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

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

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF BROADCASTERS
Jane E. Mago
Jerianne Timmerman
Erin Dozier
Scott Goodwin
1771 N Street, NW
Washington, D.C. 20036
(202) 429-5430

Sharon Warden
Theresa Ottina
NAB Research

May 27, 2011

Table of Contents

Executive Summary

In these comments, the National Association of Broadcasters ("NAB") urges the Commission to resist requests to micromanage the negotiation of thousands of complex retransmission agreements among broadcast stations and multichannel video programming distributors ("MVPDs"). Substantial or numerous changes in the Federal Communications Commission's existing retransmission consent rules are not warranted, and in fact would be harmful because they could skew or alter the existing retransmission consent system that presently is functioning very effectively. Accordingly, NAB encourages the Commission to recognize (as it has historically) that the current process provides demonstrated economic efficiencies and public benefits and has fulfilled Congress' intention in creating it.

Since its establishment by Congress in 1992, the retransmission consent regime has proven to be an economically efficient and effective vehicle that allows broadcasters and MVPDs to negotiate the terms under which MVPDs can deliver broadcast signals to their subscribers. The process has benefited consumers as well as MVPDs and broadcasters by making unique and diverse programming, including local news, weather, emergency information and sports, available to viewers in diverse markets throughout the country.

As NAB has shown on numerous occasions, it is extremely rare for retransmission consent negotiations to result in disruptions to consumers' viewing. A new study confirms that, since January 2006, these few interruptions in service have affected, on average, only about one-one hundredth of one percent (0.01%) of annual total television viewing hours. And, of course, whenever a broadcast signal is not available on a particular MVPD for any reason, broadcasters' signals are available for free, over-the air.

NAB agrees with the FCC's long-held position that it has limited authority to involve itself in retransmission consent negotiations, and that it does not have authority to require either interim carriage or compulsory binding arbitration. In recognition of this limited authority and the competitive nature of the retransmission consent marketplace, the Commission should not make significant changes to its current rules governing retransmission consent, including its good faith negotiation standard. To the extent that the Commission believes some changes are needed, it should focus on ensuring that consumers have the ability and freedom to make informed decisions about how to access programming.

NAB supports expansion of the FCC's notice requirements to non-cable MVPDs to ensure consumers have sufficient information to make educated decisions in the very rare instances when they may be impacted by a negotiating impasse. The Commission also should take action as needed to ensure that the ability and freedom of consumers to make such decisions are not impeded by the use of early termination fees by many MVPDs. The Commission further could enhance transparency by adopting rules aimed at ensuring that broadcasters have ready access to information about the ownership and operations of MVPDs to facilitate retransmission elections and communications.

With the exception of these limited, consumer-focused measures, no other changes to the existing rules are necessary or required. Importantly, many of the proposed modifications to the Commission's rules would not improve the retransmission consent process and are unnecessary, inconsistent with law, or harmful to the public interest, including as follows:

- **Joint Negotiations**. There is no legal or public policy basis to prohibit joint negotiations by broadcasters that are not commonly owned. Not only did Congress specifically intend for parties to choose how to negotiate, no credible evidence has been provided to suggest that joint negotiations by broadcasters result in delays or other complications warranting intervention in the retransmission consent marketplace. Rather, available evidence suggests that joint negotiations by non-commonly owned broadcasters serve the public interest by increasing efficiencies in the negotiation process and leveling the playing field between broadcasters and MVPDs. NAB stresses that it would be arbitrary and capricious and contrary to public policy to prohibit broadcasters from joint negotiations while expressly permitting small MVPDs to negotiate as a group.

- **Compulsory Non-Binding Mediation**. Government-mandated mediation (whether binding or non-binding) would exceed the FCC's statutory authority because it would necessarily substitute the FCC's judgment for the broadcaster's and MVPD's judgment in agreeing on a substantive term of a retransmission consent agreement. The FCC's intrusion into the selection or use of the mechanism for resolving disputes involving retransmission consent agreements or renewals, whether binding or non-binding, was never envisioned or authorized by Congress. The proposal to deem the failure to submit to non-binding mediation a *per se* violation of the good faith standard is equally unsupportable as a policy matter, as the complexity of retransmission consent negotiations makes mandatory mediation or a similar dispute resolution mechanism neither viable nor practical.

- **Terms and Conditions**. There is no basis for changing the good faith standard in a way that would constrain the fees, terms and conditions of retransmission consent agreements. As the FCC has long recognized, it lacks statutory authority to adopt rules that would impact the substance of retransmission consent negotiations. Moreover, such rules are not necessary in light of the economic efficiencies achieved by the current retransmission consent regime, as described in detail in NAB's comments. According to a new economic analysis, in 2010 retransmission consent fees were approximately six tenths of one percent of surveyed cable multiple system operator revenues. The mere fact that retransmission consent fees have increased from an initial level of zero does not mean, as some MVPDs have claimed, that fees are now somehow "too high," that broadcasters have "too much" bargaining power, or that fees are in any way the driver of rising rates paid by subscribers for MVPD services. Indeed, SNL Kagan has stated the "practice" of MVPDs paying television stations for carriage of their signals was a "rational, needed" change to bring broadcasters "more on par with cable networks, especially given the much higher viewing levels of broadcast networks." Today, the fees paid by MVPDs for broadcast signals remain significantly lower than those paid to cable networks with comparable or lower ratings.

- **Program Exclusivity Rules**. NAB urges the Commission to retain the network non-duplication and syndicated program exclusivity rules. These rules have worked in combination with the retransmission consent regime to effectively promote the broad distribution of diverse programming to the public. Not only did Congress specifically recognize the importance of the network non-duplication and syndicated exclusivity rules when establishing retransmission consent in the 1992 Cable Act, the history of this regulatory regime confirms that it has successfully advanced localism and respected the private contractual rights of broadcasters and program suppliers. Moreover, the rules are necessary for broadcasters to serve and enforce program exclusivity rights in the same manner as their competitors, namely, the MVPDs against which they compete for programming and viewers.

Finally, NAB believes that the FCC should continue to use its existing procedures to enforce the good faith rules, rather than to attach specific remedies to particular conduct, such as providing special consideration of good faith violations in the context of the license renewal process. The importance of reaching agreement with MVPDs that serve very high percentages of broadcasters' viewers effectively ensures that local stations diligently negotiate to conclude retransmission agreements with MVPDs in a timely manner.

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

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

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] respectfully submits these comments ("Comments") in response to the *Notice of Proposed Rulemaking* released by the Federal Communications Commission ("FCC" or "Commission") in the above-referenced proceeding.[2] NAB commends the Commission for focusing on consumers as it reviews its retransmission consent rules in this proceeding. To this end, these Comments explain that, since its enactment by Congress in 1992, the retransmission consent regime has benefited the viewing public. Today, the process continues to be an economically efficient and effective vehicle by which broadcasters and multichannel video programming distributors ("MVPDs") can arrange for broadcast signals to be delivered to MVPD subscribers.

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

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

As explained herein, NAB believes that substantial changes to the existing retransmission consent rules are not warranted. We agree with the FCC's long-held position that it has limited authority to involve itself in retransmission consent negotiations, consistent with congressional intent to create a retransmission marketplace in which the government would not dictate the outcome of these private negotiations. And, we submit that, overall, the FCC's current good faith negotiation rules are accomplishing their goals.

Accordingly, the Commission should focus its efforts in this proceeding on revising its rules to the extent necessary to ensure that consumers have adequate information to make informed decisions if impacted by a breakdown in negotiations, and that such decisions are not improperly influenced by certain business practices employed by MVPDs. Consistent with this focus on consumers, NAB also observes that consumers would benefit if broadcasters had access to accurate information about the ownership and operation of MVPDs to facilitate retransmission consent elections and communications.

With the exception of these limited, consumer-focused revisions, no other changes to the existing good faith rules are necessary or required. The Commission should resist requests to micromanage the negotiation of thousands of complex retransmission agreements among numerous private parties in disparate markets across the country. Moreover, as explained in detail below, many of the proposals in the *Notice* (such as the Commission's proposal to require non-binding mediation or to eliminate the network non-duplication and syndicated exclusivity rules) cannot be implemented in a manner consistent with the FCC's authority, legislative intent, or sound public policy.

I. THE CURRENT MARKET-BASED RETRANSMISSION CONSENT SYSTEM IS AN EFFECTIVE, EFFICIENT AND FAIR SYSTEM THAT BENEFITS CONSUMERS

The retransmission consent system is an economically efficient and effective vehicle by which broadcasters and MVPDs can arrange for broadcast signals to be delivered to MVPD subscribers. Importantly, the viewing public benefits from the retransmission consent process, which helps afford broadcasters the ability to develop unique and diverse programming (including local news and public affairs programming) for their viewers at a bargain value to MVPDs. Previous economic studies have confirmed 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."[3] Further, it is extremely rare for arm's length marketplace negotiations to result in any interruptions in MVPD redistribution of broadcast signals.

Since the advent of the retransmission consent regime, many thousands of retransmission consent agreements have been negotiated successfully.[4] Broadcasters routinely find that retransmission consent fees help sustain their continuing ability to offer programming relevant to the needs and interests of their local communities. Gannett has explained that "retransmission consent revenue provides a vital dual revenue stream that helps" keep quality local, national and

---

[3] Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* at Executive Summary (Apr. 2010) ("*Navigant Report*"), attached as Appendix A to Opposition of the Broadcaster Associations, MB Docket No. 10-71 (filed May 18, 2010) ("Opposition of the Broadcaster Associations"). *Accord* Jeffrey A. Eisenach, *The Economics of Retransmission Consent* (March 2009), attached to Reply Comments of NAB, MB Docket No. 07-269 (filed Jun. 22, 2009) ("*Eisenach Report*").

[4] *See* Reply Comments of the National Association of Broadcasters, MB Docket Nos. 07-29 and 07-198 at 8 (filed Feb. 12, 2008) ("NAB Reply Comments").

syndicated programming on free, over-the-air television.[5] Similarly, the CBS Television Network Affiliates Association has stated that retransmission consent "benefit[s] consumers by supporting local services, such as local news, weather, emergency, sports, and public affairs programming."[6] LIN TV Corp ("LIN TV") recently explained that, over the past two years, it has "invested heavily to increase both the amount and quality of the local programming it produces and airs" and that "[s]ignal carriage fees, though a modest portion of our revenue, helped us make those investments during a time of especially challenging market conditions."[7] And Univision Television Group, Inc. ("Univision") has stated that its "ability to recoup a portion of [its] programming investment through the retransmission consent process is key to ensuring the continued quality and availability of its popular program services to the public."[8] In

---

[5] Letter from Kurt Wimmer, Counsel to Gannett Co., Inc., to Marlene H. Dortch, FCC Secretary, MB Docket Nos. 10-71 and 09-182 at 2 (filed Jul. 30, 2010) (also noting specifically that retransmission revenue "supports broadcasters' ability to finance unique local journalism, weather coverage, emergency information, and public affairs programming," as well as investments in "highly demanded national sports programming").

[6] Letter from Jennifer Johnson, Counsel to the CBS Television Network Affiliates Association, to Marlene H. Dortch, FCC Secretary, MB Docket No. 10-71 at 2 (filed May 26, 2010). Without the support of retransmission consent compensation, "broadcasters' ability to produce local programming and to provide the public with other high-quality programming, including national sports programming, would be jeopardized." *Id.* Indeed, one of the reasons CBS "got to keep a piece" of the NCAA basketball tournament "was the retrans revenues CBS stations expect to collect" over the life of the contract with the NCAA. John Eggerton, *March Madness: A Retrans Slam Dunk, Carriage Cash Helps Pay for Broadcast Sports Rights*, BROADCASTING & CABLE, May 3, 2010.

[7] Comments of LIN TV Corp, MB Docket No. 10-71 at 8 (filed May 18, 2010) (citing Comments of LIN TV Corp, GN Docket No. 10-25 (filed May 7, 2010)). *See also* Comments of Nexstar Broadcasting, Inc., MB Docket No. 10-71 at 2 (filed May 18, 2010) ("Local television stations spend millions of dollars annually to provide current and up-to-date news and other local programming information with respect to their communities, including breaking news, severe weather alerts, school closing notices, and AMBER alerts. . . . Retransmission consent revenues defray a small percentage of all these expenses.").

[8] Comments of Univision, MB Docket No. 10-71 at 3 (filed May 18, 2010). The experience of Univision is an excellent example of a retransmission consent success story. Univision credits recent retransmission consent agreements for allowing its broadcast stations to develop local

short, retransmission consent fees help broadcast stations defer the costs of high-quality programming that serves diverse viewers in local markets across the country.

In particular, retransmission consent fees represent an opportunity for broadcasters to help defray the high costs associated with the production of local news.[9] Presently, the production of local news is largely supported by on-air advertising. However, as more viewers use a combination of media platforms to obtain news, broadcasters have come to rely increasingly on non-advertising revenue to support local news budgets. Currently, after on-air advertising, the next most important category of station revenues is retransmission consent fees.[10] In a recent survey conducted for NAB, retransmission consent fees as a percentage of

---

programming that meets the needs of the viewing public. For example, Univision's station KMEX (Los Angeles, CA), which was recently ranked number one in the United States, among adults aged 18-49, regardless of language, produced (i) the top rated early newscast in any language among adults aged 18-49 in eight markets, and (ii) the top rated late newscast, again, in any language, among adults aged 18-49 in six markets. *See id.* at 3. Univision's retransmission consent agreements have allowed the station to expand its offerings to MVPD subscribers, including a video-on-demand ("VOD") service consisting of 50 hours of content that is refreshed every month, the delivery of President Obama's inaugural address in Spanish via Comcast's VOD service, and the launch of a free Hispanic VOD channel on Time Warner cable systems. *See id.* at 3-4. *See also* Letter from Mace Rosenstein, Counsel to Univision Communications, Inc., to Marlene H. Dortch, FCC Secretary, MB Docket No. 10-71 at 1-2 (filed Jun. 30, 2010) (explaining that Univision's retransmission "agreements have produced substantial benefits for distributors, for Univision and, most importantly, for consumers – in the form of enhanced products and services developed in partnership with distributors, including Spanish-language VOD content, VOD product promotion and iTV applications").

[9] *See* Mark J. Prak, David Kushner, and Eric M. David, *The Economic Realities of Local Television News – 2010: A Report for the National Association of Broadcasters* at 4-6 (Apr. 30, 2010) ("*Economic Realities Report*") submitted as Attachment B to Comments of the National Association of Broadcasters, GN Docket No. 10-25 (filed May 7, 2010) (noting significant stresses on local broadcasters' advertising revenues and news budgets).

[10] *Id.* at 9. *See also* SNL Kagan, *The Economics of Retransmission for Broadcasters and Cable MSOs* at 3 (June 2010) ("*The Economics of Retransmission*") (noting that "retrans fees contribute a much-needed revenue source to complement fluctuating ad revenues, which have become only more volatile over time").

station revenue ranged from a low of 1.2% to a high of 14.0%, with a median value of 6.3%.[11] Retransmission consent fees as a percentage of revenue were nearly twice as high as Internet advertising, the third most important source of revenue to broadcast stations.[12] In the absence of non-advertising revenue such as retransmission consent fees, local television stations would not have been able to continue to provide top-quality local news during the recent economic downturn. Indeed, the ability to use retransmission consent fees to subsidize the costs of local news production is of critical importance, especially in light of the significant role that television stations play in delivering news to consumers.[13]

In addition to supporting varied top-quality programming, the retransmission consent regime benefits viewers by increasing consumers' access to programming, including entire channels dedicated to local and regional news.[14] One excellent example is NewsChannel 8, a local cable news network produced by Allbritton Communications Company ("Allbritton").[15]

---

[11] *Economic Realities Report* at 9.

[12] *Id.*

[13] According to a March 2010 Pew research study focusing on how the Internet has changed news consumption, local television remains the most popular platform for consumers to access news. While most Americans now use a combination of media platforms to obtain news, on a typical day 78 percent of Americans still get their news from a local television station. *See* Pew Research Center, *Understanding the Participatory News Consumer: How Internet and Cell Phone Users Have Turned News Into A Social Experience* at 3 (March 1, 2010). The study showed that local television news "is the top source of news for Americans" and is "relatively popular across the board compared with other platforms." *Id.* at 11. The study also noted that local television news plays a particularly important role for African-Americans, women, and older Americans. *See id.*

[14] *See FCC, Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* at ¶¶35, 44 (Sept. 8, 2005) ("*2005 FCC Retransmission Consent Report*") ("much of the compensation for retransmission consent has been in-kind, including . . . carriage of local news channels.").

[15] *See Video Content: Hearing Before the Committee on Commerce, Science and Technology of the Senate*, 109th Cong. 553 (2006) (prepared statement of Robert G. Lee, President/General Manager, WDBJ Television, Inc. discussing the merits of the retransmission consent process).

NewsChannel 8 provides local news, weather and public affairs programming, along with coverage of local public events. Allbritton expanded distribution of NewsChannel 8 for viewing throughout the Washington, D.C. metropolitan area through retransmission consent agreements for carriage of Allbritton's broadcast television station WJLA-TV by local MVPDs. Similarly, Belo used retransmission consent to obtain carriage of its regional cable news channel NorthWest Cable News ("NWCN") on cable systems serving over two million households in Washington, Oregon, Idaho, Montana, Alaska and California.[16] NWCN provides regional news, weather, sports, entertainment and public affairs programming to viewers, in coordination with Belo's television stations in Seattle, Portland, Spokane and Boise.[17] Through the retransmission consent process, broadcasters thus have been able to provide viewers in disparate parts of the country with access to more high quality, locally-oriented news and informational programming and additional niche programming.[18]

Importantly, it is extremely rare for retransmission consent negotiations to result in disruptions to consumers' viewing as a result of an impasse between a broadcaster and a MVPD. Despite the many thousands of retransmission consent negotiations that have taken place since Congress enacted the retransmission consent system, there have been very few showdowns and

[16] NWCN is now also available on DISH in several Northwest markets.

[17] *See* Comments of the National Association of Broadcasters, MB Docket Nos. 07-29, 07-198 at 27-28 (filed Jan. 4, 2008) ("NAB Comments") (further noting that other broadcasters have used retransmission consent agreements to secure carriage of stations with programming directed to Hispanic viewers).

[18] Not only does the retransmission consent process provide such valued locally-oriented programming to viewers, it provides MVPDs with the ability to distribute broadcast signals at a bargain value, especially when compared to the fees paid for cable network programming. As described in detail in Section V. A., statistics on fees paid by MVPDs for non-broadcast channels indicate that broadcasters' compensation is significantly less than that paid for cable channels that garner equal or lower ratings.

even fewer shutdowns.[19] Since January 2006, there have been only 15 reported instances where an impasse in retransmission consent negotiations has resulted in interruptions in carriage of a broadcast station by an MVPD, and these impasses are becoming shorter in duration over time.[20] These interruptions in service have affected, on average, only about one-one hundredth of one percent (0.01%) of annual total television viewing hours.[21] In other words, in the past five years, U.S. television households have 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 20 minutes.[22] For purposes of comparison, the average household experiences annual electricity outages of about 381 minutes, cable systems strive for reliability of 99.97%, implying average annual cable outages of about 158 minutes,[23] and the average DBS subscriber experiences annual service outages between 500 to 1,000 minutes per year.[24] Moreover, unlike other methods of viewing, broadcast television is always available. Even in times of MVPD "interruption," broadcasters' signals are available for free, over-the-air with an antenna.

---

[19] Further, some analysts have predicted that service interruptions as a result of retransmission consent disputes are likely to decline in the future. *See The Economics of Retransmission* at 3 ("The incidences of high profile spats between cable MSOs and broadcasters will diminish as the practice [of paying retransmission fees] becomes routine . . . .").

[20] *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 26, 30-31 (May 27, 2011), attached hereto as Attachment A (also showing that retransmission negotiating impasses are not increasing in frequency or impact over time) ("*Declaration*").

[21] *Id.* at 30.

[22] *Id.*

[23] *Navigant Report* at 19.

[24] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency, et al.*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614 at ¶67 (2002) ("DBS is, on the whole, extremely reliable with typical service availabilities on the order of 99.8 to 99.9 percent.").

In light of these economic efficiencies and demonstrated public benefits provided by the current retransmission consent system, NAB encourages the Commission to recognize yet again that the current process is working and benefiting consumers.[25] Substantial or numerous changes in the existing rules are not warranted, and would be harmful because they could skew or alter the existing retransmission consent system that presently is working very effectively.[26] Indeed, even the "prospect of government intervention . . . introduces uncertainty and distorts incentives in ways that can disrupt the bargaining process and make it more difficult to achieve efficient agreements."[27]

II. LIMITED REVISIONS TO THE RETRANSMISSION CONSENT RULES WOULD ENHANCE CONSUMERS' ABILITY AND FREEDOM TO MAKE INFORMED DECISIONS AND WOULD FACILITATE TRANSPARENCY AND CARRIAGE-RELATED COMMUNICATIONS

As explained above, the existing retransmission consent process is effective and has benefited consumers since Congress first authorized broadcasters and MVPDs to negotiate the terms and conditions of carriage of broadcast signals. Importantly, the FCC has repeatedly and appropriately recognized the limits of its authority to involve itself in negotiations relating to the substantive terms of a retransmission consent agreement.[28] In recognition of its limited authority

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

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

[27] *Declaration*, Attachment A at 33. *Accord id.* at 32.

[28] *See, e.g., Notice* at ¶9 ("In implementing the good faith negotiation requirement, the Commission concluded 'that the statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission.'") (quoting *Implementation of Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 at ¶6 (2000) ("*Good Faith Order*")).

to impose significant revisions to the existing good faith negotiation rules and the absence of a compelling showing of need for (and corresponding public benefit of) such revisions, the Commission should not make significant changes to its current rules governing retransmission consent. Rather, the FCC should focus its efforts on modifying its rules to the extent necessary to ensure that consumers have adequate information to make informed decisions about how to access programming in the rare instances when they may be impacted by a negotiating impasse. Additionally, the FCC should act to ensure that the ability and freedom of consumers to make such decisions are not impeded by the use of early termination fees by many MVPDs. The Commission also could promote transparency by adopting rules to enhance broadcasters' access to information about the ownership and operations of MVPDs to facilitate retransmission elections and communications.

A. The FCC Should Extend the Consumer Notice Requirement to All MVPDs

In the *Notice*, the Commission seeks comment on whether it should revise its current notice rules, which require cable operators to provide consumers with written notice of a deletion of any broadcast television signal.[29] Specifically, the FCC asks whether to expand the notice requirement to non-cable MVPDs.[30] NAB supports increased consumer notification, and believes that the expansion of the FCC's notice requirements to non-cable MVPDs is in the public interest. In fact, there is no policy reason to apply the notice requirement to cable systems but not to extend the requirement to direct broadcast satellite systems and other non-cable MVPDs. Indeed, increased consumer notice and education to all subscribers to MVPDs that retransmit broadcast signals will provide viewers who may be affected by a rare impasse in

---

[29] *See Notice* at ¶¶34-37.

[30] *See Notice* at ¶37.

retransmission consent negotiations with the ability to make informed choices about how to avoid or minimize disruption to viewing (e.g., watching programming over-the-air or via a different MVPD).

From a consumer benefit perspective, the importance of extending the notice requirement to all MVPDs is particularly compelling given recent experiences of NAB's members. For example, when LIN TV and DISH Network, LLC ("DISH") reached an impasse in their retransmission consent negotiations earlier this year, DISH attempted to require LIN *not* to provide notice to its viewers that carriage might be disrupted as a condition for agreement on a day-to-day extension to enable the parties to continue negotiations.[31] Such conduct should not be permitted. Extending the notice requirement of an anticipated service disruption to all non-cable MVPDs would not only promote regulatory parity between all types of MVPDs, but would also help mitigate such anti-consumer behavior by non-cable MVPDs.[32]

As the *Notice* acknowledges, it is important that MVPD notifications of potential deletions provide useful information to consumers and that such notifications do not "merely [serve] as a further front in the retransmission consent war."[33] To this end, the FCC should

---

[31] *See* Letter from Rebecca Duke, Vice President of Distribution, LIN TV to William Lake, Chief, Media Bureau, FCC (filed February 28, 2011), attached hereto as Attachment B.

[32] Similarly, we observe that the public interest would be served by extending the "sweeps" rules (which currently prohibits only cable operators from deleting a broadcast signal during a sweeps period) to non-cable MVPDs. Doing so would achieve regulatory parity between cable and non-cable MVPDs, consistent with FCC goals. *See, e.g., 2005 FCC Retransmission Consent Report* at ¶32. Regulatory parity among MVPDs ensures that one type of service provider (e.g., a cable operator) does not have an unfair advantage over another service provider with which it competes (e.g., a direct broadcast satellite provider) merely as a result of the technology used to distribute the broadcast signal, and is therefore in the public interest. We note that the Commission has broad authority to regulate direct broadcast satellite providers in the public interest. *See, e.g.*, 47 U.S.C. § 335(a). For the reasons stated in the *Notice*, the FCC correctly concluded it would be inappropriate to extend the sweeps rules to broadcasters. *See Notice* at ¶¶39-40.

[33] *Notice* at ¶37.

require that all notifications be clear, concise, and factually accurate. The agency, however, should defer to the expertise and reasonable judgment of the MVPD with respect to the specific language of the notice. Such a requirement, which could be applied to all MVPDs on a technology-neutral basis, would serve the public interest by arming consumers with factually accurate information regarding the status of broadcast programming distributed by an MVPD in advance of any likely negotiation impasse.

In the *Notice*, the Commission also seeks comment on whether the FCC has authority to extend the notice requirement to broadcasters.[34] NAB urges the FCC to carefully balance the pros and cons of a broadcaster notice requirement from a consumer perspective before adopting such a rule change. There are disadvantages from a consumer's perspective to extending the notice requirement to broadcasters that do not apply to MVPDs. For example, most television stations have retransmission agreements with multiple MVPDs in their markets. Because television broadcasters cannot readily tailor the content in their signals based upon the MVPD receiving such signal, the broadcast by a television station of a notice of a potential deletion of its signal by one MVPD in the market is likely to create unnecessary confusion among that station's viewers in situations where the station has successfully completed retransmission consent negotiations with all of the other MVPDs in the market.

Such viewer confusion may not be offset by the benefits flowing from the transmission of the notice of a potential disruption of service to those viewers affected by the deletion. For example, NAB understands that certain of its members in Midwestern markets have as many as 40 to 45 retransmission consent agreements with MVPDs in a single market. In situations, for example, where the broadcaster reaches an impasse with one of over 40 MVPDs in the market,

[34] *See Notice* at ¶37. Many broadcasters already voluntarily provide notice to their viewers of likely service disruptions.

the confusion to the public resulting from application of the notice requirement to a broadcaster would appear to outweigh the benefits of imposing such a notice. This would certainly be the case if that MVPD served only a small percentage of households in the television station's market. As a practical matter, broadcasters, unlike MVPDs, will not be able to effectively target the notice to only the subset of its viewers that would be affected by a possible signal deletion.

B. The FCC Should Ensure that Early Termination Fees Do Not Inhibit Consumers' Ability to Cancel MVPD Service or Switch Providers in the Event of an Impasse in Retransmission Consent Negotiations

The *Notice* seeks comment on the extent to which MVPDs impose early termination fees ("ETFs") on their customers and whether the use of ETFs impacts consumers' options in the event of a retransmission consent carriage dispute.[35] As an initial matter, the use of ETFs by MVPDs has become more commonplace and many MVPDs now require that their subscribers pay ETFs when canceling services prior to the termination of a service agreement. The use of ETFs is especially prevalent when MVPDs offer multi-year agreements for bundled services (e.g., television, telephone, and Internet) or provide equipment to receive such services. For example, Comcast XFINITY offers a number of triple play packages, all of which require a minimum two year agreement and subject subscribers to monetary penalties if services are canceled prior to the end of the term.[36] Similarly, the subscriber agreements used by DIRECTV and DISH each contain provisions permitting the imposition of significant monetary fees (e.g.,

[35] *See Notice* at ¶30.

[36] *See* The Xfinity Triple Play from Comcast *available at* http://www.comcast.com/Corporate/Learn/Bundles/bundles.html (last visited May 16, 2011) (listing offers for new subscribers to Triple Play packages and stating that "Minimum 2-year contract required. Early termination fee applies.").

up to $480) if a subscriber cancels certain services early.[37] The terms of service for Verizon's FIOS television service provide that subscribers of bundled services may be liable for ETFs if such bundled services are terminated prior to the expiration of the minimum commitment period.[38] AT&T U-verse subscribers also risk the imposition of ETFs if services are canceled before the end of the contractual term.[39] To NAB's knowledge, none of these MVPDs – or other MVPDs that use ETFs – provide an exception to their ETF policies in the event a subscriber seeks to cancel service due to the deletion of programming as a result of a retransmission consent dispute. Indeed, in the event of a dispute or negotiating impasse, such subscribers likely would be required to choose between paying a significant monetary fee to their MVPD or losing valued programming because the MVPD no longer has the right to carry a particular broadcaster's signal.

---

[37] *See* Dish Network Residential Customer Agreement at Section 3B, *available at* http://www.dishnetwork.com/downloads/legal/RCA.pdf (last visited May 16, 2011) ("You may cancel your Services for any reason at any time by notifying us at the phone number, e-mail address or mailing address set forth at the top of this Agreement. Please be aware that certain promotions have an optional or mandatory term commitment period and if you cancel your Services prior to the expiration of an applicable optional or mandatory term commitment period, certain early termination or cancellation fees may apply."); *see also* Agreements: Understanding the terms of your DIRECTV service, *available at* http://www.directv.com/DTVAPP/content/support/agreements_overview (last visited May 16, 2011) ("If you do not fulfill your Programming Agreements, DIRECTV may charge you a pro-rated fee of up to $480").

[38] *See* FIOS TV Terms of Service at Paragraph 10(b), *available at* http://www22.verizon.com/terms/files/FiOS_TV_TOS.pdf (last visited May 16, 2011) ("EXCEPT AS OTHERWISE SET FORTH IN THIS AGREEMENT, IF YOU HAVE CHOSEN TO SUBSCRIBE TO A BUNDLED SERVICES PLAN WITH A MINIMUM TERM COMMITMENT, IF ANY OF THE BUNDLE SERVICES ARE TERMINATED BY YOU OR BY US BEFORE COMPLETING YOUR MINIMUM TERM, THEN YOU AGREE TO PAY VERIZON THE EARLY TERMINATION FEE SET FORTH IN THE BUNDLED SERVICES PLAN YOU HAVE CHOSEN.").

[39] *See* U-verse Choice Bundles – Offer Details, *available at* http://www.att.com/u-verse/promotional-bundles/index.jsp (last visited May 16, 2011) ("One year term required for bundled U-verse services. An early termination fee of up to $180 may apply if U-verse services are terminated.").

In short, the use of ETFs by MVPDs is contrary to the public interest because the high costs of ETFs deter consumers impacted by a retransmission consent dispute from switching service providers or terminating service in favor of over-the-air viewing. Moreover, the limited ability and freedom of consumers to make choices about their service providers in the event of a dispute is further exacerbated because ETFs are generally utilized in conjunction with long-term service agreements (e.g., 1-2 years). Indeed, MVPDs can use ETFs as a tool to hold their subscribers "hostage" during a retransmission consent impasse. As the *Notice* correctly observes, "early termination fees imposed by some MVPDs may cause consumers faced with a potential retransmission consent negotiating impasse to be unwilling or unable to consider switching to another MVPD to maintain access to a particular broadcast station."[40] The Commission can take action to alleviate ETFs and other MVPD business practices that undermine consumers' ability to respond to service changes. Specifically, the FCC should amend its rules to prohibit an MVPD from imposing an ETF on any consumer wishing to terminate service due to the potential deletion of a broadcast signal as a result of a retransmission consent dispute.

C. Requiring MVPDs to Submit Current Data on Their Ownership, Operations, and Geographic Coverage Would Facilitate Carriage-Related Communications

Information about television broadcast station ownership and operations is readily available from electronic databases. However, there is a comparative dearth of complete and accurate information about MVPD ownership, operations, and geographic coverage.[41] As a

---

[40] *Notice* at n. 50.

[41] Unfortunately, the forms currently required to be submitted to the FCC by cable systems are inadequate to provide broadcasters with sufficient information to ensure that broadcasters can effectively identify and contact cable systems located within their markets in connection with carriage elections or other matters relating to signal carriage. For example, the Cable Community Registration Form (FCC Form 322) is a one-time filing for cable television

result, broadcasters presently do not have ready access to the names, addresses or other relevant information necessary to identify and contact all the MVPDs within their markets to which they are legally obligated to submit their retransmission elections every three years. Thus, many broadcasters have had to retain consultants to research and compile relevant details about MVPD operations in their markets. Because of the lack of transparent public data about the location, geographic coverage area and contact information of MVPDs, broadcasters often face significant challenges when attempting to compile this data and when trying to make timely carriage elections or retransmission consent-related communications. For example, NAB is aware that, in certain instances, broadcasters have had no choice but to default to must carry status due to the lack of adequate information to identify a MVPD for carriage election purposes. Such a result clearly is contrary to Congress's intent that broadcasters retain the ability to control distribution of their signals through the carriage election process.

The carriage election process cannot be implemented effectively unless MVPDs are required to publicly disclose certain information about their ownership and operations. NAB urges the Commission to consider adopting rules that require MVPDs to periodically file with the FCC data on their ownership (including a mailing address for the receipt of carriage election notices), operation, and geographic coverage. Such data could be made available for public review, thereby enabling broadcasters to have access to accurate information for correspondence with MVPDs in their markets. The requirement for a MVPD to submit data to the FCC regarding its ownership and operation need not be onerous. For example, the FCC could simply require that MVPDs submit to the Media Bureau a one-time notification with the relevant

---

systems upon commencement of service and does not require MVPDs to update ownership, contact, or service area information or specify a contact for retransmission consent matters. There are no comparable FCC forms or filing requirements for information on ownership and operation of non-cable MVPDs.

information for its systems. MVPDs then would be required to update the information supplied to the FCC only to the extent such information changes (e.g., the contact representative for retransmission consent negotiations is modified or the MVPD acquires/disposes of particular cable systems).

III. THE COMMISSION CORRECTLY CONCLUDED THAT IT LACKS STATUTORY AUTHORITY TO MANDATE INTERIM CARRIAGE DURING NEGOTIATIONS OR TO REQUIRE MANDATORY ARBITRATION TO RESOLVE RETRANSMISSION CONSENT DISPUTES

In the *Notice,* the FCC concludes that it lacks "authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations."[42] NAB strongly agrees. The FCC's determination that it lacks authority to mandate interim carriage and binding dispute resolution procedures is fully consistent with the plain language of the retransmission consent statute, congressional intent, and the FCC's past decisions interpreting and applying the statutory scheme.[43]

A. Mandatory Interim Carriage Contravenes Statutory Authority, Congressional Intent and Past FCC Decisions

Section 325(b) of the Communications Act unequivocally prohibits a cable system or other MVPD from retransmitting a television broadcast station's signal without the station's express consent. The Act plainly states that no MVPD "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station."[44] When interpreting statutory language, the Supreme Court has stated "[we] must presume that a

---

[42] *Notice* at ¶18.

[43] NAB has previously demonstrated that the FCC lacks the authority to implement compulsory interim carriage. *See, e.g.*, Opposition of the Broadcaster Associations at 63-72; *see also* Reply Comments of the Broadcaster Associations, MB Docket No. 10-71 at 2-6 (filed Jun. 3, 2010) ("Reply Comments of the Broadcaster Associations").

[44] 47 U.S.C. § 325(b)(1)(A). *See Good Faith Order* at ¶60 (holding that Section 325(b) of the Act prevents a MVPD "from retransmitting a broadcaster's signal if it has not obtained express retransmission consent").

legislature says in a statute what it means and means in a statute what it says there."[45] The plain language of the Act is clear: MVPDs do not have any rights to distribute a broadcast signal – even for an interim or short period of time – unless the broadcaster has provided consent to do so. Given this clear statutory directive, the FCC cannot step into the shoes of a broadcaster to grant a MVPD the right to retransmit a station's signal over the broadcaster's objections. In short, the unambiguous language of Section 325(b) puts an end to the question of whether the FCC can mandate interim carriage of a broadcast station's signal.

Allowing carriage of signals without the express consent of the originating broadcast station would not only violate the unambiguous mandate of Section 325(b), but also would be inconsistent with the statute's legislative history. The legislative history of Section 325(b) makes clear that Congress intended to provide broadcast stations with the exclusive right to control others' retransmission of their signals and to negotiate the terms and conditions of such retransmission through private agreements.[46] Indeed, Congress intended to create a free "marketplace for the disposition of the rights to retransmit broadcast signals" where the government would not "dictate the outcome of the ensuing marketplace negotiations."[47]

Based upon the clear language and legislative history of Section 325(b), the Commission has consistently and correctly concluded that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent"[48] as the substantive terms and

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

[46] *See* S. Rep. No. 102-92 at 34-35, 37 (1991) ("*Senate Report*") ("Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means" and "[c]arriage and channel positioning for such stations will be entirely a matter of negotiation between the broadcasters and the cable system").

[47] *Id.* at 36.

[48] *Good Faith Order* at ¶14; *Accord Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965 (1993) ("*Consumer*

conditions of carriage are to be negotiated privately by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith. Even more pointedly, 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."[49] Indeed, no authority suggests that Congress intended the Commission to negate or suspend broadcasters' statutory retransmission consent rights for *any* length of time. Consequently, the Commission rightly concludes in the *Notice* that Section 325(b) of the Act prevents it from ordering carriage over a broadcaster's objection for any period of time, interim or otherwise.

B. The FCC Lacks Authority to Mandate Binding Arbitration

Just as the Commission lacks authority to mandate interim carriage over the objection of a broadcaster, so too it lacks authority to mandate involuntary binding arbitration to resolve retransmission consent disputes. In the *Notice*, the FCC concludes that "mandatory binding dispute resolution procedures would be inconsistent with […] Section 325 of the Act, in which Congress opted for retransmission consent negotiations to be handled by private parties subject to certain requirements."[50] NAB strongly supports the FCC's determination that mandatory arbitration contravenes the Act.

Protection Order"); *see also Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc*., Memorandum Opinion and Order, 22 FCC Rcd 35 (MB 2007) ("*Mediacom/Sinclair Order*").

[49] *Good Faith Order* at ¶¶60, 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"); *see also 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).

[50] *Notice* at ¶18.

As described above, Section 325(b) expressly states that broadcasters, and only broadcasters, can provide MVPDs with authority to retransmit its broadcast signal.[51] The plain language of Section 325(b) makes clear that no party – neither the FCC nor an arbiter – can authorize a MVPD to transmit a station's broadcast signal without the broadcaster's consent. If the FCC were to mandate that broadcasters and MVPDs engage in arbitration to resolve retransmission consent disputes, the parties would have no choice but to submit to arbitration, which, by definition, involves the arbitrator rendering a "final and binding" decision. As in court-based adjudication, arbitration outcomes are typically win-lose, with the arbitrator generally making the decision as to which side is right and which side is wrong. In the retransmission context, the arbitrator would necessarily decide whether the broadcaster or the MVPD is "right." If the broadcaster "loses," the MVPD would be granted the right to retransmit the station's signal even though the broadcaster never consented to carriage on the arbitrator's terms, or authorized the carriage, and most troubling, even if the broadcaster strongly objected to such carriage. Thus, the adoption of mandatory binding arbitration as a mechanism to resolve retransmission consent disputes contravenes the plain language of Section 325(b) because it would permit the arbitrator, not the broadcaster, to decide the terms upon which to grant permission to a MVPD to carry a broadcaster's signal.

Besides being squarely at odds with the plain language of the statute, mandatory arbitration is contrary to the most fundamental premise of the retransmission consent marketplace established by Congress, in which local television stations have the opportunity to negotiate for compensation from MVPDs in exchange for the right to retransmit and resell their

[51] 47 U.S.C. § 325(b)(1)(A); *see Good Faith Order* at ¶60.

broadcast signals.[52] Congress made it quite plain that this retransmission consent marketplace 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.[53] By forcing the parties into mandatory binding arbitration, the FCC would impermissibly intervene in retransmission consent negotiations. Such government intervention would remove the negotiations from the marketplace where they belong and hammer them into an artificial forum before an arbiter. Thus, mandatory arbitration contravenes congressional intent.

In light of the clarity and preciseness with which Congress expressed its intent, the Commission has consistently and correctly concluded that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent."[54] Mandatory arbitration 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. Mandatory arbitration means that the FCC, not the negotiating parties, decides the proper forum for handling retransmission consent negotiation disputes. Recognizing this, the Commission correctly concluded in the *Notice* that mandatory arbitration exceeds the FCC's statutory authority. The *Notice* is not the first place where the FCC reached this conclusion. For example, in the *Mediacom/Sinclair Order,* the Media Bureau expressly acknowledged the FCC's lack of

[52] *See Senate Report* at 36 (stating that the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") created a "marketplace for the disposition of the rights to retransmit broadcast signals").

[53] *Id.*

[54] *Good Faith Order* at ¶14; *accord Consumer Protection Order* at ¶178.

authority to mandate binding arbitration and stated unequivocally that the "Commission does not have the authority to require the parties to submit to binding arbitration."[55]

Mandatory arbitration is not just contrary to Section 325(b) of the Communications Act and congressional intent, but it is also contrary to the Administrative Dispute Resolution Act. In the *Notice*, the Commission concluded that "mandatory binding dispute resolution procedures would be inconsistent with […] the Administrative Dispute Resolution Act ('ADRA'), which authorizes an agency to use arbitration 'whenever all parties consent.'"[56] The Administrative Dispute Resolution Act expressly prohibits an administrative agency from requiring arbitration. In particular, Section 575(a)(3) of the United States Code states that: "an agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit."[57] This "prohibition is intended to help ensure that the use of arbitration is truly voluntary on all sides."[58] The Administrative Dispute Resolution Act thus provides yet one more reason why the FCC rightly concluded that arbitration of retransmission consent disputes should be voluntary rather than mandatory.

IV. MANY OF THE PROPOSED *PER SE* VIOLATIONS ARE UNNECESSARY, INCONSISTENT WITH LAW, OR HARMFUL TO THE PUBLIC INTEREST, AND WOULD NOT IMPROVE THE RETRANSMISSION CONSENT PROCESS

As explained above, there are certain, limited steps the Commission can take to enhance consumers' access to information regarding a potential signal deletion, to ensure that consumers are not impeded by MVPD business practices when deciding how to respond to a potential signal

---

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

[56] *Notice* at ¶18, *quoting* 5 U.S.C. § 575(a)(1). *See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, Internal Policy Statement and Order, 6 FCC Rcd 5669 (1991). *See also* S. REP. NO. 101-543 at 13 (1990).

[57] 5 U.S.C. § 575(a)(3).

[58] S. Rep. No. 101-543 at 13 (1990).

deletion, and to facilitate retransmission-related communications between broadcasters and MVPDs to the ultimate benefit of consumers. However, in light of the economic efficiencies and demonstrated public interest benefits provided by the current retransmission consent system, there is no need to make substantial revisions to the existing good faith negotiation rules. Moreover, as explained below, many of the *per se* violations proposed in the *Notice* are unsupported by legal or policy rationales, are unnecessary, would not improve the retransmission consent process, and would be difficult to implement in a manner consistent with the FCC's authority.

A. There Is No Legal or Public Policy Basis to Prohibit Joint Negotiations by Non-Commonly Owned Broadcasters

The *Notice* seeks comment on whether the Commission should deem it a *per se* violation of the good faith standard for a station to grant another station (or station group) the right to negotiate its retransmission consent agreement(s) when the stations are not commonly owned ("Joint Negotiations").[59] As demonstrated below, there is no legal or public policy basis to prohibit Joint Negotiations by broadcasters that are not commonly owned. In establishing the retransmission consent system, Congress intended for parties to choose how to negotiate, subject to antitrust standards which act as safeguards against anti-competitive behavior. No credible evidence has been provided to suggest that Joint Negotiations result in delays or other complications warranting Commission intervention in the retransmission consent marketplace. In fact, experience demonstrates that Joint Negotiations among non-commonly owned broadcasters and MVPDs occur in a competitive marketplace where MVPDs, rather than broadcasters, wield significant leverage at the bargaining table. Moreover, available evidence

[59] *Notice* at ¶23 (noting that consent for Joint Negotiations "might be reflected in local marketing Agreements ('LMAs'), Joint Sales Agreements ('JSAs'), shared services agreements, or other similar agreements.").

suggests that Joint Negotiations among non-commonly owned broadcasters serve the public interest by increasing efficiencies in the negotiation process. Finally, NAB notes that it would be arbitrary and capricious and contrary to public policy to prohibit broadcasters from Joint Negotiations while expressly permitting small MVPDs to negotiate as a group.

1. Legislative History Demonstrates that Congress Never Intended to Prohibit Joint Negotiations and the FCC Has Correctly Acknowledged Such Intent

The legislative history of Section 325 clearly demonstrates that Congress never intended to prohibit Joint Negotiations. In establishing retransmission consent, Congress intended to create a free "marketplace for the disposition of the rights to retransmit broadcast signals."[60] Importantly, at the time Congress enacted the retransmission consent statute, operating agreements among non-commonly owned broadcasters, such as LMAs and JSAs, were in common use.[61] Nevertheless, Congress choose not to place any limitations on the number of markets, systems, stations or programming streams that could be simultaneously addressed as part of the same round of retransmission consent negotiations. Clearly, if Congress had intended to limit or prohibit outright the use of Joint Negotiations by broadcasters, it would have done so expressly. As the Supreme Court has observed, Congress "does not . . . hide elephants in mouseholes."[62]

In light of this clear legislative intent, the Commission has never placed restrictions on who may be designated to negotiate retransmission consent on behalf of a broadcaster or

[60] *Senate Report* at 36.

[61] *See, e.g., Broadcast Station Time Brokerage Survey Completed*, Public Notice, 7 FCC Rcd 1658 (Mass Med. Bur. 1992) (noting that "the use of . . . LMA arrangements appears often to be associated with efforts to sustain the operations of stations facing economic difficulties.").

[62] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). *See also Good Faith Order* at ¶23 ("when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity.").

MVPD.[63] Instead, the Commission has concluded that Joint Negotiations are consistent with marketplace considerations. For example, the FCC historically has stated that "[p]roposals for carriage conditioned on carriage of any other programming, such as . . . another broadcast station either in the same or a different market" are "presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement."[64] Thus, if the Commission were to prevent broadcasters from engaging in Joint Negotiations at this juncture, not only would the FCC risk indirectly influencing the outcome of the negotiations in contravention of Congress's stated intent, but also would be reversing its prior conclusion that Joint Negotiations are consistent with competitive marketplace considerations.

2. <u>MVPDs Have Failed to Show that Joint Negotiations Are Against the Public Interest or Would Improve the Retransmission Consent Process</u>

The burden of justifying a change in the current good faith negotiation standard should be placed on those advocating a departure from the Commission's well-established rules.[65] No

---

[63] The Commission does require broadcasters and MVPDs to designate a representative with authority to bind the entity in a retransmission consent agreement. *See* 47 C.F.R. § 76.65(b)(ii).

[64] *Good Faith Order* at ¶56. More recently, the cable industry proposed prohibiting agreements that would allow broadcasters to negotiate retransmission consent for more than one station affiliated with a major network in the same market. *See* Reply Comments of National Cable and Telecommunications Association, MB Docket Nos. 06-121, 02-277 at 4-5 (filed Jan. 16, 2007). However, the Commission has not adopted such a rule. Further, less than one year ago, the Commission stated that satellite providers must comply with the requirement for good faith in retransmission consent negotiations and, thus, implicitly found that the current rules are adequate. *See Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010,* Report and Order and Order on Reconsideration, 25 FCC Rcd 16383 at ¶16 (2010).

[65] *See, e.g., In Re Petition by KNOGO CORP. for Withdrawal of Waiver Granted to Checkpoint Systems, Inc., of the Field Strength Limitation Requirements*, Letter to Mr. John M. Gibbons, from Vincent J. Mullins, Secretary, FCC, 51 F.C.C. 2d 733, 734 (Feb. 26, 1975) ("the proponent of a change in government rules has the burden of proving that the change is necessary and justified"). It is also axiomatic that an agency changing course "'must supply a reasoned analysis' establishing that prior policies and standards are being deliberately changed." *Verizon Telephone Companies v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009) (quoting

credible evidence has been provided to suggest that Joint Negotiations result in delays or other complications warranting Commission attention, let alone Commission intervention in the free marketplace. Indeed, it is notable that, despite its rhetoric, the MVPD industry has consistently failed to demonstrate that there has been any change in the competitive balance between local broadcast stations and MVPDs that would warrant a reversal of the Commission's prior findings that Joint Negotiations do not presumptively violate the good faith standard. Moreover, there has been no showing to suggest that the retransmission consent process would be improved by treating Joint Negotiations as a *per se* violation of the good faith requirement.

In previous proceedings, cable operators have suggested that economic theory and evidence suggests that higher rates are paid by cable operators where one broadcast station negotiates retransmission consent on behalf of another station in the same market.[66] However, as NAB explained in refuting these claims elsewhere, cable operators have failed to show that broadcasters have any form of undue leverage in these negotiations or that anything improper has occurred.[67] For example, the economist for the American Cable Association ("ACA") was aware

---

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 57 (1983)). *See also ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (finding that the FCC had failed to establish "the requisite 'reasoned basis' for altering its long-established policy" on certain television commercial limits); *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1824 (2009) (Kennedy, J. concurring) (explaining that an agency changing course cannot "disregard contrary or inconvenient factual determinations that it made in the past").

[66] *See* Comments of Time Warner Cable, MB Docket No. 09-182 at 7 (filed Jul. 12, 2010) ("Comments of Time Warner Cable") (citing the "fact" that an economist believes that it is "very likely" that retransmission consent is jointly negotiated where stations are involved in agreements); Comments of American Cable Association, MB Docket No. 09-182 at 2, 13-16 (filed Jul. 12, 2010) ("Comments of American Cable Association") (arguing that "available evidence . . . suggests" that higher rates are being paid by cable operators where one broadcast station negotiates retransmission consent on behalf of another station in the same market).

[67] *See* Reply Comments of the Broadcaster Associations at 13-14 (demonstrating that retransmission consent fees are modest by any standard); 18-20 (negotiations involving more than one station are lawful and do not harm the public interest); 20-21 (public interest benefits of dual affiliation); 23-24 (disputing contention that joint negotiations result in higher fees).

of "only one data point" provided by one MVPD on whether Joint Negotiations result in higher retransmission consent fees.[68] In response, NAB has demonstrated that, even if the ACA's data were sufficient to prove that a pricing premium exists, the limited data available indicates that retransmission consent fees amount to only an additional $0.03 per subscriber per month to each "Big 4" affiliated station engaging in Joint Negotiations, or, put another way, $0.06 per subscriber per month in total for a pair of Big 4 affiliated stations engaging in Joint Negotiations.[69] These nominal rates certainly do not evidence any undue leverage by broadcasters participating in Joint Negotiations, nor do they support allegations that Joint Negotiations are contrary to the public interest.

3. Joint Negotiations Increase Efficiencies, Level the Retransmission Consent Negotiation Playing Field, and Serve the Public Interest

While the MVPD industry has failed to show how Joint Negotiations are against the public interest, available evidence suggests that Joint Negotiations increase efficiencies for broadcasters. Joint Negotiations help lower transaction costs of negotiating retransmission consent agreements, thereby reducing the diversion of scarce resources away from broadcaster programming and services that more directly serve the viewing public. Further, instead of delaying the negotiating process as suggested in the *Notice*,[70] Joint Negotiations allow retransmission consent agreements to be completed on an expedited time frame by reducing the total number of agreements that must be negotiated, and thus lowering the administrative burden on broadcasters and MVPDs alike.

---

[68] *Id.* at 23 (citing William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees* (May 18, 2010) ("*2010 Rogerson Joint Control Report*"), at 12, attached as Appendix B to Comments of American Cable Association, MB Docket No. 10-71 (filed May 18, 2010).

[69] *Id.* at 24.

[70] *Notice* at ¶23.

Moreover, business arrangements among non-commonly owned stations providing for Joint Negotiations do not raise any public interest concerns with respect to the Commission's traditional "diversity" goals.[71] The negotiation of retransmission agreements involves the terms for carriage of stations' signals on MVPDs, and such negotiations (whether joint or not) do not directly implicate the diversity or the content of the viewpoints expressed on the programming contained within those signals.

In addition to the benefits of increased efficiencies and the ability to reduce operating and corporate expenses, Joint Negotiations also help level the playing field between broadcasters and MVPDs. With the unfettered rise of cable clustering, MVPDs have increased their leverage against broadcasters when negotiating for retransmission consent.[72] Broadcasters are often faced with the possibility that a failed negotiation with a particular cable company will cause the broadcaster to lose MVPD access to a large percentage of households in a given market. Because there are no restrictions on local, regional or national ownership of cable systems or caps on the number of households that can be served by a single MVPD, in many situations, a single MVPD controls a majority–and sometimes an overwhelming majority–of MVPD

---

[71] The Commission's multiple ownership rules (*see* 47 C.F.R. § 73.3555) are concerned with common ownership in the media industry that will result in a reduction in diversity, especially viewpoint diversity. However, this concern is not implicated in the context of business arrangements providing for Joint Negotiations.

[72] Clustering refers to the practice by which two MVPDs agree to "swap" cable systems in different geographic areas where the other already has a significant presence, thus concentrating their operations into specific regions where all or nearly all households receive service from the same multi-system operator ("MSO"). *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227, 20 FCC Rcd 2755 at ¶141 (rel. Feb. 4, 2005) ("Cable operators continue to pursue a regional strategy of 'clustering' their systems. Many of the largest MSOs have concentrated their operations by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. This strategy is accomplished through purchases and sales of cable systems, or by system 'swapping' among MSOs.").

households in a local market. It is with this MVPD that a broadcaster must negotiate, notwithstanding that the broadcaster must compete against an average of six stations per DMA and numerous other media outlets.[73]

Even in those situations in which a nominally "small" MVPD is involved, broadcasters still find themselves at a disadvantage due to the large local market share that the MVPD holds.[74] For a broadcaster, the failure to reach an agreement with a dominant MVPD in the marketplace will impair access to a significant portion of the viewers in the market.[75] Thus, in most markets, as a result of their substantial market shares, MVPDs have significant leverage over broadcasters

---

[73] As explained in the attached economic report, the upstream market for MVPD video programming (of which broadcast programming is a part) is far less concentrated than the downstream market for video distribution, which "remains highly concentrated" among a small number of MVPDs. *Declaration*, Attachment A at 5-7.

[74] As an example of a "small" operator that controls a large share of a local market, Gray Television, Inc. recently noted that ACA member Mediacom Communications Corporation ("Mediacom") controls systems serving approximately three-fourths of all cable subscribers in the Albany, Georgia DMA. *See* Comments of Gray Television, Inc., MB 10-71 at 3 (filed May 18, 2010). Even accounting for competition from MVPDs other than cable, the market shares of some small to middle-sized cable operators can be extremely high. CableOne, Inc. for example, serves 69% of all MVPD households in the Biloxi, Mississippi, DMA; 39% in Idaho Falls-Pocatello, Idaho and nearly 38% of the Boise, Idaho, DMA. Bright House Networks, LLC serves 50% of MVPD households in the Bakersfield, California, DMA, 59% of the Tampa, Florida, DMA, and 63% of the Orlando, Florida, DMA. Insight Communications Company, Inc. serves 53% of MVPD households in the Louisville, Kentucky, DMA. Suddenlink Communications serves 63% of MVPD households in the Victoria, Texas, DMA, 57% of the Parkersburg, West Virginia, DMA and 51% in the Alexandria, LA DMA. Mediacom controls 49% of the Cedar Rapids, Iowa, DMA, 46% in the Davenport, IA-Rock Island-Moline, IL DMA and 46% of the Des Moines, Iowa, DMA. *See MediaBiz: MediaCensus Competitive Intelligence/SNL Kagan, Video Market Share (Cable & DBS & Telco Video) by DMA—4th Quarter 2010*. (Note that "MVPD households" refers to households that subscribe to MVPD service, not homes passed.)

[75] Even in those instances in which there is not a dominant cable operator within a DMA, there are no restrictions on the ability of MVPDs to negotiate across multiple systems and/or markets or to negotiate collectively. To this end, the *Notice* seeks comment on affirmatively allowing certain MVPDs to negotiate collectively. As discussed herein, it would be arbitrary and capricious and contrary to public policy to prohibit broadcasters from joint negotiations while affirmatively permitting small MVPDs to do so.

in retransmission consent negotiations.[76] Indeed, the Commission itself stated that the competitive balance between broadcast and cable had shifted to favor cable since the 1990s.[77] The attached economic study also concludes that marketplace developments (including the increase in the availability and audience shares of non-broadcast programming, the advent of cable clustering, rising concentration in the national MVPD market, and increasing competition between broadcasters and other content providers) "have likely *reduced* broadcasters' bargaining power relative to MPVDs" in retransmission consent negotiations.[78]

As a result of this difference in negotiating leverage, broadcasters frequently have had to accept less favorable terms and conditions in retransmission consent agreements in order to avoid a negotiating impasse to the detriment of their viewers. For example, many MVPDs have agreed to carry only the high definition portion of a broadcast station's digital signal, have refused to distribute additional multicast channels, or have strictly limited the number of

---

[76] The market shares (measured in terms of subscribers) of the top four MVPDs rose from 51.5% in 2002 to 68.5% in the fourth quarter of 2010, and the market shares of the top ten MVPDs rose from 67.4% to 89.9% during that same time period. *See Declaration*, Attachment A at 6 (citing SNL Kagan data). According to SNL Kagan, the number of clustered cable systems (cable systems under the same ownership serving the same local market area or region) serving over 500,000 subscribers rose from 29 in 2005, covering 29.8 million subscribers, to 36 at the end of 2008, covering 36.7 million subscribers. Of the 50 largest system clusters reported by SNL Kagan, 17 are owned by Time Warner Cable, including two of the top 10 – Los Angeles and New York City. Comcast owned six of the top 10, 12 of the top 20, and 16 of the top 30 clusters, as of December 31, 2008. *See* SNL Kagan, *Broadband Cable Financial Databook* (2009). In contrast, "the broadcasting industry is not highly concentrated." *Declaration*, Attachment A at 8 (showing that even the top broadcast television station groups do not earn large shares of the advertising market).

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

[78] *Declaration*, Attachment A at 5 ("the balance of the evidence suggests that the industry has evolved in a manner that has likely *decreased* broadcasters' relative bargaining power").

multicast channels they will retransmit to their viewers.[79] Other MVPDs have declined to carry the primary signals of non-big four network affiliated stations, unless these stations achieve certain viewer rankings in their local markets. As a result, many stations, including CW and MNT affiliates, Hispanic-oriented stations, religious stations, and other independent stations, may be deemed "ineligible" for retransmission by certain MVPDs.[80] It is highly unlikely that broadcasters would accept such disadvantageous provisions in retransmission agreements unless MVPDs possessed sufficient market power to enable them to insist on these provisions.

The resulting disparity in negotiating power in favor of MVPDs holds particularly true in small and mid-sized markets, where large, clustered MVPDs hold significant negotiating leverage over broadcast stations, which are typically owned and controlled by smaller television station groups.[81] More than half (51.2 percent) of cable subscribers in Designated Market Areas 101+ are served by one of three large cable MVPDs (Comcast, Time Warner or Charter),[82] while only 6.5 percent of the television stations in these markets are owned by one of the top ten (by revenue) television station groups.[83] Thus, in many instances, small broadcasters outside of the

---

[79] *See* NAB Comments at 21-23. This has especially been the case if a station's multicast channel contains certain types of programming, other types of services (e.g., datacasting, ancillary or supplementary services) or if the channel broadcasts less than 24 hours a day, seven days a week.

[80] *See id.*

[81] *See* Ex Parte Letter from Robert J. Rini, Counsel to Morgan Murphy Media, Spokane Television, Inc. and Apple Valley Broadcasting, Inc. in MB Docket No. 09-182 *et al.*, (filed Sept. 30, 2010) ("Retransmission consent fees are especially important in small-to-medium-sized markets, where the small available advertising revenue is subject to growing levels of competition from MVPD systems, other non-broadcast video, web-based new media and others.").

[82] *See* Attachment C, *Cable Subscriber Data in Markets 101+*. Close to 60 percent (58.8 percent) of cable subscribers in DMAs 101+ are served by one of the five largest cable systems in the U.S. (Comcast, Time Warner, Cox, Charter and Cablevision).

[83] *See* BIA Media Access Pro.

top 100 markets must deal with large nationally and regionally consolidated MVPDs in retransmission consent negotiations. Moreover, small and mid-sized market television stations, especially ones that are not the highest-performing in their markets, are suffering financially and experiencing declining profits and, in many cases, outright losses.[84] Indeed, in 2007 the Commission found that the economic health of all local broadcasters is substantially weaker than when Congress adopted retransmission consent in 1992,[85] and that economic hardships are particularly great for independent stations, stations affiliated with minor networks, and "broadcasters in smaller markets, who generally have more restricted revenue opportunities . . . ."[86] Accordingly, local broadcasters in small and mid-sized markets are no match, in terms of negotiation leverage, with highly clustered and consolidated MVPDs.[87]

---

[84] Television stations in small to mid-size markets (DMAs 50-210) experienced a 63.7 percent decline in pre-tax profits from 1998-2008. Even economically stronger major network affiliates experienced a 52.9 percent decline in pre-tax profits. Indeed, the data show that lower performing stations in these markets consistently suffered actual losses (not just declining profits) during the 1998-2008 period. *See* Comments of the National Association of Broadcasters in MB Docket No. 09-182 at 79 (filed Jul. 12, 2010) & Attachment C.

[85] *DTV Carriage Order* at n. 192.

[86] *Id.*

[87] Obviously, in some markets, stations that are owned by a larger broadcast group may negotiate for retransmission consent with cable operators that are not among the largest in the country. However, that does not mean that the retransmission consent process is somehow automatically unfair to the cable operator in such situations. As the Commission has noted, "the dynamics of specific retransmission consent negotiations will span a considerable spectrum" because the "size and relative bargaining power of broadcasters and MVPDs range from satellite master antenna television operators and low power television broadcast stations to national cable entities and major-market, network affiliate broadcast television stations." *Good Faith Order* at ¶57. The Commission did not in the past and should not now see this marketplace fact as a basis for "intrud[ing] in the negotiation of retransmission consent," contrary to the intention of Congress. *Id.* at ¶14.

4. <u>There Is No Need for the FCC to Adopt a Rule Permitting Small MVPDs to Jointly Negotiate Because Nothing Prohibits Them from Doing So</u>

The FCC also requests comment on a proposal to permit small and mid-size MVPDs to "negotiate as a group."[88] Such a rule is unnecessary because existing FCC rules do not prohibit joint negotiations among small MVPDs. The Commission has never restricted whom a broadcaster or MVPD may designate to engage in negotiations so long as the negotiating entity has "designate[d] a representative with authority to make binding representations on retransmission consent."[89] Further, given the current state of the retransmission consent bargaining table, described above, it would be arbitrary and capricious and contrary to public policy to prohibit non-commonly owned broadcasters from Joint Negotiations but to adopt a rule to permit small non-commonly owned MVPDs to bargain as a group.

B. The Commission's Proposal Relating to Bona Fide Proposals on Key Issues Is Implicit in the Current Good Faith Standard and Cannot Be Implemented in a Manner Consistent with the FCC's Statutory Authority

The Commission asks in the *Notice* whether it should modify the good faith negotiation standard to deem it a *per se* violation if a party does not offer bona fide proposals on important issues.[90] NAB agrees with the Commission that it is critical to the retransmission consent process that parties offer good faith proposals on key issues. However, amending the good faith rules to require the submission of bona fide proposals likely will not have any impact on parties' negotiating behavior because the existing rules already require that parties negotiate in good

---

[88] *Notice* at ¶29 ("Small and mid-size MVPDs could greatly enhance their ability to negotiate with broadcasters if they were permitted to pool their resources, appoint an agent, and negotiate as a group" (quoting Comments of The Organization for the Promotion and Advancement of Small Telecommunications Companies *et al*. at 6)).

[89] 47 C.F.R. § 76.65(b)(1)(ii).

[90] *See Notice* at ¶24.

faith. Indeed, the word “bona fide” literally means “good faith” in Latin.[91] In short, the addition of the term “bona fide” to the existing good faith standard (whether as a *per se* violation or otherwise) is unlikely to have real impact on the retransmission consent negotiation process and may make the requirements more, not less, confusing for negotiating entities.

To the extent the FCC’s proposal is intended to extend beyond the existing good faith negotiation standard, NAB cautions the FCC that the current good faith standard is procedural in nature, and, consistent with its statutory mandate, the FCC cannot subjectively evaluate the terms and conditions of particular proposals. Accordingly, it is not clear how the FCC would (or could) implement a rule deeming it a per se violation if a party refuses to submit bona fide proposals on key issues. Specifically, to determine whether a party has violated the proposed rule, the Commission would need to make subjective determinations regarding the terms of a party’s proposal to consider whether the proposal relates to a “key issue.” Such consideration would require the FCC to “sit in judgment of the terms of [a proposed] retransmission consent agreement,” and thus would be directly contrary to Congress’ intent that the FCC refrain from substantive oversight of retransmission consent negotiations.[92] Indeed, the Commission has consistently recognized that it lacks authority to involve itself in the substance of retransmission consent negotiations between private parties.[93]

---

[91] *See* BLACK’S LAW DICTIONARY (9th ed. 1999) (noting that the term “bona fide” is the Latin term for “in good faith”).

[92] *Good Faith Order* at ¶23.

[93] *See supra* Sections III and IV.A.1.

C. The Commission Should Not Require Negotiating Parties to Submit to Non-Binding Mediation, Which Is Costly and Would Interject Significant Delays into the Retransmission Consent Process

In the *Notice*, the FCC seeks comments on whether it should be a *per se* violation for a negotiating entity to refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement.[94] NAB urges the Commission to reject this proposal because it contravenes Section 325 and because mandatory non-binding mediation would lead to costly delays in the retransmission consent negotiation process.

1. <u>Government Mandated Mediation Would Exceed the Commission's Authority</u>

Government-mandated mediation (whether binding or non-binding) would exceed the FCC's statutory authority because it would necessarily substitute the FCC's judgment for the broadcaster's and MVPD's judgment in agreeing on a substantive term of a retransmission consent agreement. A dispute resolution provision is one of the substantive terms in a retransmission consent agreement. When parties negotiate these agreements, the parties typically negotiate and agree on a dispute resolution provision, just as with other material terms, *e.g.,* price, advertising, or carriage of non-broadcast programming. Thus, MVPDs and broadcasters negotiate on whether to handle disputes through such processes as arbitration, mediation, or civil litigation. Furthermore, the negotiation of a dispute resolution provision that provides for non-judicial resolution often requires agreement between the parties with respect to such issues as the selection of a mediator or arbitrator, the venue or jurisdiction, the seniority of the designated company representatives, and a time frame for resolving the dispute.

---

[94] *See Notice* at ¶25.

The proposal set forth in the *Notice* would violate Section 325 of the Communications Act and congressional intent because the FCC would be substituting its judgment for that of the negotiating parties by requiring them to engage in non-binding mediation when they reach an impasse in the negotiation of a renewal or agreement, rather than relying on marketplace forces as Congress intended.[95] The FCC's intrusion into the selection or use of the mechanism for resolving disputes involving retransmission consent agreements or renewals, whether binding or non-binding, was never envisioned or authorized by Congress.[96]

2. <u>Non-Binding Mediation Would Lead to Unnecessary Delays and High Costs</u>

The proposal to deem the failure to submit to non-binding mediation a *per se* violation of the good faith standard is equally unsupportable as a policy matter. The complexity of retransmission consent negotiations makes mandatory mediation or a similar dispute resolution mechanism neither viable nor practical. The proposal for involuntary non-binding mediation implicitly assumes that retransmission consent negotiations are only about money—and that a decision-maker or third-party mediator should be able to efficiently and effectively facilitate discussion and agreement between two competing offers. This is hardly the case. In fact, as NAB has previously explained, 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;

[95] *See supra* Section III.

[96] The 1992 Cable Act created a "marketplace for the disposition of the rights to retransmit broadcast signals" and Congress intended the retransmission consent process to function without government intervention. *See Senate Report* at 36.

- fiber connectivity between the station's studio or transmitter and the MVPD's headend or local receive facility;
- channel position and tier placement;
- 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 standards;
- after-acquired system provisions;
- after-acquired station provisions;
- non-discrimination clauses;
- indemnity provisions;
- venue and jurisdiction; and
- manner of dispute resolution.

Given this multiplicity and complexity, Congress wisely mandated a retransmission consent regime that does not attempt to intervene in the substantive negotiation process among broadcast stations and MVPDs but instead maintains a fair and open process so that the marketplace can operate freely. Interfering in these multifaceted marketplace negotiations by requiring parties to submit to mediation, or to be deemed a bad faith negotiator in the absence of such submission, clearly disrupts Congress's "carefully balanced combination of laws and regulations governing carriage of television broadcast signals."[97]

Besides being impractical, mandatory non-binding mediation is costly to the negotiating parties. As described above, retransmission consent disputes involve many issues, the specifics of which are best known to the individual parties negotiating the dispute. For example, involving a third-party mediator is likely to entail a determination of the market value of the broadcast signal in question. Determining the market value of the signal may require dueling expert testimony. The "battle between dueling economists and lawyers […] will frankly, bleed

[97] *2005 FCC Retransmission Consent Report* at ¶45.

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."[98] In one example, a single arbitration proceeding cost a small cable company one million dollars in legal and economic expert expenses for one cable programming network negotiation.[99] While the cost of non-binding mediation may not approach the cost of arbitration, the cost will be substantial. Even if the process of non-binding mediation would not require the level of detailed fact gathering that is required in a binding arbitration, the sheer number of mediations that might be required for a particular broadcast station would be extremely costly and likely would strain the limited financial resources of television stations located in small to mid-sized markets.[100] Given that in today's marketplace, a number of retransmission consent agreements are not finalized until the last 30 days before the expiration date, a broadcast station could be forced to involve itself in non-binding mediation with many cable and satellite companies in each local market.

In addition to the high costs associated with mandated mediation, mediation (like arbitration) is not swift and may result in lengthy delays. By way of example, Massillon Cable TV, Inc. described how it engaged in an alternative dispute resolution with Fox which dragged on

---

[98] Comments of Free Market Operators, MB Docket No. 10-71 at 2 (filed May 18, 2010) ("FMO Comments") ("In Massillon Cable's arbitration against Fox, it spent close to one million dollars for legal services and expert testimony, and that was merely to determine the fair market value for a single premium sports channel, without regard to many of the complex market factors that would be needed to assess value in a typical retransmission consent situation. Thus, even the extraordinary amount that Massillon was compelled to expend is likely to be much less than an operator would need to commit to launch a retransmission consent arbitration with a single broadcast TV station.").

[99] *See id.*

[100] *See supra* Section IV.A.3.

for over three and a half years.[101] Consequently, mandated mediation is likely to delay rather than accelerate the resolution of a retransmission consent dispute. This unintended consequence is exactly the result the FCC should be trying to avoid because these unnecessary and excessive delays ultimately end up hurting viewers.

The FCC should defer to the parties to choose their own forum and procedures for handling retransmission consent negotiations and disputes. By automatically and rigidly presuming bad faith if a broadcaster or MVPD does not submit to mediation within 30 days of expiration of a retransmission consent agreement, the FCC would, in effect, establish non-binding mediation as the only acceptable conduct for engaging in good faith negotiations during this 30 day window. Such governmental intrusion handicaps the negotiating parties' choices and flexibility for resolving complex issues discussed as part of the negotiation process, and contravenes congressional intent to rely on "marketplace" based negotiations.[102]

D. Short-Term Retransmission Consent Agreements Are Not Commonly Used and Thus It Is Not Necessary to Amend Existing Rules to Make the Use of Such Agreements a *Per Se* Violation

In the *Notice*, the Commission asks whether it should modify its rules to state that the repeated use of month-to-month or short-term retransmission agreements of less than one year constitutes a *per se* violation of the rules.[103] In asking for comments, the FCC clarifies that it is not requesting comments on short-term extensions of existing agreements that enable MVPDs and broadcasters to continue their negotiations of long-term retransmission agreements to avoid

[101] *See* FMO Comments at 2.

[102] We further note that *mandating* mediation (even non-binding) may be in tension with the terms of the ADRA. *See supra* Section III.B.

[103] *See Notice* at ¶28.

disruption of service to consumers.[104] Such short-term extensions, whether month-to-month or otherwise, are in the public interest because they are intended to avoid disruption of service while the MVPD and broadcaster continue their good faith negotiations of a long-term retransmission consent agreement. Furthermore, such short-term extensions, which are relatively common, often provide a useful "cooling" off period to enable the parties to resume or continue constructive negotiations without the pressures of an impending deadline. Accordingly, such agreements are appropriately not within the intended scope of the FCC's inquiry.

With respect to the FCC's request for comments on short-term retransmission consent agreements of less than one year, including month-to-month agreements, NAB again notes that FCC intrusion into such details of negotiations is contrary to congressional intent.[105] In any event, in NAB's experience, broadcasters typically negotiate agreements that span one or more carriage election cycles, rather than relying on month-to-month negotiations. Long-term agreements provide certainty not only to broadcasters and MVPDs, but also to consumers receiving programming as a result of such retransmission consent agreements. The use of short-term or month-to-month retransmission agreements is simply not common practice among broadcasters. Instead, as noted above, a broadcaster generally utilizes a short-term agreement only in circumstances where a short-term extension is needed and the parties are actively negotiating long-term retransmission consent agreement. As the Commission observes in the *Notice*, this practice is consistent with the public interest because short-term extensions to existing agreements mitigate the possibility of programming losses during the negotiation

[104] *See Notice* at n. 89.

[105] Similarly, the Commission should refrain from involving itself with the question of "most favored nation" clauses in retransmission agreements. *See Notice* at ¶ 28.

process.[106] Because the use of short-term agreements is not widespread, there is no need to modify the FCC's existing good faith rules as proposed in the *Notice* to take short-term agreements into account.

V. PLACING REGULATORY CONSTRAINTS ON THE FEES, TERMS AND CONDITIONS OF RETRANSMISSION CONSENT AGREEMENTS IS CONTRARY TO LAW AND PUBLIC POLICY

In addition to proposing certain *per se* violations of the good faith rules, the *Notice* also seeks comment on a number of issues relating to the terms and conditions of retransmission consent agreements.[107] As an initial matter and as described throughout these Comments, the Commission lacks statutory authority to adopt rules that would impact the substance of retransmission consent negotiations, including rules that would consider variances in retransmission consent fees as part of the good faith standard or otherwise impact broadcasters' ability to negotiate for various forms of non-monetary compensation in exchange for carriage. Moreover, such rules are not necessary in light of the economic efficiencies achieved by the current retransmission consent regime, which has proven to be an effective system for small and large MVPDs to negotiate the market-based terms and conditions of their retransmission and resale of broadcasters' signals to their subscribers.

A. Retransmission Consent Fees and Disputes Do Not Drive the Rates Consumers Pay for MVPD Services

In the *Notice*, the Commission asks whether there is an impact on the basic service rate that consumers pay as a result of retransmission consent fees or disputes.[108] As NAB has previously explained in this and other proceedings, retransmission consent fees do not drive the

---

[106] *See Notice* at n. 89.

[107] *Notice* at ¶29.

[108] *Id.* at ¶17.

rates subscribers pay for MVPD service.[109] Accordingly, even if the Commission had the authority to regulate retransmission consent fees or disputes, such action would not guarantee that subscriber MVPD retail rates would decline. Instead, only regulation of MVPD retail rates would ensure a reduction in subscriber rates.

NAB has demonstrated repeatedly that there is no substantive data showing that retransmission consent fees are leading to higher cable rates.[110] As an initial matter, it is undisputed that for years cable operators consistently refused to pay cash for retransmission consent of local broadcast signals.[111] Nevertheless, the average monthly rate subscribers were charged for the combined basic and expanded-basic tiers of service rose from $26.06 in 1997 to $36.47 in 2002—a 40 percent increase over the five years. This rate of increase was much greater than the general rate of inflation, as measured by the Consumer Price Index ("CPI"), which rose 12 percent over the same period.[112] Retransmission consent fees that cable operators did not pay certainly could not have caused the increases in cable subscription rates that subscribers experienced.

Even today, when some broadcasters have succeeded in negotiating monetary compensation for retransmission consent, the compensation paid by MVPDs is miniscule in

---

[109] *See* NAB Comments at 17; NAB Reply Comments at 26-27; Opposition of the Broadcaster Associations at 33-39; Reply Comments of the Broadcaster Associations at 10-13, 30.

[110] *See, e.g.*, NAB Comments at 17 (citing a 2003 Government Accountability Office ("GAO") study which did not attribute higher cable rates to retransmission consent fees); GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 28-29; 43-44 (Oct. 2003) ("GAO, *Issues*"); Opposition of the Broadcaster Associations at 47.

[111] *See* NAB Reply Comments at 26 citing *2005 FCC Retransmission Consent Report* at ¶10. *See also The Economics of Retransmission* at 3 ("The now standardized practice of MSOs paying TV stations for carriage . . ." was "a rational, needed, fundamental change to the economic relationships in the industry to bring broadcast networks more on par with cable networks, especially given the much higher viewing levels of broadcast networks.").

[112] *See* GAO, *Issues* at 20.

comparison with recent cable rate increases.[113] Certainly the mere "fact that retransmission consent fees have increased from an initial level of zero" does not mean that they are now somehow "too high" from the perspective of economic efficiency, or in any way the cause of the rising rates paid by consumers for MVPD services.[114] Even some cable executives appear to have acknowledged that retransmission consent fees do not affect the cable industry's overall cost structure.[115]

Further, the price paid by MVPDs for retransmission consent fees is modest when compared to the other programming-related expenses of MVPDs. Indeed, information on fees paid by MVPDs for non-broadcast channels shows that broadcasters' compensation is significantly less than "that paid to other programmers of equal or lower, ratings."[116] For example, in 2009, an MVPD paid an average of $2.08 per subscriber per month to retransmit one of the Top 4 most expensive cable networks and $1.49 per subscriber per month to retransmit one of the Top 4 most heavily viewed cable networks, while each of the "Big 4" broadcast network affiliates only received an average of approximately $0.14 per subscriber per month in

---

[113] *See* NAB Reply Comments at 26-27, citing Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming* at 42, attached as Ex. A to Walt Disney Co. Comments, MB Docket Nos. 07-29, 07-198 (filed Jan. 4, 2008).

[114] *Declaration*, Attachment A at 1-2. As Dr. Eisenach explains, "[g]iven that retransmission consent fees were previously capped at zero, it is unsurprising that broadcasters have eventually succeeded in negotiating compensation" for their signals in the years since 1992. "Indeed, from an economic perspective, it would have been virtually inconceivable for retransmission fees to have remained at zero indefinitely" unless "broadcasters' signals were truly devoid of any real economic value." *Id*. at 1.

[115] *See* Mike Farrell, *Rutledge: Cablevision Can Manage Retransmission Consent*, MULTICHANNEL NEWS (Nov. 3, 2009) (quoting Cablevision COO Tom Rutledge that the programming cost structure of the cable business is "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.").

[116] Opposition of the Broadcaster Associations at 33-34 (quoting *Mediacom/Sinclair Order* at ¶18).

retransmission consent fees in 2009.[117] Therefore, MVPDs paid almost *fifteen times* more in fees for carriage of the Top 4 most expensive cable networks and approximately *ten times* more for carriage of the Top 4 most heavily viewed cable networks than they paid in retransmission consent fees for carriage of the Big 4 broadcast network affiliates.[118] Further, Big 4 network affiliates receive much greater viewership than even the most heavily viewed cable networks. For example, in 2009 the Top 4 most heavily viewed cable networks produced aggregate prime time ratings of 8.743 compared to aggregate prime time ratings of 20.738 for the Big 4 broadcast networks.[119] Clearly, retransmission consent fees represent remarkable programming value for MVPDs – a fact explicitly recognized by independent analysts as well.[120]

As further evidence that retransmission consent fees are not driving higher cable rates, NAB has demonstrated previously that programming expenses, of which retransmission consent fees account for only a small fraction, are rising more slowly than other sectors of the cable industry's overall economic structure.[121] For example, between 2003 and 2008, with respect to six large publicly-traded MVPDs:

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

[117] *See* Opposition of the Broadcaster Associations at 34-35, 37-38 (citing SNL Kagan, *Economics of Basic Cable Networks 2009* and SNL Kagan, *Nielsen November 2009 Prime-Time Live Coverage*).

[118] *See* Opposition of the Broadcaster Associations at 34-38.

[119] *See id.*

[120] *See The Economics of Retransmission* at 3, 8 (noting disparity between carriage fees of broadcast networks compared to cable networks, "especially given the much higher viewing levels of broadcast networks").

[121] *See* Opposition of the Broadcaster Associations at 34-35.

- the share of cost of revenue, plus selling, general, and administrative costs 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%.[122]

As NAB has shown in detail, one of the primary reasons that retransmission consent fees do not drive consumer MVPD rates is that "retransmission fees make up a small fraction of programming costs, and an even smaller percentage of MVPD revenues."[123] For example, in 2008, the average MVPD programming expenses were approximately $26 per subscriber per month, and the average MVPD revenues were almost $100 per subscriber per month.[124] In contrast, MVPDs paid retransmission consent fees totaling only $0.70 per subscriber per month in 2009.[125] Therefore, retransmission consent fees comprised just 2.7% of the programming expenses of MVPDs and approximately 0.71% of the revenues of MVPDs.[126] Further, retransmission consent fees are not expected to drive cable subscriber rates in the future. A

---

[122] *See* Opposition of the Broadcaster Associations at 47 (citing *Navigant Report* at 22, attached as Appendix A); s*ee also* Jeffrey A. Eisenach, *Video Programming Costs and Cable TV Prices*, at 5-15, filed by The Walt Disney Company, MB Docket Nos. 10-71 *et al*., (filed Apr. 23, 2010) (reaching similar conclusion).

[123] *See* Opposition of the Broadcaster Associations at 47 (citing *Navigant Report* at 21).

[124] *See id.* at 48 (citing *Navigant Report* at 22).

[125] *See id.*

[126] *See id.*

March 2009 study estimated that cable revenues per subscriber are predicted to rise *45 times* more than retransmission consent fees between 2006 and 2015.[127]

More recent analysis only reconfirms these earlier findings, and demonstrates again that programming costs generally – and retransmission consent fees specifically – are not responsible for rising MVPD prices. Empirical evidence continues to show that programming costs are decreasing relative to the costs, revenues and profits of MVPDs, while retransmission consent fees make up a small fraction of MVPD programming costs, and an even smaller percentage of MVPD revenues.[128] Specifically, between 2005 and 2010, the revenues of the publicly traded cable multiple system operators ("MSOs") analyzed increased by $53.06 per subscriber per month, from $80.95 to $134.01, while programming expenses increased by just $10.03 per subscriber per month (from $18.21 to $28.24). In comparison, the average retransmission fee per cable subscriber per month increased from *zero* in 2005 to $0.86 in 2010. Thus, in 2010, retransmission consent fees, at $0.86 per subscriber per month, were approximately *six tenths of one percent of cable MSO revenues*.[129]

Given this evidence, the Commission must reject unmeritorious MVPD claims that retransmission fees are somehow "too high" or are responsible for any meaningful portion of MVPDs' rapidly increasing subscription fees.[130] Simply put, the "empirical evidence does not support the proposition that programming costs in general, or retransmission fees in particular,

---

[127] *See id.*, citing *Eisenach Report* at 33.

[128] *See Declaration*, Attachment A at 2.

[129] *Id.* at 22.

[130] *See id.* at 1-2. *See also 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 at ¶28 (MB 2009) (noting that the weighted average price of cable service grew four times faster than the increase in prices for other goods and services as measured by the CPI between 1995 and 2008).

have played or will play a significant role in increasing the prices that MVPDs charge to consumers."[131] Consequently, even if the Commission had authority to dictate the amount of retransmission consent fees, which it does not,[132] regulation of such fees would not guarantee any change in cable subscriber prices. Indeed, past GAO reports have linked higher cable rates to a lack of competition in the MVPD marketplace, rather than retransmission consent fees.[133] Therefore, if the Commission's goal is to reduce subscriber prices, the Commission should identify ways to promote competition among MVPDs or regulate the rates MVPDs charge consumers.[134]

B. Congress Did Not Intend for the Commission to Consider Market-Driven Variances in Retransmission Consent Fees Paid by MVPDs Operating in the Same Markets

In the *Notice*, the Commission seeks comment on whether it should clarify or expand the totality of the circumstances standard to include consideration of variances in retransmission consent fees paid by MVPDs in the same market.[135] NAB opposes such a clarification or expansion of the totality of the circumstances standard because the consideration of variances in retransmission consent fees as part of the good faith standard clearly contravenes congressional

---

[131] *Declaration*, Attachment A at 2.

[132] *See Good Faith Order* at 5450 ("Congress did not intend that the Commission should intrude in the negotiation of retransmission consent."). *See also Consumer Protection Order* at 3006 (finding that Congress did not intend for the Commission to be involved in direct regulation of retransmission consent negotiations).

[133] *See* GAO, *Issues* 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); 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).

[134] *See* Reply Comments of the Broadcaster Associations at 30 for an expanded discussion of the merits of regulating the rates MVPDs charge their customers to protect customers from escalating MVPD subscription rates.

[135] *Notice* at ¶¶31-33.

intent and Commission precedent. As explained below, both Congress and the Commission have determined previously that different retransmission consent fees are permissible in, and reflective of, a competitive marketplace.

As an initial matter, when creating the retransmission consent regime, Congress intended to establish a "marketplace" for broadcasters and MVPDs to negotiate varying fees, terms, and conditions of retransmission consent.[136] Accordingly, the plain language of Section 325(b)(3)(C) expressly allows broadcast stations to enter into retransmission agreements "containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."[137] Therefore, it is appropriate to rely on marketplace forces to determine the rates, terms and conditions offered, and ultimately agreed upon, by negotiating parties.

The Commission has recognized that one of the most significant marketplace forces driving retransmission consent fees is the popularity of the programming being offered by broadcasters. Specifically, the Commission has held 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."[138] In addition, because the popularity of programming is not the sole force driving retransmission consent fees, the FCC also has concluded that a broadcaster proposal "for

[136] *Senate Report* at 36.

[137] 47 U.S.C. § 325(b)(3)(C).

[138] *Mediacom/Sinclair Order* at ¶18. *See also The Economics of Retransmission* at 3 (noting that "practice of MSOs paying TV stations for carriage" was a "rational, needed" change to "bring broadcast networks more on par with cable networks, especially given the much higher viewing levels of broadcast networks").

compensation above that agreed to with other MVPDs in the same market" is "presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirements."[139]

In short, the clear language of Section 325(b), the legislative history of the statute and Commission precedent make clear that broadcasters may negotiate disparate retransmission consent fees based on marketplace forces. Accordingly, it would be inappropriate for the Commission to consider varying retransmission consent fees paid by MVPDs and other competitive marketplace factors as part of the totality of circumstances test or otherwise in connection with the good faith negotiation standard.

C. The Retransmission Consent Fees Paid by Small MVPDs Are Not Materially Higher than the Fees Paid by Larger MVPDs and Represent Great Value for Small MVPDs

The Commission also asks in the *Notice* whether smaller MVPDs get less favorable retransmission fees, terms and conditions, and, if so, whether this is fair.[140] NAB has previously pointed out that no evidence, data, or proof of any type has been submitted to support an assertion that smaller MVPDs get less favorable retransmission fees, terms, and conditions.[141] The cable industry's claims of such variances in retransmission consent fees for smaller MVPDs appear to be mere conjecture. For example, in a report submitted last year by the American Cable Association ("ACA") to the Commission, the ACA's economist was only able to state that he "believe[s]," "it appears," and "anecdotal evidence" supports the view that smaller MVPDs

[139] *Good Faith Order* at ¶56. For example, retransmission consent fees, terms and conditions also are based on economies of scale. *See infra* Section V.C.

[140] *Notice* at ¶31.

[141] Reply Comments of the Broadcaster Associations at 14-17.

pay more in retransmission consent rates.[142] Such a rationale, based primarily on speculation, does not provide the Commission with sufficient evidence on which to base a decision.[143]

In any event, even assuming for the sake of argument that ACA is correct that smaller MVPDs pay more in retransmission consent fees, retransmission consent fees, terms and conditions are based on economies of scale. Economies and efficiencies of scale and volume discounts are trademarks of a competitive marketplace, a phenomenon familiar to and accepted by any consumer who shops at Costco and Sam's Club. The Commission has found previously that economies of scale are present and permissible in the context of retransmission consent fees. Specifically, the Commission declined to restrict the ability of broadcasters to engage in disparate pricing of broadcast retransmission consent fees between large and small video programming distributors.[144] The FCC determined that higher programming rates "alone do not allow the Commission to step in with a new scheme of regulation."[145] Rather, the Commission stated that such differentiating fees are "consistent with the common practice of vendors offering discounts for bulk purchasers."[146]

---

[142] *2010 Rogerson Price Discrimination Report* at 12, 12, 13 (respectively). Specifically, the *Rogerson Price Discrimination Report* suggests that smaller MVPDs pay retransmission consent fees of $0.30 per subscriber per month to each of the Big 4 affiliated stations. *Id.*

[143] *See* Reply Comments of the Broadcaster Associations at 14-15 (citing *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 763-64 (6th Cir. 1995) (rules restricting cellular providers from participating in certain spectrum auctions found arbitrary because the FCC had no factual or documentary support for them); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1231 (D.C. Cir. 1980) (Commission order does not qualify as reasoned decision-making where it does not examine the actual evidence in the record and analyze that evidence on its merits)).

[144] *See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd 16802 at ¶¶155, 157 (1997).

[145] *Id.* at ¶157.

[146] *Id.*

The anecdotal evidence provided by ACA demonstrates that retransmission consent fees for smaller MVPDs (which, in any event, indicates only minimal differences) likely are based on economies of scale. For example, as discussed above, NAB previously estimated that, in 2009, the average retransmission consent fees paid by both small and large MVPDs amounted to $0.14 per subscriber per month for each Big 4 affiliated station.[147] On the other hand, the ACA's economist has estimated that larger MVPDs paid average retransmission consent fees in the amount of $0.19 per subscriber per month for each Big 4 station and smaller MVPDs paid an average of $0.30 per subscriber per month for each Big 4 station.[148] Even assuming the accuracy of these figures, a difference of $0.11 per subscriber per month for each Big 4 station amounts to a reflection of economies of scale and not price discrimination. In sum, even if price differentials exist in retransmission consent fees among smaller and larger MVPDs (a claim not supported by the record and which NAB contests), there is nothing illegal or questionable about the result. Accordingly, consistent with Commission precedent and legislative intent, differences in retransmission consent fees paid by smaller and larger MVPDs should not be considered under the good faith negotiation standard, whether as part of the totality of circumstances test or otherwise.

D. Congress Specifically Intended to Permit Broadcasters to Negotiate for Various Forms of Compensation in Exchange for Carriage of their Signals and the Commission Should Not Adopt Rules that Contravene this Legislative Directive

The *Notice* asks whether the Commission should consider whether broadcasters condition retransmission consent on the purchase of other programming services, such as the programming of affiliated non-broadcast networks, when evaluating whether broadcasters have negotiated in

---

[147] *See* Opposition of the Broadcaster Associations at 37-38.

[148] *2010 Rogerson Price Discrimination Report* at 12, 13 (respectively).

good faith.[149] For the reasons NAB has articulated in this and other proceedings, both law and public policy dictate that broadcasters' decision to negotiate for non-cash compensation in exchange for retransmission consent should not be considered by the Commission as part of the good faith negotiation standard.[150]

As has been well-documented herein, Congress established retransmission consent in 1992 to create a marketplace in which broadcasters could negotiate for consideration from MVPDs for the right to retransmit and resell to their subscribers popular broadcast signals. In establishing retransmission consent, Congress created a "marketplace for the disposition of the rights to retransmit broadcast signals," and stressed that it did not intend "to dictate the outcome" of the "marketplace negotiations" between broadcasters and MVPDs.[151] Indeed, the legislative history of Section 325 shows that Congress clearly envisioned that broadcasters would be permitted to negotiate for various forms of compensation, including the right to negotiate for MVPD carriage of one or more additional commonly owned stations or non-broadcast program services.[152] Congress clearly anticipated that some broadcasters would seek "the right to program an additional channel on a cable system" as a form of compensation for MVPDs' retransmission and resale of local stations' signals.[153] In light of such an unambiguous expression of congressional intent, the Commission has properly concluded that seeking carriage

---

[149] *See Notice* at ¶29.

[150] *See*, *e.g*., NAB Comments at 2-3, 13, 30; NAB Reply Comments at 5-7; Opposition of the Broadcaster Associations at 54-56, 78-80; Reply Comments of the Broadcaster Associations at 22-23.

[151] *Senate Report* at 36 (finding "the right to program an additional channel on a cable system" an appropriate form of consideration).

[152] *Id.*

[153] *Id.*

of an additional channel or program service is "presumptively consistent" with broadcasters' obligation to negotiate retransmission consent in good faith.[154]

Congress's decision to refrain from prohibiting broadcasters from negotiating for carriage of additional programming, coupled with its explicit endorsement of such negotiations, confirms that the Commission lacks authority to deem it a violation of the good faith standard for a broadcaster to negotiate for carriage of non-broadcast programming in retransmission consent discussions. Indeed, unless Congress amends Section 325, it would be directly at odds with congressional intent to modify the good faith standard to consider whether broadcasters offer MVPDs the opportunity to carry additional programming in exchange for retransmission consent rights.[155] 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."[156] "[E]mploying traditional tools of statutory construction,"[157] 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.[158] The Commission accordingly must "give effect" to this plain expression of

---

[154] *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 2598 at ¶35 (2001); *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").

[155] *See Senate Report* at 36 (expressly identifying "the right to program an additional channel on a cable system" an appropriate form of consideration).

[156] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842-43 (1984).

[157] *Id.* at 843 n.9.

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

congressional intent by continuing to permit broadcasters to negotiate for a variety of types of compensation in retransmission consent negotiations, including the right to program an additional channel.[159]

Broadcasters often offer a menu of "consideration" options in retransmission consent negotiations, including cash payment, MVPD promotion of the station, the purchase of additional advertising by the MVPD, payment by the MVPD for video on demand rights, carriage of other commonly owned stations, carriage of other cable programs services, and/or carriage of digital multicast streams. In fact, MVPDs historically have encouraged and favored such non-cash forms of consideration in retransmission consent negotiations. Consistent with existing Commission rules, broadcasters do not engage, nor to our knowledge have ever engaged, in "take it or leave it" bargaining tactics by insisting upon the carriage of affiliated non-broadcast programming. Indeed, the Commission's rules already state clearly that such bargaining tactics are a *per se* violation of the FCC's good faith negotiations requirement.[160] And, the Commission has never found a single example of a "take it or leave it" retransmission proposal by a broadcast station that unconditionally required carriage of additional programming.

Importantly, the opportunity to "mix and match" benefits of carriage provides additional incentives for broadcasters to reach agreement with MVPDs, while increasing the diversity of content available to the viewing public. Some broadcasters have used retransmission consent to

---

[159] *Chevron*, 467 U.S. at 842. Moreover, the statute's failure to "expressly foreclose" the agency from prohibiting broadcasters from negotiating for the right to program an additional channel on a cable system 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 Execs.' 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)).

[160] *See* 47 C.F.R. § 76.65(b)(1)(iv).

obtain carriage of affiliated regional cable news networks.[161] Group owners of broadcast stations also created new programming channels, such as Home and Garden (HGTV), Lifetime and the A&E Television Networks (including A&E and the History and Biography channels). Other broadcasters have used the retransmission consent process to secure MVPD carriage of co-owned Spanish-language formatted stations such as Univision, Telemundo Group, Inc., and Azteca America stations.[162] If the Commission were to interfere with retransmission consent negotiations by making it a potential violation of the good faith standard to negotiate for carriage of affiliated programming in exchange for retransmission consent, one of the outcomes likely would be a decline in the diversity of programming available to the viewing public. In short, both law and policy dictate that the Commission should not take into consideration carriage of affiliated programming, including non-broadcast networks, when evaluating whether broadcasters have negotiated in good faith.

VI. ELIMINATION OF THE NETWORK NON-DUPLICATION AND SYNDICATED EXCLUSIVITY RULES WILL NOT IMPROVE THE RETRANSMISSION CONSENT PROCESS BUT WILL HARM LOCALISM

In the *Notice*, the FCC seeks comment regarding whether it should eliminate its network non-duplication and syndicated program exclusivity rules.[163] NAB urges the Commission to retain the network non-duplication and syndicated program exclusivity rules, as these rules are an integral part of the retransmission consent regime and have long been recognized by Congress and the Commission as promoting our locally based system of television broadcasting. Both rules help ensure that broadcasters can negotiate for exclusivity with respect to distribution rights within their markets for their programming. In fact, Congress recognized the importance of the

[161] *See supra* Section I.

[162] *See* NAB Comments at 28.

[163] *See* Notice at ¶42.

network non-duplication and syndicated program exclusivity rules when establishing retransmission consent in the 1992 Cable Act. The history of this regulatory regime confirms that it has successfully advanced localism and respected the private contractual rights of broadcasters and program suppliers. As a result, the network non-duplication and syndicated program exclusivity rules have worked in combination with the retransmission consent regime to effectively promote the broad distribution of diverse programming to the public, and thus are critical to the successful operation of the video programming marketplace.

A. The History of the Network Non-Duplication and Syndicated Exclusivity Rules Demonstrates that These Rules Are Necessary to Promote Localism and for the Effective Operation of the Video Programming and Retransmission Consent Marketplace

NAB has previously set forth the history of the network non-duplication and syndicated exclusivity rules in detail, and we again submit that history herein.[164] As we discussed before, the history of these rules demonstrate that their purpose and structure are to promote 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 program exclusivity rules are also “part” of the “mosaic” of “regulatory and statutory provisions,” including must carry and retransmission consent, designed to implement these “key policy goals.”[165]

Indeed, since adoption of the retransmission consent requirements in 1992, the Commission and Congress have consistently and continually recognized the importance of the interplay of the syndicated exclusivity, network non-duplication and retransmission consent rules

[164] *See* Attachment D, *A Short History Of The Program Exclusivity Rules* (previously submitted as Appendix B to Opposition of the Broadcaster Associations).

[165] *2005 FCC Retransmission Consent Report* at ¶33 (explaining how all these rules and policies promote localism and also the continued viability of free, over-the-air television).

to eliminate the “artificial handicaps exacerbated by disparate regulatory treatment.”[166] When Congress adopted the retransmission consent regime in the 1992 Cable Act, it expressly “relied on the protections which are afforded local stations by the FCC’s network non-duplication and syndicated exclusivity rules.”[167] To this end, Congress stated that “[a]mendments or deletions of [the network non-duplication and syndicated exclusivity rules] in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee’s view, be inconsistent with the regulatory structure created in [the 1992 Cable Act].”[168]

Similarly, adopting regulations to implement the *Satellite Home Viewer Improvement Act of 1999,* the Commission remained “cognizant also of the important protection that the exclusivity rules provide to broadcasters and copyright holders.”[169] Thus, the Commission structured program exclusivity rules for direct broadcast satellite operations to be as parallel as possible to the analogous rules for cable television. In late 2005, the Commission again acknowledged the importance of such rules to implementing the retransmission consent requirements effectively.[170] Most recently, with the enactment of the *Satellite Television Extension and Localism Act of 2010*, the FCC extended the exclusivity protection against

---

[166] *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 2 FCC Rcd 2393 at ¶12 (1988) (“*Program Exclusivity Order*”).

[167] *Senate Report* at 38.

[168] *Id.*

[169] *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 at ¶5 (2000).

[170] Specifically, the FCC stated that the “legislative history of the 1992 [Cable] Act indicates that the network non-duplication and syndicated exclusivity rules were viewed as integral to achieving congressional objectives.” *2005 FCC Retransmission Consent Report* at ¶50.

duplicating distant network signals afforded by the "unserved" household limitation to all network-affiliated multicast and primary digital channels of local stations.[171]

In short, when Congress and the FCC established the modern retransmission consent regime and adopted rules governing the operation of the marketplace for video programming distribution, they relied on the exclusivity protections afforded to local broadcast stations by the FCC's non-duplication and syndex rules. Congress and the FCC viewed these rules as crucial mechanisms to balance the then-uneven competitive playing field between broadcasters and MVPDs in the video programming marketplace so that television stations could exercise their private contractual rights to the fullest extent possible and to facilitate the effective operation of the retransmission consent system.

B. Eliminating the Network Non-Duplication and Syndicated Exclusivity Rules Would Hurt Localism

In the *Notice*, the FCC seeks comment on whether eliminating the non-duplication and syndex rules would negatively impact localism.[172] The answer is unequivocally yes. As explained above, the network non-duplication, syndex and retransmission consent rules are a package of requirements that are intended to work in tandem to ultimately benefit consumers. Together, the retransmission consent, syndex, and network non-duplication rules support local broadcasters' investments in high-quality, diverse programming. Television stations must invest significant resources in producing local news and providing other information and critical services. Revenues from advertising support stations' local programming, including news, and their ability to serve their communities. Local affiliates always have negotiated with networks

---

[171] *See Satellite Television Extension and Localism Act of 2010*, Pub. L. No. 111-175 § 102 (codified at 47 U.S.C. §119(d)(10)).

[172] *See Notice* at ¶44.

and syndicated programming sources for exclusive programming within their markets. Advertisers on local broadcast stations expect and, indeed pay for, this exclusivity.

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.[173] 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 offered by MVPDs such as cable and satellite.[174] In fact, Congress has observed that amendments to or deletions of the program exclusivity rules in a manner that would usurp localism would be "inconsistent with the regulatory structure" crafted by the 1992 Cable Act.[175]

[173] *See, e.g., 2005 FCC Retransmission Consent Report* at ¶50; *Consumer Protection Order* at ¶114; *Senate Report* at 38.

[174] The non-duplication and syndicated exclusivity rules themselves do not mandate program exclusivity. In fact, the rules actually restrict program exclusivity by (1) limiting the geographic area in which television stations may enter into exclusive programming agreements with network and syndicated program suppliers; (2) providing a forum for adjudication of program exclusivity disputes; and (3) imposing certain formal notice requirements on local television stations as a condition to enforcement. The actual terms and conditions for network non-duplication and syndicated program exclusivity are a matter of negotiated private contractual agreement between the 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. These rules provide broadcasters with an important and convenient forum and mechanism for enforcing their privately negotiated program exclusivity rights. The continued retention of such requirements has no adverse impact on MVPDs, while providing substantial benefits to consumers.

[175] *Senate Report* at 38; s*ee also Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), ¶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").

C. Repeal of the Non-Duplication and Syndicated Exclusivity Rules Would Result In an Unfair Competitive Advantage to MVPDs

In the *Notice,* the FCC asks whether the exclusivity rules confer an "advantage" on broadcast stations or whether the rules provide broadcasters with a "one-sided level of protection."[176] This is the very same inquiry that the FCC asked and answered when it decided to reinstate the syndex rule in 1988.[177] Indeed, this inquiry appears to ignore the unfair competitive "advantage" that MVPDs would otherwise have in continuing to exercise their own discretion to freely enter into and enforce exclusive programming contracts (a notable example being the NFL Sunday Ticket, an exclusive sports package, offered only on DIRECTV) while depriving broadcasters of similar rights. In any event, the simple answer to the FCC's question, is no. The rules attempt to help restore equilibrium in the marketplace to ensure the continued supply of high quality local and other television programming. As explained above, without the program exclusivity and retransmission consent rules, television broadcasters will be unable to secure and enforce their privately negotiated programming contracts, which are critical to continuation of this country's locally-based free television system.

Repeal of the program exclusivity rules, moreover, would confer an unfair advantage on MVPDs in retransmission consent negotiations. Specifically, if retransmission consent negotiations between a local television station and a MVPD become contentious or reach an impasse, the MVPD could end round its negotiations with the local station by entering into a retransmission consent agreement to import a distant signal of an out-of-market television station. Without the ability to efficiently enforce local broadcast stations' syndex and network non-duplication rights through FCC processes, MVPDs could import duplicative syndicated

[176] *Notice* at ¶43.

[177] *See A Short History Of The Program Exclusivity Rules,* Attachment D, at 3-6.

programming and network programming from an out-of-market station and retransmit such programming into the local station's viewing market. Such a result would completely distort and skew the operation of the marketplace and the relative bargaining rights of the local television station and MVPD. Indeed, the retransmission consent regime "should not be used to engage distant entities and require protracted good faith negotiation for signals that have no logical or local relation to the MVPD's service area."[178]

The so-called "advantage" that MVPDs assert the FCC's exclusivity rules give to broadcasters is not an advantage, but merely the ability to enforce a privately negotiated property right and realize a corresponding improvement in the balance of bargaining power in an otherwise distorted market.[179] In light of these policy rationales for supporting the programming exclusivity rules, and their integral role in promoting competition and the proper functioning of the retransmission consent marketplace, it is no surprise that, in 2005, the Commission expressly rejected various MVPDs' proposals to allow MVPDs to abrogate and bypass the local program

---

[178] *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339 at ¶32 (2005).

[179] NAB further notes that economic theory demonstrates that program exclusivity contracts – which have the effect of assigning exclusive territories to downstream distributors (broadcasters) of network and syndicated programming – are presumptively efficient because they allow downstream distributors to obtain the economic benefits associated with promotional activities undertaken on behalf of the upstream producer and limit or prevent free riding. *See*, *e.g.*, Roger D. Blair and David L. Kaserman, *Antitrust Economics* at 370 (Irwin, 1985). In the broadcasting market, where local broadcasters make both product- and geographic-specific investments that benefit content owners (e.g., local advertising that features a network's logo or investments in local news programming that generate a larger carry-over audience for network programming), the efficiencies resulting from exclusive territories are clear.

exclusivity rights of stations if they could not reach agreement on retransmission consent with local stations.[180]

In sum, the Commission has long recognized the important public policy objectives served by the program exclusivity rules, in both the cable and DBS contexts. Significantly, these rules do not mandate exclusivity or even provide program exclusivity to broadcasters—the rules only enable broadcasters to preserve the private contractual arrangements they make to secure programming that serves the needs and interests of local audiences and communities. The rules are critical to broadcasters' ongoing ability to provide local and other programming using their free, over-the-air distribution platforms. Additionally, the rules are necessary for broadcasters to serve and enforce program exclusivity rights in the same manner as their competitors, namely, the MVPDs against which they compete for programming and viewers.

VII. IT IS UNNECESSARY TO PROVIDE SPECIAL CONSIDERATION TO GOOD FAITH VIOLATIONS DURING THE LICENSE RENEWAL PROCESS AND TO DO SO WOULD BE INEQUITABLE AND CONTRARY TO THE PUBLIC INTEREST

In the *Notice*, the Commission asks whether there are actions it could take to strengthen penalties for violations of its good faith negotiation rules.[181] NAB believes that the FCC should continue to use its existing procedures to enforce the good faith rules, rather than to attach specific remedies to particular conduct, such as providing special consideration of good faith violations in the context of the license renewal process. As explained herein, the retransmission consent process is working, and it is extremely rare for retransmission consent negotiations to

---

[180] *2005 FCC Retransmission Consent Report* at ¶¶50-51 ("To the extent that cable operators are asking the Commission to modify the network nonduplication and syndicated exclusivity rules such that they would supersede contract arrangements between broadcasters and their programming suppliers that are permitted by the rules, we cannot endorse or recommend such modifications. The legislative history of the 1992 Act indicates that the network nonduplication and syndicated exclusivity rules were viewed as integral to achieving congressional objectives.").

[181] *Notice* at ¶30.

result in any interruptions in MVPD distribution of broadcast signals. Since broadcasters were granted retransmission consent rights by statute, tens of thousands of retransmission consent agreements have been successfully negotiated. No broadcaster has ever been found by the Commission to have breached its obligation to negotiate in good faith with MVPDs and, as the FCC acknowledges in the *Notice*, there have been very few complaints alleging violations of the good faith rules.[182] In short, because broadcasters already are operating in compliance with the good faith rules, it is not necessary to modify the FCC's existing enforcement procedures as a means to provide an "incentive for compliance with the good faith standard."[183] The FCC's existing retransmission consent requirements, including its remedies for non-compliance, are adequate to ensure broadcaster ongoing conformance to such rules. Indeed, the importance of reaching agreement with MVPDs that serve very high percentages of broadcasters' viewers effectively ensures that local stations diligently negotiate to conclude retransmission agreements with MVPDs in a timely manner.

Importantly, the FCC's proposal to consider good faith violations in connection with the license renewal process would be difficult to apply in a fair and equitable manner, given that the various players involved in retransmission consent negotiations hold different types of Commission licenses. Specifically, the FCC licenses held by broadcasters and direct broadcast satellite providers are the centerpieces of their operations. Broadcasters simply cannot provide over-the-air television service without the appropriate license. Similarly, DBS providers require a satellite license to offer their services to consumers. By contrast, the FCC licenses held by cable systems tend to serve a more secondary purpose, and cable systems in many situations can continue to operate a viable business even without using their FCC licenses, including their

[182] *Notice* at ¶12.

[183] *Id.* at ¶30.

CARS licenses. Similarly, telecommunications companies providing MVPD services (like Verizon FIOS and AT&T U-Verse) often do not require any FCC licenses specific to the provision of their video programming services. Accordingly, if the FCC were to provide special consideration to good faith violations during the license renewal process, broadcasters would face unequal risks as compared to many MVPDs. Moreover, the regulatory risk associated with retransmission consent negotiations would vary depending upon the technology used by a particular MVPD to distribute video programming. Such a result clearly is not in the public interest, especially given that the obligation to negotiate in good faith is a reciprocal obligation, applied to broadcasters and all MVPDs alike.

VIII. CONCLUSION

As demonstrated herein, the retransmission consent regime has worked effectively and efficiently to bring broadcast programming to MVPD subscribers since it was enacted by Congress in the 1992 Cable Act. Indeed, marketplace forces have resulted in thousands and thousands of successful retransmission consent agreements and very few impasses that have negatively impacted consumers' ability to receive broadcast programming from their chosen MVPD. Accordingly, NAB urges the Commission to refrain from adopting substantial changes to the existing good faith rules, especially in light of the fact that Congress never intended for the Commission to play a substantive role in, or to micromanage, the private retransmission consent negotiations among broadcasters and MVPDs.

Nevertheless, NAB recognizes that certain, limited rule changes could benefit consumers, particularly those to help ensure that consumers have adequate information, and the ability to act freely on that information, if impacted by an impasse in negotiations. Similarly, ensuring that broadcasters have access to accurate information about the ownership and operation of MVPDs to facilitate retransmission consent elections and communications would ultimately work to the benefit of consumers. For all the reasons set forth above, other changes to the existing good faith rules are not necessary, desirable or consistent with congressional intent and the FCC's authority.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

Jerianne Timmerman

Jane E. Mago
Jerianne Timmerman
Erin Dozier
Scott Goodwin
1771 N Street, NW
Washington, D.C. 20036
(202) 429-5430

Sharon Warden
Theresa Ottina
NAB Research

May 27, 2011

ATTACHMENT A

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

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

DECLARATION OF
JEFFREY A. EISENACH AND KEVIN W. CAVES

MAY 27, 2011

CONTENTS

I. INTRODUCTION

1. Before 1992, the law permitted pay TV providers to retransmit and resell broadcasters' signals without their permission, and without providing any compensation. Congress enacted the current retransmission consent regime to ensure that broadcasters would be able to negotiate in a free marketplace for fair compensation for pay television providers' use of their signals. Given that retransmission consent fees were previously capped at zero, it is unsurprising that broadcasters have eventually succeeded in negotiating compensation, including cash compensation, for their signals in the years since the price cap has been removed. Indeed, from an economic perspective, it would have been virtually inconceivable for retransmission fees to have remained at zero indefinitely unless (1) broadcasters' signals were truly devoid of any real economic value; or (2) broadcasters somehow possessed no bargaining power whatsoever in their bilateral negotiations with pay TV providers.

2. The fact MVPDs now generally pay some compensation to broadcasters for use of their signals does not imply that retransmission consent fees are "too high" from the perspective of economic efficiency, that broadcasters have "too much" bargaining power, or even that broadcasters' bargaining power has increased over time. Although the entry of new multichannel video programming distributors (MVPDs), such as direct broadcast satellite (DBS) providers and telephone companies, might be expected to have increased broadcasters' leverage in retransmission negotiations, this development has not occurred in a vacuum. To the contrary, there have been several other, no less significant developments—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 push in the opposite direction. Thus, the balance of the evidence suggests broadcasters' relative bargaining

power has *decreased*.[1] To reiterate, this is in no way inconsistent with the fact that retransmission consent fees have increased from an initial level of zero.

3. While it has sometimes been alleged that retransmission consent fees can be shown to harm consumer welfare, such claims are based on the faulty premise that only the purported costs of retransmission consent to consumers should be considered, while the benefits to consumers and the economy should be ignored. According to this erroneous logic, consumers would also be "harmed" because MVPDs must pay for the capital equipment, labor services, and electricity that they use, or, more generally, whenever firms that produce consumer goods are obliged to pay positive prices for their inputs. In reality, programming costs in general, and retransmission consent fees in particular, purchase content valued highly by both MVPDs and their ultimate customers, and there is abundant evidence that both the quality and quantity of this content has increased in recent years.[2]

4. The empirical evidence does not support the proposition that programming costs in general, or retransmission fees in particular, have played or will play a significant role in increasing the prices that MVPDs charge to consumers. To the contrary, programming costs are decreasing relative to the costs, revenues, and profits of MVPDs, while retransmission consent fees make up a small fraction of MVPD programming costs, and an even smaller percentage of MVPD revenues. In any case, because the market for MVPD services is not perfectly

---

[1] See, e.g., Mark Israel and Michael Katz, "Responses to 'Murphy Method' for Calculating Departure Rates for Cable Networks," *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56 [Redacted Version] (November 10, 2010), at 7 ("[T]he increasing range of entertainment options is very likely reducing the power of broadcast networks."). Dr. Katz thus appears to no longer hold the view, expressed in a November 2009 report, that broadcasters' bargaining power is increasing. See Michael Katz, Jonathan Orszag and Theresa Sullivan, "An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime" (November 12, 2009) at 20 ("Broadcasters' bargaining power has significantly increased since the retransmission consent regime was put in place.").

[2] See, e.g., Jeffrey A. Eisenach and Kevin W. Caves, *Video Programming Costs and Cable TV Prices: A Reply to CRA* (June 2010) (hereafter *CRA Reply*), Section III.

competitive, MVPDs would be unlikely to pass on 100 percent of any given cost increase in the form of higher prices, and indeed both the FCC and academic researchers have found significantly smaller pass-through rates for the cable industry.[3]

5. Another form of alleged consumer harm comes in the form of service interruptions arising from retransmission consent impasses, which sometimes attract significant publicity. However, it has been clear for some time that negotiating impasses are extremely rare, and have an infinitesimally small impact on television viewing in the U.S.[4] Below, this finding is updated and confirmed using the most recently available evidence, which continues to demonstrate that service interruptions due to retransmission impasses have represented, on average, approximately 0.01 percent of annual total viewing hours since January 2006. Moreover, as discussed below, there is no discernible upward trend in the overall impact of carriage interruptions, a clear downward trend in their duration, and every reason to believe that impasses will become even less common as retransmission consent payments become standard industry practice.[5]

---

[3] The FCC has found that any cost savings that MSOs derive from cable system "clustering" do not appear to be passed on to consumers, suggesting a pass-through rate of close to zero. *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, MB Docket No. 06-189 (Jan. 16, 2009), ¶180 [hereafter *Thirteenth Annual MVPD Report*]. See also George S. Ford and John D. Jackson (1997), "Horizontal Concentration and Vertical Integration in the Cable Television Industry," *Review of Industrial Organization*, 12(4):501-518 at 513-14 (showing pass-through rates of approximately 50 percent).

[4] See Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, Empiris, LLC (March 2009) (hereafter *March 2009 Report*) and Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010) (hereafter *Lexecon Reply*).

[5] See, e.g., SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," *SNL Kagan Industry Whitepaper* (2010) (hereafter *Kagan Retrans Whitepaper*) at 3 ("Retransmission revenues have revitalized the broadcast model. …[i]t was a rational, needed, fundamental change to the economic relationships in the industry to bring broadcast networks more on par with cable networks, especially given the much higher viewing levels of broadcast networks...[t]he incidences of high profile spats between cable MSOs and broadcasters will diminish as the practice becomes routine…a very low percentage of negotiation stand-offs culminate in a TV station getting pulled from a multichannel distributor.").

II. QUALIFICATIONS

6. Jeffrey A. Eisenach is a Managing Director and Principal at Navigant Economics, a Chicago, Illinois-based economics consulting firm, and an Adjunct Professor at George Mason University Law School. He holds a Ph.D. in Economics from the University of Virginia and a B.A. in Economics from Claremont McKenna College. He has previously served in senior policy positions at the U.S. Federal Trade Commission and the White House Office of Management and Budget, and on the faculties of Harvard University's Kennedy School of Government and Virginia Polytechnic Institute and State University. A copy of Dr. Eisenach's *curriculum vita* is at Attachment A.

7. Kevin W. Caves is a Director at Navigant Economics. He holds a Ph.D. in Economics from the University of California at Los Angeles and a B.A. in Economics from Haverford College. Dr. Caves has served as Assistant Economist at the Federal Reserve Bank of New York, and has held senior positions in the economic consulting industry for several years. He has authored and co-authored FCC filings and white papers on topics related to various network industries, including the video programming industry. A copy of Dr. Caves' *curriculum vita* is at Attachment B.

8. We have prepared this declaration at the request and on behalf of the National Association of Broadcasters (NAB). The views expressed are our own.

III. BROADCASTERS DO NOT WIELD "EXCESSIVE" MARKET POWER IN RETRANSMISSION CONSENT NEGOTIATIONS

9. Proposals to weaken the existing retransmission consent regime are premised on the notion that fees are somehow "too high" from the perspective of economic efficiency, and that broadcasters have "too much" bargaining power. There is simply no credible evidence to support either proposition.

10. MVPDs support their "market power" arguments by noting that (a) retransmission fees have risen from zero to greater than zero in recent years, and (b) new MVPDs, such as direct broadcast satellite (DBS) providers and telephone companies, have entered the market, thereby increasing competition for broadcasters' signals. However, neither of these developments have altered the fact that the upstream market for MVPD video programming (of which broadcast programming is a part) remains far less concentrated than the downstream market for video distribution. In addition, there have been other developments in the industry, such as a reduction in the share of viewers watching television over the air, the increase in the availability and audience shares of non-broadcast programming, and the advent of cable system clustering, which have likely *reduced* broadcasters' bargaining power relative to MVPDs. In other words, the balance of the evidence suggests that the industry has evolved in a manner that has likely *decreased* broadcasters' relative bargaining power.

A. The Downstream Market for Distribution of Video Programming Remains Highly Concentrated[6]

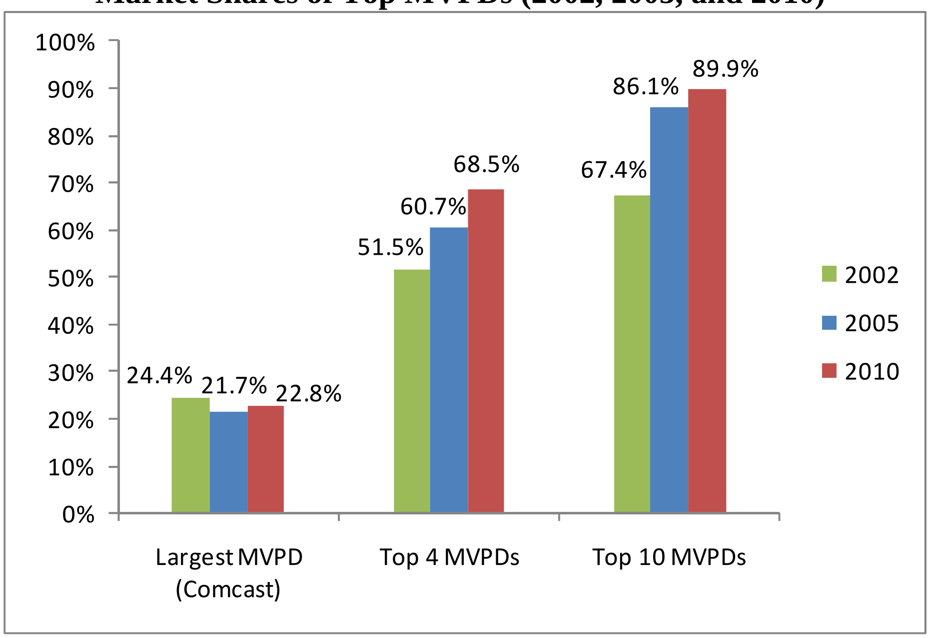
11. The downstream market for video programming, which serves consumers directly, is characterized by high levels of concentration among a few major MVPDs. This remains true despite entry and expansion by intermodal MVPDs in recent years. Although satellite providers have succeeded in capturing a substantial share of subscribers, because satellite TV is a duopoly, national concentration among MVPDs has actually increased by most

[6] Industry concentration ratios are at best a rough proxy for bargaining power. MVPDs argue that *changes* in concentration have affected their bargaining power relative to broadcasters. As the data below show, their argument falls short regardless of whether one looks at concentration at the national level (arguably a proxy for bargaining power between cable multiple system operators (MSOs) and national satellite operators, on the one hand, and owners of broadcast stations in multiple markets, on the other) or at the local level (arguably a proxy for bargaining power between individual cable systems, on the one hand, and individual broadcast stations, on the other).

metrics. Meanwhile, telco operators' share of the market remains quite modest, with Verizon accounting for just 3.5 percent of video subscribers as of 2010, and AT&T just 3.0 percent.[7]

12. As a consequence, the most recently available data show that the MVPD industry is, on a national level, more concentrated among top providers than it was in the early 2000s. As seen in Figure One, the market share (measured in terms of subscribers) of the largest MVPD (Comcast) remained quite stable, decreasing only slightly (from 24.4 percent to 22.8 percent) from 2002 to 2010. The collective market share of the four largest MVPDs increased substantially, from 51.5 percent to 68.5 percent by 2010. Over this same interval, the top 10 MVPDs increased their collective share by even more, from 67.4 percent to 89.9 percent.

Figure One:
Market Shares of Top MVPDs (2002, 2005, and 2010)



Sources: SNL Kagan, *U.S. Multichannel Industry Benchmarks* (2011); SNL Kagan *Operating Profiles* (2011); SNL Kagan, *U.S. Video Market Share Trends* (2011); Navigant Economics calculations.

[7] SNL Kagan, "U.S. Multichannel Industry Benchmarks" (2011); SNL Kagan, "Operating Profiles" (2011).

13. In addition to these relatively high levels of concentration at the national level, MSOs have also succeeded in increasing concentration at the local level through the prevalence of cable system "clustering" through regional transactions. The FCC defines a "cable cluster" as a group of co-owned and operated cable systems serving a contiguous geographic area or region.[8] According to SNL Kagan, the number of clustered cable systems serving over 500,000 subscribers rose from 29 in 2005, covering 29.8 million subscribers, to 36 at the end of 2008, covering 36.7 million subscribers.[9]

14. Clustering reduces the number of cable systems in each local market, thereby increasing each remaining system's market share – and also its bargaining power relative to a local broadcaster.[10] Thus, although it is true that the *variety* of MVPD modalities operating in local markets (e.g., DBS, telco as well as cable) has generally risen, this does not imply that the relative market power of cable MSOs vis-à-vis broadcasters has diminished. To the contrary, the number of agents negotiating for the right to retransmit broadcast signals has likely decreased in many markets since the advent of retransmission consent in 1992. At that time, there typically were several MSOs in each market, each serving some fraction of the broadcaster's service area, whereas today (thanks to clustering) there may be only one or two, each serving a high proportion of the relevant market.

B. The Upstream Market for Video Programming Remains Highly Competitive

15. The evidence shows that the market for television programming is highly competitive, with low levels of concentration. As of the fourth quarter of 2010, SNL Kagan reports that there were a total of 1,307 full-power commercial televisions stations nationwide,

---

[8] *Thirteenth Annual MVPD Report* ¶19.

[9] SNL Kagan, "Broadband Cable Financial Databook," 2009 Edition (showing major cable systems/clusters with 100,000 or more subscribers as of December 2008).

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

owned by 331 unique parent companies, ranging from household names like CBS and Disney to owners of individual stations in small markets.[11]

16. Because a broadcaster's advertising revenues are an increasing function of the size of its audience, advertising revenues are one appropriate measure of size for purposes of gauging industry concentration. As seen in Table One, the evidence shows that the broadcasting industry is not highly concentrated. In 2010, the top four station owners accounted for just 19.5 percent of total advertising revenue in the top 25 markets, while the top ten station owners accounted for 31.2 percent of advertising revenues in these markets.[12]

Table One:
Advertising Shares of Top 10 US Broadcast Station Owners, Top 25 Markets (2010)

Rank	Station Owner	Market Share	
1	FOX Television Stations, Inc.	6.1%	
2	NBC/General Electric/Comcast	5.0%	
3	CBS Corporation	4.3%	
4	ABC/Disney	4.0%	
Top 4			**19.5%**
5	Tribune Broadcasting Company	2.9%	
6	Univision Television Group, Inc.	2.6%	
7	Gannett Company, Inc.	2.1%	
8	Cox Broadcasting	1.7%	
9	Belo Corp	1.5%	
10	Hearst-Argyle Television, Inc.	1.0%	
Top 10			**31.2%**

Sources: SNL Kagan, "TV Station Revenues in Top 25 Markets by Station Owner" (2010); SNL Kagan, "TV Network Industry Benchmarks (Broadcast Networks)," (2011); SNL Kagan, "TV Network Industry Benchmarks (Basic Cable Networks)" (2011); Navigant Economics calculations. Numbers may not sum to totals due to rounding.

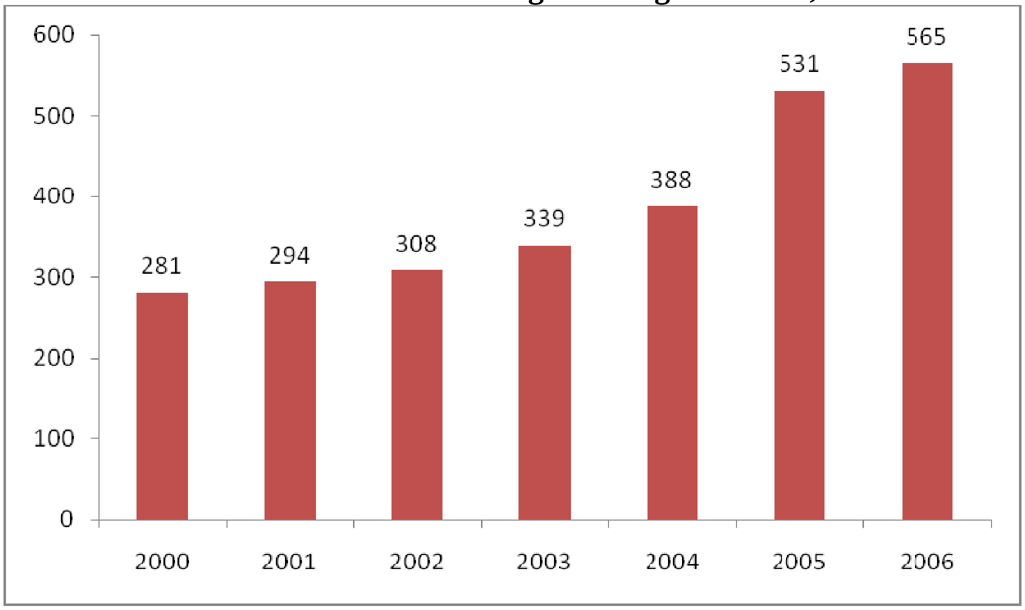
17. The evidence also indicates that barriers to entry in the programming market are low, and that entry is occurring at a rapid pace. For example, according to the most recently available data from the FCC, there were 565 satellite-delivered national programming networks

[11] SNL Kagan TV Station Database, "Commercial TV Stations by Market" (2011).

[12] To capture broadcast stations' market shares accurately, each station owner's advertising revenues are expressed as a fraction of total estimated net advertising revenues earned by both broadcast and cable networks in the top 25 markets.

as of 2006, an increase of 34 networks over the 2005 total of 531 networks – a six percent increase in the number of national networks in the course of just one year.[13]

Figure Two:
Number of Satellite-Delivered Programming Networks, 2000-2006



Sources: *Thirteenth Annual MVPD Report* at ¶20; Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MB Docket No. 05-255 (Mar. 3, 2006), at ¶157; Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227 (Feb. 4, 2005), at ¶145; Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, MB Docket No. 03-172 (Jan. 28, 2004), at ¶17; Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, MB Docket No. 02-145 (Dec. 31, 2002), at ¶13; Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, CS Docket No. 01-129 (Jan. 14, 2002), at ¶13. Note: 2004 and prior years are not strictly comparable to 2005-6.

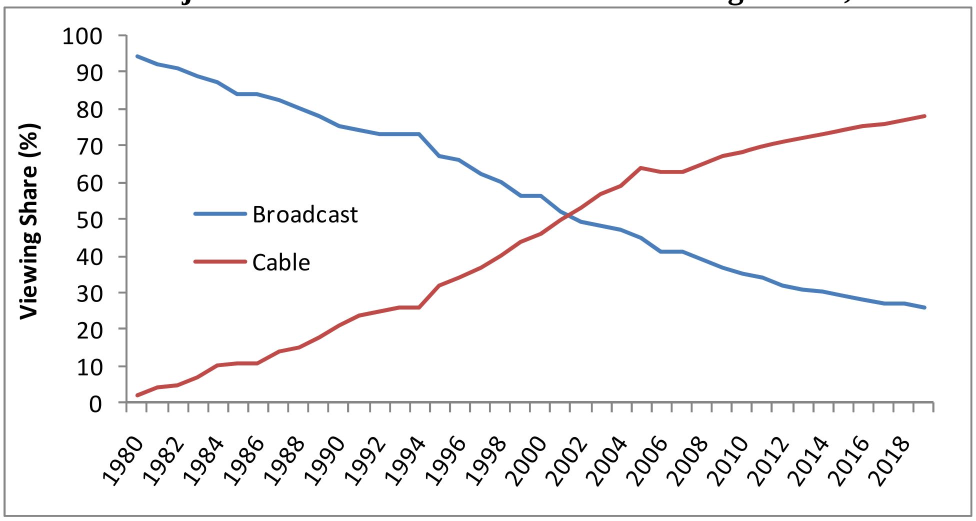
18. Broadcasting content is part of a larger market for television programming. As the share of households with MVPD service has increased, broadcaster programming has faced increased competition from cable networks for viewing time and advertising dollars. Present-day broadcasters, while still accounting for a substantial share of aggregate viewing (and a relatively small share of total channels), have experienced a decline in viewership relative to previous decades. Conversely, basic cable networks, in part because they account for a

---

[13] *Thirteenth Annual MVPD Report* at ¶186.

disproportionate share of all channels, have captured increasing shares of total viewership. As shown in Figure Three, cable networks have consistently taken share from broadcast networks, and are projected to continue to do so in the future.

Figure Three:
Actual and Projected Broadcast vs. Basic Cable Viewing Shares, 1980-2018



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

19. The observed decline in broadcast viewing shares reflects increasing programming diversity and resulting audience fragmentation, which has served to increase the competitiveness of the programming market. For example, the highest-rated television show in 1950 (Texaco's *Star Theater*) captured over 60 percent of the prime-time audience; as recently as the 1980s, top-rated shows remained capable of delivering ratings in the 30s.[14] But in recent years, even top-rated programs yield much lower audience shares. For example, *American Idol*, which has consistently delivered the highest ratings among regularly scheduled programming during the past few years, had a rating of just 7.9 in 2010.[15]

---

[14] Adam Thierer and Grant Eskelsen, *Media Metrics: The True State of the Modern Media Marketplace* (The Progress & Freedom Foundation, 2008) at 58, citing Nielsen Media Research.
[15] See Nielsen, "U.S. Top 10s and Trends for 2010," (Top 10 TV Programs – Regularly Scheduled), (available at http://blog.nielsen.com/nielsenwire/consumer/u-s-top-10s-and-trends-for-2010/).

IV. Retransmission Consent Fees Do Not Harm Consumers

20. MPVDs argue that retransmission consent fees are adding to their programming costs, forcing them to raise prices to consumers, and producing no offsetting benefits. The facts are the opposite: Retransmission consent fees represent a tiny fraction of MVPD costs and the amount passed through to consumers is an even tinier fraction of consumer bills. Moreover, retransmission consent revenues allow broadcasters to produce and/or support the production of programming which is valued highly by consumers, including local programming such as local news and sports.

A. Programming Costs and Retransmission Consent Fees are Not Responsible for Rising MSO Prices

21. According to the FCC's *Report on Cable Industry Prices*, expanded basic cable prices have historically risen substantially slower than the rate of general inflation on a per-channel basis.[16] In contrast, the price MVPDs charge per subscriber per month for programming services has historically risen faster than inflation, at approximately six percent per year.[17] However, the data simply do not support the claim that increases in MVPD prices are caused by rising programming costs in general, or retransmission consent fees in particular. As seen in Figure Four below, the upward trend in expanded basic cable prices predates the advent of retransmission consent fees by several years, and recent increases in cable prices have vastly outpaced increases in retransmission consent fees: Expanded basic cable prices grew more or less in line with inflation from 1995 through 1999. Since that time, average cable prices have

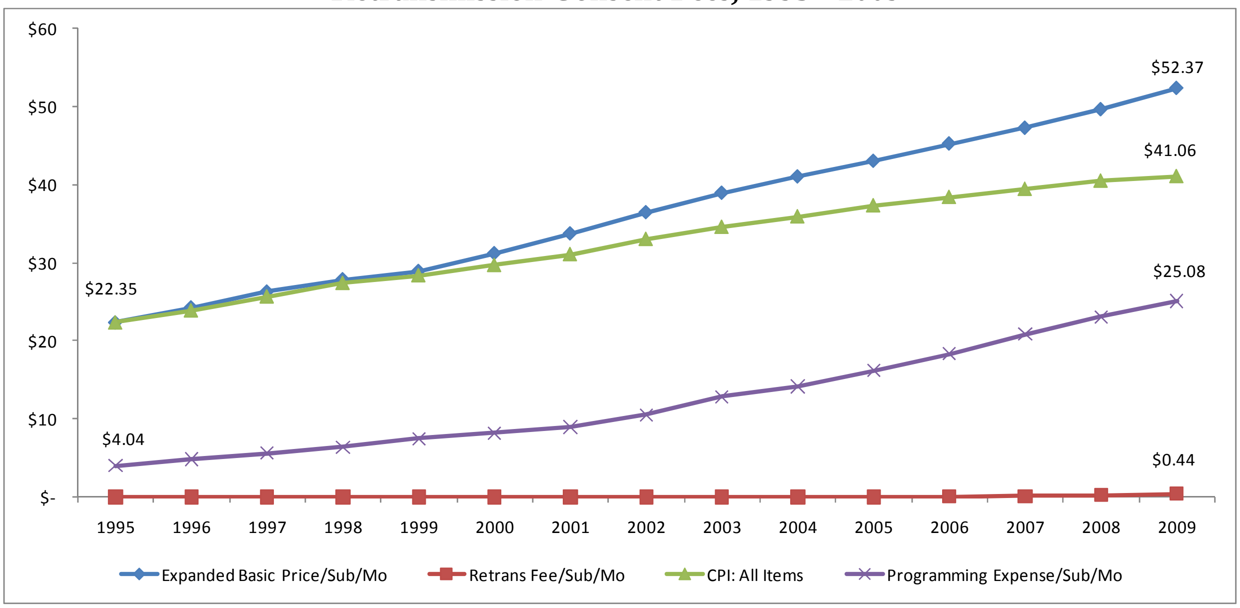
---

[16] Although the average monthly price of expanded basic cable has risen at a faster pace than the average number of channels, the resulting increase in the price per channel is still significantly below the rate of general inflation. *See* Federal Communications Commission, *Report on Cable Industry Prices* (February 14, 2011) [hereafter *FCC Report on Cable Prices*], Table 2 (showing an 18 percent increase in the expanded basic price per channel from 1995 – 2009, compared with a 39 percent increase in the Consumer Price Index over the same time period).

[17] *FCC Report on Cable Prices*, ¶2.

consistently outpaced general inflation. Retransmission consent fees, which were at zero throughout most of the period, clearly were not responsible for the divergence.

Figure Four:
Basic Cable Prices, Consumer Prices, Programming Costs, and Retransmission Consent Fees, 1995 - 2009



Sources: *FCC Report on Cable Prices*, Chart 1; SNL Kagan, *Broadcast Retransmission Fee Projections 2006-2016* (2010); SNL Kagan, *US Multichannel Industry Benchmarks*; SNL Kagan, *TV Network Industry Benchmarks (Basic Cable Networks)*.

22. Although overall programming expenses have risen as MSOs have expanded the scope and diversity of their channel offerings, the observed increase ($21.04 per subscriber per month from 1995-2009) is only about two thirds as large as the increase in basic cable prices over the same timeframe ($30.02).

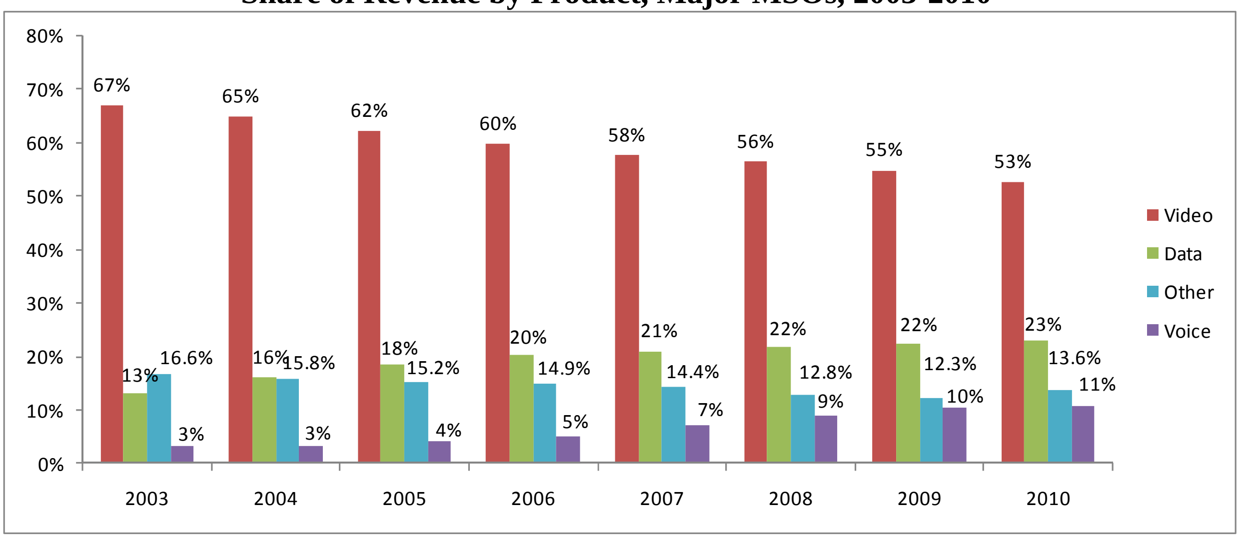
23. While informative as a first pass, the data in Figure Four obscures the fact that trends in programming costs must be analyzed in a manner consistent with the transformation of MSOs from single-product firms to multi-product firms. From an economic perspective, MSO video offerings are complementary with other products (i.e., data and telephony), and thus allow

MSOs to exploit economies of scope and scale in production. Programming costs are, as a result, are inextricably intertwined with the costs of other inputs to MSO services.[18]

B. MSOs Must Be Analyzed as Multi-Product Firms

24. Today's MSOs are multi-product firms, whose ability to use video services to draw subscribers to other product offerings, such as wireline telephony and high-speed internet, has transformed the industry. As illustrated in Figure Five, the composition of MSO revenue has shifted markedly over time: Whereas video revenue has historically accounted for the vast majority of the business, it had fallen to 67 percent by 2003, and to 53 percent by the year 2010.

Figure Five:
Share of Revenue by Product, Major MSOs, 2003-2010



Source: Public filings of major MSOs, as reported by SNL Kagan. Incorporates financial data from Adelphia, Cablevision, Cequel, Charter, Comcast, Cox, Insight, Knology, Mediacom, RCN, and Time Warner Cable.

25. Consistent with fundamental economic principles governing multi-product firms, video, voice, and data services exhibit interdependencies in terms of both the cost of production and demand. First, with respect to costs, MSOs are characterized by economies of both scope and scale: All else equal, the average cost of producing video, data and voice services (or any

---

[18] While satellite video providers also have revenues from other (non-video) services, the proportions are much smaller. Accordingly, the analysis below focuses on MSOs.

combination of two of the three) is lower for a consolidated entity using a single network to provide these services; in addition, average costs tend to fall as an MSO's customer base expands, and fixed costs are defrayed over a larger base.[19] Second, with respect to demand, MSO product offerings exhibit strong complementarities at the consumer level: Consumers value the ability to purchase multiple services from the same provider, and are more likely to purchase (say) cable voice service from a company that also offers video programming. As we have explained elsewhere, in the presence of both supply-side and demand-side economies of scope, any attribution of particular costs items to particular sources of revenue is inherently arbitrary.[20]

C. Programming Costs are Decreasing Relative to Other Costs, Revenues, and Profits

26. If programming cost increases were a significant factor forcing MSOs to raise consumer prices, then all else equal, one would expect to see programming expenses accounting for an increasing share of overall MSO cost structures. This is so because video programming inputs are strongly complementary with other inputs to production, as discussed above. When inputs are complements, rather than substitutes, the share of costs accounted for by a given input rises with the relative price of that input.

27. To illustrate, consider a stylized "Cobb-Douglas" production function, commonly employed in economic analysis, for which capital and labor are the only inputs to production. Under such a framework, the factor cost ratio – the firm's expenditures on capital relative to its labor costs – is invariant to changes in factor prices: An increase in wages, for example, would not alter the factor cost ratio, because substitution towards capital and away

---

[19] For a discussion of economies of scope and scale, see W. Kip Viscusi, Joseph E. Harrington, Jr. and John M. Vernon, *Economics of Regulation and Antitrust* (MIT Press, 2005) at 404-8.

[20] *See CRA Reply*, Section IV.

from labor would exactly offset the change in the factor price ratio. In contrast, under more general production structures, such as constant elasticity of substitution (CES) production functions, labor and capital may be complements in production. This implies that the capital-labor ratio adjusts by less than the factor price ratio in response to an increase in wages (or not at all, in the case of perfect complements), such that the ratio of labor costs to capital costs increases.[21]

28. Likewise, given the strong complementarities among MSOs' video, voice, and data offerings, an increase in the price of video programming, holding all else fixed, would increase the ratio of video programming costs to other costs. Intuitively, this is due to the fact that MSOs cannot provide consumers with the same or comparable bundled offerings by substituting other inputs for video programming. As explained below, the proportion of overall MSO cost structures accounted for by programming costs has actually declined in recent years. This is consistent with the hypothesis that video programming costs are not actually rising relative to other input costs, and/or the hypothesis that programming expenditures are being leveraged to boost demand for MSO service offerings, such that expenditures on other inputs tend to rise in order to meet the increased demand for complementary services.

29. To examine the role of programming costs, we gathered data on five publicly traded cable operators (Adelphia, Charter, Comcast, Knology, and Time Warner Cable) for which up-to-date programming cost data are consistently available for the period from 2005-

---

[21] The elasticity of substitution, denoted σ, measures how much firms change their capital intensity when factor prices change. For Cobb-Douglas production functions, $\sigma = 1$. For more general, constant elasticity of substitution (CES) production functions, inputs to production are considered substitutes if $\sigma > 1$, and complements if $\sigma < 1$. *See, e.g.,* Sir John R. Hicks, *The Theory of Wages* (MacMillan, 1932); *see also* Devesh Raval, "Beyond Cobb-Douglas: Estimation of a CES Production Function with Factor Augmenting Technology," U.S. Census Bureau Center for Economic Studies Paper No. CES-WP-11-05 (February 2011) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762590##, at 1-2).

2010.[22] Taking weighted averages across companies, we calculated the share of operators' costs accounted for by programming costs. Importantly, and consistent with the fundamental economic principle that any allocation of joint costs to individual products in a multiproduct firm is inherently arbitrary, these calculations do not rely on the allocation of costs to specific segments (such as "video costs," "high-speed data costs," and so on). Although MVPDs and MSOs sometimes report such data in SEC filings for accounting purposes, it would be a mistake to rely on these allocations for purposes of economic analysis here. In multi-product firms with economies of scale and scope, and with complementarities of demand between products, all costs are to some extent "common," and as a result, any allocation of costs to specific products is inherently arbitrary.[23]

30. As seen in Figures Six, Seven and Eight below, from 2005-2010, programming costs decreased relative to (a) the cost of revenue; (b) the sum of cost of revenue and selling, general, and administrative expenses (SG&A); and (c) total operating expenses.[24] The share of cost of revenue accounted for by programming costs for these five major MSOs shrank from 54 percent to 49 percent between 2005 and 2010, as shown in Figure Six. Over this same interval, the share of cost of revenue plus SG&A accounted for by programming costs decreased from 36 percent in 2005 to 34 percent in 2010, as shown in Figure Seven. Finally, as seen in Figure Eight, the ratio of programming expenses to total MSO operating costs decreased as well, from 27 percent in 2005 to 26 percent in 2010.

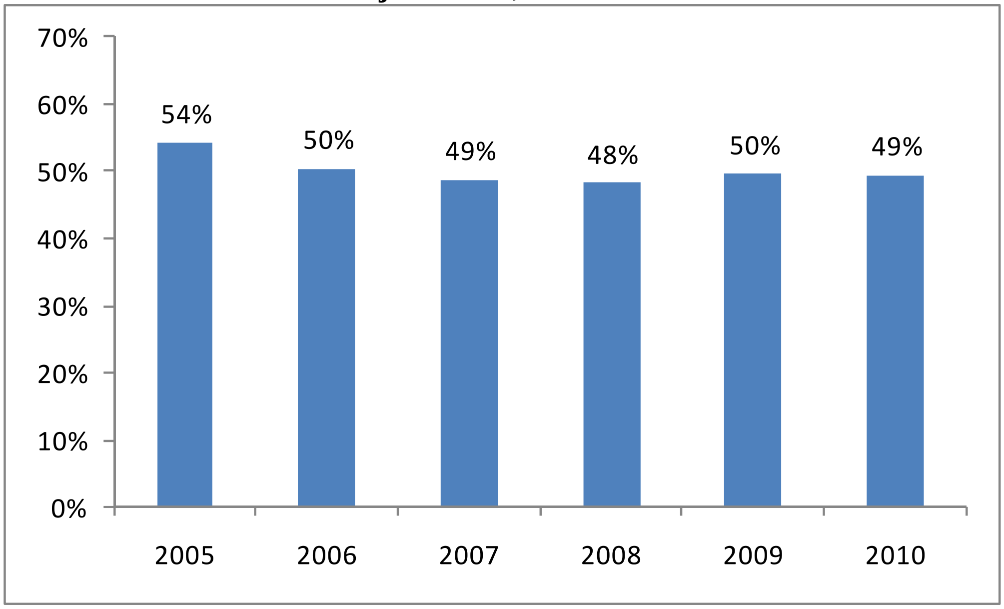
---

[22] Owing to Comcast and Time Warner Cable's joint acquisition of Adelphia assets, data for Adelphia as a separate entity are reported only in 2005. Note that this does not imply any discontinuity, as Adelphia's figures are effectively absorbed into those of Comcast and Time Warner.

[23] *CRA Reply*, Section IV.C.

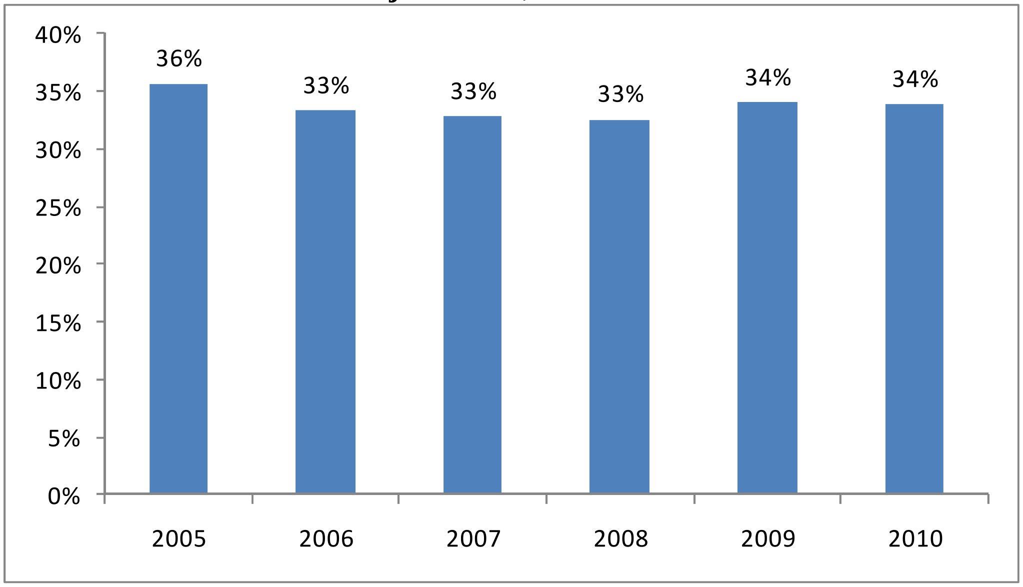
[24] A company's cost of revenue, sometimes referred to as its cost of sales, reflects the costs associated with the sale and delivery of its products and services to its customers. It is distinguished from selling, general, and administrative expenses, which are expenses incurred in the normal operating business of the company. Both represent accounting concepts, rather than economic concepts. In theory, however, selling, general, and administrative expenses should be less sensitive to variations in output.

Figure Six:
Programming Costs as a Share of Cost of Revenue
Major MSOs, 2005-2010



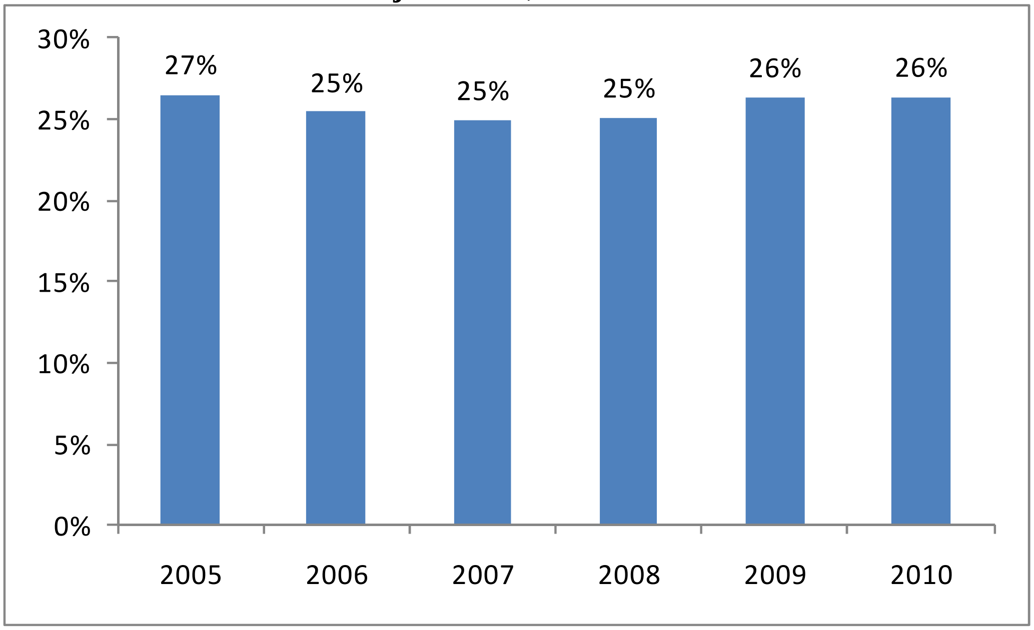
Source: Public filings of major MSOs as reported on a uniform basis by SNL Kagan. Incorporates financial data for Adelphia, Charter, Comcast, Knology, and Time Warner Cable.

Figure Seven:
Programming Costs as a Share of Cost of Revenue + SG&A
Major MSOs, 2005-2010



Sources: Public filings of major MSOs as reported on a uniform basis by SNL Kagan. Incorporates financial data for Adelphia, Charter, Comcast, Knology, and Time Warner Cable.

Figure Eight:
Programming Costs as a Share of Total Operating Costs
Major MSOs, 2005-2010



Sources: Public filings of major MSOs as reported on a uniform basis by SNL Kagan. Incorporates financial data for Adelphia, Charter, Comcast, Knology, and Time Warner Cable.

31. If increases in MSO prices were driven by rising programming costs, then programming expenses should also be increasing relative to revenues. Theory predicts that only perfectly competitive firms pass through 100 percent of a given increase in marginal costs. Consistent with this prediction, both the FCC and academic researchers have found significantly smaller pass-through rates for the cable industry.[25] For any pass-through rate less than (or equal to) 100 percent, it is straightforward to show that an increase in input costs leads to a less-than-

---

[25] As noted above, the FCC has found that any cost savings that MSOs derive from cable system "clustering" do not appear to be passed on to consumers, suggesting a pass-through rate of close to zero, while earlier academic research from the 1990s found pass-through rates of approximately 50 percent. We are not aware of any evidence of pass-through rates for MSOs (or MVPDs) in the neighborhood of the perfectly competitive rate of 100 percent.

proportionate increase in revenues, all else equal. This holds true regardless of whether demand for the relevant services is elastic[26] or inelastic.[27]

32. To illustrate, suppose that the cost of input *A* increases, such that expenditures on input *A* increase by x percent, and that firms pass on some fraction δ of the increase in the form of higher prices, such that $0 < \delta \leq 1$. If demand is elastic, then, by definition, total revenues will fall in response to the price increase, which means that expenditures on input *A* must increase relative to revenues. If demand is inelastic, then firms' total revenues will rise in response to the price increase. However, the increase in revenues as a result of the pass-through will be necessarily smaller in percentage terms than the increase in expenditures on input *A*. Specifically, if p_1, q_1 and $TR_1 \equiv p_1 q_1$ represent price, quantity, and total revenue before the input cost increase, and if the (inelastic) own-price demand elasticity is given by $0 < \varepsilon < 1$, then total revenues after the input cost increase are given by:

$$\begin{aligned} TR_2 &= p_1(1+\delta x)q_1(1-\delta\varepsilon x) \\ &= p_1 q_1(1+\delta x)(1-\delta\varepsilon x) \\ &= TR_1(1+\delta x)(1-\delta\varepsilon x) \end{aligned}$$

33. Thus, total revenues increase by less than δx percent. Because expenditures on input *A* have increased by x percent, and because $0 < \delta \leq 1$, it follows immediately that expenditures on input *A* must have risen relative to total revenues. To see this more concretely,

---

[26] Early research has found the demand for cable services—as opposed to MVPD services generally—to be elastic, and recent research has confirmed this finding. For an older estimate, *see Federal Communications Commission*, *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, *MM Docket No. 92-266* (Feb. 14, 2001) at ¶48 (estimating the own-price elasticity of demand for cable television at -1.95). For a newer estimate, s*ee Lexecon Reply*, Figure A-1 (citing own-price elasticity estimates for the demand of expanded basic cable of approximately -1.5).

[27] The empirical evidence suggests that the demand for MVPD services overall (as opposed to cable services alone) is inelastic. *See Lexecon Reply*, at Appendix (estimating a demand elasticity for MVPD services of approximately -0.66, based on published estimates of the matrix of demand elasticities for individual MVPD modalities).

suppose hypothetically that rising input costs cause total expenditures on input *A* to increase by ten percent. Given a pass-through rate of 100 percent or less, retail prices would increase by some percentage less than or equal to ten percent as a result. As long as the demand curve is (even slightly) downward-sloping, revenues will increase by less than ten percent, such that expenditures on input *A* increase as a proportion of revenues.

34. As explained below, the available evidence suggests the opposite for MSOs: Relative to revenues, programming costs have been declining. This is inconsistent with the hypothesis that the observed increases in MSO prices can be fully explained by rising programming costs, but consistent with the hypothesis that expenditures on programming have been an important driver of new business, boosting revenues and demand – i.e., that video services are complements with voice and data services.

35. As above, we examined data on publicly traded MSOs for which up-to-date programming cost data are consistently available. We first computed the share of total revenue accounted for by programming costs, again taking weighted averages across companies, for the period 2005 through 2010. As briefly discussed above, these calculations do not rely on accounting allocations of revenues across video, voice, and data segments. Although segmented revenue data are on occasion reported in SEC filings for accounting purposes, these allocations should not be relied upon for purposes of economic analysis here. This is so for two basic reasons. First, the use of accounting conventions for the allocation of revenues among products is confounded by bundled pricing, which stymies efforts to meaningfully assign revenues to specific services. Reliance on such conventions would ultimately reflect reliance on arbitrary

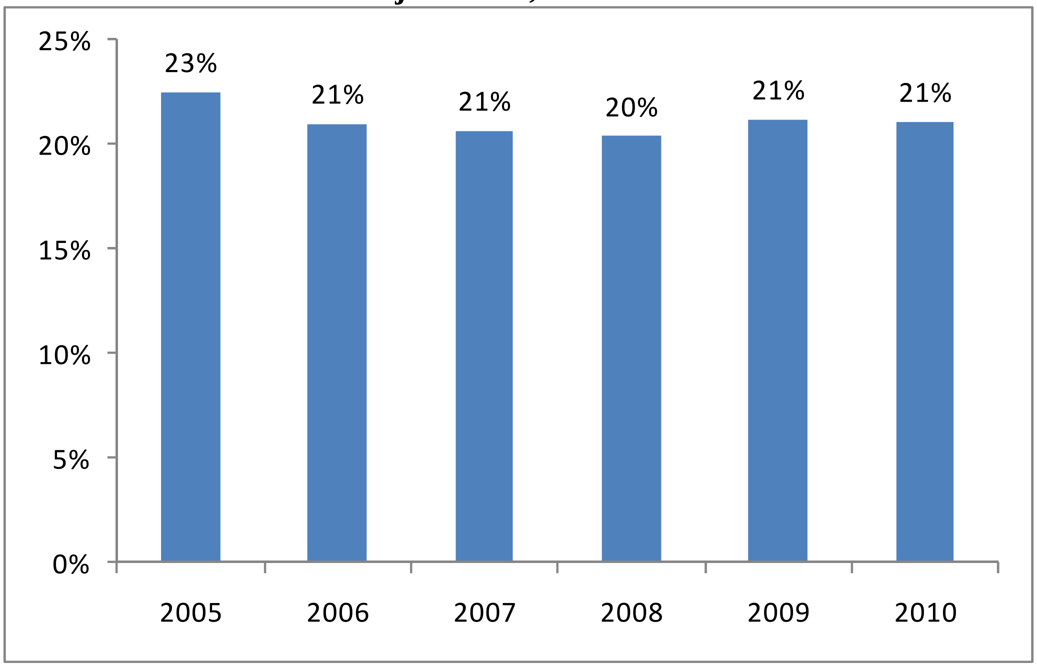
"rules of thumb." Thus, there is a fundamental measurement problem hampering any attempt to analyze the relationship between programming costs and "only" video revenues.[28]

36. Second, even if there were no measurement problem, it would be erroneous to rely on segmented revenue data, because data and voice are such strong complements to video services, which means that video programming is effectively an input with respect to all three services: Programming expenditures that maintain or increase the quality and quantity of video programming services drive both the demand for video *and* the demand for high-speed data and voice offerings. In this context, it would be nonsensical to analyze video in isolation from data and voice: The demand for video drives the demand for data and voice, and programming costs reflect the costs associated with boosting demand for *all three services*, relative to what they would be otherwise.

37. In contrast with the hypothesis that programming costs are the driving force behind higher MSO prices, from 2005-2010, programming costs have decreased relative to revenues. Figures Nine and Ten below illustrate this trend in terms of both (a) aggregate revenues; and (b) revenues per subscriber per month. The share of total revenues accounted for by programming costs shrank from 23 percent to 21 percent between 2005 and 2010, as shown in Figure Nine.

[28] The Commission itself has confronted this issue in the past (e.g., in the context of calculating the proportion of cell phone revenues properly allocated to long distance services for universal service support purposes).

Figure Nine:
Programming Costs as a Share of Revenue
Major MSOs, 2005-2010

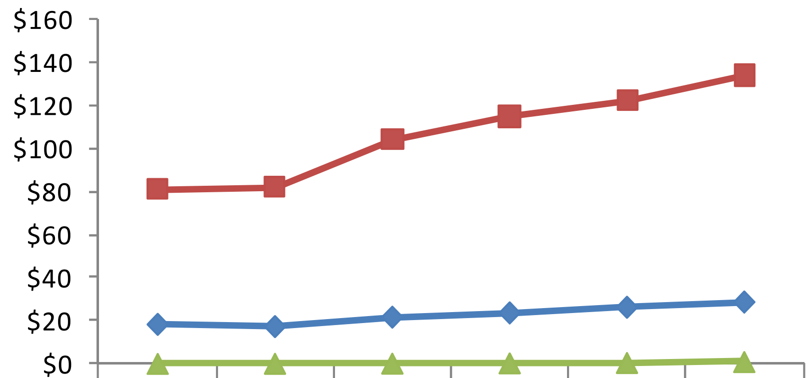


Sources: Public filings of major MSOs as reported on a uniform basis by SNL Kagan. Incorporates financial data for Adelphia, Charter, Comcast, Knology, and Time Warner Cable.

38. Over this same interval, Figure Ten reveals that MSO revenues increased by $53.06 per subscriber per month, from $80.95 to $134.01, while programming expenses increased by just $10.03 per subscriber per month (from $18.21 to $28.24). By way of comparison, Figure Ten also displays the average retransmission fee per cable subscriber per month, which increased from zero in 2005 to $0.86 in 2010.

39. Figure Ten also reveals an important relationship. In 2010, retransmission consent fees, at $0.86 per subscriber per month, were approximately six tenths of one percent of MSO revenues.

Figure Ten:
Programming Costs, Revenue, and Retransmission Consent Fees, Per Subscriber Per Month, Major MSOs, 2005-2010



	2005	2006	2007	2008	2009	2010
Total Revenue	$80.95	$82.02	$104.00	$114.68	$122.17	$134.01
Programming Expenses	$18.21	$17.22	$21.48	$23.37	$25.89	$28.24
Retrans Fees	$0.00	0.06	0.11	0.24	0.44	0.86

Sources: Public filings of major MSOs as reported on a uniform basis by SNL Kagan. Incorporates financial data for Adelphia, Charter, Comcast, Knology, and Time Warner Cable. Per-subscriber retransmission fees reported by SNL Kagan, *Broadcast Retransmission Fee Projections 2006-2017* (2011).

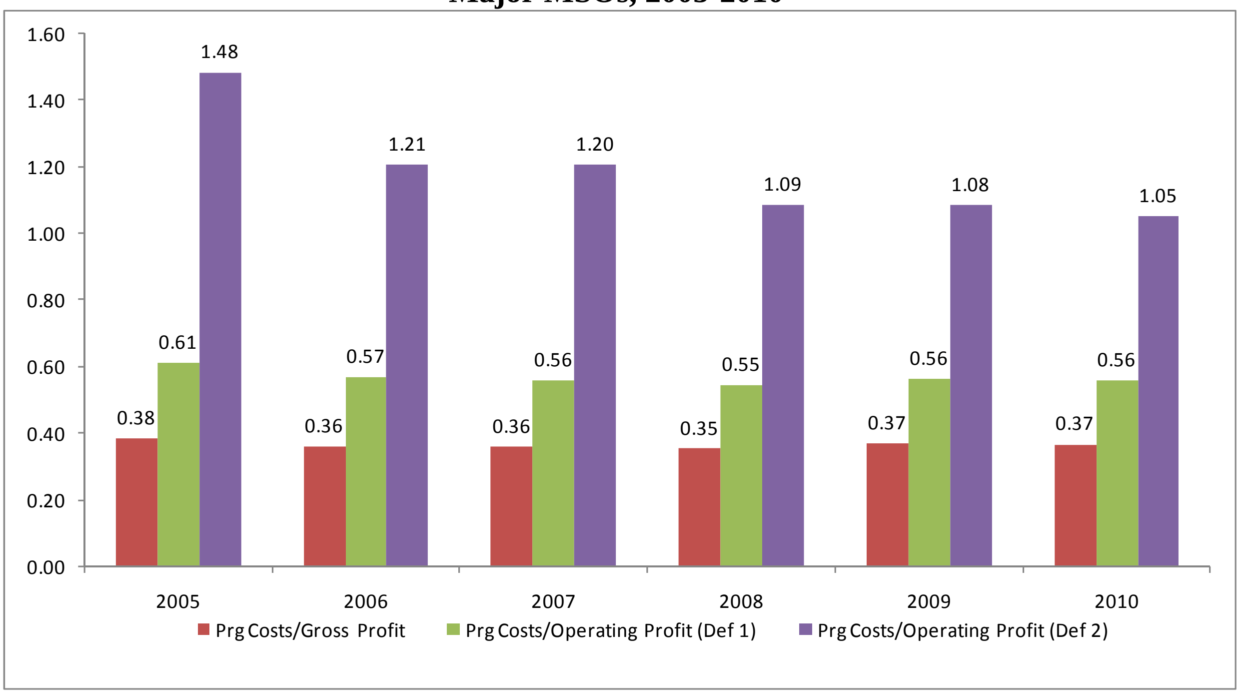
40. If programming cost increases were a significant factor forcing cable operators to raise rates, then all else equal, one would expect that profits would decline as programming expenses increased, causing the ratio of programming costs to profits to rise: As explained above, an increase in input costs leads to a less-than-proportionate increase in revenues.

41. To compare the growth in programming costs over time to the increase in per-subscriber profitability that MSOs have enjoyed in recent years, we employed data on the same set of publicly traded MSOs. We performed these comparisons using two profitability metrics. Initially, we computed the MSOs' average gross profits per subscriber per month, again taking weighted averages across companies, for the period 2005 through 2010. Next, for the same time period, we computed the MSOs' average operating profits per subscriber per month, according to two separate definitions. First, we computed operating profit as the difference between MSO

revenues and the sum of (a) cost of revenue; and (b) SG&A expenses. Second, we computed operating profit as the difference between MSO revenues and total MSO operating expenses.

42. Given that programming costs are decreasing relative to both MSO costs and MSO revenues, it should not be surprising that programming costs are also decreasing relative to MSO profits. As shown in Figure Eleven, programming costs have declined relative to each of the three profitability metrics. For instance, the ratio of programming costs to operating profits according to the second definition has decreased from 1.48 to 1.05 over this timeframe.

Figure Eleven:
Ratio of Programming Costs to MSO Profitability Metrics
Major MSOs, 2005-2010



Sources: Public filings of major MSOs as reported on a uniform basis by SNL Kagan. Incorporates financial data for Adelphia, Charter, Comcast, Knology, and Time Warner Cable. Operating profits according to the first definition are total revenues minus the cost of revenue and SG&A expenses. Operating profits according to the second definition are total revenues minus total operating expenses.

V. THE INCIDENCE OF CARRIAGE INTERRUPTIONS IS INFINITESIMALLY SMALL AND IS NOT INCREASING

43. MVPDs allege that consumers are harmed when broadcasters and MVPDs are unable to agree on retransmission consent and temporary carriage interruptions ensue. In fact, as we have demonstrated previously and demonstrate again below, negotiating impasses are extremely rare, affecting only an infinitesimally small proportion of viewing. Moreover, as we demonstrate below, there is no evidence that the impasses are increasing in frequency or impact, and clear evidence they are growing shorter in duration.

A. The Impact of Negotiating Impasses on Television Viewing Remains Infinitesimally Small

44. MVPDs have economic incentives to claim that consumers incur substantial harm due to negotiating impasses, and have funded high-profile publicity campaigns to this effect. Nevertheless, as we have demonstrated empirically in prior studies, concerns about the consumer impact of negotiating impasses in retransmission consent negotiations are misplaced: The evidence shows that carriage interruptions represent, on average, approximately one one-hundredth of one percent of annual U.S. viewing hours. [29] To put this figure in perspective, 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 impasse.[30]

45. Our prior analyses examined the impact on viewers of the impasses that occurred between January 2006 to March 2010,[31] a period of four years and three months, during which

---

[29] *See March 2009 Report,* Section V; *see also Lexecon Reply,* Section IV.B.

[30] *See Lexecon Reply,* Section IV.B.

[31] *See Lexecon Reply*, Section IV.B. The impasse that occurred in March 2010 was the highly publicized impasse 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. See John Eggerton, "WABC Back on Cablevision," *Broadcasting & Cable* (March 8, 2010).

there were 12 negotiating impasses (about three per year). Since March 2010, there have been three additional impasses. Below, we provide updated estimates, reflecting the three additional impasses that have occurred since March 2010, including the impasse between Fox and Cablevision that affected Cablevision subscribers in the Northeast during the second half of October 2010, and which coincided with the first two games of the 2010 World Series.[32]

46. Table Two provides a summary of the 15 impasses that have occurred since January 2006, including the total number of TV Households in the affected DMAs, the parties to the negotiation, the dates and duration of each carriage interruption, the number of markets affected, the call signs of the affected broadcast stations, and the number of households in the affected DMAs.[33]

---

[32] *See, e.g.,* John Eggerton, "FCC Chairman Welcomes Fox/Dish Deal," *Broadcasting & Cable* (October 29, 2010). To control for the fact that World Series games have higher viewership than typical programming, we obtained publicly available ratings data specific to this event. We then computed an hours-weighted average rating for the impasse, with World Series ratings receiving a weight equal to the estimated duration of the games affected by the impasse. A similar procedure was followed for the ABC/Cablevision impasse that briefly interrupted the Academy Awards in early 2010.

[33] As explained in the *March 2009 Report*, and further below, even in the DMAs where interruptions occurred, most households are not affected. See *March 2009 Report* at 36-37 ("It would be incorrect, however, to conclude that all of the households in these DMAs – or even a significant fraction of them – were affected by these carriage interruptions. First, these interruptions affected (at most) only the households subscribing to the MVPD involved in the dispute. Thus, only Dish subscribers (not cable subscribers, and not DirecTV subscribers) were affected by the Dish disputes; and, only subscribers of the affected cable company (not DBS subscribers or subscribers of other cable companies operating in these DMAs) were affected by the disputes involving cable companies. Of course, none of the households which receive their television exclusively over the air (i.e., which do not subscribe to pay TV at all) were affected at all.

Second, among households which do subscribe to the affected cable or DBS provider, not all households would have watched the affected channels at all during the duration of the interruption. Nationally, the typical household only tunes in to about 17 television channels each month.

Third, even among households that would otherwise have tuned in to a particular channel during the period of the interruption, it is reasonable to believe that many of them were able to find another channel offering acceptable programming. For example, a viewer who might have tuned in to the local nightly news on the channel for which carriage was interrupted in order to see the weather forecast might well have found local weather news on another channel.

Taking these three factors into account, it is clear that many of the households in a DMA where a carriage interruption occurs would be completely unaffected by that interruption, as they did not subscribe to the MVPD involved in the interruption, would not have watched the affected channel anyway, or found the programming they were seeking on a different channel.")

Table Two:
Retransmission Consent Negotiating Impasses, 2006 - May 2011

Parties	Dates	Duration (Days)	Number of Affected Stations	List of Affected Stations	Total TV Households in Affected DMAs
KAYU/Time Warner Cable	December 2006-February 2008	415	1	KAYU	416,630
Sinclair/MediaCom	December 2006-February 2007	60	24	KDSM, KGAN, WEAR, WFGX, WYZZ, WLOS, WMYA, WDKY, WMSN, WZTV, WUXP, WNAB, WUCW, KBSI, WDKA, WICS, WICD, KDNL, WTWC, WTTO, WABM, WTVZ, WCGV, WVTV	10,726,520
Lin TV/Suddenlink	December 2007-March 2008	90	2	KXAN, KBIM	1,356,790
Barrington Broadcasting/Dish Network	July-September 2008	72	1	KRCG	179,010
Citadel/Dish Network	August-September 2008	37	4	WOI , WHBF, KLKN, KCAU	1,178,200
Lin TV/Time Warner Cable	October-November 2008	31	17	KXAN, KNVA, KBVO, WIVB, WNLO, WWHO, WUPW, WDTN, WISH, WNDY, WIIH, WTHI, WANE, WLUK, WALA, WBPG, WWLP	5,914,950
Fisher Communications/Dish Network	December 2008-June 2009	180	10	KBAK, KBFX, KBCI, KVAL, KIDK, KATU, KOMO, KUNS, KIMA, KUNW	4,061,880
Young Broadcasting/Dish Network	December 2008	5	10	KRON , WLNS, WKRN , WTEN , WRIC , WATE , WBAY, KLFY, KELO, KWQC	6,650,980
Sunflower/Hearst-Argyle	December 2008-February 2009	33	2	KMBC, KCWE	937,970
Free State/DISH network	January 2009	7	1	KTKA	175,940
Newport/Cable One	February 2009	5	5	WPTY, WLMT, WPMI, KMYT, KOKI	1,741,120
ABC/Cablevision	March 2010	~9 hours	1	WABC	7,433,820
Fox /Cablevision/	October 2010	14	3	WNYW, WWOR, WTXF	10,384,040
KOMU/Mediacom	January 2011	4	1	KOMU	179,010
LIN TV/Dish	March 2011	8	27	WTHI, KRQE, KASA, WWLP, WDTN, WBDT, WTNH, WCTX, KXAN, KNVA, WIVB, WNLO, WWHO, WANE, WOOD, WOTV, WLUK, WISH, WNDY, WLFI, WALA, WFNA, WAVY, WVBT, WPRI, WNAC, WUPW	9,768,150
Averages/Totals	**N/A**	**64**	**7**	**N/A**	**42,403,300***

*Rows to not sum to total since some markets were affected by more than one impasse.

47. Table Three presents estimates of the impact of these carriage interruptions on household viewing hours, both in the aggregate and as a proportion of total viewing hours, taking into account that not all households subscribe to affected MVPDs, or would have watched the affected programs. Columns (1) and (2) show the number of markets affected by each interruption, and the total number of TV households in those markets. Column (3) shows the estimated proportion of households in the affected markets which subscribe to the MVPD for which service was interrupted – i.e., the proportion of households *potentially* affected by the interruption. Column (4) shows, for potentially affected households only, the average number of daily viewing hours affected by the interruption, i.e., the hours those households would have spent watching the station that was made unavailable by the interruption, and Column (5) shows affected viewing hours for those households divided by total daily viewing hours, i.e., the proportion of daily television viewing time affected by the interruption. Column (6) shows affected viewing hours as a proportion of total annual viewing hours for potentially affected households; Column (7) shows affected viewing hours as a proportion of total viewing hours for all households in the affected markets (including those subscribing to an unaffected MVPD, or which receive television only over the air). The bottom row in the table shows national totals and averages. For the reasons explained above, the estimates here are conservative, i.e., they likely overstate the actual impact on viewership.

Table Three:
Estimated Effect of Carriage Interruptions on Viewing Hours, 2006 – May 2011

Parties	(1) Affected Markets	(2) Total TV HHs in Affected Markets	(3) % of TV HHs Subscribing to Affected MVPD	(4) Daily Affected Viewing Hours (Affected HHs)	(5) % Daily Viewing Hours Affected (Affected HHs)	(6) % Annual Viewing Hours Affected (Affected HHs)	(7) % Annual Viewing Hours Affected (All TV HHs)
KAYU/Time Warner Cable	1	416,630	10%	0.31	3.75%	4.26%	0.42%
Sinclair/MediaCom	16	10,726,520	7%	0.33	4.01%	1.01%	0.07%
Lin TV/Suddenlink	2	1,356,790	22%	0.47	5.68%	1.08%	0.24%
Barrington Broadcasting/Dish Network	1	179,010	20%	0.90	10.94%	2.16%	0.44%
Citadel/Dish Network	4	1,178,200	15%	0.49	5.97%	0.58%	0.09%
Lin TV/Time Warner Cable	11	5,914,950	38%	0.59	7.16%	0.68%	0.26%
Fisher Communications/Dish Network	7	4,061,880	13%	0.44	5.37%	4.02%	0.51%
Young Broadcasting/Dish Network	10	6,650,980	13%	0.84	10.24%	0.11%	0.01%
Sunflower/Hearst-Argyle	1	937,970	3%	0.65	7.90%	1.43%	0.05%
Free State/Dish Network	1	175,940	13%	0.38	4.65%	0.09%	0.01%
Newport/Cable One	3	1,741,120	53%	0.45	5.41%	0.12%	0.07%
ABC/Cablevision	1	7,433,820	42%	0.52	6.32%	0.02%	0.01%
Fox/Cablevision	2	10,384,040	81%	0.36	4.32%	0.26%	0.21%
KOMU/Mediacom	1	179,010	36%	0.67	8.16%	0.09%	0.03%
LIN TV/Dish Network	17	9,768,150	11%	0.58	7.06%	0.25%	0.03%
National Averages/Totals	**57***	**42,403,300***	**44%**	**0.57**	**6.96%**	**0.07%**	**0.01%**
	Totals		Averages (Affected Markets)				Average (All HHs).

*Rows to not sum to total since some markets were affected by more than one impasse.

48. The data in Table Three continue to show that the aggregate impact of retransmission impasses on viewing hours is miniscule.[34] Most significantly, the share of US viewing hours affected by retransmission impasses remains at approximately one one-hundredth of one percent, as before – that is, U.S. households experienced an average annual service interruption of about 20 minutes. Of course, these figures assume none of these households had access to the affected channels over-the-air,[35] and that none were able to find equally acceptable programming on other stations.

B. Impasses are Not Increasing in Frequency or Impact, and are Becoming Shorter in Duration

49. Using the same underlying data, Table Four displays annual trends in key impasse statistics. As seen below, the share of annual U.S. viewing hours affected by retransmission impasses has fluctuated within a narrow range. Even in 2010, which, as noted above, included both the ABC/Cablevision and Fox/Cablevision impasses, the share of annual viewing hours affected was still very small (less than two one-hundredths of one percent). Since that time, the share of viewing hours affected has declined to well under one one-hundredth of one percent.

---

[34] As noted above, viewing hour estimates for the ABC/Cablevision and Fox/Cablevision interruptions were adjusted to reflect the higher-than-typical viewership associated with the Oscars and with the World Series, respectively. In addition, the ratings data utilized in these calculations are for the year in which the dispute occurred, an adjustment which became worthwhile due to the lengthier period covered by the analysis, relative to the two prior reports. Both the *March 2009 Report* and the *Lexecon Reply* utilized 2008 ratings data only. The impact on the analysis is to very slightly increase the estimate of annual viewing hours affected in 12 of the 15 service interruptions; however, even after these increases, the overall proportion of viewing hours affected remains unchanged from the prior estimates, to the second decimal place – i.e., it remains at 0.01% (one one-hundredeth of one percent). Finally, the *Lexecon Reply* erroneously calculated the impact of the ABC/Cablevision dispute on the assumption that a full day of programming was affected. The estimate in this report is based, correctly, on the fact that the impasse lasted only nine hours.

[35] In fact, nationally, approximately 32 percent of television households have at least one television set receiving signals over the air. See Comments of the National Association of Broadcasters, *In the Matter of Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25 (May 7, 2010) at 50, n. 175.

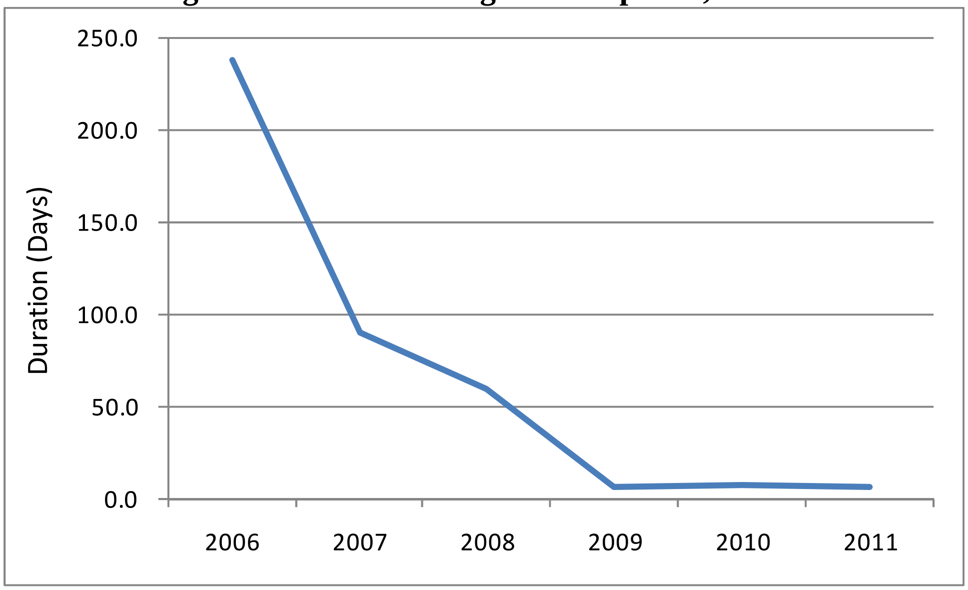
Table Four
Trends in Impasse Statistics, 2006 – May 2011

	Number of Impasses*	Number of Affected Stations	Average Duration (Days)*	% Annual US Viewing Hours Affected (All TV HHs)
2006	2	25	237.5	0.0036%
2007	1	19	90.0	0.0047%
2008	6	47	59.7	0.0199%
2009	2	18	6.0	0.0181%
2010	2	4	7.2	0.0195%
2011	2	28	6.0	0.0058%**

Note: The share of annual viewing in 2010 was affected disproportionately by the ABC/Cablevision impasse and the Fox/Cablevision impasse, both of which affected highly rated events in large metropolitan areas.
* Reports number of impasses beginning in each year; impasses that carried over from one year to the next are not double counted. ** Affected viewing hours as a percentage of all viewing hours for January-May 2011.

The data in Table Four show no discernable upward trend in the prevalence of negotiating impasses, or in their aggregate effects on viewership. And, as illustrated in Figure Twelve, the data shows a clear trend towards much shorter durations.

Figure Twelve
Average Duration of Carriage Interruptions, 2006-2011



50. From a theoretical perspective, the trend towards shorter impasses is unsurprising. First, both broadcasters and MVPDs face strong incentives to avoid impasses, which are unambiguously harmful to both parties. Second, the trend towards shorter disputes is consistent with a learning function; i.e., it suggests that, beginning in 2006 (when the first significant impasses occurred), underlying factors perturbed the prior (zero cash payments) market equilibrium, leading to a "price discovery" process in which both parties (broadcasters and MVPDs) were uncertain of the other's reservation price. It is reasonable to conclude that the revelation of new equilibrium prices (through subsequent transactions) will further reduce bargaining friction and lead to shorter and less frequent impasses in the future.[36]

51. However, we note that if negotiating parties anticipate regulatory intervention, the effect could be to lead to more contentious negotiations and potentially lengthier impasses. This is especially true to the extent either party believes the likelihood of "favorable" regulatory intervention is affected by the existence or length of impasses. Since the MVPDs have staked their case for FCC intervention largely on the purported costs of carriage interruptions, one would expect, if anything, that they would be less reluctant than otherwise to engage in "brinksmanship" so long as the FCC's decision is pending.

VI. CONCLUSIONS

52. The evidence demonstrates that retransmission consent continues to represent an economically efficient regime that results in reasonable compensation for the value of broadcast signals.

---

[36] See, e.g., *Kagan Retrans Whitepaper* at 11 ("Given the precedents being set in terms of the deals that have been done — which are widely considered to have arrived at similar levels of payments — we believe chances are growing that future negotiations can be conducted without major public stand-offs and a loss of the broadcast signal.") and at 3 ("The incidences of high profile spats between cable MSOs and broadcasters will diminish as the practice becomes routine.").

53. There is simply no evidence that the fees MVPDs pay to broadcasters are in any way inefficient or uneconomic, and no basis for concluding that broadcasters have disproportionate "bargaining power" over MVPDs. To the contrary, the evidence suggests that the fees paid by MVPDs for broadcast signals are lower than those paid to cable networks with comparable ratings. Retransmission consent fees represent only a tiny fraction of MVPD costs and revenues, and play at most a miniscule role in the retail price of pay TV. By the same token, there is no basis for the contention that retransmission consent fees harm consumer welfare.

54. Retransmission consent negotiating impasses are extremely rare, and have an infinitesimally small impact on television viewing. Service interruptions due to retransmission impasses have represented, on average, only 0.01 percent of annual total viewing hours since January 2006. Their impact on television viewing is not increasing, and there is a clear trend towards shorter durations. As equilibrium prices continue to be revealed through future negotiations, there is every reason to believe impasses will become even less common, or even disappear altogether. The prospect of government intervention, on the other hand, introduces uncertainty and distorts incentives in ways that can disrupt the bargaining process and make it more difficult to achieve efficient agreements.

55. In short, the evidence shows that the market for broadcast signals is routinely producing welfare-enhancing transactions at efficient prices. Efforts to change the rules in order to tilt the negotiating playing field cannot increase economic efficiency, and are likely to distort the market in ways that harm consumers.

April 2011

JEFFREY AUGUST EISENACH

Education

Ph.D. in Economics, University of Virginia, 1985
B.A. in Economics, Claremont McKenna College, 1979

Professional Experience

Managing Director and Principal, Navigant Economics LLC, January 2010-present
Chairman and Managing Partner, Empiris LLC, September 2008-January 2010
Chairman, Criterion Economics, LLC, June 2006-September 2008
Chairman, The CapAnalysis Group, LLC, July 2005-May 2006
Executive Vice Chairman, The CapAnalysis Group, LLC, February 2003-July 2005
President, The Progress & Freedom Foundation, June 1993-January 2003
Executive Director, GOPAC, July 1991-May 1993
President, Washington Policy Group, Inc., March 1988-June 1991
Director of Research, Pete du Pont for President, Inc., September 1986-February 1988
Executive Assistant to the Director, Office of Management and Budget, 1985-1986
Special Advisor for Economic Policy and Operations, Office of the Chairman, Federal Trade Commission, 1984-1985
Economist, Bureau of Economics, Federal Trade Commission, 1983-1984
Special Assistant to James C. Miller III, Office of Management and Budget/Presidential Task Force on Regulatory Relief, 1981
Research Associate, American Enterprise Institute, 1979-1981
Consultant, Economic Impact Analysts, Inc., 1980
Research Assistant, Potomac International Corporation, 1978

Teaching Experience

Adjunct Professor, George Mason University School of Law, 2000-present (Courses Taught: Regulated Industries; Perspectives on Government Regulation; The Law and Economics of the Digital Revolution)
Adjunct Lecturer, Harvard University, John F. Kennedy School of Government, 1995-1999 (Course Taught: The Role of Government in the 21st Century)
Adjunct Professor, George Mason University, 1989 (Course Taught: Principles of Economics)
Adjunct Professor, Virginia Polytechnic Institute and State University, 1985, 1988 (Courses Taught: Graduate Industrial Organization, Principles of Economics)
Instructor, University of Virginia, 1983-1984 (Courses Taught: Value Theory, Antitrust Policy)
Teaching Assistant, University of Virginia, 1982-1983 (Courses Taught: Graduate Microeconomics, Undergraduate Macroeconomics)

Awards, Activities and Concurrent Positions

Member, Board of Directors/Audit Committee, Economic Club of Washington, 2011-
Member, World Bank ICT Broadband Strategies Toolkit Advisory Group, 2010-
Member, Economic Club of Washington, 2009-
Member, Board of Directors, Intelligent Grid Solutions, 2009-
Member, Board of Directors, PowerGrid Communications, 2008-2009
Member, Board of Advisors, Washington Mutual Investors Fund, 2008-
Member, Board of Advisors, Pew Project on the Internet and American Life, 2002-
Member, Board of Directors, The Progress & Freedom Foundation, 1993-2009
Member, Attorney General's Identity Theft Task Force, Virginia, 2002
Member of the Board of Directors, Privacilla.com, 2002-2003

Member, Executive Board of Advisors, George Mason University Tech Center, 2001-2004
Contributing Editor, *American Spectator*, 2001-2002
Member, Bush-Cheney Transition Advisory Committee on the FCC, 2001
Member, Governor's Task Force on E-Communities, State of Virginia, 2000-2001
Member, 2000-2001 Networked Economy Summit Advisory Committee, 1999-2001
Member, Board of Directors, Internet Education Foundation, 1998-2003
Member, Internet Caucus Advisory Committee, 1998-2003
Member, American Assembly Leadership Advisory Committee, 1996 -2002
Member, Commission on America's National Interests, 1995-2000
Adjunct Scholar, Hudson Institute, 1988-1991
Visiting Fellow, Heritage Foundation, 1988-1991
President's Fellowship, University of Virginia, 1981-1984
Earhart Foundation Fellowship, University of Virginia, 1981-1983
Member, Reagan-Bush Transition Team on the Federal Trade Commission, 1981
Henry Salvatori Award, Claremont Men's College, 1979
Frank W. Taussig Award, American Economic Association, 1978

White Papers and Academic Publications

"Spectrum Reallocation and the National Broadband Plan," *Federal Communications Law Journal* 63, forthcoming 2011

"Evaluating the Cost-Effectiveness of RUS Broadband Subsidies: Three Case Studies," Navigant Economics LLC, April 2011

"Revenues from a Possible Spectrum Incentive Auction: Why the CTIA/CEA Estimate is Not Reliable," Navigant Economics LLC, April 2011

"Competition in the New Jersey Communications Market: Implications for Reform," Navigant Economics LLC, March 2011

"The Role of Independent Contractors in the U.S. Economy," Navigant Economics LLC, December 2010

"Vertical Separation of Telecommunications Networks: Evidence from Five Countries," (with R. Crandall and R. Litan), *Federal Communications Law Journal* 62;3, June 2010

"Video Programming Costs and Cable TV Prices: A Reply to CRA," (with K. Caves), Navigant Economics LLC, June 2010

"Video Programming Costs and Cable TV Prices," Navigant Economics LLC, April 2010

"Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon," Navigant Economics LLC, April 2010

"The Benefits and Costs of Implementing 'Return-Free' Tax Filing In the U.S.," (with R. Litan and C. Caves), Navigant Economics LLC, March 2010

"The Impact of Regulation on Innovation and Choice in Wireless Communications," (with E. Ehrlich and W. Leighton), *Review of Network Economics* 9;1, 2010

"Uncollected Sales Taxes on Electronic Commerce," (with R. Litan), Empiris LLC, February 2010

"The Economics of ESPN360.com," Empiris LLC, November 2009

"Net Neutrality versus Consumer Welfare," in *The Consequences of Net Neutrality Regulations on Broadband Investment and Consumer Welfare: A Collection of Essays,* American Consumer Institute, November 2009

"The Economics of Retransmission Consent," Empiris LLC, March 2009

"Economic Effects of Tax Incentives for Broadband Infrastructure Deployment," (with H. Singer and J. West), Empiris LLC, January 5, 2009

"An Event Analysis Study of the Economic Implications of the FCC's UNE Decision: Backdrop For Current Network Sharing Proposals," (with P. Lowengrub and J.C. Miller III), *Commlaw Conspectus* 17;1, 2008

“Broadband Policy: Does the U.S. Have It Right After All?” in *Telecommunications Policy & Regulation*, Practicing Law Institute, December 2008
“Broadband in the U.S. – Myths and Facts,” in *Australia’s Broadband Future: Four Doors to Greater Competition*, Committee for Economic Development of Australia, 2008
“The Benefits and Costs of I-File,” (with R. Litan and K. Caves), Criterion Economics, LLC, April 14, 2008
“Irrational Expectations: Can a Regulator Credibly Commit to Removing an Unbundling Obligation?” (with Hal J. Singer), *AEI-Brookings Joint Center Related Publication 07-28*, December 2007
“Due Diligence: Risk Factors in the Frontline Proposal,” Criterion Economics, LLC, June 28, 2007
“The Effects of Providing Universal Service Subsidies to Wireless Carriers” (with K. Caves) Criterion Economics, LLC, June 13, 2007
“Assessing the Costs of the Family and Medical Leave Act,” Criterion Economics, LLC, February 16, 2007
“Improving Public Safety Communications: An Analysis of Alternative Approaches,” (with P. Cramton, T. Dombrowsky, A. Ingraham, H. Singer) Criterion Economics, LLC, February 6, 2007
“Economic and Regulatory Implications of Unregulated Entry in the Canadian Mortgage Insurance Market,” Criterion Economics, LLC, June 20, 2006
“The FCC’s Further Report on A La Carte Pricing of Cable Television,” (with R. Ludwick) The CapAnalysis Group, LLC, March 6, 2006
“The EX-IM Bank’s Proposal to Subsidize the Sale of Semiconductor Manufacturing Equipment to China: Updated Economic Impact Analysis,” (with J.C. Miller III, R. Ludwick) The CapAnalysis Group, LLC, November 2005
“Retransmission Consent and Cable Television Prices,” (with D. Trueheart) The CapAnalysis Group, LLC, March 2005
“The EX-IM Bank’s Proposal to Subsidize the Sale of Semiconductor Manufacturing Equipment to China: An Economic Impact Analysis,” (with J.C. Miller III, R. Ludwick, O. Grawe) The CapAnalysis Group, LLC, January 2005.
“Peer-to-Peer Software Providers’ Liability under Section 5 of the FTC Act,” (with J.C. Miller III, L. Fales, C. Webb) The CapAnalysis Group, LLC and Howrey LLP, April 2004
“Mandatory Unbundling: Bad Policy for Prison Payphones,” (with D. Trueheart, J. Mrozek) The CapAnalysis Group, LLC, March 2004
“UNE Rates Do Not Reflect Underlying Costs: A Rebuttal to Ekelund and Ford,” (with J. Mrozek), The CapAnalysis Group, LLC, January 30, 2004
“Do UNE Rates Reflect Underlying Costs?” (with J. Mrozek) The CapAnalysis Group, LLC, December 2003
“Rising Cable TV Rates: Are Programming Costs the Villain?” (with D. Trueheart) The CapAnalysis Group, LLC, October 2003
“Economic Implications of the FCC’s UNE Decision: An Event Analysis Study,” (with J.C. Miller III, P. Lowengrub) The CapAnalysis Group, LLC, April 2003
“Telecom Deregulation and the Economy: The Impact of ‘UNE-P’ on Jobs, Investment and Growth” (with T. Lenard) *Progress on Point 10.3,* The Progress & Freedom Foundation, January 2003.
“The CLEC Experiment: Anatomy of a Meltdown,” (with L. Darby and J. Kraemer) *Progress on Point 9.23,* The Progress & Freedom Foundation, September 2002
“The Debate Over Digital Online Content: Understanding the Issues,” (with W. Adkinson, Jr.) *Progress on Point 9.14,* The Progress & Freedom Foundation, April 2002
“Electricity Deregulation after Enron,” *Progress on Point 9.11,* The Progress & Freedom Foundation, April 2002
“Political Privacy: Is Less Information Really Better?” *Progress on Point 9.2,* The Progress & Freedom Foundation, January 2002

"Communications Deregulation and FCC Reform: Finishing the Job," (with R. May), in *Communications Deregulation and FCC Reform: What Comes Next?* (ed., with R. May) Kluwer Academic Publishers, 2001

"Does Government Belong in the Telecom Business?" *Progress on Point 8.1,* The Progress & Freedom Foundation, January 2001

"Critics Fear Surveillance of Web Surfers Compromising Personal Privacy," *Progress on Point 7.11,* The Progress & Freedom Foundation, July 2000

"Access Charges and The Internet: A Primer," *Progress on Point 7.9*, The Progress & Freedom Foundation, June 2000

"The Need for a Practical Theory of Modern Governance," *Progress on Point 7.7*, The Progress & Freedom Foundation, May 2000

"The Microsoft Monopoly: The Facts, the Law and the Remedy," (with T. Lenard) *Progress on Point 7.4*. The Progress & Freedom Foundation, April 2000

"Regulatory Overkill: Pennsylvania's Proposal to Breakup Bell Atlantic," (with C. Eldering, R. May) *Progress on Point 6.13,* The Progress & Freedom Foundation, December 1999

"Is There a Moore's Law for Bandwidth?" (with C. Eldering, M. Sylla), *IEEE Communications Magazine,* October 1999

"The High Cost of Taxing Telecom" *Progress on Point 6.6,* The Progress & Freedom Foundation, September 1999

"Creating the Digital State: A Four Point Program," *Progress on Point 6.4,* The Progress & Freedom Foundation, August 1999

"How to Recognize a Regulatory Wolf in Free Market Clothing: An Electricity Deregulation Scorecard," (with T. Lenard) *Progress on Point 6.3,* The Progress & Freedom Foundation, July 1999

"Into the Fray: The Computer Industry Flexes Its Muscle on Bandwidth," *Progress on Point 5.9,* The Progress & Freedom Foundation, December 1998

"Surprise: Even in Electricity, the Market Works," The Progress & Freedom Foundation, Nov. 1998

"Finally! An 'Electricity Deregulation' Bill That Deregulates," *Progress on Point 5.7,* The Progress & Freedom Foundation, October 1998

"Time to Walk the Walk on Telecom Policy*," Progress on Point 4.3*, The Progress & Freedom Foundation, July 1997

"The FCC and the Telecommunications Act of 1996: Putting Competition on Hold?" (with G. Keyworth), *Progress on Point 2.1,* The Progress & Freedom Foundation, October 1996

"Forebearance, Self-Certification and Privatization," (with J. Gattuso, et al) *Future Insight No. 3.2,* The Progress & Freedom Foundation, May 1996

"Privatizing the Electromagnetic Spectrum," (with R. Crandall, et al) *Future Insight No. 3.1*, The Progress & Freedom Foundation, April 1996

"Broadcast Spectrum: Putting Principles First," (with R. Crandall et al) *Progress on Point 1.9,* The Progress & Freedom Foundation, January 1996

"How (Not) to Solve the Liability Crisis," in P. McGuigan, ed., *Law, Economics & Civil Justice Reform: A Reform Agenda for the 1990's,* Free Congress Foundation, 1995

"The Future of Progress," *Future Insight 2.3*, The Progress & Freedom Foundation, May 1995

"American Civilization and the Idea of Progress," in D. Eberly, ed., *Building a Community of Citizens: Civil Society in the 21st Century*, University Press of America, 1994

"Fighting Drugs in Four Countries: Lessons for America?" *Backgrounder* 790, The Heritage Foundation, Washington, DC, September 24, 1990

"Drug Legalization: Myths vs. Reality," *Heritage Backgrounder 122*, The Heritage Foundation, January 1990

"How to Ensure A Drug-Free Congressional Office," The Heritage Foundation, January 1990

"A White House Strategy for Deregulation," in *Mandate for Leadership III,* The Heritage Foundation, 1989

"From George Bush, A Convincing Declaration of War on Drugs," *Executive Memorandum* No. 250, The Heritage Foundation, September 14, 1989

"Winning the Drug War: What the States Can Do," *Heritage Backgrounder* 715/S, July 7, 1989

"Why America is Losing the Drug War," *Heritage Backgrounder* 656, June 9, 1988

"Selectivity Bias and the Determinants of SAT Scores," (with A. Behrendt and W. Johnson) *Economics of Education Review* 5;4, 1986

"Review of Banking Deregulation and the New Competition in the Financial Services Industry," *Southern Economic Journal* 52;3, January 1986

"Warranties, Tie-ins, and Efficient Insurance Contracts: A Theory and Three Case Studies," (with R. Higgins and W. Shughart II), *Research in Law and Economics* 6, 1984

"Regulatory Relief under Ronald Reagan," (with James C. Miller III), in Wayne Valis, ed., *The Future Under President Reagan*, Arlington House, 1981

<u>Expert Reports, Filings and Testimony</u>

In the Matter of Section 36 of the Public Utilities Commission Act, Proposal to Establish a New Interconnection Agreement Between Digicel and GT&T, Expert Oral Testimony on Behalf of Guyana Telephone and Telegraph Company, Guyana Public Utilities Commission (July 13, 2010)

In the Matter of International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act, Federal Communications Commission GN Docket No. 09-47, Supplemental Declaration Regarding the Berkman Center Study (NBP Public Notice 13) (with R. Crandall, E. Ehrlich and A. Ingraham), on Behalf of Verizon Communications (May 10, 2010)

Testimony on Deployment of Broadband Communications Networks, Before the Subcommittee on Communications, Technology and the Internet, Committee on Energy and Commerce, United States House of Representatives (April 21, 2010)

Net Neutrality: The Economic Evidence, Expert Declaration in the Matters of Preserving the Open Internet and Broadband Industry Practices, GN Docket No. 09-191 and WC Docket No. 07-52 (with Brito et al) (April 12, 2010)

In the Matter of the Constitution of the Co-Operative Republic of Guyana and In the Matter of the Application for Redress Under Article 153 for the Contravention of the Applicant's Fundamental Rights Guaranteed by Articles 20, 146, and 149D of the Constitution of the Republic of Guyana and In the Matter of the Telecommunications Act No. 27 of 1990, U-Mobile (Cellular) Inc., v. The Attorney General of Guyana, "International Exclusivity and the Guyanese Telecommunications Market: A Further Response to DotEcon," Expert Report on Behalf of Guyana Telephone and Telegraph Company (March 9, 2010)

Universal Service Subsidies to Areas Served by Cable Telephony: Supplemental Report, Expert Report Submitted to the Federal Communications Commission, on Behalf of the National Cable and Telecommunications Association (January 2010)

Policy Proceeding on a Group-Based Approach to the Licensing of Television Services and on Certain Issues Relating to Conventional Television, Canadian Radio-Television and Telecommunications Commission, Broadcasting Notice of Consultation CRTC 2009-411, Oral Testimony on Behalf of CTVgm (November 16, 2009)

In the Matter of International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act, Federal Communications Commission GN Docket No. 09-47, Declaration Regarding the Berkman Center Study (NBP Public Notice 13) (with R. Crandall and E. Ehrlich) on behalf of the National Cable and Telecommunications Association and the United States Telecom Association (November 16, 2009)

Universal Service Subsidies to Areas Served by Cable Telephony, Expert Report Submitted to the Federal Communications Commission, on behalf of the National Cable and Telecommunications Association (November 2009)

Policy proceeding on a Group-based Approach to the Licensing of Television Services and on Certain Issues relating to Conventional Television, Canadian Radio-Television and Telecommunications Commission Broadcasting Notice of Consultation CRTC 2009-411, Expert Report on the Economics of Retransmission Consent Negotiations in the U.S. and Canada, (with S. Armstrong) on Behalf of CTVgm (September 19, 2009)

In the Matter of the Constitution of the Co-Operative Republic of Guyana and In the Matter of the application for redress under Article 153 for the contravention of the Applicant's fundamental rights guaranteed by Articles 20, 146, and 149D of the Constitution of the Republic of Guyana and In the Matter of the Telecommunications Act No. 27 of 1990, U-Mobile (Cellular) Inc., v. The Attorney General of Guyana, Expert Report on Behalf of Guyana Telephone and Telegraph Company (June 19, 2008)

Virginia State Corporation Commission, Second Order for Notice and Hearing In Re: Revisions of Rules for Local Exchange Telecommunications Company Service Quality Standards, Comments on Behalf of Verizon Virginia (March 13, 2009)

In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Federal Communications Commission Docket MB 07-198, Supplemental Report on Behalf of the Walt Disney Company (December 11, 2008)

In re: Investigation of Rates of Virgin Islands Telephone Corporation d/b/a Innovative Communications, PSC Docket 578, Rebuttal Testimony on Behalf of Virgin Islands Telephone Corporation (October 31, 2008)

Evidence Relating to the ACCC's Draft Decision Denying Telstra's Exemption Application for the Optus HFC Footprint, Australian Consumer and Competition Commission, Expert Report on Behalf of Telstra Corporation Ltd. (October 13, 2008)

In re: Investigation of Rates of Virgin Islands Telephone Corporation d/b/a Innovative Communications, PSC Docket 578, Direct Testimony on Behalf of Virgin Islands Telephone Corporation (September 26, 2008)

In the Matter of the Appropriate Forms of Regulating Telephone Companies, Maryland Public Service Commission, Case No. 9133, Rebuttal Testimony on Behalf of Verizon Maryland (September 24, 2008)

Virginia State Corporation Commission, Proposed Service Quality Rules for Traditional Landline Telecommunications, Comments on Behalf of Verizon Virginia (August 21, 2008)

In re: Complaint and Request for Emergency Relief against Verizon Florida, LLC for Anticompetitive Behavior in Violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for Failure to Facilitate Transfer of Customers' Numbers to Bright House Networks Information Services (Florida), LLC, and its Affiliate, Bright House Networks, LLC, Florida Public Service Commission, Docket No. 070691-TP, Rebuttal Testimony on Behalf of Verizon Florida LLC (July 25, 2008)

In the Matter of the Appropriate Forms of Regulating Telephone Companies, Maryland Public Service Commission, Case No. 9133, Direct Testimony on Behalf of Verizon Maryland (July 8, 2008)

Comparative Analysis of Communications Markets as it Relates to the Economic Viability of Optus' HFC Network and Telstra's Proposed HFC Exemption, Australian Consumer and Competition Commission, Expert Report on Behalf of Telstra Corporation Ltd. (June 23, 2008)

In the Matter of Bright House Networks LLC et al v. Verizon California et al, Federal Communications Commission File No. EB-08-MD-002, Expert Declaration on Behalf of Verizon Communications (February 29, 2008)

In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Federal Communications Commission Docket MB 07-198, Reply Report on Behalf of the Walt Disney Company (February 12, 2008)

In the Matter of Verizon's 2007 Price Cap Plan for the Provision of Local Telecommunications Services in the District Of Columbia, District of Columbia Public Service Commission, Formal Case No. 1057, Rebuttal Testimony on Behalf of Verizon (January 31, 2008)

In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Federal Communications Commission Docket MB 07-198, Expert Report on Behalf of the Walt Disney Company (January 4, 2008)

In the Matter of Verizon's 2007 Price Cap Plan for the Provision of Local Telecommunications Services in the District Of Columbia, District of Columbia Public Service Commission, Formal Case No. 1057, Direct Testimony on Behalf of Verizon (December 7, 2007)

In the Matter of the Commission's Investigation Into Verizon Maryland, Inc.'s Affiliate Relationships, Maryland Public Service Commission, Case No. 9120, Rebuttal Testimony on Behalf of Verizon (November 19, 2007)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Pacific Bell Telephone Company d/b/a AT&T California, et al., Petitioners, v. Linkline Communications, Inc., et al., Respondents, Brief of Amici Curiae Professors and Scholars in Law and Economics in Support of the Petitioners (with R. Bork, G. Sidak, et al) (November 16, 2007)

In the Matter of the Commission's Investigation Into Verizon Maryland, Inc.'s Affiliate Relationships, Maryland Public Service Commission, Case No. 9120, Direct Testimony on Behalf of Verizon (October 29, 2007)

Application of Verizon Virginia, Inc. and Verizon South for a Determination that Retail Services Are Competitive and Deregulating and Detariffing of the Same, State Corporation Commission of Virginia, Case No. PUC-2007-00008, Rebuttal Report on Behalf of Verizon (July 16, 2007)

Testimony on Single Firm Conduct, "Understanding Single-Firm Behavior: Conduct as Related to Competition," United States Department of Justice and United States Federal Trade Commission, Sherman Act Section 2 Joint Hearing (May 8, 2007)

Testimony on Communications, Broadband and U.S. Competitiveness, Before the Committee on Commerce, Science and Transportation, United State Senate (April 24, 2007)

Application of Verizon Virginia, Inc. and Verizon South for a Determination that Retail Services Are Competitive and Deregulating and Detariffing of the Same, State Corporation Commission of Virginia, Case No. PUC-2007-00008, Expert Testimony and Report on Behalf of Verizon (January 17, 2007)

In re: ACLU v. Gonzales, Civil Action No. 98-CV-5591, E.D. Pa., Rebuttal Report on Behalf of the U.S. Department of Justice (July 6, 2006)

In re: ACLU v. Gonzales, Civil Action No. 98-CV-5591, E.D. Pa., Expert Report on Behalf of the U.S. Department of Justice (May 8, 2006)

In re: Emerging Communications Shareholder Litigation, "The Valuation of Emerging Communications: An Independent Assessment" (with J. Mrozek and L. Robinson), Court of Chancery for the State of Delaware (August 2, 2004)

In the Matter of Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers, WC Docket No. 03-173, Declaration of Jeffrey A. Eisenach and Janusz R. Mrozek, Federal Communications Commission (December 2003)

In the Matter of Disposition of Down Payments and Pending Applications Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications, Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc., Federal Communications Commission, (October 11, 2002)

In the Matter of Echostar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Federal Communications Commission (February 4, 2002)

In the Matter of United States v. Microsoft Corp. and New York State v. Microsoft Corp., Proposed Final Judgment and Competitive Impact Statement (with T. Lenard), U.S. Department of Justice, Civil Action No. 98-1232 and 98-1233 (January 28, 2002)

In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 (with R. May), Federal Communications Commission (January 4, 2002)

In the Matter of Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications (with R. May), National Telecommunications and Information Administration (December 19, 2001)

In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Consumer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended (with T. Lenard and J. Harper), Federal Communications Commission (November 16, 2001)

In the Matter of Flexibility for Delivery of Communications by Mobile Satellite Service Providers (with W. Adkinson), Federal Communications Commission (October 22, 2001)

In the Matter of Deployment of Advanced Telecommunications Capability (with R. May), Federal Communications Commission (October 5, 2001)

In the Matter of Deployment of Advanced Telecommunications Capability (with R. May), Federal Communications Commission (September 24, 2001)

In the Matter of Nondiscrimination in Distribution of Interactive Television Services Over Cable (with R. May), Federal Communications Commission (March 19, 2001)

In the Matter of High-Speed Access to the Internet Over Cable and Other Facilities, Reply Comments (with R. May), Federal Communications Commission (December 1, 2000)

Testimony on Federal Communications Commission Reform, Before the Committee on Government Reform, Subcommittee on Government Management, Information and Technology, United States House of Representatives (October 6, 2000)

In the Matter of Public Interest Obligations of TV Broadcast Licensees (with R. May), Federal Communications Commission (March 27, 2000)

Testimony on Truth in Billing Legislation, Before the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, United States House of Representatives (March 9, 2000)

In the Matter of GTE Corporation, Transferor and Bell Atlantic, Transferee for Consent to Transfer of Control, (with R. May), Federal Communications Commission (February 15, 2000)

Testimony on Reforming Telecommunications Taxes in Virginia, Governor's Commission on Information Technology (October 26, 1999)

Testimony on Telecommunications Taxes, Advisory Commission on Electronic Commerce (September 14, 1999)

In the Matter of GTE Corporation, Transferor and Bell Atlantic, Transferee for Consent to Transfer of Control, Federal Communications Commission (December 23, 1998)

In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 (with C. Eldering), Federal Communications Commission (September 14, 1998)

Testimony on Section 706 of the Telecommunications Act of 1996 and Related Bandwidth Issues, Before the Subcommittee on Communications Committee on Commerce, Science, and Transportation, United States Senate (April 22, 1998)

Testimony on the Impact of the Information Revolution on the Legislative Process and the Structure of Congress, Before the Subcommittee on Rules and Organization of the House of the Committee on Rules, United States House of Representatives (May 24, 1996)

Testimony on Efforts to Restructure the Federal Government, Before the Committee on Governmental Affairs, United States Senate (May 18, 1995)

Testimony on the Role of the Department of Housing and Urban Development and the Crisis in America's Cities, Before the Committee on Banking and Financial Services, United States House of Representatives (April 6, 1995)

Books and Monographs

The Impact of State Employment Policies on Job Growth: A 50-State Review (with David S. Baffa, et al), U.S. Chamber of Commerce, March 2011

The Digital Economy Fact Book 2002, (with W. Adkinson Jr. and T. Lenard) The Progress & Freedom Foundation, August 2002

Privacy Online: A Report on the Information Practices and Policies of Commercial Web Sites, (with W. Adkinson, Jr., T. Lenard) The Progress & Freedom Foundation, March 2002

The Digital Economy Fact Book 2001, (with T. Lenard, S. McGonegal) The Progress & Freedom Foundation, August 2001

Communications Deregulation and FCC Reform: What Comes Next? (ed., with R. May) Kluwer Academic Publishers, 2001

The Digital Economy Fact Book 2000, (with T. Lenard, S. McGonegal) The Progress & Freedom Foundation, August 2000

Digital New Hampshire: An Economic Factbook, (with R. Frommer, T. Lenard) The Progress & Freedom Foundation, December 1999

The Digital Economy Fact Book, (with A. Carmel and T. Lenard), The Progress & Freedom Foundation, August 1999

Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace, (ed., with T. Lenard), Kluwer Academic Publishers, 1999

The People's Budget, (with E. Dale, et al), Regnery Publishing, 1995

The Telecom Revolution: An American Opportunity, (with G. Keyworth, et al) The Progress & Freedom Foundation, 1995

Readings in Renewing American Civilization, (ed. with S. Hanser) McGraw-Hill, Inc, 1993

America's Fiscal Future 1991: The Federal Budget's Brave New World, Hudson Institute, 1991

Winning the Drug War: New Challenges for the 1990's, (ed.) The Heritage Foundation, Washington, DC, 1991

Drug-Free Workplace Policies for Congressional Offices, (ed.) The Heritage Foundation, Washington, DC, 1991

America's Fiscal Future: Controlling the Federal Deficit in the 1990's, Hudson Institute, 1990

The Role of Collective Pricing in Auto Insurance, Federal Trade Commission, Bureau of Economics Staff Study, 1985

The Five-Year Budget Outlook, Hudson Institute, 1988

Short Articles and Op-Eds

"Follow Obama's Lead on Wireless," *The Australian*, February 7, 2011

"The Radicalism of Net Neutrality," *The Hill*, September 2, 2010

"Net Neutrality Rules Threaten Telecom Détente," *Law360.com*, August 10, 2010

"Don't Drag Broadband Into the Net Neutrality Morass," *The Daily Caller*, July 13, 2010

"Coase vs. the Neo-Progressives," (with A. Thierer), *The American: The Journal of the American Enterprise Institute* (October 28, 2009)

"The U.S. Abandons the Internet," (with J. Rabkin), *The Wall Street Journal*, October 3, 2009

"A La Carte Regulation of Pay TV: Good Intentions vs. Bad Economics," (with A. Thierer) *Engage*, June 2008

"A New Takings Challenge to Access Regulation," American Bar Association, Section on Antitrust Law, *Communications Industry Committee Newsletter*, Spring 2007
"Reagan's Economic Policy Legacy," (with J.C. Miller III), *The Washington Times*, August 8, 2004
"Do Right by Minority Farmers," *The Washington Times*, July 17, 2003
"Pruning the Telecom Deadwood," *The Washington Times*, November 1, 2002
"The Real Telecom Scandal," *The Wall Street Journal*, September 30, 2002
"Ensuring Privacy's Post-Attack Survival," (with Peter P. Swire) *CNET News.com*, September 11, 2002
"One Step Closer to 3G Nirvana," *CNET News.com*, August 6, 2002
"Reviving the Tech Sector," *The Washington Times*, July 10, 2002
"Broadband Chickens in Age of the Internet," *The Washington Times*, March 11, 2002
"Watching the Detectives," *The American Spectator*, January/February 2002
"Can Civil Liberties Survive in a Society Under Surveillance?" *Norfolk Virginian-Pilot*, November 18, 2001
"Microsoft Case: There Are Still Antitrust Laws," *Newport News Daily Press*, July 6, 2001
"Dear Diary: There's Still an Antitrust Law," *Los Angeles Times*, June 29, 2001
"Lost in Cyberspace? Does the Bush Administration Get the New Economy?" *The American Spectator*, June 2001
"Local Loop: NASDAQ Noose, Al Gore's Internet Socialism is Choking the Technology Sector," *The American Spectator*, April 2001
"Local Loop, High-Tech Noose," *The American Spectator*, March 2001
"Rescue Opportunity at the FCC," *The Washington Times*, February 4, 2001
"Economic Anxieties in High-Tech Sector," *The Washington Times*, December 12, 2000
"Nation's Conservatives Should Support a Breakup of Microsoft," *The Union Leader & New Hampshire Sunday News*, February 22, 2000
"Benefits Riding on a Breakup," *The Washington Times*, November 14, 1999
"Still Wondering What Cyberspace is All About?" *Insight on the News*, Vol. 15, No. 11, March 22, 1999
"Computer Industry Flexes Its Muscle," *Intellectual Capital.com*, January 28, 1999
"Ira Magaziner Targets the Internet," *The Washington Times*, March 26, 1997
"Revolution – or Kakumei" *Forbes ASAP*, December 1996
"Digital Charity," *Intellectual Capital.com*, November 28, 1996
"Time to Junk the Telecom Act," *Investor's Business Daily*, July 23, 1998
"Consumers Win in Mergers," *Denver Post*, July 5, 1998
"Microsoft's Morality Play," *News.com*, March 11, 1998
"California Will Soon Be Eating Dust," *Forbes Magazine*, August 1997
"Watch Out for Internet Regulation," *The Washington Times*, July 9, 1997
"Those GOP Blockheads Just Don't Get It; Block Grants are Merely another Bogus Solution," *The Washington Post*, September 3, 1995
"Replace, Don't Reinvent, HUD," *The Wall Street Journal*, May 11, 1995
"Poor Substitute," (with P. du Pont), *National Review*, December 31, 1994
"Just Say No to More Drug Clinics," *St. Louis Post-Dispatch*, June 14, 1991
"Drug Rehab Funding is No Panacea," *Chicago Tribune*, June 7, 1991
"The Vision Thing, Conservatives Take Aim at the '90's," *Policy Review* 52, Spring 1990
"What States Can Do To Fight the Drug War," *The Washington Times*, September 4, 1989
"Congress: Reform or Transform," (with P. McGuigan) *Washington Times*, June 12, 1989
"How to Win the War on Drugs: Target the Users," *USA Today*, January 1989
"Invest Social Security Surplus in Local Project Bonds," *Wall Street Journal*, January 4, 1989
"The Government Juggernaut Rolls On," *Wall Street Journal*, May 23, 1988
"Is Regulatory Relief Enough?" (with M. Kosters), *Regulation* 6, March/April 1982
"Price Competition on the NYSE," (with J.C. Miller III), *Regulation* 4, Jan./Feb. 1981

Selected Presentations

"Sell Globally, Sue Locally: The Growing Perils of Global 'Dominance,'" Antitrust Section, Ohio State Bar Association, October 27, 2006

"The Growing Global Perils of 'Dominance,'" Aspen Summit Conference, August 21, 2006

"Telecoms in Turmoil: What We Know and (Mostly) Don't Know About the Telecom Marketplace in 2006," National Regulatory Conference, May 11, 2006

"Mandatory Unbundling in the U.S.: Lessons Learned the Hard Way," Telstra Corporation, November 25, 2005

"The Fourth 'S': Digital Content and the Future of the IT Sector," Federal Communications Bar Association, May 2, 2003

"Restoring IT Sector Growth: The Role of Spectrum Policy in Re-Invigorating 'The Virtuous Circle,'" National Telecommunications and Information Administration Spectrum Summit, April 2, 2002

"Restoring IT Sector Growth-Why Broadband, Intellectual Property and Other E-Commerce Issues Are Key to a Robust Economy," August 2001

"Remarks at the 2000 Global Internet Summit," March 14, 2000

"The Digital State: Remarks on Telecommunications Taxes," Address Before the Winter Meeting of the National Governors Association, February 21, 1999

"The Digital Economy," Address at the George Mason University Conference on The Old Dominion and the New Economy, November 1998

"A Convergence Strategy for Telecommunications Deregulation," Remarks at the United States Telephone Association's Large Company Meeting, September 1998

KEVIN W. CAVES
DIRECTOR
NAVIGANT ECONOMICS
1801 K Street, NW, Suite 500, Washington, DC 20006
Phone: (202) 973-2460
E-mail: kevin.caves@naviganteconomics.com

EDUCATION

Ph.D. Economics, University of California at Los Angeles, December 2005
Fields of Study: Industrial Organization, Applied Econometrics

M.A. Economics, University of California at Los Angeles, May 2002

B.A. *Magna cum laude*, Departmental Honors in Economics, Haverford College, May 1998

EMPLOYMENT HISTORY

Director, Navigant Economics, March 2011 to present

Associate Director, Navigant Economics, February 2010 to March 2011

Vice President, Empiris LLC, September 2008 to February 2010

Senior Economist, Criterion Economics LLC, October 2006 to September 2008

Senior Consultant, Deloitte & Touche LLP, September 2005 to October 2006

Teaching Fellow, Department of Economics, UCLA, January 2002 to June 2004

Assistant Economist, Federal Reserve Bank of New York, August 1998 to June 2000

ACADEMIC AND COMMISSIONED RESEARCH

Quantifying Price-Driven Wireless Substitution in Telephony (revise and resubmit, TELECOMMUNICATIONS POLICY, April 2011).

.

Evaluating the Cost-Effectiveness of RUS Broadband Subsidies: Three Case Studies (prepared with support from The National Cable & Telecommunications Association, co-authored with Jeffrey A. Eisenach, April 2011).

Video Programming Costs and Cable TV Prices: A Reply to CRA (prepared with support from The National Association of Broadcasters, co-authored with Jeffrey A. Eisenach, June 2010).

Modeling the Welfare Effects of Net Neutrality Regulation: A Comment on Economides and Tåg (prepared with support from Verizon Communications, April 2010).

Retransmission Consent and Economic Welfare: A Reply to Compass-Lexecon (prepared with support from The National Association of Broadcasters, co-authored with Jeffrey A. Eisenach, April 2010).

The Benefits and Costs of Implementing "Return-Free" Tax Filing in the U.S. (prepared with support from The Computer & Communications Industry Association, co-authored with Jeffrey A. Eisenach & Robert E. Litan, March 2010).

The Benefits and Costs of I-File (prepared with support from The Computer & Communications Industry Association, co-authored with Jeffrey A. Eisenach & Robert E. Litan, April 2008).

The Effects of Providing Universal Service Subsidies to Wireless Carriers (prepared with support from Verizon Communications, co-authored with Jeffrey A. Eisenach, June 2007).

Structural Identification of Production Functions (co-authored with Daniel Ackerberg and Garth Frazer, revise and resubmit, ECONOMETRICA, December 2006).

State Dependence and Heterogeneity in Aggregated Discrete Choice Demand Systems: An Example from the Cigarette Industry (UCLA Dissertation, December 2005).

HONORS AND AWARDS

Howard Fellowship for Excellency in Teaching, University of California at Los Angeles, Spring 2005.

Graduate Fellowship, University of California at Los Angeles, 2000 – 2004.

Departmental Honors in Economics, Haverford College, May 1998.

Phi Beta Kappa Society, elected May 1998.

ATTACHMENT B

lin media

February 28, 2011

Via Hand Delivery and E-mail

Mr. William Lake
Chief, Media Bureau
Federal Communications Commission
445 Street, S.W., Room 8-A302
Washington, D.C. 20554

Re: DISH Network Termination of Carriage of LIN Television Stations

Dear Mr. Lake:

At 11:59 p.m. Mountain Time on Friday, March 4, we expect DISH Network, LLC ("DISH") to terminate carriage of signals of television stations owned or serviced by LIN Television Corporation ("LIN") and its subsidiaries in 17 television markets. The affected stations will begin giving notice of the carriage interruption this afternoon.

We want to emphasize that DISH made the decision to terminate carriage. When LIN realized that negotiations were unlikely to conclude by 11:59 p.m. today, the end of the term of our existing retransmission agreement with DISH, LIN proposed to extend its existing agreement for an additional month, with no change in compensation or other terms during the extended period. We hoped to prevent an interruption of service to our viewers and DISH's subscribers. DISH refused that offer. DISH proposed a day-to-day extension provided that LIN did not give notice to viewers that carriage might be disrupted.

LIN is unwilling to put viewers at risk of losing access to LIN's signals with no prior notice, so we rejected DISH's proposed day-to-day extension subject to no consumer notice. We told DISH that we would extend the existing agreement for more or less than one month, but would not agree to an extension so short as to preclude reasonable consumer notice. Late last week DISH finally agreed to a four-day extension, until 11:59 p.m. on Friday of this week. However, DISH was unavailable to negotiate over this past weekend, and it now appears unlikely that negotiations will conclude this week.

We at LIN were surprised that DISH would refuse our offer to carry these signals under terms of the expiring agreement for another month in an effort to reach a new agreement without disrupting service to DISH's subscribers. DISH has asked the FCC to <u>require</u> parties to continue carriage on terms of expiring retransmission agreements, so we did not expect DISH to refuse the identical relief when voluntarily offered by LIN.

One West Exchange Street, Suite 5A, Providence RI 02903 | p 401.457.9500 f 401.454.2817 | www.linmedia.com

LIN has made every effort to avoid this disruption. However, now that DISH has made the decision to terminate carriage, we are working hard to alert viewers and to ensure that all viewers will continue to have access to the affected television stations' signals while we continue our efforts to negotiate a carriage agreement with DISH.

What LIN is doing to mitigate viewer disruption. All affected stations broadcast from state-of-the-art technical facilities that provide excellent over-the-air coverage to the great majority of households in every market we serve. In addition, LIN has retransmission agreements in effect with all other multichannel video distributors serving our markets. Essentially all LIN viewers now served by DISH can receive these signals over-the-air or through another multichannel distributor. The great majority of affected DISH subscribers have three or more options to receive affected television programming.

This afternoon LIN will launch a coordinated initiative in every affected market with three goals: (i) to inform affected subscribers that DISH might not carry these stations after midnight on Friday of this week; (ii) to educate affected viewers about their other options for receiving these signals; and (iii) to provide assistance in taking the steps necessary to ensure uninterrupted service. Specifically:

- Beginning today, each affected station will run crawls and special announcements informing viewers that the station may not be available on DISH after Friday, March 4.

- We are establishing a call center reachable by special toll-free telephone numbers that consumers can call 24/7 for more information.

- Each station has designated staff to read and respond to emails and telephone calls from viewers.

- We will establish a series of special web pages that provide information about alternative ways DISH subscribers can continue to receive the signals.

- We will launch a print, broadcast, and web campaign informing viewers of alternative ways to receive affected signals.

- Before Friday we will provide community leaders in each market with advance notice and we will keep them informed throughout the process.

- We will notify our other distribution partners and encourage them to make extra efforts to be responsive to inquiries from DISH subscribers in LIN markets.

Ideally, we would have begun these efforts earlier than today, but we did not expect DISH to decline our offer to extend our existing agreement.

I assure you that LIN will continue to take all reasonable steps to educate viewers about their options for continued access to these stations, which are among the most widely viewed television channels in each market we serve. We believe the best result for all parties would be a final agreement that assures continued carriage. We are actively working on this process, and we will continue to devote all necessary resources to reaching a fair agreement with DISH as quickly as possible.

Please feel free to contact me if you have any questions about these events or would like more information.

Respectfully,

/s/ Rebecca Duke

Rebecca Duke
Vice President of Distribution

cc: Mary Beth Murphy
Diana Sokolow
Steven Broeckaert

ATTACHMENT C

Cable Subscriber Data*
Markets 101+

Total Subscribers, All Owners in Markets 101+: **7,602,362**

Total Subscribers, Comcast, Time Warner, and Charter in Markets 101+: **3,892,418**

Number of Cable Subscribers Markets 101+		
Owner Name	**Total Subscribers in Markets 101+**	**% of All Cable Subscribers in Markets 101+**
Comcast	1,522,628	20.0%
Time Warner	1,205,553	15.9%
Charter	1,164,237	15.3%
Total:	**3,892,418**	**51.2%**

****See MediaBiz: MediaCensus Competitive Intelligence /SNL Kagan, Video Market Share (Cable & DBS & Telco Video) by DMA® - 4th Quarter 2010*.**

ATTACHMENT D

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

[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*

---

[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

---

[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

---

[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

[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.

---

[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.