the United States,[41] meaning that the average household is roughly 24 times more likely to be without electricity than it is to be deprived of its first-choice television channel.

Of course, it is possible to extend this prior sample period for an additional year, to take subsequent service interruptions into account for the year 2009. As demonstrated in Table Two below, doing so does not change the conclusions of the March 2009 Report.

Lexecon identifies two service interruptions that occurred in 2009.[42] In addition, Table Two reflects a dispute between Fisher Communications and Dish Network, already documented

[39] *March 2009 Report* at Tables 2 and 3.

[40] This is a dispute that occurred between Sinclair Broadcast Group and Suddenlink Communications in 2006. According to press reports, Sinclair indicated it was contemplating withholding its signal from Suddenlink, but ultimately did not follow through, when the parties reached a deal including "mutually agreeable economic considerations." See Mike Farrel, "Suddenlink, Sinclair Settle Retrans Flap," *Multichannel News* (August 10, 2006).

[41] *March 2009 Report* at Table 3.

[42] The first, a dispute involving Hearst-Argyle Television and Sunflower Broadband, caused approximately 31,000 viewers in Kansas City, MO to lose access to two channels. See Linda Moss, "Sunflower Retrans Dispute Keeps K.C. Viewers In The Dark," *Multichannel News* (January 6, 2009). The second, a dispute involving Free State Communications and Dish Network, caused approximately 13 percent of viewers in the Topeka, KS area to lose access to the signal of the local ABC affiliate for one week. See Michael Hooper, "KTKA, DISH continue talks," *Topeka Capital-Journal* (January 3, 2009).

in the prior report, which spilled into 2009,[43] as well as an additional service interruption in February of 2009, arising from a retransmission dispute between Cable One and Newport Television, which caused several local channels in Mobile, AL, Memphis, TN, and Tulsa, OK to be unavailable for approximately five days.[44] Finally, Table Two contains one 2010 dispute between ABC and Cablevision, which caused Cablevision viewers in the New York City metropolitan area to lose access via cable to WABC's broadcast of the Academy Awards for approximately 14 minutes.[45]

When these subsequent outages are accounted for, the conclusions of the March 2009 Report are unaltered: Aggregate service interruptions continue to represent approximately one one-hundredth of one percent of annual U.S. viewing hours, as shown in the bottom right cell of Table Two. To put this figure in perspective, U.S. households experienced an average annual service interruption – that is, the inability to tune in to their first-choice television channel via an MVPD – of about 19 minutes during this period. As noted in the prior report, the average North American household experiences annual electricity outages of about 381 minutes – during which time, they are, of course, unable to watch any TV channels. In addition, the *aspirational* standard for cable system reliability is 99.97%, implying average annual system outages of *at least* 158 minutes per year. Thus, the average household is far more likely to be without electricity, or to experience a cable system outage, than it is to be unable to watch its favorite broadcast channel via an MVPD as a result of a retransmission dispute.[46]

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[43] *March 2009 Report* at Table 2.

[44] Michael Malone, "Stations go dark in Mobile, Memphis and Tulsa," *Broadcasting & Cable* (February 6, 2009).

[45] John Eggerton, "WABC Back on Cablevision," *Broadcasting & Cable* (March 8, 2010). Note that the analysis in Table 2 takes into account the high ratings associated with the Academy Awards.

[46] As noted above, broadcast channels would still remain available to viewers over-the-air, even during these extremely rare outages arising from retransmission disputes.

Table Two:
Estimated Effect of Service Interruptions on Viewing Hours, Updated To Reflect Disputes in 2006 – 2009, and 2010 ABC/Cablevision Dispute

Parties	Affected Markets	Total TV HHs in Affected Markets	% of TV HHs Subscribing to Affected MVPD	Daily Affected Viewing Hours (Affected HHs)	% Daily Viewing Hours Affected (Affected HHs)	% Annual Viewing Hours Affected (Affected HHs)	% Annual Viewing Hours Affected (All TV HHs)
Fisher Communications/Dish Network	7	4,061,880	13%	0.39	4.7%	3.49%	0.44%
Young Broadcasting/Dish Network	10	6,650,980	13%	0.80	9.7%	0.10%	0.01%
Lin TV/Time Warner Cable	11	5,914,950	38%	0.55	6.7%	0.67%	0.25%
Citadel/Dish Network	4	1,178,200	15%	0.40	4.8%	0.46%	0.07%
Barrington Broadcasting/Dish Network	1	179,010	20%	0.88	10.7%	2.12%	0.43%
Lin TV/Suddenlink	2	1,356,790	22%	0.40	4.8%	0.92%	0.20%
KAYU/Time Warner Cable	1	416,630	10%	0.28	3.4%	3.83%	0.38%
Sinclair/Mediacom	16	10,726,520	7%	0.32	3.9%	0.95%	0.07%
Sunflower/Hearst-Argyle	1	937,970	3%	0.59	7.2%	1.30%	0.04%
Free State/DISH network	1	175,940	13%	0.29	3.5%	0.07%	0.01%
Newport/Cable One	3	1,741,120	53%	0.48	5.8%	0.13%	0.07%
National Averages/Totals (2006 - 2009)	**51***	**33,339,990**	**18%****	**0.47**	**5.7%**	**0.21%**	**0.01%*****
ABC/Cablevision (3/2010)	1	7,433,820	42%	1.19	14.4%	0.04%	0.02%
National Averages/Totals (2006 - 3/2010)	**52***	**40,773,810**	**22%****	**0.48**	**5.8%**	**0.13%**	**0.01%*****

* Rows to not add to total since some markets were affected by more than one dispute. ** Average across affected markets.
*** Based on 100% of U.S. TV HHs.

It remains true that, as in any market involving negotiations between free economic actors, there will sometimes be unresolved disagreements that result in potentially beneficial transactions not taking place. The relevant question is whether government can, through regulation, achieve a better outcome. The answer ultimately depends on whether government can (a) reliably distinguish efficiency-enhancing trades from economically harmful ones (and mandate only the former) and (b) accurately discern and mandate an efficient price. There is substantial evidence that markets are far more effective at accomplishing both tasks, and that government efforts to mandate exchanges at regulated prices have resulted in large reductions in

economic welfare.[47] And, there is every reason to believe the same would be true in the market for broadcast signals.[48]

V. LEXECON PROVIDES NO EVIDENCE THAT PROGRAMMING COSTS IN GENERAL, OR RETRANSMISSION FEES IN PARTICULAR, HAVE A SIGNIFICANT IMPACT ON MVPD PRICES

Lexecon expresses concern over the impact of rising MVPD prices on consumers;[49] and, it is indeed true that monthly subscription prices for certain types of MVPD service, such as cable television prices, have increased more rapidly than inflation in recent years.[50] However, as noted in the March 2009 Report,[51] and reiterated here, the data simply do not support the claim that increases in MVPD rates are caused by rising programming costs in general, or rising retransmission fees in particular. To the contrary, programming costs are rising slower than MVPD revenues, slower than other components of MVPD costs, and slower than MVPD profits, while retransmission fees make up a small fraction of programming costs, and an even smaller percentage of MVPD revenues. Lexecon provides no evidence to contradict this.

Specifically, for the six publicly traded MVPDs for which up-to-date programming cost data are consistently available,[52] the share of cost of revenue accounted for by programming

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[47] See, e.g., Jerry A. Hausman and Gregory J. Sidak, "A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks," *Yale Law Journal* 109; 3 (December 1999) 417-505 (Available at SSRN: http://ssrn.com/abstract=205670).

[48] See also Jeffrey A. Eisenach, *Why the FCC Should Not Increase Regulation of Wholesale TV Programming: Reply to Comments in MB Docket No. 07-198* (February 12, 2008) (available at http://fjallfoss.fcc.gov/ecfs/document/view?id=6519840921).

[49] *Lexecon Report* at 3.

[50] *See* Federal Communications Commission, *Thirteenth Annual Report on Competition in Video Markets* at ¶4 ("While competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation, prices continue to outpace the general level of inflation.")

[51] *March 2009 Report*, Section IV.

[52] The six MVPDs are Adelphia, Charter, Comcast, DirecTV, Knology, and Time Warner Cable. The data presented here were compiled from Forms 10-K for the years 2003 through 2008. In some isolated cases, data from earlier years not available in Forms 10-K were supplemented with data derived from analyst reports by SNL Kagan and Morgan Stanley. *See* SNL Kagan, "Benchmarking Cable MSO Financial Statistics," 2007 Edition; SNL Kagan, "Media Trends," 2008 Edition; Morgan Stanley, "Cable Satellite Industry Overview: What Does the Market Expect?" (April 2004); Morgan Stanley, "Cable Satellite Industry Overview: Bundling and the Battle for Basic," (October 2004). Data for Adelphia are available for the years leading up to the acquisition of its systems by Comcast and Time Warner (from 2003-2005). Therefore, the industry statistics include Adelphia for these years. For further

costs declined from 67 percent to 59 percent between 2003 and 2008; during the same period, the share of cost of revenue plus selling, general, and administrative costs ("SG&A") accounted for by programming costs shrank from 44 percent in 2003 to 41 percent in 2008. In addition, monthly revenues per subscriber rose by $35.13 between 2003 and 2008, while programming expenses rose by only $8.84. Put differently, for every dollar increase in programming expenses, MVPDs raised total monthly charges to consumers by $3.97. As a result, although programming expenses per subscriber for these MVPDs increased by approximately 51 percent from 2003 - 2008, MVPD gross profits per subscriber increased by approximately 57 percent over the same interval; operating profits per subscriber for the MVPDs increased by approximately 78 percent over this time period.

Finally, to repeat a point made above, retransmission fees account for only a small component of programming expenses, and an even smaller fraction of MVPD revenues. For instance, in 2008, the average MVPD programming expense per subscriber per month was approximately $26, while average MVPD revenue was over $99 per subscriber per month. In contrast, as noted above, the average per-subscriber, per-month retransmission fee was about $0.74 in 2009 (and even this estimate is inflated, as it does not account for the fact that millions of households subscribe to MVPDs that pay no retransmission fees whatsoever).

Thus, while rates for certain types of MVPD services – such as cable television prices – are undeniably on the rise, it makes little sense to blame this trend on programming costs, and even less to single out retransmission fees.

explanation, see Jeffrey A. Eisenach, "Video Programming Costs and Cable TV Prices," Navigant Economics LLC (April 2010).

VI. CONCLUSION

The Lexecon Report tries but fails to demonstrate that retransmission consent harms consumers.

Lexecon begins by proffering a game-theoretic model which is both empirically unsupported and conceptually antithetical to its underlying argument, and which does not even attempt to demonstrate that broadcasters have *greater* bargaining power than MVPDs, or that the retransmission consent agreements broadcasters and MVPDs negotiate are in any way inefficient or uneconomic. Indeed, the way the model is constructed, retransmission consent agreements are presumptively consumer welfare-enhancing.

Lexecon's "consumer welfare" analysis is nothing of the sort. At best, Lexecon attempts to calculate the costs to consumers of receiving broadcast content through MVPD systems, while ignoring the benefits of broadcasting to consumers and in general. Even so, Lexecon errs in its calculations, resulting in substantial inflation of its estimates.

Finally, nothing in the Lexecon Report refutes the undeniable evidence that while MVPDs sometimes choose to draw the attention of an interested public to their contentious negotiations with broadcasters, the incidence of actual negotiating impasses is almost infinitesimally low.

In short, nothing in the Lexecon Report challenges the conclusion that the current retransmission consent regime represents an effective, market-based mechanism for ensuring broadcasters receive an economically efficient level of compensation for the value of their signals, and as such benefits both consumers and the economy overall.

APPENDIX: ESTIMATION OF CORRECTED ELASTICITY

In its calculations of MVPD subscriber loss due to retransmission fees, Lexecon improperly makes use of an elasticity estimate from Goolsbee and Petrin (2004) ("G&P")[1] that measures the responsiveness of basic cable customers to the price of basic cable. To obtain an estimate of the elasticity that Lexecon should have used, I used data presented in G&P to estimate the elasticity of demand for all MVPD services with respect to the price of all MVPD services. The elasticity matrix that G&P estimate contains own-price and cross-price elasticities for each type of MVPD service in their model, and is reproduced below in Figure A-1:

Figure A-1:
Table VIII from Goolsbee & Petrin (2004)

TABLE VIII

ESTIMATED DEMAND ELASTICITIES (MARSHALLIAN AND HICKSIAN)

	SUR	3SLS	3SLS
Method		Marshallian	Hicksian
Price of expanded basic			
Antenna only share	.020	1.301	1.323
Expanded basic share	.014	−1.538	−1.516
Premium share	−.040	1.263	1.284
Satellite share	−.014	.929	.951
Price of premium			
Antenna only share	−.000	.917	.932
Expanded basic share	−.030	.924	.938
Premium share	.074	−3.175	−3.161
Satellite share	−.035	1.173	1.187
Price of satellite			
Antenna only share	.001	.123	.129
Expanded basic share	−.005	.286	.292
Premium share	−.015	.492	.498
Satellite share	.050	−2.448	−2.442

Note: Specification is estimated using the 254 markets for which the tax on franchise revenues is reported in Warren Publishing. SUR is seemingly unrelated regressions (not instrumented). 3SLS is three stage least squares using the tax to instrument price.

[1] Austan Goolsbee & Amil Petrin, "The Consumer Gains From Direct Broadcast Satellites and the Competition With Cable TV," *Econometrica* 72(2) , 351 – 381 (March 2004), (hereafter, *Goolsbee & Petrin*).

As seen above, G&P present a full matrix of own and cross-price elasticities for four categories of television viewers, consisting of (1) "Antenna only" customers who lack MVPD service, and thus rely solely on over-the-air broadcasts; (2) "Expanded basic" cable customers, with access to an assortment of channels beyond the local broadcast stations; (3) "Premium" cable customers, who (in addition to the "expanded basic" package also receive channels such as HBO; and, (4) "Satellite" customers, or DBS subscribers. The relevant elasticities are those in the final two columns, produced by three-stage-least squares ("3SLS") estimation. The entries from these two columns are nearly identical, because Hicksian and Marshallian elasticities converge when income effects are small.[2]

The only entry from the table that Lexecon relies on is the elasticity of the market share[3] of expanded basic cable with respect to the price of expanded basic cable, which appears in the second row of the second column, and is equal to approximately -1.5. Lexecon naively interprets this estimate to mean that a one percent increase in the price of *all* MVPD services leads to a 1.5 percent decrease in the quantity of MVPD services demanded. In other words, Lexecon interprets the elasticity to mean that, in the face of the price increase, one hundred percent of the resulting substitution is away from MVPD services and towards over-the-air television. This interpretation is flatly incorrect, for two reasons. First, it treats the elasticity as if it were capturing substitution patterns in the wake of a price increase for all MVPD services, when in fact it only captures substitution associated with an increase in the price of basic cable. Second,

[2] The Marshallian demand function is sometimes referred to as the "uncompensated demand function," because it measures consumers' demand responsiveness when they are not compensated for the decrease in utility that occurs in the face of a price change. In contrast, the Hicksian demand function, sometimes referred to as the "compensated demand function," holds the consumer at a fixed level of utility by compensating the consumer through adjustments in income. *See, e.g.,* Carl Simon & Lawrence Blume, *Mathematics for Economists* (Norton: 1994), at 547-557. For products such as MVPD services, which comprise a relatively small share of total consumer income, the Marshallian and Hicksian demand elasticities are typically quite similar.

[3] The price elasticity of a product's market share is equivalent to the price elasticity of a product's quantity.

and more importantly, it treats the elasticity as if it measured substitution towards over-the-air television (and away from all MVPD services), when in fact it measures substitution towards *both* over-the-air television *and* alternate MVPD services (and away from basic cable).

To understand precisely why the elasticity that Lexecon employs is incorrect, it is useful to note that the cross-price elasticity matrix allows us to decompose the Lexecon elasticity. As noted above, the matrix indicates that, given a one percent increase in the price of basic cable, the demand for basic cable declines by approximately 1.5 percent. But the matrix gives us more information, by indicating how this decline in the demand for basic cable is spread across three mutually exclusive alternatives (premium cable, satellite, and over-the air television).

Specifically, according to the entry in the third row of the second column, the cross-price elasticity of premium cable with respect to the price of expanded basic cable is equal to 1.26, which means that a one percent increase in the price of basic cable causes the demand for premium cable to increase by approximately 1.26 percent. According to the entry in the fourth row (second column), the cross-price elasticity of satellite with respect to the price of expanded basic cable is equal to 0.929, which means that a one percent increase in the price of basic cable causes the demand for DBS to increase by approximately 0.929 percent. Finally, the first row (second column) indicates that a one percent increase in the price of basic cable causes the antenna-only share to increase by 1.301 percent. Thus, of the three sub-components of the Lexecon elasticity, *only one* involves substitution away from MVPD services entirely (and towards over-the-air television). The rest involve substitution *between* different MVPD services.

Retransmission fees are paid by all types of MVPD providers. Therefore, to obtain the correct elasticity, it is necessary to estimate the responsiveness of the demand for all MVPD services to an across-the-board increase in the price of all MVPD services. Fortunately, the G&P

elasticity matrix contains sufficient information to produce such an estimate. The most straightforward way to do so is simply to recognize that the mutually exclusive market shares for over-the-air, basic cable, premium cable, and satellite will always sum to one.[4] Therefore, a decrease in the market share of all MVPD services translates directly into increase in the share of over-the-air households.

Consider the experiment of raising all MVPD prices by one percent. According to the elasticity matrix, this would cause the demand for over-the-air television to increase by 1.301 percent (due to the basic cable price increase) plus 0.917 percent (due to the premium price increase) plus 0.123 percent (due to the satellite price increase), which comes to a total of approximately 2.34 percent. According to G&P, approximately 22.1 percent of households in their 2001 sample were "Antenna Only"; the remaining 77.9 percent subscribed to some form of MVPD service. Therefore, according to the elasticity matrix, a one percent, across-the-board increase in MVPD prices would cause the demand for over-the-air television to expand by $(0.0234) \times (0.221) \approx 0.00517$, or approximately 0.517 percentage points. In other words, about one half of one percent of U.S. households would drop all MVPD service in response to an across-the-board, one percent increase in MVPD prices. This corresponds to a decline in MVPD subscribership of $(0.00517)/(0.779) \approx 0.0066$, or approximately 0.66 percent. To summarize: a one percent, across-the-board increase in MVPD prices is estimated to reduce MVPD subscribership by roughly 0.66 percent.[5]

Thus, in contrast to the elasticity that Lexecon selects, which, at -1.5, implies an elastic demand curve (elasticity greater than one in absolute value), the corrected estimate of -0.66

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[4] Goolsbee and Petrin rely on the fact that these market shares sum to one as a part of their estimation algorithm. *See Goolsbee & Petrin* at 352.

[5] If the market share data were updated to reflect the decline in the "Antenna-Only" share since 2001, the implied elasticity would be even smaller.

actually implies inelastic demand: That is, the percentage decline in the demand for MVPD services is less than the percentage increase in MVPD prices. Thus, according to G&P, consumers of MVPD services are substantially less price-sensitive than Lexecon assumes.

APPENDIX B

A Short History Of The Program Exclusivity Rules

The history of the current program exclusivity rules[1]—even in condensed form—demonstrates that their purpose and structure are designed to protect "localism" and the private contractual rights of broadcasters and program suppliers and, in turn, to promote the broad distribution of diverse programming to the public. The first program exclusivity rule, a predecessor to the current network non-duplication rule, was promulgated in 1965. Against the background of Congress not having acted upon an earlier recommendation by the Commission to apply retransmission consent to cable, the Commission stated that "reasonable nonduplication requirements will serve, in part, to achieve the equalization of competitive conditions at which the 'rebroadcasting consent' proposal is, in large part, aimed."[2] This was followed, in 1972, by the first syndicated exclusivity ("syndex") rule, which was adopted as a result of a "Consensus Agreement" that had been negotiated by the cable, broadcast, and program production industries to facilitate passage of copyright legislation. The Commission expressed the view that this additional program exclusivity rule would "protect local broadcasters and insure the continued supply of television programming" which, the Commission noted, is "fundamental to the continued functioning of broadcast and cable television alike."[3]

Following the 1976 revision to the Copyright Act, which created the section 111

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[1] These rules include the network nonduplication rules, *see* 47 C.F.R. §§ 76.92-76.95, 76.120-76.122, and the syndicated exclusivity rules, *see* 47 C.F.R. §§ 76.101-76.110, 76.120, 76.123-76.125. The terms and operation of these rules are discussed in Section III of the Opposition of the Broadcaster Associations.

[2] *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, First Report and Order, 38 FCC 683, 706 n.37 (1965).

[3] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Cable Television Report and Order, 36 FCC 2d 143 (1972), at ¶ 73.

compulsory copyright license, the Commission soon took the view that the unfair competition between cable operators and broadcast stations that the syndex rules were aimed at ameliorating was actually coextensive with the issue of copyright liability, which had just been resolved in the 1976 Act, so that there remained no reason to retain the syndex rules.[4] Because the Commission thought that the potential effect of eliminating syndex protection both on local station audiences and on program supply would be minor, the Commission repealed the syndex rules in 1980.[5]

By the late 1980s, however, the Commission found that its earlier analysis leading to the repeal of the syndex rules was flawed. In reinstituting syndex rules in 1988, while maintaining its network nonduplication rules, the Commission determined that it had previously—and incorrectly—focused on competitors rather than on competition.[6] Thus, in properly refocusing on how the competitive market process operates, the Commission sought to remove government intrusion into that process and, therefore, "to remove anticompetitive restrictions on the ability of broadcasters to serve their viewers."[7] The prior repeal of the syndex rules in 1980 was, as noted above, a direct consequence of the institution of the new section 111 compulsory license, but, because that compulsory license was an abrogation of full copyright liability, such a license already represented a movement *away* from a market situation. The repeal of syndex protection itself, then, "given the existence of the compulsory license, moved the marketplace *further away*

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[4] *See Cable Television Syndicated Program Exclusivity Rules*, Report and Order, 79 FCC 2d 663 (1980) ("*1980 Program Exclusivity Order*"), at ¶ 193.

[5] *See 1980 Program Exclusivity Order* at ¶¶ 217, 242.

[6] *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299 (1988) ("*1988 Program Exclusivity Order*"), at ¶ 23.

[7] *1988 Program Exclusivity Order* at ¶ 1.

from effective freedom of contract."[8] Without regard to specific competitors, competition itself suffered as a consequence, since, as the Commission recognized, "[f]reedom of contract and, in general, enforceable property rights, are essential elements of a competitive marketplace."[9]

Therefore, during a special Program Exclusivity rulemaking proceeding, the Commission essentially decided that it needed to minimize government interference so

> (1) that its regulations foster a level playing field among the various competitors, including those who produce and those who distribute [programming]; and (2) that freedom of contract, and thus private property rights, are unimpeded by the Commission's regulation or deregulation of the industries.[10]

The Commission observed further:

> For competition to maximize consumer benefits, it is important that a property rights framework be applied that permits markets to operate effectively. Failure to supply an appropriate structure of rules and regulations will lead to market failures in satisfying consumer preferences. To ensure free and efficient functioning of competitive market processes, the Commission seeks to permit equality, to the extent possible within our regulatory framework, of contractual opportunity among competing modes of distribution. In the instant setting, that means permitting broadcasters to acquire and enforce the same kinds of exclusive performance rights that competing suppliers are now permitted to exercise. Failure to supply parity in contractual freedom will bias the nature of competitive rivalry among competing suppliers in ways not grounded in operating efficiencies but instead based on artificial handicaps exacerbated by disparate regulatory treatment.[11]

The 1980 removal of syndex protection had skewed the competitive balance in cable's

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[8] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rule Making, 2 FCC Rcd 2393 (1987) ("*Program Exclusivity NPRM*"), at ¶ 26 (emphasis in original).

[9] *Program Exclusivity NPRM* at ¶ 26.

[10] *Program Exclusivity NPRM* at ¶ 5.

[11] *Program Exclusivity NPRM* at ¶ 12.

favor (a particular competitor) since cable operators had the ability to enter into exclusive contracts with program suppliers, but broadcast stations did not. The Commission saw that this lack of contractual parity had distorted the local video programming market, to the detriment not only of broadcast stations and their advertisers but also of television viewers. Broadcasters' "inability to enforce exclusive contracts puts them at a competitive disadvantage relative to their rivals who can enforce exclusive contracts; their advertisers' abilities to reach as wide an audience as possible are impaired; and consumers are denied the benefits of full and fair competition: higher quality and more diverse programming, delivered to them in the most efficient possible way."[12]

Ultimately, the Commission concluded that syndex protection *was* necessary as a counter-weight to an imperfect compulsory license scheme where copyright holders are *not* paid

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[12] *1988 Program Exclusivity Order* at ¶ 62. The Commission found the illogic of the lack of syndex protection particularly telling:

> Normally, firms suffer their most severe losses to competitors when they fail to offer the services most desired by the public. In the absence of syndicated exclusivity, extensive duplication reverses this relationship for broadcasters—they suffer their most severe loss precisely when they offer programming most desired by audiences; thus diversion is an indication of a competitive imbalance that results from the absence of the rules. Firms that choose to exhibit programming on an enforceable exclusive basis (e.g., cablecasters) generally do not face the problem of audience diversion to duplicative product. The fact that only broadcasters suffer this kind of diversion is stark evidence, *not* of inferior ability to be responsive to viewers' preferences, but rather of the fact that broadcasters operate under a different set of competitive rules. All programmers face competition from alternative sources of programming. Only broadcasters face, and are powerless to prevent, competition from the programming they themselves offer to viewers.

Id. at ¶ 42 (emphasis in original).

the full value for the right to publicly perform their works, i.e., copyright holders are paid a price not set by the marketplace. The Commission determined that the potential negative effect of the disincentive to produce and distribute programming that consumers might desire could be countered by re-introducing parity in property rights in the form of syndex protection. As the Commission stated: "[S]yndicated exclusivity rules are an important component of a sound communications policy designed to foster full and fair competition among competing television media. Without syndicated exclusivity, there is a likelihood that programs will not be distributed efficiently among alternative outlets and that viewers will not get the most efficient quantity and diversity of programming."[13]

Although network nonduplication was not subject to the same repeal and reinstitution as syndex, the Commission has been well aware that any differences between network nonduplication and syndex appear "to be more one of degree than of kind" and that the "same policy arguments" apply to both.[14] Finally, then, following the 1988 reinstitution of syndex protection together with the maintenance of network nonduplication protection and the adoption of the modern retransmission consent regime following the 1992 Cable Act, the Commission was able to eliminate the "artificial handicaps exacerbated by disparate regulatory treatment."[15]

In adopting regulations to implement SHVIA in 1999, the Commission, while attempting to level the competitive playing field between cable operators and satellite carriers, remained "cognizant also of the important protection that the exclusivity rules provide to broadcasters and

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[13] *Program Exclusivity NPRM* at ¶ 75.

[14] *Program Exclusivity NPRM* at ¶ 48.

[15] *Program Exclusivity NPRM* at ¶ 12.

copyright holders."[16] Accordingly, the Commission attempted to structure the program exclusivity rules in the satellite context to be as parallel as possible to the analogous rules in the cable context.

In sum, the Commission has long recognized the important public policy objectives served by the program exclusivity rules, in both the cable and satellite contexts. Significantly, these rules do *not* mandate exclusivity or even provide program exclusivity to broadcasters—the rules only enable broadcasters to protect the private contractual arrangements they make to secure programming that serves the needs and interests of local audiences and communities.

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[16] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, Report and Order, 15 FCC Rcd 21688 (2000), at ¶ 5.

APPENDIX C

Standard Antitrust Analysis Confirms The Concentration Of Market Leverage By Multichannel Video Programming Distributors

Assuming for the sake of argument that there are four multichannel video programming distributor ("MVPD") competitors in a local market,[1] the Herfindahl-Hirshman Index ("HHI") for that local market will be at least 2500 ($25^2 + 25^2 + 25^2 + 25^2$), far above the level of 1800 indicating that a market is highly concentrated.[2] But in fact, MVPD competitors do not have even shares of the market, thereby making local MVPD markets far more concentrated. If each MVPD has in a typical local market its national share average, then the cable operator's share would be about 62%, DIRECTV's share about 19%, DISH's share about 14%, and the local telco's share about 5%.[3] This makes the HHI in the MVPD buyer's market a remarkably concentrated 4426 ($62^2 + 19^2 + 14^2 + 5^2$).[4] The Commission's economists think the HHI may be even slightly higher, positing as a concrete example a local market in which the cable operator's share is 65%, each of the DBS companies' share is 12.5%, and the telco's share is 10% for an HHI of 4637.5.[5] And in some actual markets, the HHI would be higher still (greatly exceeding

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[1] Such competitors could include a traditional wired cable system, two direct broadcast satellite ("DBS") providers, and a local telco video provider. However, not all markets have four such MVPD competitors.

[2] *See Horizontal Merger Guidelines*, issued by the U.S. Department of Justice and the Federal Trade Commission, §1.5 (Apr. 2, 1992, revised Apr. 8, 1997).

[3] These figures are derived from the data provided by NCTA on its website for the Top 25 MVPDs, *see* NCTA, *Top 25 Multichannel Video Programming Distributors*, *available at* <http://www.ncta.com/Stats/TopMSOs.aspx>, together with the fact that there are approximately 96 million MVPD households, *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009), at ¶ 8 ("*Thirteenth Video Competition Report*").

[4] Even in a two-firm oligopsony with equal market shares, the HHI would be only marginally higher at 5000.

[5] *See Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 24 FCC Rcd 259 (2009) ("*2008 Cable Industry*

5000) because the cable operator's market share far exceeds the national share average, such as in Albany-Schenectady-Troy where the cable share is 75.3%, Honolulu where the cable share is 89.8%, and Syracuse where the cable share is 75.0%.[6]

In contrast, the seller's market for television programming is highly unconcentrated and has become less concentrated since 1992. For any given consumer, an MVPD can assemble programming packages from among a plethora of choices, buying from among the 565 nationally-distributed cable networks as reported in 2006,[7] as well as from the handful of local commercial television stations (fewer than seven, on average). Using audience measurement ratings as a logical proxy for market leverage, the Big 4 Network stations combined ratings, as shown in Section V of the Broadcaster Associations' Opposition, was 20.738 for prime time in November 2009, or 5.185 for each Network-affiliated station, on average. The ratings for the other six broadcast networks were 5.259, or 0.877, on average. The average ratings for the Top 4 most heavily viewed cable networks was 2.186, for the next six most heavily viewed cable

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Prices Report"), Appendix B, at ¶ 18.

[6] *See* Television Bureau of Advertising, *Cable and ADS Penetration by DMA* (estimates as of Feb. 2010), *available at* <http://www.tvb.org/rcentral/markettrack/Cable_and_ADS_Penetration_by_DMA.asp>.

[7] *See Thirteenth Video Competition Report* at ¶ 184. Not only must broadcasters compete with hundreds of other programming networks, they must do so while subject to ownership limitations that do not exist for other competitors in the video marketplace. A single entity may own an unlimited number of non-broadcast programming networks. Additionally, DBS and other non-cable MVPDs can establish vertical relationships with an unlimited number of programming networks. Cable operators were at one time subject to channel occupancy limits, not outright caps, on vertical integration. These limits, however, were reversed by a federal appeals court and remanded to the FCC in 2001. *See Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). The cable horizontal ownership cap was recently vacated. *See Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). New limits have not yet been established. Ownership of television broadcast stations, by contrast, is capped at both the local and national levels, and no more than one major television broadcast network can be owned by the same entity. *See* 47 C.F.R. § 73.3555(b), (e); 47 C.F.R. § 73.658(g).

networks, 1.325, and for the next 10 most heavily viewed cable networks, 0.917.[8] Dividing the remaining ratings of 48.144 among the 545 remaining cable networks suggests an average rating of 0.088. Thus, taking account of common ownership within each ratings tranche, the HHI for the market for sellers of television programming can be roughly estimated to be 214.[9]

The level of concentration in the market for television programming has only decreased since 1992. In 1995, there were only 129 nationally-distributed cable programming networks (compared with 565 in 2006).[10] And in the 1994-1995 television season, the Big 4 Networks accounted for a combined 66% share of prime time viewership[11] (compared with a 38% share for

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[8] The underlying data used in these calculations is from SNL Kagan, *Economics of Basic Cable Networks 2009*, with additional data from Nielsen Media Research.

[9] As noted, this estimate takes approximate account of common ownership, within each cable network ratings tranche (Top 4, Top 5-10, Top 11-20, below Top 20), based upon the cable network ownership data provided in the Commission's *Thirteenth Video Competition Report*, Appendix C. This calculation will understate the HHI for three independent reasons, but if perfect data were available, even all of these reasons combined are unlikely to make the market for television programming anything but unconcentrated. *First*, the use of ratings, instead of shares, will understate the market share to some extent. However, share data was not available for all broadcast network stations and cable networks. *Second*, using averages of the ratings, instead of actual ratings for each programming service, will result in a slightly lower HHI calculation, although, at these ratings levels, the difference is not likely to be appreciable. For example, if a rating of 5.2 translated into a share of 8, the difference in HHI is 37. *Third*, and most significantly, the ratings for individual Big 4 Network stations in particular markets will be higher than those given for the national Big 4 Network ratings. However, even if an individual station's ratings approach 15 or even 20, the change in the HHI might increase as much as 400 (20^2), but it is clear that the total market HHI will still be substantially less than 1000, making this market unconcentrated.

[10] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060 (1995) ("*Second Video Competition Report*"), at ¶ 150. Moreover, in recent years, the number of television broadcast stations also increased significantly, from 1663 stations in 2000, FCC, *Broadcast Station Totals as of September 30, 2000*, *available at* <http://www.fcc.gov/mb/audio/totals/bt000930.html>, to 1782 by December 2009, FCC, *Broadcast Station Totals as of December 31, 2009*, *available at* <http://www.fcc.gov/mb/audio/totals/bt091231.html>.

[11] *See Second Video Competition Report* at ¶ 113.

the 2008-2009 television season). Thus, in the time frame just after retransmission consent was established, the HHI in the market for television programming may be taken roughly to have been as high as 1130,[12] which is moderately concentrated but not highly concentrated.

Even if one focuses on a television programming market consisting of broadcast stations alone (while more concentrated than the actual programming market that includes nonbroadcast networks), this narrowly defined market is still far less concentrated than the MVPD market. Using the November 2009 prime time ratings for the top 10 national broadcast networks, the Big 4 Networks attract approximately 80% of the viewership while the other six networks attract the remaining 20%. The HHI is, accordingly, roughly 1667.[13] This represents a moderately concentrated market, but it must be contrasted with the extremely concentrated average MVPD market where the HHI is 4426. Clearly, the relative level of market leverage skews heavily in favor of MVPDs and against programmers.

Economist Jeffrey Eisenach has also examined the market structure of both the upstream market of sellers of television programming and the downstream market of buyers of television programming that assemble the programming into packages and resell those packages to consumers. Dr. Eisenach similarly finds the upstream market to be highly competitive and the downstream market concentrated.[14] He reports that, with respect to the upstream market, the

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[12] This calculation is not fully comparable to the one for the market in 2009 because it uses network shares, not network ratings. It is worth noting that cable MSOs held a majority interest in a greater percentage of cable programming networks in 1995 than today, which has the effect of increasing somewhat the HHI for 1995 stated in the text.

[13] $(4 \times 20.00^2) + (6 \times 3.33^2)$. The estimate ignores common ownership between the FOX network and MNT programming service and between the NBC and Telemundo networks, as well as CBS's ownership interest in the CW network because, in most local television markets, the local stations affiliated with these networks are generally not commonly owned.

[14] *See* Jeffrey A. Eisenach, *Video Programming Costs and Cable TV Prices*, filed by The Walt Disney Company in MB Docket Nos. 10-71, 09-191, 07-52 (filed Apr. 23, 2010) ("*2010*

HHI for prime time audience shares in 2006 for the top six leading media companies (which include both a cable MSO and broadcast networks) is 881, which indicates the market is unconcentrated.[15] Dr. Eisenach further observes that cable MSOs owned, in whole or in part, interests in 84 cable networks, demonstrating that, from an economic perspective, non-MSO-affiliated programmers must not have the ability to charge cable operators higher than competitive prices because otherwise cable operators could simply shift to self-provisioning.[16]

Dr. Eisenach has shown that the downstream MVPD market is relatively concentrated since the market share of the Top 4 MVPDs, in the aggregate, is 71% of all subscribers and the market share of the Top 10 MVPDs, in the aggregate, is 91% of all subscribers. In addition, cable MSOs have achieved local concentration through their strategy of "clustering." For example, of the 50 largest system clusters, Time Warner Cable owns 17, including in New York City and Los Angeles.[17]

Dr. Eisenach summarizes the evidence from the market structures as follows:

> [T]here is some evidence that cable operators may have market power vis-à-vis programmers—which might allow them to demand programming prices *below* market rates—but there is virtually no evidence of market power on behalf of programmers. Thus, cable operators' claims that programming prices are "too high" do not square with the underlying structure of the marketplace.[18]

Disney/Eisenach Report"), at 20-28.

[15] *See 2010 Disney/Eisenach Report* at 24 & Table 2.

[16] *See 2010 Disney/Eisenach Report* at 25.

[17] *See 2010 Disney/Eisenach Report* at 27-28 & Table 3.

[18] *2010 Disney/Eisenach Report* at 3 (emphasis in original).

This conclusion is consonant with the discussion in Section V of the Broadcaster Associations' Opposition showing that retransmission consent rates are but a fraction of their true market value.