
DOES RETRANSMISSION CONSENT NEED FIXING? (OR DO CONSUMERS NEED HELP SO THEY CAN WATCH THE SUPER BOWL, WORLD SERIES, AND ACADEMY AWARDS?)

Gregory J. Vogt[†]

I. INTRODUCTION

In today's marketplace, television programming consumers have more choices of providers than ever before. Customers are regularly bombarded with advertising from satellite, cable companies, and over-builders; and many can also choose a competitive wireline cable provider, such as Verizon or AT&T. In addition, more and more video programming is available online, with some customers choosing to drop all video subscription services in favor of Internet offerings.¹ However, based on market share data, consumers still prefer traditional television.²

Local broadcast affiliates of the major networks and network-owned affiliates had allowed cable providers to retransmit their feeds in exchange for carriage of other network-owned channels and similar non-monetary compensation.³ However, beginning around 2004, networks and broadcasters have used

[†] Gregory J. Vogt is the owner of the law firm of Law Offices of Gregory J. Vogt, PLLC, www.vogtlawfirm.com. At the Federal Communications Commission he was Deputy Chief of the second Cable Services Bureau (1994–96) and Chief, Tariff Division (1992–94), Chief, Mobile Services Division (1989–92), Chief, Enforcement Division (1985–89), all of the Common Carrier Bureau.

¹ Jenna Wortham, *Crowded Field for Bringing Web Video to TVs*, N.Y. TIMES, Aug. 23, 2010, at B4.

² NIELSEN, A LOOK ACROSS MEDIA: THE CROSS-PLATFORM REPORT Q3 2013, at 5 (2013), available at <http://commcns.org/1olhwIv>; see Wortham, *supra* note 1; see also Mark Hughes, *How Cable's Emmy Wins Signal the Future of Television Programming*, FORBES (Sept. 23, 2013), <http://commcns.org/1i891CU> (commenting on the success of television programs at the Emmy Awards).

³ Matthew A. Brill & Matthew T. Murchison, *How the FCC Can Protect Consumers in the Battle Over Retransmissions Consent*, BLOOMBERG LAW, <http://commcns.org/OUraax>

the entry of new competitors into the video programming market and their leverage as providers of critical programming to demand increasing monetary compensation from cable and satellite providers.⁴ Battles over the appropriate level of compensation for network programming have led to several “blackouts,” in which the broadcaster withholds permission for retransmission of its signal during negotiations.⁵ For example, Time Warner Cable’s viewers in a number of markets could not view CBS programming for at least a month in 2013, and Cablevision’s New York viewers were unable to see the first two games of the 2010 World Series due to a transmission dispute between Cablevision and Fox.⁶ These blackouts have raised the ire of consumers, causing concern both in Congress and at the Federal Communications Commission (“FCC” or “Commission”).⁷

While broadcasters argue that the majority of retransmission consent agreements are resolved without blackouts and that the retransmission consent regime is working,⁸ multi-channel video programming distributors (“MVPDs”), such as incumbent and competitive cable companies and satellite providers, claim that it is these increasing retransmission consent fees that are causing

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⁴ See *In re* Amendment of the Commission’s Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 F.C.C.R. 2718, 2719 (Mar. 3, 2011) [hereinafter *Time Warner et al., Petition*] (“Today . . . many consumers have additional options for receiving programming . . . 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.”); see also Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism*, 20 COMM.LAW CONSP. 345, 345 (2012).

⁵ See Napoli, *supra* note 4, at 349 (“Of particular importance has been the increased frequency of actual or threatened broadcast station blackouts and the publicity surrounding these high-stakes negotiations. 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.”).

⁶ Bill Carter, *CBS Returns, Triumphant, to Cable Box*, N.Y. TIMES, Sept. 3, 2013, at A1 (discussing the month long dispute between Time Warner and CBS); see *Time Warner et al., Petition, supra* note 4, at 2726–27; see also Brian Stelter, *For World Series, Cablevision Steers Customers Online*, N.Y. TIMES, <http://commcns.org/1i898hL> (last updated Oct. 27, 2010, 8:02 PM) (“The first game of the [2010] World Series was blacked out in three million homes serviced by Cablevision on Wednesday night, because of a continuing dispute between the cable company and Fox, which is broadcasting the championship series.”).

⁷ See *Time Warner et al., Petition, supra* note 4, at 2726–27; see also Ted Johnson, *CBS-Time Warner Cable Blackout Spurs D.C. Action on Retrans*, VARIETY (Sept. 12, 2013), <http://commcns.org/1hH85SR>.

⁸ *In re* Amendment of Commission’s Rules Related to Retransmission, *Comments of National Association of Broadcasters*, MB Docket No. 10-71, at 3, 7–8 (May 27, 2011), available at <http://commcns.org/NoQDrC>. The National Association of Broadcasters claims that “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.” *Id.* at 7.

consumers to suffer losses of programming and increased costs.⁹ Further complicating matters is increased network demands that local affiliates rebate a portion of retransmission fees back to the network, and efforts by at least one network to offer the network feed to an MVPD directly if the MVPD is unable to come to agreement with the local affiliate.¹⁰

A number of the major MVPDs have succeeded in convincing the FCC to initiate a rulemaking to revise the retransmission consent process, although the FCC's authority in this area is limited by statute.¹¹ Based on the conditions the Commission included in its approval of the Comcast/NBC merger, it is possible that the Commission might pressure broadcasters by allowing MVPDs to continue offering the broadcast programming during a negotiation impasse and by requiring binding arbitration.¹² However, the FCC has concluded that it does not have the statutory authority to require these measures and instead sought comment on less stringent means to encourage retransmission agreements and avoid programming blackouts.¹³

Currently, the competition amongst programmers for viewership is increasing, the nature and delivery methods for programming are changing, and many programmers are making inroads against more traditional network TV shows.¹⁴ Cable-delivered news programming has proliferated, although it provides a level of news coverage different from local news programming or over-the-air broadcasters.¹⁵ Notwithstanding these changes, however, many viewers still want access to local broadcasts for news and network programming,¹⁶ and

⁹ *In re* Amendment of Commission's Rules Related to Retransmission, *Comments of AT&T*, MB Docket No. 10-71, at 9-10 (May 27, 2011), available at <http://commcns.org/MJAWua>.

¹⁰ See *supra* notes 59-62.

¹¹ See *Time Warner et al., Petition, supra* note 4, at 2720-21, 2725. The Commission noted that in "March 2010, 14 MVPDs and public interest groups filed a rulemaking petition arguing that the Commission's retransmission consent regulations are outdated and are harming consumers." *Id.* at 2725.

¹² *In re* Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memo-randum Opinion and Order*, 26 F.C.C.R. 4238, 4309, 4353, 4358, 4363-64 (Jan. 20, 2011) [hereinafter *Comcast et al., Applications*] (approving Comcast's purchase of NBC-Universal). Under Part II of Appendix A, the FCC required that retransmission consent be subject to commercial arbitration. *Id.* at 4358. At Part IV.G of Appendix A, the FCC lists the prohibited unfair practices. *Id.* at 4363-64.

¹³ *Time Warner et al., Petition, supra* note 4, at 2720 & n.6.

¹⁴ See Hughes, *supra* note 2.

¹⁵ Hyuhn-Suhck Bae, *Product Differentiation in National TV Newscasts: A Comparison of the Cable All-News Networks and the Broadcast Networks*, 44 J. BROAD. & ELEC. MEDIA 62, 65 (2000) (observing that, for example, "CNN's reporting was of less depth compared to network reporting," and CNN reported on "a somewhat greater number of *international* stories").

¹⁶ See Napoli, *supra* note 4, at 350-51 (noting that local broadcasting is important to citizens during natural disasters and that localism drives the communications policy in the

many new MVPDs believe carriage of local broadcasters is an essential part of their channel line-ups.¹⁷

The reality is that the number of retransmission disputes is growing.¹⁸ This trend is likely to continue with increased competition among MVPDs and mounting involvement by networks in local affiliate retransmission negotiations. The question is whether there is a need for a total reworking of retransmission consent law, or is the real competitive need for more limited relief, for example, on behalf of new entrant MVPDs that arguably lack the ability to negotiate favorable carriage agreements with more established over-the-air broadcasters. While the FCC's proposals, if adopted, may have some effect on retransmission negotiations, the Commission's authority is limited by statute and any meaningful change will need to be made by Congress.¹⁹

Section II of this article describes the origins of retransmission consent and must carry laws and regulations. Section III outlines the retransmission consent negotiation requirement of the 1992 Cable Act. Section IV highlights the current retransmission consent negotiations environment. Section V describes the current consumer anger and reactions of government officials to that anger. Section VI describes the FCC's recent Notice of Proposed Rulemaking, which proposes possible changes to the retransmission consent regulations. Finally, Section VII analyzes possible changes to the current negotiations environment

United States).

¹⁷ Brill & Murchison, *supra* note 3.

¹⁸ *Time Warner et al., Petition*, *supra* note 4, at 2719 (“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”); *see also* Brill & Murchison, *supra* note 3 (“[I]n recent years, the demands for greater cash payments have made retransmission consent negotiations between broadcast stations and MVPDs increasingly contentious.”).

¹⁹ Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy “Voluntary” Agreements*, 53 FED. COMM. L.J. 49, 51–52 (2000). As Tramont explains:

The Commission's ability to exploit its power to achieve policies outside its mandate depends on the agency's ability to escape judicial and, to a lesser degree, congressional review. In theory, a number of forces should constrain the FCC's authority. Most fundamentally, the Act, like other delegations of congressional authority, delineates the scope of the Commission's authority over the communications marketplace. Essential to this statutory scheme is the ability of aggrieved parties to obtain judicial review of the FCC's actions. Through judicial review, the courts limit the Commission's discretion to act by enforcing legislative limitations and holding the FCC to standards of reasoned decision[]making and constitutional norms. Beyond the limits imposed by the Act and the courts, Congress impacts the FCC's authority through appropriations and oversight. Theoretically, these constraints require the Commission to stay within its regulatory and jurisdictional boundaries and to engage in reasoned and publicly documented decision-making procedures.

Id. (citations omitted).

given modern market realities.

II. EVOLUTION OF THE CURRENT RETRANSMISSION CONSENT AND MUST-CARRY REGIME

Cable television originated in the late 1940s as a retransmission service for areas that did not receive a high quality signal from broadcast television stations using standard antennas.²⁰ Cable television did not initially compete with broadcasters, but rather expanded the audience broadcast stations were able to reach.²¹ Consequently, in 1958 the FCC declined to regulate cable television, stating that cable television was not a common carrier or a broadcaster under the Communications Act of 1934.²² The FCC reaffirmed this interpretation in 1959.²³

As cable operators began adding “distant” signals to their offerings, cable television became more valuable to consumers and a potential threat to local broadcasters.²⁴ In response to these developments, in 1963, the Court of Appeals for the District of Columbia upheld a Commission decision refusing to grant a microwave license to a cable operator unless the cable operator agreed to carry the signal of the local broadcast station.²⁵ These rules were later extended, requiring cable systems to transmit to their subscribers the signals of any station into whose service area they have brought competing signals (must-carry)²⁶ and prohibiting the import of distant signals into the 100 largest televi-

²⁰ *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 627 (1994) (“The earliest cable systems were built in the late 1940’s [sic] to bring clear broadcast television signals to remote or mountainous communities.”); see Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. § 325(b)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 99, 104–05 (1996); see also Nat’l Cable & Telecomm. Ass’n, *Who We Are: Our Story*, NCTA, available at <http://commens.org/1i0jEDu> (last visited Oct. 12, 2013) (providing a useful graph, which depicts the history of cable).

²¹ See *Turner Broad. Sys.*, 512 U.S. at 627 (noting that, initially, cable systems’ purpose “was not to replace broadcast television but to enhance it”).

²² *Frontier Broadcast Co. v. J.E. Collier*, *Memorandum Opinion and Order*, 24 F.C.C. 251, 253–54 (Apr. 2, 1958).

²³ *In re Inquiry into the Impact of Community Antenna Systems, TV Translators, TV “Satellite” Stations, and TV “Repeaters” on the Orderly Development of Television Broadcasting*, *Report and Order*, 26 F.C.C. 403, 427–28 (Apr. 13, 1959).

²⁴ Lubinsky, *supra* note 20, at 105.

²⁵ *Carter Mountain Transmission Corp. v. F.C.C.*, 321 F.2d 359, 366 (D.C. Cir. 1963).

²⁶ *In re Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems; and Amendment of Subpart I, Part 21, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Domestic Public Point-to-Point Microwave Radio Service for Microwave Stations Used to Relay Television Broadcast Signals to Community Antenna Television Systems*, *First Report and Order*, 38 F.C.C. 683, 716–19 (Apr. 22, 1965) (applying rules to all cable providers using microwave relay systems). In 1966, the requirement was expanded to all cable systems. See

sion markets without FCC approval.²⁷ These rules were upheld by the Supreme Court in 1968.²⁸ In 1972, the FCC added a program exclusivity requirement, which gave local television stations that had purchased exclusive exhibition rights and copyright holders the ability to demand that the local cable systems delete a program from retransmitted distant signals.²⁹ However, in *Quincy Cable TV, Inc.*, the D.C. Circuit held that the FCC's must-carry regulations violated cable operators' First Amendment rights.³⁰ Subsequently, the FCC attempted to make the rules consistent with the *Quincy Cable* decision, but the D.C. Circuit again struck them down as a violation of the First Amendment.³¹

In addition to reviewing FCC regulation, the courts were also addressing copyright questions raised by broadcast retransmission over cable systems. In response to two Supreme Court decisions, finding that the retransmission of broadcast programming did not implicate copyright issues,³² Congress revised

In re Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems; Amendment of Subpart I, Part 21, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Domestic Public Point-to-Point Microwave Radio Service for Microwave Stations Used to Relay Television Broadcast Signals to Community Antenna Television Systems; Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters, *Second Report and Order*, 2 F.C.C. 2d 725, 746 (Mar. 4, 1966) [hereinafter *CATV Second Report and Order*] ("To insure effective integration of CATV with a fully developed television service, the new regulations will apply equally to all CATV systems, including those which require microwave licenses and those which receive their signals off the air . . . The microwave rules will be revised to reflect the new rules adopted for all systems.").

²⁷ *CATV Second Report and Order*, *supra* note 26, at 782.

²⁸ In *United States v. Southwestern Cable*, the Court upheld the Commission's authority to prohibit a cable operator's ability to import the distant signal of a local television stations from another local market. *United States v. Sw. Cable*, 392 U.S. 157, 175, 178, 181 (1968). It also affirmed the Commission's ancillary authority to regulate cable operators in aid of its authority to regulate television broadcasting. *Id.* at 178.

²⁹ *In re* Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals; Amendment of Section 74.1107 of the Commission's Rules and Regulations to Avoid Filing of Repetitious Requests; Amendment of Section 74.1031(c) and 74.1105(a) and (b) of the Commission's Rules and Regulations As They Relate to Addition of New Television Signals; Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Federal-State or Local Relationships in the Community Antenna Television System Field; and/or Formulation of Legislative Proposals in This Respect; Amendment of Subpart K of Part 74 of the Commission's Rules and Regulations with Respect to Technical Standards for Community Antenna Television Systems, *Cable Television Report and Order*, 36 F.C.C. 2d 143, 165 (Feb. 3, 1972).

³⁰ *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434, 1438 (D.C. Cir. 1985).

³¹ *Century Comm'ns Corp. v. F.C.C.*, 835 F.2d 292, 297, 303 (D.C. Cir. 1987).

³² *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 412 (1974) (hearing a claim by holders of copyrighted television programs, which alleged copyright infringe-

the Copyright Act to establish a compulsory licensing scheme.³³ These changes required cable operators to compensate copyright owners for retransmitted programming based on a government-set formula, but did not require payment to broadcasters for retransmission of local or distant signals.³⁴ After these changes to the Copyright Act, the idea of retransmission consent was proposed to the FCC by the National Telecommunications and Information Administration (“NTIA”),³⁵ but no such scheme was adopted.

The retransmission and must-carry laws in place today were passed as part of the 1992 Cable Act.³⁶ Congress sought to address a number of issues, including consumer complaints regarding rising cable rates and poor service quality.³⁷ The Act re-regulated basic tier cable rates³⁸—which had been deregulated in 1984³⁹—and the Act also eliminated exclusive cable franchises⁴⁰ and increased consumer protections.⁴¹ In addition, while leaving the copyright payment scheme intact, Congress added retransmission consent requirements and must-carry provisions.⁴² The retransmission provision prohibits a cable system or other MVPD from retransmitting the signal of a broadcasting station, unless it receives the express authority of the originating station or pursuant to the must-carry provisions, if a station elects to be subject to them.⁴³ Thus, if a

ment through the broadcasting of television programs by CATV systems); *Fortnightly Corp. v. United Artists Television Inc.*, 392 U.S. 390, 395, 402 (1968) (deciding whether CATV systems performed the copyrighted works).

³³ Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–801 (2006)); *see also* H.R. REP. NO. 94-1476, at 88–89 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5703 (stating that the compulsory copyright was adopted in response to Supreme Court precedent).

³⁴ 17 U.S.C. § 111(a)(1) (2012) (providing an exemption for retransmissions within the station’s local service area).

³⁵ Lubinsky, *supra* note 20, at 112.

³⁶ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.); *see* 47 U.S.C. § 534 (2006) (requiring must carry); *see also* 47 U.S.C. § 325 (2006) (retransmission consent).

³⁷ Cable Television Consumer Protection and Competition Act of 1992 §§ 3, 8, 106 Stat. 1460, 1464–71, 1484 (codified at 47 U.S.C. §§ 543, 552) (regulating rates and service quality).

³⁸ *Id.* § 3, 106 Stat. 1460, 1464 (codified at 47 U.S.C. § 543(a)(2)).

³⁹ Thomas W. Hazlett, *Cable Television Rate Deregulation*, 3 INT’L J. ECON. BUS. 145, 145, 150 (1996).

⁴⁰ Cable Television Consumer Protection and Competition Act of 1992 § 7, 106 Stat. 1460, 1483 (codified at 47 U.S.C. § 541(a)(1)).

⁴¹ *Id.* §§ 8, 19–20, 106 Stat. 1460, 1484, 1494, 1497 (codified at 47 U.S.C. §§ 551–52) (regulating service quality and privacy).

⁴² 47 U.S.C. § 325(b) (2006). If the station elects must carry status pursuant to section 534, then no retransmission consent fees are owed. *See id.* § 534. Further, section 535 requires cable operators to carry the signals of qualified, noncommercial educational television stations. *Id.* § 535(a).

⁴³ *Id.* § 325(b)(1).

broadcaster selects must carry, it is guaranteed carriage on cable systems operating within its broadcast footprint, but will receive no compensation.⁴⁴ If a broadcaster chooses retransmission consent, it is not guaranteed carriage, but can negotiate “in good faith” for compensation.⁴⁵ Broadcasters were required to choose between retransmission consent and must-carry within one year of § 325’s enactment and every three years thereafter.⁴⁶

The Act also required the FCC to establish rules to implement these provisions.⁴⁷ In 1993, the FCC determined that retransmission consent applies to both distant and local signals, but only local broadcasters have the option of selecting must carry.⁴⁸ In addition, the Commission concluded that a broadcaster’s failure to choose either must-carry or retransmission consent by the applicable deadline would result in must-carry status for the broadcaster; the broadcaster would then need to bargain over the rights to the signal, rather than the rights in the individual programming.⁴⁹ However, the FCC’s authority to require retransmission consent agreements is limited because the only restriction on broadcasters is that they negotiate in good faith.⁵⁰

The impetus for the retransmission consent and must-carry provisions was to protect broadcasters and strengthen their position vis-à-vis the growing popularity (and power) of cable television.⁵¹ The Conference Committee Report for the Act does not provide much information regarding the inclusion of the retransmission consent and must-carry provisions; however, the provisions evolved from a report by the Senate Committee on Commerce, Science, and Transportation.⁵² The Senate Committee’s report stated:

Cable systems now include not only local signals, but also distant broadcast

⁴⁴ Rob Frieden, *Analog and Digital Must-Carry Obligations of Cable and Satellite Television Operators in the United States*, 15 MEDIA L. & POL’Y 230, 231, 234 & n.9 (2006).

⁴⁵ *Id.* at 241 n.31.

⁴⁶ 47 U.S.C. § 325(b)(3)(B).

⁴⁷ Cable Television Consumer Protection and Competition Act of 1992 § 6, 106 Stat. 1460, 1482–1483 (codified at 47 U.S.C. 325(b)(3)).

⁴⁸ *In re* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 8 F.C.C.R. 2965, 2972–74 (Mar. 29, 1993); Thomas W. Hazlett, *Digitizing “Must-Carry” Under Turner Broadcasting v. FCC (1997)*, 8 SUP. CT. ECON. REV. 141, 143 (2000) (“Must-carry rules require cable systems to carry local broadcast signals without charge.”).

⁴⁹ *In re* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *supra* note 48, at 3002. The Commission believed that making “must-carry the default category” would incentivize stations to grant the “express authority” needed by cable operators to acquire access to the signals for the operators’ subscribers. *Id.*

⁵⁰ AM. TELEVISION ALLIANCE, UNTIL THE RETRANS RULES CHANGE, THE SKY’S THE LIMIT ON BROADCASTER BLACKOUTS, AMERICAN TELEVISION ALLIANCE 6, *available at* <http://commens.org/1jN2hru> (last visited Oct. 13, 2013).

⁵¹ Former Rep. Jack Fields, *Fix Broken Broadcast Retransmission Consent System*, HILL (Nov. 15, 2010, 11:53 AM), <http://commens.org/1coV00Y>.

⁵² Lubinsky, *supra* note 20, at 119.

signals and the programming of cable networks and premium services. . . . Due to the FCC's interpretation of section 325, however, cable systems use these signals without having to seek the permission of the originating broadcaster or having to compensate the broadcaster for the value its product creates for the cable operator.⁵³

The Report further explained that this created a "distortion in the video marketplace which threatens the future of over-the-air broadcasting"⁵⁴ and "the intent of [the retransmission consent provision] is to ensure that our system of free broadcasting remain [sic] vibrant, and not be replaced by a system which requires consumers to pay for television service."⁵⁵ The Committee intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals" but did not intend "to dictate the outcome of the ensuing marketplace negotiations."⁵⁶

III. RETRANSMISSION NEGOTIATIONS UNDER THE 1992 CABLE ACT

Although broadcasters tried to use the new Act to seek monetary compensation in return for retransmission consent, cable operators strongly resisted this and instead offered "to compensate broadcasters with advertising time, cross-promotions, and carriage of affiliated channels."⁵⁷ As the FCC noted:

[By 2005], cash still has not emerged as a principal form of consideration for retransmission consent. Today, virtually all retransmission consent agreements involve a cable operator providing in-kind consideration to the broadcaster.⁵⁸

However, despite the fact that broadcasters were generally not able to negotiate cash compensation,⁵⁹ the FCC still found that:

Must-carry alone would fail to provide stations with the opportunity to be compensated for their popular programming. Retransmission consent alone would not preserve local stations that have a smaller audience yet still offer free over-the-air programming and serve the public in their local areas.⁶⁰

In 2000, the FCC adopted rules governing what constituted "good-faith" ne-

⁵³ S. Rep. No. 102-92, at 35 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1168.

⁵⁴ *Id.*, 1992 U.S.C.C.A.N. at 1168.

⁵⁵ *Id.* at 36, 1992 U.S.C.C.A.N. at 1169.

⁵⁶ *Id.*, 1992 U.S.C.C.A.N. at 1169.

⁵⁷ FED. COMM'NS COMM'N, RETRANSMISSION CONSENT AND EXCLUSIVITY RULES: REPORT TO CONGRESS PURSUANT TO SECTION 208 OF THE SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT OF 2004, at 6 (2005), available at <http://commcns.org/11vhC35>.

⁵⁸ *Id.* at 6-7.

⁵⁹ *Id.* at 6.

⁶⁰ *Id.* at 18.

gotiations between cable providers and direct satellite providers⁶¹ (together “MVPDs”) and broadcasters.⁶² These rules require that broadcasters negotiate with MVPDs in good faith, while making an exception for retransmission consents—proposed or entered into—containing different terms, so long as such terms are based “competitive marketplace considerations.”⁶³ Other rules regarding the conduct of negotiations were adopted at the same time.⁶⁴ These rules were originally set to terminate in 2006, but have been extended.⁶⁵

At the time this report was published, the relative bargaining position of broadcasters began to increase vis-à-vis with that of MVPDs. Broadcasters were first able to negotiate monetary compensation from MVPDs beginning in 2005.⁶⁶ Cable providers, who long had a monopoly position, were now competing with direct broadcast satellite providers and telephone companies entering the video market, and broadcasters were beginning to explore additional outlets for their programming using the Internet.⁶⁷ Because the satellite providers and telephone companies were new entrants in the market, their smaller customer bases afforded them less market power from which to resist broadcaster demands for monetary compensation. As these competitors to cable increased their market share, broadcasters were able to increase pressure on the cable

⁶¹ Note that satellite providers are governed by separate but similar retransmission consent and must-carry requirements. *Compare* 47 C.F.R. § 76.65 (2012) (regulating television broadcast stations and MVPDs), *with id.* § 76.66 (governing satellite broadcast signal carriage).

⁶² *In re* Implementation of the Satellite Home View Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, *First Report and Order*, 15 F.C.C.R. 5445, 5446 (Mar. 16, 2000). The good faith requirement was extended to all MVPDs in 2004. *See generally* Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-477, 118 Stat. 3393 (2004).

⁶³ 47 C.F.R. § 76.65.

⁶⁴ A broadcaster must not: (1) refuse to negotiate retransmission consent with any multichannel video programming distributor; (2) refuse to designate a representative with authority make binding representations on retransmission consent; (3) refuse to meet and negotiate retransmission consent at reasonable times and locations; (4) refuse to put forth more than a single, unilateral proposal; (5) fail respond to a retransmission consent proposal of an MVPD; (6) enter into an agreement which requires a broadcast station to refrain from granting retransmission consent to any MVPD; and (7) refusing to execute a written retransmission consent agreement with an MVPD. *Id.* § 76.65(b)(1).

⁶⁵ *In re* Implementation of the Satellite Home View Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, *supra* note 62, at 5448 (“The Commission’s rules regarding exclusive retransmission consent agreements sunset on January 1, 2006.”); 47 C.F.R. § 76.65(f) (extending the rules to February 28, 2010).

⁶⁶ *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Twelfth Annual Report*, 21 F.C.C.R. 2501, 2584 (Mar. 3, 2006).

⁶⁷ *Id.* at 2511–69 (discussing the marketplace competition for video programming); *see* Katy Bachman, *FCC Set to Decide on Program Access Rule: Could Change Lineups on Cable*, ADWEEK (Aug. 31, 2012), <http://commcns.org/1hH8zZd>.

companies to make similar deals.⁶⁸

Broadcasters had a few additional advantages that further strengthened their bargaining position. In addition to increased leverage from MVPD competitors, broadcasters had the protection of the network non-duplication rule, which allows a television broadcast station that has purchased exclusive rights to network programming within a specified area to demand that a local cable system's duplicate carriage of the same program be blacked out.⁶⁹ A similar protection existed with the syndicated program exclusivity rule, but it applies to exclusive contracts for syndicated programming, rather than for network programming.⁷⁰ These twin protections gave broadcasters exclusive geographic rights in showing programming to their customers, which allowed them to leverage their customer preferences into money exacted from their cable competitors. Finally, despite the increasingly broad array of non-broadcast programming that are available to cable operators, the broadcast television station signals are still regarded as "must have" programming.⁷¹

The FCC recognized this broadcaster power over these various types of programming when reviewing the News Corp. and DIRECTV transaction.⁷² The Commission described local broadcast stations as "without close substitutes"⁷³ and noted that News Corp. "possesses significant market power in the [Designated Market Areas] in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations."⁷⁴

Despite this increased broadcaster power, the FCC had done little to help cable operators and other MVPDs protect themselves against payment of higher and higher fees in retransmission consent disputes. In general, the FCC has filed few complaints filed regarding the good-faith negotiation requirement. Therefore, there was little precedent regarding what constitutes "good faith."⁷⁵ Indeed, the FCC has explicitly recognized that even good faith negotiations may not result in an agreement.⁷⁶

⁶⁸ *Time Warner et al., Petition, supra* note 4, at 2726 n.48, 2738.

⁶⁹ 47 C.F.R. § 76.92(a).

⁷⁰ *Id.* § 76.101. Syndicated programming is broadcast by local broadcast stations that enter into their own arrangements with programmers, such as Jeopardy or Wheel of Fortune, whereas network programming is marketed by TV networks, such as ABC or Fox, for airing through local affiliation agreements.

⁷¹ *In re* General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control, *Memorandum Opinion and Order*, 19 F.C.C.R. 473, 477 (Jan. 14, 2004).

⁷² *Id.* at 476–77.

⁷³ *Id.* at 565.

⁷⁴ *Id.*

⁷⁵ *Time Warner et al., Petition, supra* note 4, at 2724.

⁷⁶ *In re* Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc. Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith, *Memorandum Opinion and*

With critically important, popular programming, multiple MVPDs in each market, and the non-duplication and syndicated program exclusivity rules, the power of the broadcasters to demand substantial monetary compensation from MVPDs has continued to increase.

IV. CURRENT RETRANSMISSION CONSENT NEGOTIATION ENVIRONMENT

Expirations of retransmission consent agreements are now loud, public affairs punctuated by ad campaigns by the relevant MVPD and broadcast station, each blaming the other for any impasse in negotiations and the possibility of a blackout, in which the broadcaster will withdraw its programming from the MVPD.⁷⁷ For example, the March 2010 Academy Awards broadcast was marred for about 3 million viewers in New York, New Jersey, and Connecticut because ABC's New York affiliate required Cablevision, the incumbent cable operator, to block out its signal because of a retransmission consent dispute.⁷⁸ The signal was restored thirteen minutes into the Awards ceremony.⁷⁹ During the dispute Cablevision said that Disney, the owner of ABC, was putting its "own financial interests above their viewers," while Disney criticized "Cablevision's legendary greed and disregard for the needs of their customers."⁸⁰

In October 2010, Cablevision viewers endured a two-week blackout of Fox's local affiliate, which prevented Cablevision customers from watching a significant part of the Major League Baseball playoffs.⁸¹ The parties settled their dispute prior to the beginning of the World Series, with Cablevision stating, "In the absence of any meaningful action from the FCC, Cablevision has agreed to pay Fox an unfair price for multiple channels of its programming including many in which our customers have little or no interest."⁸² A further interesting feature of the Cablevision/Fox dispute was that Fox blocked Cablevision's Internet subscribers from accessing Fox shows on Hulu.com, ex-

Order, 22 F.C.C.R. 35, 45 (Jan. 4, 2007).

⁷⁷ See Roger Yu, *CBS, Time Warner Cable Reach Deal, End Blackout: Programming Resumed Monday for More Than 3 Million Customers*, USA TODAY, Sept. 3, 2013, at A4 (discussing the Time Warner Cable and CBS dispute).

⁷⁸ Barry Paddock & Richard Huff, *ABC-Cablevision Blackout Lifted Just after Oscars Begin As Two Companies Reach Agreement*, NYDAILYNEWS.COM, <http://commcns.org/1gNL11u> (last updated Mar. 7, 2010, 10:19 PM).

⁷⁹ *Id.*

⁸⁰ Sam Schechner & Ethan Smith, *Cablevision, Disney End Dispute*, WALL. ST. J. (Mar. 8, 2010), <http://commcns.org/NOiOjy> (internal quotation marks omitted).

⁸¹ Tom McElroy, *Fox, Cablevision Reach Deal to End NY Blackout*, HUFF POST (Oct. 31, 2010), <http://commcns.org/1hH8Paq>.

⁸² *Id.* (internal quotation marks omitted).

tending retransmission consent issues to the Internet.⁸³

In January 2011, Time Warner and Sinclair Broadcast Group came to an agreement that prevented the blacking out of certain ABC, Fox, and CBS stations throughout the country.⁸⁴ Time Warner was forced to blackout CBS stations in a number of major markets for a month in August 2013, and included a blackout of online CBS video content.⁸⁵ This last blackout ended as the NFL season quickly approached.⁸⁶

MVPDs blame broadcasters' demands for higher retransmission-consent fees for the increased cable rates⁸⁷ levied on consumers and the recurring losses of programming for consumers.⁸⁸ Conversely, broadcasters argue that most retransmission consent agreements are resolved without blackouts, that there is no evidence showing a relationship between increased retransmission consent fees and increased cable rates, and that reducing retransmission consent fees would harm both the quality and quantity of broadcast television.⁸⁹

Network involvement in retransmission consent is also increasing the likelihood of disputes. The networks have begun pressuring local affiliates for increasing shares of retransmission consent fees.⁹⁰ Fox has been particularly aggressive, threatening to terminate the network affiliation if a local station does not agree to share retransmission fees and even demanding that the local station pay the network itself if the local station cannot negotiate sufficient retransmission fees.⁹¹ Although NBC, CBS, and ABC are also looking for contributions from their local affiliates, they do not appear to be threatening to ter-

⁸³ Cecilia Kang, *Fox to Restore Internet Videos to Cablevision Customers*, WASH. POST (Oct. 16, 2010, 5:55 PM), <http://commcns.org/MJBzUD>.

⁸⁴ David Goetzl, *Fox, Sinclair Extend Carriage Agreement*, MEDIADAILYNEWS (Jan. 12, 2011), <http://commcns.org/1pX48hk>; see Rob Golum & Sylvia Wier, *Sinclair, Time Warner Reach Agreement in Fee Dispute*, BLOOMBERG (Jan. 15, 2011), <http://commcns.org/1dipDUi>.

⁸⁵ Brendan Bordelon, *Time Warner Subscribers Ensure CBS Blackout As NFL Season Looms*, DAILY CALLER (Aug. 21, 2013), <http://commcns.org/1fD1LNG>.

⁸⁶ Yu, *supra* note 77, at A4.

⁸⁷ Cable rates have increased at a rate that exceeds inflation, although the price per channel increased at a lower rate than inflation. *In re* Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates of Basic Service, Cable Programming Service, and Equipment, *Report on Cable Industry Prices*, 28 F.C.C.R. 9857, 9859 (June 7, 2013).

⁸⁸ *Time Warner et al., Petition*, *supra* note 4, at 2726; see Brill & Murchison, *supra* note 3 (describing the increasing frequency of disputes which end in blackouts).

⁸⁹ Letter from Erin L. Dozier, Assoc. Gen. Counsel of Legal & Regulatory Affairs, Nat'l Ass'n of Broadcasters, to Marlene H. Dortch, Sec'y, Fed. Commc'ns Comm'n 3 (May 6, 2010). The National Association of Broadcasters argues that consumers are twenty times more likely to lose television during an electricity outage than during a bargaining impasse between broadcasters and MVPDs. *Id.*

⁹⁰ See Joe Flint, *Fox Seeks a Share of Retransmission Fees; the Network Wants Some of the Money Affiliates Get from Cable Operators*, L.A. TIMES, Feb. 12, 2011, at B3.

⁹¹ *Id.*

minate station affiliations.⁹² In addition, the Time Warner and Sinclair negotiations, mentioned above, revealed that Time Warner and Fox had entered into an agreement which allowed Time Warner to purchase Fox programming if the cable operator loses its rights to carry the signals of a Fox affiliate.⁹³ Carrying the network feed rather than the affiliate feed deprives the MVPD of local news and programming, but allows the MVPD to continue showing the network's "must-see" offerings.⁹⁴ This type of side agreement allows the network to profit directly from the MVPD but reduces the local affiliates' leverage vis-à-vis the MVPD, which in turn decreases any retransmission consent fees that can be shared with the network.⁹⁵

Blackouts, due to impasses over retransmission consent negotiations, continue to this day.⁹⁶ Former Chairman Julius Genachowski has publicly stated that it may be time to address these blackouts, but he indicated that Congress probably has to act to give the FCC authority to prevent them.⁹⁷

V. CONSUMER ANGER AND GOVERNMENT REACTION

Consumer complaints regarding these high profile blackouts and loss-of-programming threats have attracted attention from both Congress and the FCC.⁹⁸ Government officials describe consumers as innocent bystanders injured by fights between greedy corporations.⁹⁹ For example, discussing the Fox

⁹² *Id.*

⁹³ Joe Flint, *Fights Between Programmers and Distributors Heat Up As 2011 Nears*, L.A. TIMES (Dec. 30, 2010), <http://commcns.org/1c2z6AC>.

⁹⁴ Use of this option by an MVPD could implicate the local affiliates' non-duplication rights. However, some broadcasters have not been diligent about protecting these rights, opening an opportunity for negotiations between the network and the MVPD. Additionally, if the network only offers the network feed and includes no local programming, the action is unlikely to conflict with the FCC's network non-duplication rules. *See* Joe Flint, *Fox Clause Is Focal Point of Fight Between Time Warner Cable and Sinclair Broadcast Group*, L.A. TIMES (Dec. 6, 2010), <http://commcns.org/1g5rUj6>.

⁹⁵ *See id.*

⁹⁶ *See, e.g.*, Michael Malone, *Grant Communications Stations Remain Dark for Dish Subs*, MULTICHANNEL NEWS (Feb. 20, 2013), <http://commcns.org/1eNXTYB>; Lydia Grimes, *Lost Channel Sparks Blame Game*, ATMORE ADVANCE (Sept. 7, 2011), <http://commcns.org/1g5s1es>.

⁹⁷ *Genachowski: May Be Time to Update Retrans Rules to Limit Blackouts*, MULTICHANNEL NEWS (Mar. 20, 2013), <http://commcns.org/1gNLEJu> (last visited Jan. 25, 2014).

⁹⁸ *See id.*; *see also* Letter from Senator John Kerry to Chase Carey, President & COO, News Corp., and Glenn Britt, Chairman & CEO, Time Warner Cable (Dec. 22, 2009), available at <http://commcns.org/1diqJi>.

⁹⁹ *Television Viewers, Retransmission Consent, and the Public Interest: Hearing Before the S. Subcomm. on Commc'ns, Tech., & the Internet of the S. Comm. on Commerce, Science, & Transp.*, 111th Cong. 1–2 (2010) [hereinafter *Subcommittee Hearing on Retransmission Consent*] (statement of Sen. John F. Kerry) (describing the feelings of consumers and business owners).

and Time Warner dispute, former Senator John Kerry stated that a programming blackout would “neglect[] the core interests of the millions of households that subscribe to Time Warner Cable in affected markets.”¹⁰⁰ Congressmen and public interest groups have strongly condemned Fox’s decision to limit Internet access to its online programming.¹⁰¹

In October 2010, Senator Kerry introduced legislation that would have restricted broadcasters’ authority to pull their signal during a negotiation impasse and that would have also given the FCC increased authority.¹⁰² Although hearings were held by the Senate Communications Subcommittee regarding this proposed legislation, no further action was taken.¹⁰³

A further opportunity for congressional action is in the possible extension of the distant signal provisions in the Communications Act’s satellite television provisions, where the retransmission consent laws and the good faith negotiation requirements are contained.¹⁰⁴ MVPDs have been hard at work lobbying members of Congress to modify retransmission consent requirements, and broadcasters have been insisting that no changes be made. The Subcommittee on Communications and Technology in the House of Representatives has specifically recognized that the law of retransmission consent may need to be revised in the process of reauthorizing the distant signal provisions.¹⁰⁵ It is doubtful that anything significant will change in this Congress concerning retransmission consent given that significant lobbying interests are at polar opposites from each other. Nevertheless, the budget and reauthorization process bears watching for its potential to include new retransmission consent legislation.

VI. FCC NOTICE OF PROPOSED RULEMAKING

During this same timeframe, the FCC has continued to face substantial pressure to take action to prevent, or at least mitigate, future programming blackouts.¹⁰⁶ In March 2010, several MVPDs, both cable and satellite providers, and

¹⁰⁰ Letter from Senator John Kerry to Chase Carey, *supra* note 98.

¹⁰¹ Brian Stelter, *In Brief Blackout, Web Becomes a Weapon in Fox-Cablevision War*, N.Y. TIMES, Oct. 20, 2010, at B3.

¹⁰² See John Eggerton, *Kerry Outlines Retrans Bill to FCC*, BROADCASTING & CABLE (Oct. 19, 2010), <http://commcns.org/OU2A6>.

¹⁰³ *Subcommittee Hearing on Retransmission Consent*, *supra* note 99.

¹⁰⁴ See 47 U.S.C. § 325(b) (2006).

¹⁰⁵ Memorandum from Majority Comm. Staff of the Comm. on Energy & Commerce to Members & Staff of the Subcomm. on Commc’ns & Tech., at 3–4 (Jun. 10, 2013), available at <http://commcns.org/1pX5etb>; see Fields, *supra* note 51; see also John Eggerton, *Rep. Eshoo Proposes Retransmission Consent Bill*, MULTICHANNEL NEWS (Sept. 9, 2013), <http://commcns.org/NoSn44> (summarizing a draft bill that would make some changes to retransmission consent laws).

¹⁰⁶ See *FCC May Look into Banning Future Chanel Blackouts*, LONG ISLAND NEWSDAY, <http://commcns.org/1n3KiOO> (last updated Mar. 12, 2010, 9:13 PM).

several public interest groups filed a petition for rulemaking requesting that the FCC modify the retransmission consent process to prevent future programming blackouts and MVPD rate hikes caused by excessive retransmission consent fees paid to broadcasters.¹⁰⁷ This petition has generated over 250 comments and ex parte notices, according to the FCC's records.¹⁰⁸ In December of that year, FCC Media Bureau Chief William Lake stated that the FCC initiated a rulemaking to examine retransmission consent practices in an effort to ensure that these fees are set by market forces while also protecting the interests of consumers.¹⁰⁹ In describing the effect of programming blackouts on consumers, Lake quoted an African proverb that "when the elephants fight, it is the grass that suffers."¹¹⁰ Although the FCC's authority to regulate retransmission consent is limited, the agency can consider regulations regarding the definition of "good faith" negotiations as well as other rules, such as the network non-duplication requirements, that give broadcasters leverage in negotiations. As Lake explained:

One thing we've heard is that uncertainty exists about what good faith means. Our rules provide some limited guidance on this; but, if we can provide greater certainty to the marketplace, that could help to guide the negotiating parties and reduce the number of failed deals and dropped signals. We may try to identify additional practices that will be treated as *per se* violations of the duty to bargain in good faith. We may be able to provide more specifics about the meaning and scope of the "totality of the circumstances" test. Because a principal concern is to protect consumers when talks break down, we may propose to strengthen our notice requirement and extend it to non-cable distributors and broadcasters. If some of our broadcast rules are thought to interfere with market negotiations, we may want to look at those rules.¹¹¹

An indication of what the FCC might want to do (without consideration of any statutory authority limitations) can be found in the conditions attached to the merger of Comcast and NBC.¹¹² The FCC frequently uses merger applications to obtain "voluntary" agreements from parties to ensure that they comply with certain requirements for which the FCC lacks the statutory authority to regulate.¹¹³ One of the conditions attached to the Comcast-NBC transaction required that NBC affiliates owned by the combined Comcast/NBC entity submit to a baseball-style arbitration process during which time Comcast and NBC must continue to provide the programming at issue in the event of a dis-

¹⁰⁷ *Time Warner et al., Petition, supra* note 4, at 2725.

¹⁰⁸ See generally *Electronic Comment Filing System: Proceeding 10-71*, FCC.GOV, <http://comcomns.org/1hH9SY3> (last visited Mar. 3, 2014).

¹⁰⁹ See Remarks of William T. Lake, Chief, Media Bureau, FCC, to The Media Inst., at 5 (Dec. 8, 2010), available at <http://comcomns.org/1gNLW3c>.

¹¹⁰ *Id.* at 4.

¹¹¹ *Id.* at 6.

¹¹² *Comcast et al., Applications, supra* note 12, at 4355–81.

¹¹³ *Tramont, supra* note 19, at 52.

pute regarding the provision of programming.¹¹⁴ In addition, Comcast agreed to honor NBC's agreements to preserve network non-duplication to prevent importation of another affiliate's broadcast station signal into an NBC affiliate's market.¹¹⁵ Comcast further agreed to refrain from using an NBC network direct feed in any NBC affiliate's market when an NBC affiliate withdraws retransmission consent in connection with retransmission negotiations between Comcast/NBC and the NBC affiliate.¹¹⁶ Comcast also agreed not to seek repeal of the current retransmission consent regime.¹¹⁷

However, the FCC recognizes that its ability to reform the retransmission consent process without Congressional action is limited.¹¹⁸ On March 3, 2011, the FCC released a Notice of Proposed Rulemaking with a goal "to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services."¹¹⁹ In this Notice, the Commission stated that it does not believe that it has the authority to require interim carriage or mandatory binding dispute resolution procedures.¹²⁰ Nevertheless, it asked for comment on certain measures to reduce retransmission consent disputes, including:

[W]hether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision . . . we seek comment on whether it should be a *per se* violation for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned . . . whether it should be a *per se* violation for a [broadcaster or MVPD] to refuse to put forth *bona fide* proposals on important issues . . . whether it should be a *per se* violation for a [broadcaster or MVPD] 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 . . . what it means to "unreasonably" delay retransmission consent negotiations [to give more substance to the reasonableness requirement in Section 76.65(b)(1)(iii)] . . . whether a broadcaster's request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market "significantly viewed" . . . station violates Section 76.65(b)(1)(vi) of [the Commission's] rules.¹²¹

Another measure the FCC considered was whether the Commission should provide more specificity in defining what would be a breach of good faith under the "totality of the circumstances" in § 76.65(b)(2) and, if so, how.¹²² An additional measure the FCC contemplated was whether it should revise its

¹¹⁴ *Comcast et al., Applications, supra* note 12, at 4358.

¹¹⁵ *Id.* at 4433.

¹¹⁶ *Id.* at 4308.

¹¹⁷ *Id.* at 4355–81.

¹¹⁸ *See Time Warner et al., Petition, supra* note 4, at 2743.

¹¹⁹ *See id.* at 2727.

¹²⁰ *See id.* at 2727–28.

¹²¹ *See id.* at 2730–33.

¹²² *See id.* at 2734.

rules requiring notice to consumers of programming blackouts.¹²³ The FCC also asked whether it should eliminate the network non-duplication and syndicated exclusivity rules.¹²⁴

Although these proposals would put some additional pressure on MVPDs and broadcasters to come to agreements on retransmission consent, they are unlikely to have a substantial effect because the Commission would not have the authority to require binding arbitration or even interim carriage in the event of an impasse.¹²⁵ Eliminating the network non-duplication and syndicated exclusivity rules might sound as if it would give MVPDs greater leverage to bargain among broadcasters, but as the FCC recognized, these rules were originally derived from private contracts between broadcast networks and their affiliates.¹²⁶ Thus, even if the FCC were to remove them, the parties could enforce such agreements through litigation.¹²⁷

Since the record was complete with respect to this NPRM, the Commission itself has taken no formal steps to complete work in the docket.¹²⁸ Nevertheless, the industry continues to pressure the FCC.¹²⁹ The latest arguments surround the allegation that unaffiliated broadcasting entities are jointly engaged in retransmission consent negotiations, increasing the number of potential broadcast stations subject to the negotiations and hence their market power.¹³⁰ MVPDs argue that such joint groupings should be outlawed because they unnecessarily increase retransmission consent fees and, thus, harm consumers.¹³¹ These arguments are made unabashedly, even by multi-billion dollar MVPDs.¹³² Broadcasters, of course, claim that these negotiations are lawful, are pro-competitive, and that there is no evidence that joint negotiations increase retransmission consent fees.¹³³ There is no doubt that the level of the rhetoric is soaring, although the public interest arguments for or against a particular proposal are not improving.

¹²³ *See id.* at 2738.

¹²⁴ *See id.* at 2740.

¹²⁵ *See id.* at 2727–29.

¹²⁶ *See id.* at 2740–41.

¹²⁷ *Id.*

¹²⁸ Brill & Murchison, *supra* note 3.

¹²⁹ *See e.g.*, Letter from Mathew M. Brill, Counsel, Time Warner Cable, to Marlene H. Dortch, Sec’y, Fed. Comm’n Comm’n, MM Docket No. 10-71 (filed June 7, 2013); *In re* Amendment of the Commission’s Rules Relating to Retransmission Consent, *Supplemental Comments of the National Association of Broadcasters*, MM Docket No. 10-71 (filed May 29, 2013) [hereinafter *Supplemental Comments of the NASB*].

¹³⁰ Letter from Mathew M. Brill, Counsel, Time Warner Cable, *supra* note 129, at 2.

¹³¹ *Id.* at 1.

¹³² *Id.*

¹³³ *Supplemental Comments of the NASB*, *supra* note 129, at iii.

VII. RETRANSMISSION CONSENT IN A CHANGING ENVIRONMENT

One can question whether multi-billion dollar cable TV companies actually need any help in their negotiations with over-the-air broadcast stations, particularly those that have much lower capitalization than their larger competitors. However, several newer competitors, such as those companies providing Internet-protocol Television (“IPTV”), argue that they are new entrants in local markets trying to compete against their much more established cable TV competitors.¹³⁴ These new entrants argue that they often lack negotiating power with over-the-air broadcasters, because they do not yet have sufficient viewers to motivate broadcasters to negotiate a reasonable price for carriage of their broadcast programming.¹³⁵ Given that increasing competition in the delivery of video programming has long been a goal of both Congress¹³⁶ and the FCC,¹³⁷ the availability of programming, particularly “must see” programming that arguably includes local TV broadcasts, might be a goal that policymakers would like to advance. Given this market imbalance, it probably would be wise to analyze separately the need for retransmission consent rules by these new entrants from the interests of more established MVPDs, which may simply be looking for legal leverage to help them gain lower programming prices. This is help that they do not need.¹³⁸

Without congressional modification of the laws governing retransmission consent, it is likely that the current brinkmanship between broadcasters and MVPDs will continue regardless of whether the FCC adopts its proposed changes. Broadcast networks and MVPDs, who are, more and more frequently, direct competitors in originating programming, are under increasing pressure to enhance revenues. Networks are also putting pressure on their affiliates for additional revenue and even percentages of retransmission consent fees.¹³⁹ The

¹³⁴ *In re* Amendment of the Commission’s Rule Related to Retransmission Consent, *Comments of CenturyLink*, MM Docket No. 10-71, at 2–3 (May 27, 2011).

¹³⁵ *Id.* at i.

¹³⁶ 47 U.S.C. § 548(a) (2006).

¹³⁷ *In re* Competition, Rate Deregulation and the Commission’s Policies Relating to the Provision of Cable Television Service, *Report*, 5 F.C.C.R. 4962, 4965–66 (1990).

¹³⁸ The FCC has used the new entrant rationale to impose unique regulatory requirements in the past grounded in antitrust principles. *See* Inquiry Into The Employment Practices of Stations Licensed to the Charlotte, North Carolina Market, *Memorandum Opinion and Order*, 77 F.C.C. 2d 384, 474–75 (1980). The downside of new entrant regulation is that it has often survived the usefulness or need for such limited regulation. *The Computer Inquiries—Then and Now*, FREE STATE FOUND. (Nov. 9, 2009), <http://commcns.org/1fWoFy9>.

¹³⁹ *See* *Fox Seeks a Share of Retransmission Fees*, *supra* note 90, at B3; *Fights Between Programmers and Distributors Heat Up*, *supra* note 93; *Fox Clause Is Focal Point of Fight*, *supra* note 94.

cost of programming, especially in the sports market, continues to rise.¹⁴⁰ Consumers are able to get more programming for free on the Internet.¹⁴¹ These and other factors will push broadcast affiliates and networks to demand greater compensation from MVPDs, while impelling MVPDs, who face consumer anger over rate increases, to resist. But all of these factors applicable to established market players militate against further congressional or regulatory action, which might well end up simply being government action that tips the scales of the negotiations toward one type of player or the other. This type of regulatory intervention is unwarranted either as a matter of antitrust principles, or to promote competition in the programming environment.

Thus, Congress would be better off taking a step back and determining whether the current legal structure makes sense given the vast changes that have occurred in the video-programming market.¹⁴² In 1993, one year after the 1992 Cable Act was adopted, 40 percent of television households relied on over-the-air television.¹⁴³ By 2009, only 10 percent of households were still

¹⁴⁰ Programming costs have mushroomed in the past several years. Meg James, *Cost of Cable TV Content Soars; Spending on Sports and Original Shows Has Shot up in the Last 5 Years*, L.A. TIMES, Dec. 8, 2011, at B1 (commenting that “networks are beginning to feel the pinch of dramatically higher programming costs”). A driving factor in these increasing costs has been sports programming fees. Todd Spangler, *Sports Rights Costs Are Swelling Dramatically Enough to Raise Fears of Exploding the Pay-TV Biz*, VARIETY MEDIA (Aug. 13, 2013, 3:00 PM), <http://commcns.org/1i8bvRY> (stating that sports entertainment is a “high-demand content that viewers don’t DVR. And unlike other video entertainment, it’s not available from Netflix or other Internet services,” and the “[s]ports fees paid by cable, satellite and telco TV companies are on pace to increase 12% in 2013, to \$17.2 billion, according to research firm SNL Kagan”).

¹⁴¹ G. Chambers Williams, III, *Internet Video Invades Cable TV’s Turf As More People ‘Cut Cords’*, TRIB. BUS. NEWS (Jan. 1, 2011), <http://commcns.org/OUtLBu> (“[P]roviders are losing customers to the Internet as consumers find that free or low-cost video streaming can give them the programming they want at a much lower price than many cable providers charge.”); Lindsay Wise, *More Media Consumers Are Cutting the Cable Cord*, MCCLATCHDC (Sept. 16, 2013), <http://commcns.org/1fD2BKg> (“[T]he number of households that choose [to cut the cord] is on the rise, from 2 million in 2007 to 5 million in 2013, Nielsen’s data show.”).

¹⁴² Consumers want to be connected, and online video increasingly provides this connection. See Williams, *supra* note 141 (“The trend, analysts say, is being fueled by the popularity of online video . . . [in what the industry calls] ‘over the top’ viewing.”); Dan O’Shea, *SNL Kagan: Q3 Video Subscriber Net Loss Hits 119,000*, CONNECTED PLANET ONLINE (Nov. 18, 2010, 12:14 PM), <http://commcns.org/1ksGsAr> (“[R]apidly growing loss[es] . . . [show that] the impact of over-the[-]top video can no longer be dismissed.”). In fact, recent research indicates that average online viewing time is now nearly equal to traditional television viewing time. Maria Sciuillo, *I Want My E(verywhere)-TV!*, PITT. POST-GAZETTE (Aug. 11, 2013), <http://commcns.org/1hHaGfn> (“A recent report from eMarketer . . . concluded that for the first time, U.S. adults are on the verge of spending more time using digital media than watching traditional television on a set.”).

¹⁴³ See *In re Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *First Report*, 9 F.C.C.R. 7442, 7451–52 (Sept.

doing so.¹⁴⁴ Similarly, in 1993, almost all multichannel video subscribers were cable customers.¹⁴⁵ By the end of 2010, cable had a little over 60 percent of the multichannel video market, with satellite providers at around 33 percent and telecommunications companies at about 6.4 percent.¹⁴⁶

Other market developments also point to the need for a complete reexamination of cable and broadcast regulation. Cable channels and broadcasters are now direct competitors in programming.¹⁴⁷ Cable networks produce their own original programming, although not to nearly the same degree as the networks,¹⁴⁸ and are starting to challenge network dominance.¹⁴⁹ Cable providers can rely on two revenue streams, subscriber fees and advertising, while broadcasters are dependent on advertising and to a lesser extent on retransmission consent fees.¹⁵⁰ Broadcast television is watched by almost 90 percent of consumers via an MVPD subscription in the same way as cable channels; however, broadcasters have substantially higher regulatory burdens, such restrictions on indecency and requirements for children's programming.¹⁵¹ In addition, the availability of content over the Internet and on demand continues to increase. Wireless providers are openly calling for the repurposing of television broadcast spectrum to meet the growing demand for wireless broadband services.¹⁵² Further, broadcasters face a new threat: Internet services that allow people to watch broadcast television on their computers.¹⁵³

28, 1994); *see also* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 190 (1997) (“Forty percent of American households continue to rely on over-the-air signals for television programming.”).

¹⁴⁴ *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fourteenth Report*, 27 F.C.C.R. 8610, 8701 (July 20, 2012) [hereinafter *Fourteenth Report*].

¹⁴⁵ *See In re Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, supra* note 143, at 7540.

¹⁴⁶ *See Fourteenth Report, supra* note 144, at 8612.

¹⁴⁷ *See* Joe Flint, *Cable Vs. Broadcast Isn't a Fair Fight*, L.A. TIMES (Nov. 2, 2009, 10:23 AM), <http://commcns.org/1n3LZvN>.

¹⁴⁸ *Id.*

¹⁴⁹ Gary Levin, *In 2010, Cable TV's Ratings Put Networks on Notice*, USA TODAY (Dec. 24, 2010, 2:01 AM), <http://commcns.org/1pX7mRX>.

¹⁵⁰ *Cable Vs. Broadcast Isn't a Fair Fight, supra* note 147.

¹⁵¹ *See Fourteenth Report, supra* note 144, at 8630, 8690–91, 8694 (stating that 90 percent of households with televisions receive their broadcast stations from an MVPD; also discussing the regulatory burdens imposed on broadcasters); *Obscenity, Indecency & Profanity – FAQ*, FCC.GOV, <http://commcns.org/MJDuZn> (last visited Sept. 21, 2013); *FAQS - Television and Cable*, FCC.GOV, <http://commcns.org/NOkU35> (last visited Sept. 21, 2013).

¹⁵² CTIA, WIRELESS ASS'N & CONSUMER ELECS. ASS'N, WHITE PAPER: BROADCAST SPECTRUM INCENTIVE AUCTIONS (2011), *available at* <http://commcns.org/1eY4VWk>.

¹⁵³ For example, the New York Times recently reported:

Aereo [an Internet service] is able to stream broadcast stations by operating an array of tiny antennas that pick up over-the-air signals. Subscribers pay[] [a small monthly fee] . . . [and] Aereo essentially turns the subscriber's phone,

Over-the-air TV broadcasters themselves enjoy several regulatory advantages that seem anachronistic in today's marketplace. Examples such as syndicated exclusivity and network non-duplication rights are just two examples of these advantages.¹⁵⁴ These unique advantages were created in order to protect broadcasters from unfair cable TV competition, but they are no longer necessary in today's marketplace.¹⁵⁵ Eliminating these special advantages on all sides may level the playing field, create a more competitive retransmission consent negotiation environment, and preclude further government regulation.¹⁵⁶

This all points to more limited retransmission consent modifications aimed solely at aiding new entrants in obtaining needed broadcast programming during the early stages of their entry into particular viewer markets. A regulation that would guarantee access for a start-up period, such as for two years, would go far in ending delay tactics that over-the-air broadcasters exhibited toward new entrants.

Although regulators focus on viewing audience disruptions caused by retransmission consent-related blackouts, where there exists market competition for programming, these types of disruptions will work themselves out fairly quickly. Despite individual subscribers' understandable anger that they cannot view their favorite football game or the Academy Awards, these types of disruptions simply are not so serious that they warrant government intervention. Consumers are increasingly capable of voting with their pocketbooks. If individual corporate actors anger enough consumers, they are not going to be in business long, and these consumers will find their programming other ways,

computer or tablet into a small television set Aereo [is able] to avoid paying the retransmission fees . . . for access to stations. . . . [B]roadcasters, including CBS Corporation, Comcast, News Corporation and the Walt Disney Company, filed two suits . . . before the service was made available in New York. But a district court judge denied the request for a preliminary injunction last summer.

Brian Stelter, *Aereo Wins a Court Battle, Dismaying Broadcasters*, N.Y. TIMES, Apr. 2, 2013, at B3; see also Felix Salmon, *Aereo and The Death of Broadcast TV*, REUTERS (Apr. 22, 2013, 1:05 PM), <http://commens.org/1dV1iAP>.

¹⁵⁴ 47 C.F.R. §§ 76.92(a), 76.93, 76.101, 76.103 (2012).

¹⁵⁵ THOMAS W. HAZLETT, IF A TV STATION BROADCASTS IN THE FOREST . . . : AN ESSAY ON 21ST CENTURY VIDEO DISTRIBUTION 4–5 (Apr. 20, 2011), available at <http://commens.org/NO16zm>.

¹⁵⁶ James DeMint, former U.S. Senator from South Carolina, introduced legislation that proposed to end these unnecessary regulations, but the bill has since died. See Next Generation Television Marketplace Act of 2011, S. 2008, 112th Cong. (2011). The Comporium recognized the importance of Senator DeMint's bill, saying, "Today's high-tech video marketplace is governed by a set of laws and regulations that are 20 years old. [T]hese outdated regulations are, in fact, stymieing innovation and harming consumers." *Comporium Applauds Sen. DeMint for Introducing the Next Generation Television Marketplace Act*, BUS. WIRE (Dec. 16, 2011), available at <http://commens.org/1dV1sYM>.

which often cuts the offending business out of the equation.¹⁵⁷

Rather than considering the relative merits of MVPD arguments that broadcasters are price gouging and broadcaster arguments that they are only seeking appropriate compensation for their programming, it is time to rethink the laws and regulations governing cable and broadcast as a whole. The proposed revisions to retransmission consent rules will mitigate consumer blackouts in the short term, but do nothing to address the fundamental changes in the video distribution industry.

VIII. CONCLUSION

The twin broadcast programming provisions of must carry and retransmission consent have served the purpose of ensuring that MVPDs are allowed to carry local broadcast programming, while protecting broadcasters from unfair competition. Over time, however, these provisions have failed to keep pace with market realities. Broadcasters began to exact higher and higher payments in exchange for permission to carry their local stations on MVPD systems. Breakdown of negotiation over broadcast programming have often disrupted consumers by creating blackouts at unpredictable periods of time.

Although the Commission is examining in an NPRM whether to change retransmission consent regulations, it is unclear whether it has the statutory authority to enact meaningful changes to retransmission consent law. Given the rise in competition, however, it is unclear that any further regulation is justified, except perhaps to protect nascent MVPD competitors. In the meantime, however, continued retransmission consent battles are likely to continue. More fundamental video marketplace reform seems justified, and would likely address some of the negotiations imbalances that are the source of the retransmission consent battles.

¹⁵⁷ Alternative access to other sources of programming is increasingly available, whether in the form of You Tube, Netflix, Amazon, or other varied sources. *Fourteenth Report, supra* note 144, at 8724, 8734, 8739, 8744, 8751–52, 8756–58.