
RETRANSMISSION CONSENT AND BROADCASTER COMMITMENT TO LOCALISM

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I. INTRODUCTION

The issue of retransmission consent between multi-channel video programming distributors (“MVPD”) and local broadcast television stations has grown increasingly contentious in recent years. Broadcasters are more frequently seeking cash payments from MVPDs and are being more aggressive in terms of the size of the payments that they pursue in an effort to transition to a business model more akin to that of basic cable networks, which have long relied on both subscriber fees and advertising revenue.¹

Increasingly, these retransmission consent negotiations have grown so contentious that consumers are now faced with the loss—or threatened loss—of access to some of their local broadcast signals. This state of affairs has attracted the interest of the Federal Communications Commission (“FCC”), which recently initiated an inquiry into possible revisions of its existing retransmission consent rules.²

Any reconsideration of the retransmission consent rules should be grounded within the context of the original intent behind these provisions, as well as in the available empirical evidence about whether these provisions are accomplishing the goals they were designed to achieve. This article addresses

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¹ George Szalai, *Murdoch: Content is Emperor, Not King*, HOLLYWOOD REPORTER (Feb. 2, 2010, 9:13PM), <http://commcns.org/KowkTA> (discussing broadcasters’ recent efforts to reconfigure their business model). See also Jonathan A. Loeb & Sara Rezvanpour, *A Sea Change to Retransmission Landscape in TV*, L.A. & S.F. DAILY JOURNAL (July 14, 2011), <http://commcns.org/JybSSS> (discussing generally the recent developments in retransmissions).

² *In re* Amendment of Commission’s Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 F.C.C.R. 2718, ¶¶ 1-3 (Mar. 3, 2011) [hereinafter *Retransmission Consent NPRM*].

these issues in terms of the retransmission consent provisions' relationship to the FCC's guiding principle of localism.³

A key motivating factor behind Congress' enactment of the retransmission consent provisions was to strengthen local television broadcasting, particularly in terms of broadcasters' provision of local news and public affairs programming. Such programming long has been central to the FCC's localism goals.⁴ Congress and the FCC also intended that broadcasters would receive help to enhance their provision of the local news and public affairs programming that is at the core of their mandate as public trustees.

Given this intent, it seems particularly important that any assessment of the current state of affairs of the retransmission consent provisions be informed by a thorough understanding of broadcasters' provision of local news and public affairs programming. Understanding the extent to which broadcasters are investing in such programming, and whether the trends in the provision of such programming are moving in a positive or negative direction, can help us to understand whether the retransmission consent provisions are having their intended effects. Thus, this article reviews and assesses the research that has been conducted to date on a wide range of indicators of the extent of broadcaster commitment to providing communities with local news and information. The consistently low—and in some contexts declining or absent—commitment among broadcasters to local news and public affairs programming indicates that the retransmission consent provisions are not accomplishing their goal of enhancing broadcasters' commitment to localism.

II. THE CONTEMPORARY RETRANSMISSION CONSENT LANDSCAPE

The current retransmission consent provisions were first introduced as part of the Cable Television Consumer Protection and Competition Act of 1992.⁵ One of Congress' principal goals in the 1992 Cable Act was to address perceived competitive imbalances between cable providers and local broadcast television licensees.⁶ At the time of the Act's passage, cable companies

³ See Philip M. Napoli, *The Localism Principle Under Stress: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL'Y STUD. J. 372, 373-74 (2001) (discussing the role of localism in U.S. communications policymaking). See also Paul Cowling, *An Earthly Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 283-84 (2005) (discussing the history of localism in U.S. communications law).

⁴ *Id.*

⁵ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 6, 106 Stat. 1460, 1482 (1992) (codified at 47 U.S.C. § 325) [hereinafter *Cable Act*].

⁶ *Id.* § 2(a)-(b).

typically were the sole providers of MVPD service in local markets. With cable service rapidly penetrating television households, MVPDs were increasingly competing with free over-the-air television for advertising dollars.⁷

The Act imposed “must-carry” provisions that required cable systems to carry all local broadcast stations that broadcast within the cable system’s television market.⁸ Alternatively, broadcasters had the option to negotiate “retransmission consent” compensation.⁹ Under this system, those broadcasters that felt that they had sufficient leverage to extract compensation from cable systems were permitted to do so through retransmission consent negotiations, while those that did not were able to invoke their (uncompensated) must-carry rights. The ultimate goal of these provisions was to ensure that local television stations remained economically viable and widely accessible, and thus able to effectively serve the local informational needs of viewers.¹⁰

In recent years, retransmission consent revenues have started to play a much more prominent role in the economics and strategy of broadcast television. In a 2005 report to Congress, the FCC determined that “[t]welve years [after the 1992 Cable Act], cash still has not emerged as a principal form of consideration for retransmission consent.”¹¹ Rather, broadcasters historically obtained compensation in the form of in-kind considerations such as securing carriage of their affiliated non-broadcast networks.¹² The past five years, however, have seen a dramatic change in this pattern. As Figure 1 illustrates, cash retransmission fees paid to broadcast stations have increased from an estimated \$215 million in 2006 to nearly \$1.1 billion in 2010, and a projected \$1.46 billion in 2011.¹³

⁷ 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 5 (2005) [hereinafter RETRANSMISSION CONSENT REPORT].

⁸ *Cable Act*, *supra* note 5, § 4 (codified as amended at 47 U.S.C. § 534).

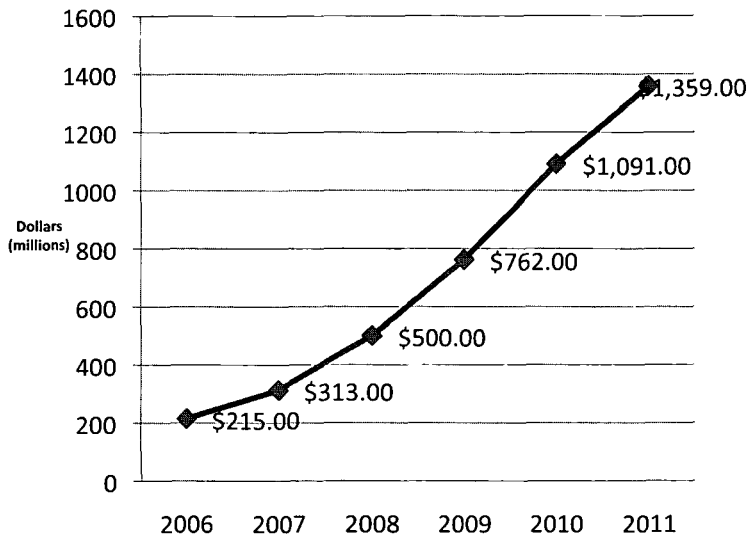
⁹ *Id.* § 6 (codified as amended at 47 U.S.C. § 325).

¹⁰ *Id.* § 2(a)(15)-(16).

¹¹ RETRANSMISSION CONSENT REPORT, *supra* note 7, at 7.

¹² *Id.*

¹³ *In re* Amendment to the Commission’s Rules Related to Retransmission Consent, *Comments of AT&T*, MB Docket No. 10-71, at 2-3 (May 27, 2011). *See also* Katy Bachman, *Retransmission Fees Set to Skyrocket*, ADWEEK (May 26, 2011), <http://commcns.org/J2vZpA>.

Figure 1: Broadcaster Retransmission Revenue Growth

An important element of this transition has been a role reversal between local broadcasters and national broadcast networks. National broadcast networks are seeking an increasing amount of this revenue stream, even in instances in which they are not the owners of the stations serving the local market, in the form of “reverse compensation.”¹⁴ That is, they are requiring their affiliates to pay them for programming—a reversal of a decades-long tradition in which national networks compensated local stations for airing their programming.¹⁵

As part of their effort to obtain revenue from their local affiliates, national broadcast networks are increasingly taking an active role in their affiliates’ retransmission consent negotiations. NBC, for instance, recently proposed to its affiliates that the network would handle all retransmission consent negotiations and split the proceeds 50-50 with the affiliates.¹⁶ For major networks, sharing an affiliate’s retrans revenue is now standard industry practice, with the networks planning to receive *at least half* of the

¹⁴ Brian Stelter, *Networks Want Slices of New Pie*, N.Y. TIMES, Jan. 3, 2011, <http://commcns.org/J2vZpB>.

¹⁵ *Id.*

¹⁶ Harry A. Jessell, *NBC’s Affiliate Retrans Plan is 50-50 Split*, TVNEWSCHECK (May 18, 2011), <http://commcns.org/J2vZpC>.

retransmission content revenues flowing to affiliates.¹⁷

In tandem with this transition, broadcasters' negotiations with MVPD service providers have grown more contentious, and the negotiating tactics that they have employed have become more extreme.¹⁸ Of particular importance has been the increased frequency of actual or threatened broadcast station blackouts and the publicity surrounding these high-stakes negotiations.¹⁹ In these instances, broadcast stations have refused to allow MVPDs to carry their signals until a new retransmission consent agreement is reached.²⁰ While there were 31 actual or publicly threatened broadcast blackout events between 2000 and 2009, there were 5 additional blackout events in 2010 alone, affecting 19 million viewers.²¹

These blackouts can have the potential to be incredibly damaging to local communities. For instance, during the approach of Hurricane Irene in 2011, LIN Television Corporation, owner of over 30 broadcast television stations across the United States, threatened to withhold the signals of its NBC and Fox affiliated stations in the Portsmouth-Norfolk, Virginia television market while in the midst of protracted retransmission consent negotiations with the cable operator Mediacom Communications.²² Similarly, LIN blacked out its FOX affiliate WALA, which serves southern Alabama, southeastern Mississippi, and the Florida Panhandle, as Tropical Storm Lee approached the Gulf Coast.²³

¹⁷ Heidi Schmid and Andrea Person, *A Big Price Tag: \$2.5 Billion in Retrans Fees: Who Will Pick Up the Tab? What You Need to Know About the 2011 Retransmission Consent Cycle*, INDEPENDENT CABLE, at 2 (Apr. 2011).

¹⁸ Retransmission Consent NPRM, *supra* note 2, at ¶ 2.

¹⁹ See, e.g., Katy Bachman, *Lawmakers Fret Over Potential Super Bowl Blackout in Boston*, ADWEEK (Jan. 24, 2012), <http://commcns.org/JNLR0a> (discussing action by lawmakers in Massachusetts to avoid a potential blackout of the Super Bowl on DirecTV in Boston); Brian Stelter, *In New York and Elsewhere, Disputes Over Television Fees Lead to a Few Blackouts*, N.Y. TIMES, Jan. 1, 2012, <http://commcns.org/J2wy2F> (noting Time Warner Cable's continuing retransmission dispute with MSG Networks in New York); Katy Bachman, *DirectTV, Fox Reach Carriage Deal*, ADWEEK (Oct. 31, 2011), <http://commcns.org/JyVsvg>; Brian Stelter & Bill Carter, *In Cable TV Fights, Consumers Wait to See Who Blinks*, N.Y. TIMES, Oct. 16, 2010, <http://commcns.org/Mo7GXs> (reporting 3 million Cablevision customers in the New York area without access to Fox programming after failed contract negotiations with the News Corporation).

²⁰ Steven C. Salop et al., *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, ¶ 2 (June 3, 2010) (unpublished economic study), attached to *in re* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, *Reply Comments of Time Warner Cable Inc.*, MB Docket No. 10-71 (June 3, 2010), available at <http://commcns.org/JyV28e>.

²¹ *Id.* ¶ 5; *Television Blackouts Reach High Points Over Rights Fees*, RADIO BUSINESS REPORT (Oct. 11, 2010, 3:32 PM), <http://commcns.org/JVx9Wk>.

²² Press Release, ACA President & CEO Matthew M. Polka Condemns LIN TV's Retrans Blackout Threat as Hurricane Irene Bears Down on Eastern Seaboard, AMERICAN CABLE ASSOCIATION (Aug. 26, 2011), <http://commcns.org/Kj2XBN>.

²³ Lawrence F. Specker, *Month-Old Cable Dispute Drags on for WALA, WFNA*, PRESS-

Given the extent to which citizens necessarily rely on local broadcasting during such times of natural disaster, situations in which broadcasters are withholding their signals before, during, or after such disasters raise serious questions about whether the public interest is being served.

It is perhaps not surprising that, under these circumstances and given the importance of localism in American communications policy, the FCC has decided to revisit its retransmission consent rules. In March 2011, the Commission issued a Notice of Proposed Rulemaking (“NPRM”) seeking comment on a number of possible revisions to the Commission’s retransmission consent rules.²⁴ As the Commission noted in the NPRM:

Since Congress enacted the retransmission consent regime in 1992, there have been significant changes in the video programming marketplace. . . . One result of such changes in the marketplace is that disputes over retransmission consent have become more contentious and more public, and we recently have seen a rise in negotiation impasses that have affected millions of consumers.²⁵

Any efforts to revise the existing retransmission consent rules should be grounded in a thorough understanding of the original motivations and goals for these rules, as well as in the available empirical evidence as to whether the rules are succeeding in achieving these goals. These issues are the focus of the next two sections.

III. RETRANSMISSION CONSENT AND LOCALISM

The policy responses to cable carriage of broadcast television signals have a long history, dating as far back as 1965.²⁶ As noted above, the current set of regulations date back to the 1992 Cable Act, which was motivated in large part by concerns about localism and the possibility that technological and competitive changes in the television marketplace might adversely affect the extent to which local communities were receiving the news and information that addressed their specific needs, interests, and concerns.²⁷

REGISTER ENTERTAINMENT (Sept. 30, 2011), <http://commcns.org/J0BHHC>; Andrew Gauthier, *LIN Media Warns Viewers of Potential COX Blackout*, TVSPY (Mar. 28, 2011), <http://commcns.org/LaoPyn>.

²⁴ See *Retransmission Consent NPRM*, *supra* note 2.

²⁵ *Id.* ¶ 2.

²⁶ For an overview of this history, see Cecil Bohanon et al., *Retransmission Consent, Must Carry and the Public: Current Economic and Regulatory Realities of Multichannel Video Providers*, BALL STATE UNIVERSITY DIGITAL POLICY INSTITUTE (2007), <http://commcns.org/JNLPFC>. See also Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision of the 1992 Cable Act*, 49 FED. COMM L.J. 99 (1996-97).

²⁷ See CHARLES C. GOLDFARB, CONG. RESEARCH SERV., LOCALISM: STATUTES AND RULES AFFECTING LOCAL PROGRAMMING ON BROADCAST, CABLE, AND SATELLITE TELEVISION (2005), <http://commcns.org/KTiQBs>.

Localism has a central place in the regulation and policy affecting American media. Early postal subsidies, which charged differential rates to newspapers based on the distance mailed, were designed to protect small local papers competing with larger metropolitan publications.²⁸ The system of broadcast license allocation in the United States was similarly designed, ensuring that even the smallest community was served by at least one local broadcast station.²⁹ This rationale created a system characterized by a large number of stations that service relatively small geographic areas rather than fewer, higher-powered stations capable of serving larger regions of the country.³⁰ Moreover, rules governing the relationship between broadcast networks and their affiliates were designed to protect the autonomy of local stations, allowing decisions about the kind of programming that was aired to be made at the local level.³¹ And, perhaps most explicitly, for years the FCC maintained formal requirements that mandated minimum levels of locally produced programming and minimum levels of news and public affairs programming.³² The uniting theme among these various policies has been an overarching desire to ensure that local broadcasters operated in a way that served the informational needs and interests of the local communities in which they were based.

Reflecting these priorities, the 1992 Cable Act imposed the must-carry provisions, which were intended to ensure the survival of free, over-the-air, local news and information sources in an era in which more and more television viewing was migrating to the cable platform.³³ The must-carry provisions prevented cable systems from excluding local broadcast stations in

²⁸ Richard B. Kielbowicz, *Postal Subsidies for the Press and the Bus of Mass Culture, 1880-1920*, 64 BUS. HIST. REV. 451 (1990), <http://commcns.org/JyV28h>.

²⁹ See 47 U.S.C. § 307(b) (2006) (“the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”); *In re* Amendment of Section 3.606 of the Commission’s Rules and Regulations; Amendment of the Commission’s Rules, Regulations and Engineering Standards Concerning the Television Broadcasting Service; Utilization of Frequencies in the Band 470 to 890 Mhz for Television Broadcasting, *Sixth Report and Order*, 41 F.C.C.R. 148, 172 (1992) (“In the Commission’s view as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs.”).

³⁰ Darcy Gerbarg, TELEVISION GOES DIGITAL 175 (2009).

³¹ For example, the Commission instituted the Prime Time Access Rule in 1970, which limited the amount of network programming that affiliates could air during prime time. The Commission repealed the Prime Time Access Rule in 1995. See *in re* Review of Prime Time Access Rule, Section 73.658(K) of the Commission’s Rules, *Report and Order*, 11 F.C.C.R. 546 (July 31, 1995).

³² Matthew Lasar, *Broadcasters Blast FCC Localism Proposal*, ARS TECHNICA (Mar. 6, 2008), <http://commcns.org/Jj4woi>.

³³ For a discussion of the must-carry rules and their relationship to the localism principle, see Napoli, *supra* note 3.

favor of carrying additional cable channels.³⁴ As the FCC noted in its 2005 report to Congress, “In adopting the mandatory carriage provisions of the 1992 Act, Congress recognized the importance of local television broadcast stations as providers of local news and public affairs programming.”³⁵ And, in a further effort to preserve and enhance local broadcasting—and its ability to uphold the core elements of the localism principle—the retransmission consent option was included in order to ensure that broadcast stations could elect to receive compensation for cable carriage of their signals.³⁶

The Congressional discussions and debates accompanying the 1992 Cable Act provide evidence that broadcasters’ provision of such local news and information was a key motivating factor that led Congress to add the retransmission consent provisions. For instance, according to the Senate conference committee report, “whatever the result of those [retransmission consent] negotiations, this provision will strengthen local television stations so that they can maintain their ability to provide news, sports, weather, [and] other local programming”³⁷ Senator Daniel Inouye, author of the 1992 Cable Act’s retransmission consent provisions, stated: “[P]roviding local stations with the ability to negotiate with cable systems and other multichannel providers is a necessary step, we believe, to ensure that local stations remain viable well into the future to continue to provide local service to cable subscribers and nonsubscribers alike.”³⁸ Local news and information was similarly emphasized in a statement from Representative Rodney Chandler in the discussion surrounding the 1992 Act: “[R]etransmission consent is a local issue It is an issue of local stations, carrying local programming and news about local interests.”³⁹

These statements illustrate the importance that the drafters of the retransmission consent provisions placed on the idea that broadcasters would use this right to enhance their stations’ ability to provide local news and information to viewers. Additionally, they highlight the right linkage between retransmission consent revenues and the performance of local broadcast stations. Within this context, the fact that national broadcast networks are now seeking to obtain a large proportion of the retransmission consent revenues that local stations receive represents a troubling disconnect between the original reasons the retransmission consent provisions were introduced and the contemporary reality of how these provisions are functioning in the television

³⁴ *Cable Act*, *supra* note 5, § 4 (codified at 47 U.S.C. § 534).

³⁵ See RETRANSMISSION CONSENT REPORT, *supra* note 7, ¶ 8.

³⁶ *Cable Act*, *supra* note 5, § 6 (codified at 47 U.S.C. § 325).

³⁷ 138 CONG. REC. 14,222 (1992) (statement of Sen. Slade Gorton).

³⁸ 138 CONG. REC. 642 (1992).

³⁹ 138 CONG. REC. 6,487 (1992).

marketplace.⁴⁰ Revenues intended to support local news and public affairs programming should not be used to support national program providers.

Some analysts predicted that the retransmission consent provisions would succeed where so many previous efforts by policymakers to spur broadcasters to better serve the information needs of their local communities had failed. As one analysis noted soon after the passage of the 1992 Cable Act:

For half a century, lawmakers have searched for the carrot or the stick that would encourage American television stations to produce more local news and information programs Congress and the Federal Communications Commission . . . have struggled to infuse the spirit of community service into the commercial world of American broadcasting. It has never worked.⁴¹

However, according to this same analysis, “retransmission consent for the first time gives television broadcasters a substantial property right in their local programming. This property right could make it attractive for stations to produce more—and more diverse—local news and information programming.”⁴² In the end, the analysis concluded “[t]o the extent that lawmakers allow market forces to dictate the respective property rights in programming, they may better serve the public interest in local news and information programming than has any previous attempt to achieve those same goals through direct regulation.”⁴³

The rationale linking broadcast localism to the retransmission consent provisions has remained consistent in the nearly two decades since the passage of the 1992 Cable Act. In a 2007 Report to Congress, the Congressional Research Service emphasized that the retransmission consent provisions were meant to “foster[] local programming, especially local broadcast programming; [and] foster[] diversity of news and public affairs voices and entertainment choices.”⁴⁴

Broadcasters themselves have echoed the linkage. The FCC’s 2011 report on the Information Needs of Communities (“Future of Media Report”) noted that “[b]roadcasters believe that if stations can increase the retrans revenue streams, they would be in a better financial position to invest in local news.”⁴⁵ One broadcast television executive stated that without retransmission consent,

⁴⁰ See discussion, *supra* Part II.

⁴¹ Lorna Veraldi, *Newscasts as Property: Will Retransmission Consent Stimulate Production of More Local Television News?*, 46 FED. COMM. L. J. 469, 470-471 (1994).

⁴² *Id.* at 470.

⁴³ *Id.* at 489.

⁴⁴ CHARLES B. GOLDFARB, CONG. RESEARCH SERV., RETRANSMISSION CONSENT AND OTHER FEDERAL RULES AFFECTING PROGRAMMER-DISTRIBUTOR NEGOTIATIONS: ISSUES FOR CONGRESS 56 (2007).

⁴⁵ See STEVEN WALDMAN, FCC, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 299 (2011), <http://commcns.org/LfsIbI>.

“local news will die.”⁴⁶ Similarly, in a 2010 editorial, Gordon Smith, former Oregon Senator and current President and CEO of the National Association of Broadcasters, noted:

Without this essential revenue, broadcast viewers would face a diminished local news product, fewer public affairs programs and a further migration of sports and entertainment programming to pay TV. Most important is that this retransmission revenue supports a local news and entertainment platform for the more than 30 million Americans who are unable, or unwilling, to pay for cable or satellite TV.⁴⁷

In these statements, the linkage is again quite explicit: retransmission consent revenues should serve as a means by which broadcasters enhance their provision of the local news and informational programs on which their audiences rely.

IV. AN ASSESSMENT OF BROADCASTER COMMITMENT TO LOCALISM

The previous sections have made clear that 1) the retransmission consent revenues that broadcast stations have been receiving from MVPD service providers have been increasing dramatically, and 2) the retransmission consent provisions were instituted under the assumption that retransmission consent revenues would help enhance broadcasters’ provision of local news and informational programming.⁴⁸ Consequently, it makes sense to examine the available evidence to assess the current state of affairs in terms of broadcasters’ demonstrated commitment to localism.

As one recent study noted:

In the past, the [FCC] had imposed a pervasive set of substantive programming regulations which demanded that specific amounts of local programming be aired by stations, mandated that stations keep in continuing contact with local and regional organizations in order to “be in touch” with the local community (and, therefore, be better positioned to offer programming meeting local needs and interests) and required stations to submit frequent and thorough substantiation of the station’s programming and other efforts in order to achieve renewal of the broadcast license. Significant FCC deregulation in these broadcast programming and station “accountability” areas may be relevant to efforts at reviewing many of the cable television and multichannel provider regulations.⁴⁹

A key implication of this statement is that the current state of retransmission consent needs to be understood in terms of the economic and regulatory dynamics surrounding broadcasters’ provision of local news and informational programming. This section assesses the current state of affairs in broadcasters’

⁴⁶ *Id.*

⁴⁷ Gordon Smith, *Compromise Benefits TV Viewers*, POLITICO (Nov. 16, 2010), <http://commcns.org/KowkTC>.

⁴⁸ See discussion, *supra* Parts II, III.

⁴⁹ See Bohanon et al., *supra* note 26.

provision of such programming in an effort to offer some conclusions as to whether retransmission consent revenues are being used to support local news and informational programming in the ways that Congress and the FCC intended, and in ways that broadcasters themselves claimed the revenues would be used.

A growing body of research has emerged examining broadcasters' commitment to localism, focusing primarily on various aspects of broadcaster provision of local news and public affairs programming. Much of this research has been motivated by the FCC's various media ownership regulations, which the Commission is required to reassess every four years. This research has addressed questions as to whether different market and station ownership characteristics are related, to the extent to which broadcasters address the informational needs of local communities.⁵⁰ This research uses a variety of methodological approaches, though there are three particular analytical approaches that have been the most common.

The first, and most common, approach is to analyze the quantity (in minutes) of local news and public affairs programming.⁵¹ These studies generally find low levels of such programming, or that many stations across the U.S. fail to provide any programming of this type. A 1998 study that focused on local public affairs programming found that commercial television stations devoted 0.35% of total broadcast hours to local public affairs programming.⁵² These results were subsequently affirmed in a larger-scale 2001 study that found that commercial television stations devoted roughly 0.3% of total broadcast hours to local public affairs programming.⁵³ A 2004

⁵⁰ In some instances, studies that address the issue of broadcaster commitment to localism provide analysis of the impact of various ownership and market conditions, but fail to provide basic descriptive information about how well the sampled stations perform in their provision of local informational programming. See PETER J. ALEXANDER & KEITH BROWN, *DO LOCAL OWNERS DELIVER MORE LOCALISM? SOME EVIDENCE FROM LOCAL BROADCAST NEWS* (2004), <http://commcns.org/JyV0x7>.

⁵¹ Some studies have failed to distinguish between local and national news and public affairs programs, or focused exclusively on national network programming, and thus have been excluded from this discussion, given that such an approach makes it impossible to accurately assess a station's commitment to localism. See GREGORY S. CRAWFORD, FCC, *TELEVISION STATION OWNERSHIP STRUCTURE AND THE QUANTITY AND QUALITY OF TV PROGRAMMING*, FEDERAL COMMUNICATIONS COMMISSION MEDIA OWNERSHIP STUDY #3 (2007), <http://commcns.org/L2YJhs>. See also DANIEL SHIMAN, FCC, *THE IMPACT OF OWNERSHIP STRUCTURE ON TELEVISION STATIONS' NEWS AND PUBLIC AFFAIRS PROGRAMMING*, FCC MEDIA OWNERSHIP STUDY #4: NEWS OPERATIONS (2007), <http://commcns.org/JLa6gt>.

⁵² *What's Local About Local Broadcasting?*, MEDIA ACCESS PROJECT & THE BENTON FOUNDATION (1998), <http://commcns.org/Jixu6X>.

⁵³ Philip M. Napoli, *Social Responsibility and Commercial Broadcast Television: An Assessment of Public Affairs Programming*, 3 INT'L J. ON MEDIA MANAGEMENT 4, 226, 233 (2001). For further analysis of this data, see Philip M. Napoli, *Market Conditions and Public*

analysis of data compiled by the FCC found that stations provided an average of less than 30 minutes of local public affairs programming per week, or roughly 0.29% of total broadcast hours.⁵⁴ More recent research drawing upon an even larger sample of stations reached similar conclusions, finding that commercial stations provided, on average, just over 21 minutes of local public affairs programming per week, which is equivalent to about 0.2% of a week's worth of broadcast time.⁵⁵ Most recently, in 2011, the FCC conducted a study that found that individual stations provided, on average, just under 12 minutes of local public affairs programming per day, which translates to approximately 0.83% of total available broadcast hours.⁵⁶

Many studies have focused on stations' provision of local news programming. A common theme of this research is the prevalence of commercial stations that provide absolutely no local news programming. For instance, a 2003 analysis of all full power television stations in the top 50 U.S. television markets found an average of three stations per market providing no local news or public affairs programming.⁵⁷ A 2004 analysis of data compiled by the FCC found that stations provided an average of slightly less than 20 hours of local news programming per week, comprising roughly 12% of total broadcast hours.⁵⁸ A similar study published in 2007 found that commercial stations provided an average of just over 10 hours of local news programming per week, roughly 6% of total broadcast hours, with nearly a quarter of the 233 stations analyzed airing absolutely no local news programming.⁵⁹

In 2011, the FCC conducted a study that found that stations provided, on

Affairs Programming: Implications for Digital Television Policy, 6 HARV. INT'L J. OF PRESS/POLITICS 2, 15, 29 (2001).

⁵⁴ Philip M. Napoli, *Television Station Ownership Characteristics and Local News and Public Affairs Programming: An Expanded Analysis of FCC Data*, 6(2) J. OF POL'Y, REG. & STRATEGY FOR TELECOMM., INFO., & MEDIA 112, 117 (2004) (stating that stations provided on average 0.24 hours of local public affairs programming).

⁵⁵ Michael Zhaoxu Yan & Philip M. Napoli, *Market Competition, Station Ownership, and Local Public Affairs Programming on Broadcast Television*, 56 J. OF COMM. 795, 804 (2006) (citing study results for a 2 week time period where an average of 45 minutes of local public affairs programming was aired on commercial stations).

⁵⁶ JACK ERB, FCC, LOCAL INFORMATION PROGRAMMING AND THE STRUCTURE OF TELEVISION MARKETS, FCC MEDIA OWNERSHIP STUDY #4, at 20 (May 20, 2011), <http://commcns.org/KihX12>.

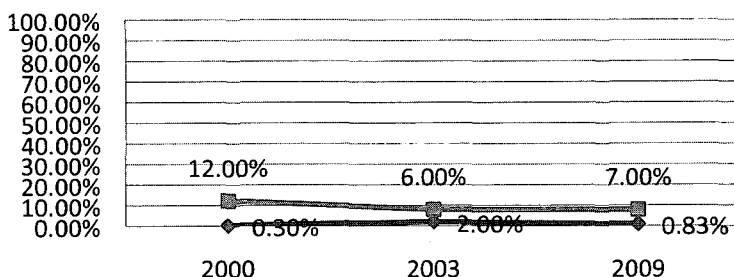
⁵⁷ Loy A. Singleton & Steven C. Rockwell, *Silent Voices: Analyzing the FCC 'Media Voices' Criteria Limiting Local Radio-Television Cross-Ownership*, 8 COMM. L. & POL'Y 385, 398 (2003).

⁵⁸ Philip M. Napoli, *Television Station Ownership Characteristics and Local News and Public Affairs Programming: An Expanded Analysis of FCC Data*, 6(2) J. OF POL'Y, REG. & STRATEGY FOR TELECOMM., INFO., & MEDIA 112, 117 (2004).

⁵⁹ Philip M. Napoli & Michael Zhaoxu Yan, *Media Ownership Regulations and Local News Programming on Broadcast Television: An Empirical Analysis*, 51(1) J. OF BROADCASTING & ELECTRONIC MEDIA 39, 49 (2007).

average, roughly 11.5 hours of local news programming per week, making up almost 7% of total broadcast hours. This analysis also found that, of the 518 stations analyzed, 32% “did not air a single minute of local news programming.”⁶⁰ According to the FCC’s 2011 report on the information needs of communities, its Industry Analysis Division recently conducted an analysis that reached similar conclusions, finding that, in the top 100 markets, 35.7% of stations air no local news and that, among stations in all markets, 30.6% do not air any local news.⁶¹ These results (for both local news—in red—and local public affairs programming—in blue) are represented in Figure 2.

Figure 2: Percentage of Broadcast Time Devoted to Local News and Public Affairs Programming



Note: Data points reflect programming years analyzed rather than years in which analyses were published/released.

Obviously, the trend lines here stand in stark contrast to the dramatically rising trajectory of broadcasters’ retransmission consent revenues.⁶² These contrasting patterns raise questions about whether retransmission consent revenues are in fact furthering the provision of local news and public affairs.

Second, two related analytical approaches have been employed to analyze broadcasters’ commitment to localism raise questions about whether the state of broadcasters’ commitment to localism is even worse than overall hours of news and public affairs programming provided would lead us to believe. These alternative analytical approaches suggest that the total hours of local news and public affairs programming found on a station’s schedule should not be taken

⁶⁰ Erb, *supra* note 56, at 21.

⁶¹ See Waldman, *supra* note 45, at 101.

⁶² See discussion, *supra* Part II.

at face value as an indicator of the extent of a station's commitment to localism.

One increasingly common approach analyzes the *nature of the programming itself* to determine how much of it actually addresses local issues and concerns.⁶³ This approach is based on the premise that a local news program that devotes a substantial amount of time to national news issues, or to other topics that are not related to the local community, is not serving the localism principle as effectively as a program that is genuinely focused on local news events and/or local public affairs concerns.

These studies often make it distressingly clear that, within the hours of local newscasts that local broadcast stations provide, a relatively small proportion of the broadcast time is devoted to addressing the core informational needs of local communities. For instance, a 2004 study of local election coverage⁶⁴ found that only 8% of the 4,333 news broadcasts analyzed in the month before the election featured stories that mentioned local political races.⁶⁵ A 2007 study of 2004 local television news broadcasts found that

[a] typical half-hour of local news contained three minutes and eleven seconds of total campaign coverage; however, almost two full minutes were devoted to the presidential race, while another forty-four seconds were devoted to non-race related stories (voting issues, ballot initiatives, and bond issues), which left fewer than thirty seconds for coverage of all other races (including local, state, and federal offices). In other words, information about candidates other than the president was extremely scarce.⁶⁶

Other studies have taken a somewhat broader approach to analyzing local news content. A 2010 reanalysis of FCC data on a sample of fifty-three commercial television stations in the U.S. examined a variety of categories of news content, categorizing each story as either local or non-local in its orientation. This study found that almost 30% of local news broadcast time was devoted to non-local topics, with stations owned and operated by a broadcast network devoting less of their local newscasts to local stories than stations not owned and operated by a broadcast network.⁶⁷ Along similar lines, a 2010 study of the Los Angeles market found that coverage of local civic

⁶³ See, e.g., Laura K. Smith, *Consolidation and News Content: How Broadcast Ownership Policy Impacts Local Television News and the Public Interests*, JOURNALISM & COMM. MONOGRAPHS, Winter 2009, at 4, 10, 387, 411.

⁶⁴ Political and election coverage is widely considered a "core" representation of a station's commitment to localism, and to serving the informational needs of local communities.

⁶⁵ *TV News Ignores Local Politic Races*, POLITICS AND SOCIETY: A SPECIAL RESOURCE FOR JOURNALISTS (Feb. 17, 2005), <http://commcns.org/LaoRq3>.

⁶⁶ Erika F. Fowler et al., *Does Local News Measure Up?*, 18 STAN. L. & POL'Y REV., 410, 419 (2007).

⁶⁷ Danilo Yanich, *Does Ownership Matter? Localism, Content, and the Federal Communications Commission*, 23 J. OF MEDIA ECON. 51 (2010).

issues accounted for only one minute and sixteen seconds of a typical thirty minute newscast.⁶⁸ Studies such as these raise questions about whether even the relatively low levels of local informational programming that broadcasters provide are adequately addressing the kinds of issues that should be at the core of broadcasters' commitment to localism.

A third commonly employed approach to understanding broadcasters' level of commitment to localism involves assessing the *amount of resources* devoted to the production of local news and public affairs.⁶⁹ This approach might focus on either financial resources or personnel, in an effort to get a sense of the extent to which broadcasters are investing in serving the informational needs of their local communities. The most recent *State of the News Media* report, issued by the Pew Research Center's Project for Excellence in Journalism, found that the median full-time news staff for a local television station dropped from 32 in 2006 to 29 in 2009.⁷⁰

Broadcast television news budget data gathered by the Pew Research Center's Project for Excellence in Journalism highlight the fact that, during the same four-year period referenced above, retransmission fees substantially *increased* while budget resources dedicated to newsrooms significantly *decreased*. During the four-year period from 2006 through 2009, retransmission fees increased from approximately \$215 million to \$762 million. However, during the same period, the percentage of local television stations cutting their newsroom budgets went from 8% in 2006 to a staggering 65% in 2009.⁷¹

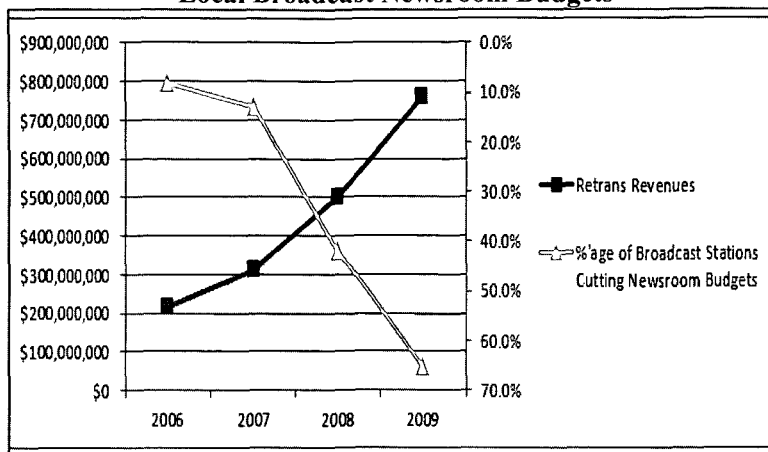
⁶⁸ MARTIN KAPLAN & MATTHEW HALE, THE NORMAN LEAR CENTER, LOCAL TV NEWS IN THE LOS ANGELES MEDIA MARKET: ARE THE STATIONS SERVING THE PUBLIC INTEREST?, 18 (2011), <http://commcns.org/J2vX11>.

⁶⁹ David K. Scott, et al., *Chain Versus Independent Television Station Ownership: Toward an Investment Model of Commitment to Local News Quality*, 59 COMMUNICATION STUDIES 84 (2008).

⁷⁰ *State of the News Media 2011*, PEW RESEARCH CENTER PROJECT FOR EXCELLENCE IN JOURNALISM, <http://commcns.org/JyV0xc> (last visited Apr. 15, 2012).

⁷¹ *Id.*

Figure 3: Trends in Retransmission Consent Revenue and Local Broadcast Newsroom Budgets



Research also suggests that there is an increasing amount of resource-sharing taking place among broadcast stations. For instance, many of the stations that air local news are, in fact, airing local news broadcasts produced by other stations in their market.⁷² According to one recent analysis, there are 762 television stations in the U.S. that are originating local news, and another 224 stations that air news broadcasts produced by one of these 762 stations.⁷³ These news-sharing arrangements can arise from common ownership (given the relaxation of local television station ownership rules) or from local news-sharing agreements that are becoming increasingly common, and can often involve complete duplication of news programming across multiple stations.⁷⁴

The most recent and extensive study to date of this phenomenon examined local news programming in eight U.S. television markets.⁷⁵ This study found that:

The implementation of shared services (SSA) and local management/marketing

⁷² JOSH STEARNS & CORIE WRIGHT, *FREE PRESS, OUTSOURCING THE NEWS: HOW COVERT CONSOLIDATION IS DESTROYING NEWSROOMS AND CIRCUMVENTING MEDIA OWNERSHIP RULES 2* (2011).

⁷³ STEVEN WALDMAN, FCC, *THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 96* (2011) (discussing the results of a survey by the Radio/Television News Directors Association).

⁷⁴ Danilo Yanich, *Local TV News and Shared Service Agreements: Examining News Content in Honolulu*, CENTER FOR COMMUNITY RESEARCH & SERVICE, SCHOOL OF PUBLIC POLICY, UNIV. OF DEL., at 2-3 (Feb. 2011), <http://commcns.org/KDoNTp>.

⁷⁵ Danilo Yanich, *Local TV News and Service Agreements: A Critical Look*, CENTER FOR COMMUNITY RESEARCH & SERVICE, SCHOOL OF PUBLIC POLICY, UNIV. OF DEL., at 5 (Oct. 2011), <http://commcns.org/KbFJOB>.

(LMA) agreements had a profound effect on the local news broadcasts in the markets in which they operated. Specifically, the effect was evident in the distribution of stories across the stations and in the use of shared resources, such as the anchor, the reporter, the script and video/graphics for the story.⁷⁶

The study also documented numerous instances in which stations in the same market shared scripts, news personnel, graphics, and in some instances resorted to airing the exact same newscasts.⁷⁷ The overall effect is one in which the diversity of information, and the diversity of sources, available to citizens diminishes dramatically. Given the documented increasing prominence of such newscast duplication strategies, it seems unlikely that broadcasters are directing their increased retransmission consent revenues towards enhancing their service of the informational needs and interests of local communities.

Table 1: Summary of Research Findings on Broadcaster Commitment to Localism (2000-2011)

Local Public Affairs Hours	Local News Hours	Local Orientation of News Content	Resources Invested in News Production
<ul style="list-style-type: none"> - Between 0.3 percent and 2 percent of broadcast time devoted to local public affairs. - Downward trend according to most recent findings. - In top 50 markets, average of 3 stations per market provide no local news or public affairs. 	<ul style="list-style-type: none"> - 12 percent of broadcast time devoted to local news in 2000. - Down to 6 or 7 percent of broadcast time in more recent studies. - In top 50 markets, average of 3 stations per market provide no local news or public affairs. 	<ul style="list-style-type: none"> - 8 percent of local news devoted to local election coverage. - 30 seconds per half hour devoted to substantive non-presidential election coverage. - 30 percent of local newscasts devoted to non-local topics. - 96 seconds of typical 30-minute newscast devoted to local civic issues. 	<ul style="list-style-type: none"> - Median full time news staff in decline from 2006-2009. - 224 stations exclusively airing news produced by <u>another</u> station.

⁷⁶ *Id.* at 105.

⁷⁷ *Id.* at 105-06.

Overall, the majority of the literature to date on broadcasters' commitment to localism paints a discouraging picture in terms of the extent to which local stations are dedicating themselves to serving the needs and interests of their local communities. These findings need to be taken into consideration when assessing whether or how the retransmission consent rules should be modified. Despite Congress' intentions that these provisions would enhance broadcasters' ability to serve the informational needs and interests of local communities, by most measures the informational needs of these communities continue to be underserved despite the availability of significant additional revenues through retransmission consent fees.

V. CONCLUSION

The retransmission consent provisions were instituted with the goal of enhancing local broadcast stations' ability to serve the informational needs and interests of their local communities. In this regard, the retransmission consent provisions are part of a well-established tradition in American communications policy of preserving and promoting localism.

Unfortunately, research on local broadcasters' provision of local news and public affairs programming provides little compelling evidence that retransmission consent revenues are being utilized by broadcasters to enhance their provision of local news and public affairs programming. Rather, it appears that these revenues are being used in large part to fund the programming activities of national broadcast networks. As the Federal Communications Commission considers possible revisions to its retransmission consent rules, it is important to keep in mind the localism objectives underlying these rules, as well as to keep in mind the increasingly disappointing state of affairs in terms of the extent broadcasters dedicate themselves to serving the informational needs and interests of their local communities.