

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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June 3, 2010

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Public Knowledge (“PK”) hereby submits the following reply comments in the above-referenced docket. PK was a party to the Petition for Rulemaking that is the subject of this proceeding, and respectfully requests that the Commission grant the Petition and the relief requested therein. Furthermore, PK requests that the Commission add two additional requirements to the retransmission consent rules: 1) that retransmission consent agreements be made public and 2) that retransmission consent fees be reasonable and nondiscriminatory.

I. INTRODUCTION AND SUMMARY

The comments filed in this proceeding demonstrate clearly that the retransmission consent regime put in place by Congress and the Commission nearly twenty years ago is broken, and as a result, consumers are the biggest losers. Changes in the marketplace for multichannel subscription television services, coupled with numerous regulatory protections that limit competition, have given broadcasters the ability and incentive to increase their retransmission consent fees enormously. This raises consumer costs without creating any added value. When broadcasters’ demands are not met, consumers are faced with a Hobson’s choice: change multichannel video programming distributors (“MVPDs”) and incur the switching costs attendant to that change, or go without valued “free” over-the-air programming. Clearly,

Congress did not intend that consumers be held hostage when it granted large broadcasters the benefit of retransmission consent.

The Commission cannot allow this untenable situation to continue. It must protect consumers from losing access to programming broadcast in the public interest and ensure that both parties to retransmission consent agreements negotiate in good faith. Therefore, PK urges the Commission to grant the Petition for Rulemaking to establish a new framework to resolve retransmission consent disputes, including creating a dispute resolution mechanism to protect consumers from unreasonable rates; clarify that mandatory program tying is a *per se* violation of a broadcaster's "good faith;" and provide for interim carriage during negotiations or dispute resolution proceedings, if the MVPD negotiates in good faith. In addition, PK urges the Commission to adopt transparency requirements for all retransmission consent agreements and to require that retransmission consent fees be reasonable and nondiscriminatory.

II. THE PROPOSED RULES WOULD ENSURE THAT CONSUMERS HAVE ACCESS TO VALUABLE, DIVERSE, AND REASONABLY PRICED VIDEO PROGRAMMING

A. The Current Retransmission Consent Regime Has Led To Higher Prices And Less Diverse Programming For Customers

Despite the broadcasters' attempt to characterize retransmission consent agreements as a byproduct of "marketplace" negotiations,¹ a protective regulatory regime does not constitute a free market. In the 1992 Cable Act, Congress gave broadcasters regulatory, non-market based leverage to use in negotiations with MVPDs.² This leverage is further strengthened by the Commission's non-duplication and syndicated exclusivity rules, which prohibit MVPDs from

¹ See Opposition of the Broadcaster Associations at 11-22, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010).

² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

importing competing broadcast signals, removing a market-based incentive for broadcasters to price their retransmission consent competitively.³ Recent incidents demonstrate that broadcasters no longer need to be insulated from market forces, as evidenced by their ability to hold viewers hostage during retransmission consent negotiations.⁴

Recent changes in the video programming marketplace have given broadcasters even more leverage. Broadcasters now have a number of distribution options from which to choose, including direct broadcast satellite providers, incumbent local exchange carriers, and online video distribution. Consequently, broadcasters may threaten MVPDs and their subscribers with programming blackouts without risk that their programs will not be seen elsewhere in the market. The constant threat of blackouts by broadcasters is enough to force MVPDs to accept higher consent fees that are passed on to consumers.⁵ The Commission should not dismiss these significant events as unique circumstances, but as warning signs of a continuing power shift in

³ 47 C.F.R. § 76.92(a) (“ . . . [A] cable community unit located in whole or in part within the geographic zone for a network program, the network non-duplication rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal”); *id.* § 76.101 (“ . . . [A] cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal”).

⁴ *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed March 9, 2010).

⁵ Comments of Time Warner Cable, Inc. at 6-7, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010). The threat of blackout has become even more significant to MVPDs after a local ABC affiliate pulled its programming from Cablevision, disrupting part of the 2010 Academy Awards broadcast. See Brian Stelter and Brooks Barnes, *At the Last Minute, A Disney-Cablevision Truce*, N.Y. TIMES, Mar. 7, 2010 at B1, available at <http://mediadecoder.blogs.nytimes.com/2010/03/07/disney-pulls-abc-from-cablevision-after-deal-fails/>. <http://www.nytimes.com/2010/03/08/business/media/08cable.html>.

retransmission consent negotiations.⁶ As a result, consumers are left with the choice of leaving their MVPD and incurring switching costs or not receiving the programming they value.

This situation is exacerbated by other laws and regulations that insulate local broadcasters from competition that might drive down retransmission consent fees. For example, MVPDs are prohibited from 1) importing broadcast signals from other markets,⁷ and 2) excluding broadcaster stations from the basic tier of channels they offer to consumers.⁸

These marketplace changes and regulatory protections have permitted broadcasters to increase their fee demands dramatically.⁹ As a result, retransmission consent fees are no longer reasonable, as the law requires,¹⁰ and the cost is being borne by consumers. Moreover, broadcasters use their leverage to require MVPDs to carry less valuable commonly-owned programming that has been bundled together with the broadcasters' main programming

⁶ Comments of Free Press, Parents Television Council, and Consumers Union at 1-2, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010).

⁷ See 47 C.F.R. § 76.92 (“Cable network non-duplication”); *id.* § 76.101 (“Cable syndicated program exclusivity”).

⁸ See 47 U.S.C. § 534(b) (requiring cable operators to offer commercial broadcast stations to all customers); 47 U.S.C. § 543(b)(7) (requiring cable operators to offer a “basic tier” including broadcast signals).

⁹ See Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, “An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime,” Nov. 12, 2009, attached to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269 (filed Dec. 16, 2009), at 30; *see also* Clarus Research Group: “Impact of Retransmission Consent Costs on Members of the American Cable Association,” May 2009, at question 3 (filed as an attachment to the Comments of the American Cable Association, MB Docket No. 07-269 (May 20, 2009)) (“ACA Comments”).

¹⁰ “The Commission shall consider ... the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission’s obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable.” Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 § 3(A) (1992).

channel.¹¹ This again raises rates for consumers, as MVPDs must pay for these additional mandatory programs, in addition to crowding out valuable independent programming.

Amidst the struggles for higher consent fees and more channel space for affiliated programs, broadcasters seem to have lost sight of the real reason Congress sought to protect over-the-air broadcasters with the must-carry/retransmission consent regime in 1992: to ensure that the public continued to receive local news and public affairs programming of value to broadcasters' communities. There is little evidence that the fees broadcasters are extracting are being used for such programming – indeed, what local news there is consists mostly of weather and sports, and public affairs programming is almost non-existent.¹² Furthermore, in many retransmission consent negotiations, large national networks have served as proxys for local broadcasters, exercising veto power through their contracts.¹³ The national networks use this power to dictate the agreement provisions and collect a percentage of the cash fee, so a

¹¹ See, e.g., Federal Communications Commission, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Report and Order and Noticed of Proposed Rulemaking*, FCC 07-169, M.B. Docket No. 07-198 (Sept. 11, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-169A1.pdf.

¹² The Donald McGannon Communications Research Center, "Newspaper/Television Cross-Ownership and Local News and Public Affairs on Television Stations: An Empirical Analysis" by Michael Z. Yan (Oct. 2006) "[B]ig four network ownership significantly decreased the probability of local public affairs programming being available on a station; whereas local ownership significantly increased that probability."

¹³ See, e.g., Reply Comments of Mediacom Communications Corp., at 22, *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, CSR No. 8233-C (Nov. 18, 2009) (describing the Sinclair Broadcasting Group's requirement that agreement be terminable at will if not approved by the network); see also Comments of Free Market Operators at 5, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010) ("Now, in many markets group owners are precluding the local affiliate from negotiating with the local cable operator and require instead that the cable operator negotiate with a consultant for the group owner or a corporate negotiator with no connection to the local market").

substantial portion of the exorbitant price MVPDs must pay for diverse local programming in fact goes straight to the coffers of national network giants.¹⁴

B. The Current Retransmission Consent Regime Places Smaller MVPDs At A Disadvantage In Obtaining Programming For Consumers At A Reasonable Price

1. The current retransmission consent regime particularly harms the customers of smaller MVPDs.

The substantial regulatory leverage given to broadcasters particularly hurts smaller MVPDs, which serve fewer customers and therefore have less bargaining power in retransmission consent negotiations. During negotiations with smaller MVPDs, broadcasters recently have demanded substantial increases in retransmission consent fees on a “take it or leave it” basis.¹⁵ Broadcasters can afford to deny service to the small percentage of viewers who use smaller MVPDs, but the smaller MVPDs cannot survive without offering broadcaster programming.¹⁶ This threatens the survival of smaller MVPDs, which must either forgo offering that broadcasters’ important local programming or be forced to raise prices above competitive rates to afford the broadcasters’ programming.¹⁷ As a result, higher expenses are passed on to the consumers, who must choose between incurring the costs of switching MVPDs or accept unreasonably high rates. Additionally, as smaller MVPDs’ bargaining profit margins decrease

¹⁴ Ex Parte Comments of Time Warner Cable Inc. in Support of Mediacom Communications Corporation’s Retransmission Consent Complaint, at 10, *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, CSR Nos. 8233-C and 8234-M, Dec. 8, 2009 (“FOX evidently is seeking to exploit the placement of broadcast signals on the basic cable tier by obtaining substantial cash payments and forcing MVPDs to pass through the cost to all basic cable subscribers whether they want to view the broadcast programming or not.”).

¹⁵ Comments of U.S. Small Business Admin. Office of Advocacy at 3, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 10, 2010).

¹⁶ Comments of the American Public Power Assoc., et al., at 13, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010) (describing difficulties encountered by public providers in serving of rural and small market subscribers).

¹⁷ Comments of U.S. Small Business Admin. Office of Advocacy at 3-4, cited *supra* note 15.

their bargaining power diminishes. Once again, the ultimate losers are consumers, who suffer from a lack of diverse content at a reasonable price.

2. *Requiring transparency and reasonable nondiscriminatory pricing in retransmission consent agreements would level the playing field between broadcasters and smaller MVPDs.*

Particularly damaging to smaller MVPDs, and consequently their customers, is the lack of transparency in retransmission consent agreements and broadcasters' ability to condition retransmission consent on unreasonable or discriminatory terms. Currently, most retransmission consent agreements are not publicly available, preventing anyone from determining the exact scope of broadcasters' discriminatory practices against smaller MVPDs. As a result, broadcasters are able to insist upon conditions that reach beyond standard confidentiality protections to impose disproportionate negotiation costs on MVPDs.¹⁸ Furthermore, the current lack of transparency hides retransmission consent agreements from public scrutiny, preventing the Commission from making informed decisions regarding whether the retransmission consent rates have an unreasonable impact on cable rates for consumers.¹⁹

Unreasonable and discriminatory prices in retransmission consent agreements with smaller MVPDs also unfairly burden consumers. Research shows that smaller MVPDs pay retransmission consent fees more than twice as high as fees paid by larger MVPDs.²⁰

¹⁸ Comments of RCN Telecom Services, Inc. at 8-9, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010) (describing how broadcaster data restrictions inflate dispute costs for small carriers by making them hire a new expert for each proceeding).

¹⁹ See 47 U.S.C. § 325(b)(3)(A).

²⁰ William P. Rogerson, "The Economic Effects of Price Discrimination in Retransmission Consent Agreements," attached to the Comments of the American Cable Association, MB Docket No. 10-71 (filed May 18, 2010).

Discriminatory pricing practices drain the resources of smaller MVPDs, leading to higher fees for viewers and inhibiting capital development.²¹

Under the current retransmission consent regime, broadcasters are able to extract higher prices from smaller MVPDs and then keep those disparate agreements from public light. As a result, different groups of viewers are charged different prices for the same programming. A transparency requirement combined with a prohibition of unreasonable and discriminatory consent terms would protect consumers from shouldering the burden of smaller MVPDs' weak bargaining position. Making retransmission consent agreements publicly available would significantly bolster smaller MVPDs' ability to negotiate prices that reflect fair market rates. The FCC could thus discipline pricing imbalances by ensuring transparency and reasonable, nondiscriminatory pricing in retransmission consent agreements.

C. The Current Retransmission Consent Regime Disadvantages Independent Programmers To The Detriment Of Consumer Choice

An unfortunate consequence of broadcasters' demands for higher cash fees and more channel capacity for the broadcasters' commonly-owned stations²² is that MVPDs have less money and less channel space available to distribute diverse independent programming.²³ When broadcasters enjoy a disproportionate share of the MVPDs' channel capacity and programming budget, popular independent cable networks like the Africa Channel, C-SPAN, the Discovery

²¹ Comments of American Cable Association at 14-15, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010).

²² See Comments of Media Access Project at 8-9, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010).

²³ See Reply Comments of HDNet, LLC at 2, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed June 3, 2010); Comments of Starz Entertainment, LLC at 8, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 17, 2010).

Channel, HDNet, Retirement Living TV, and Starz Entertainment risk being left out.²⁴ Thus, decisions regarding channel carriage and fees are made not according to which channel's programming is the most popular or of the highest quality, but by which channels are owned by broadcasters who can leverage their negotiating power. Consumer preferences and costs are irrelevant.

Furthermore, independent programmers depend upon the carriage fees they receive from MVPDs to create new programming.²⁵ If MVPDs are unable to pay reasonable carriage fees or even to offer carriage at all, independent programmers must decrease investment in their programs. As a result, independent programmers that are not affiliated with broadcasters or MVPDs have become increasingly scarce. The effect of the distorted video programming carriage marketplace on independent programmers thus deprives consumers of the ability of choose among many diverse and informative programs.

Finally, PK agrees with HDNet, LLC that it will take more than retransmission consent reform to ensure an environment where independent programmers can thrive. MVPDs have a legal duty under Section 616 of the Communications Act to refrain from discriminating in favor of affiliated programming or requiring a financial interest for carriage.²⁶ And despite Section 616's clear directive that the Commission "provide for expedited review of any complaints made

²⁴ Comments of the Africa Channel at 2-3, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010); Comments of The C-SPAN Networks at 1-2, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010); Comments of the Discovery Channel at 15-17, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010); Reply Comments of HDNet, LLC at 2, cited *supra* note 23; Comments of Retirement Living TV at 2-3, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 17, 2010); Comments of Starz Entertainment, LLC at 3-4, cited *supra* note 23.

²⁵ Comments of the Discovery Channel at 16, cited *supra* note 24.

²⁶ 47 U.S.C. § 536.

by [an independent programmer]....”²⁷ the Commission has yet to write rules implementing this requirement.²⁸ The Commission should comply with this Congressional mandate without delay and complete the open rulemaking in MB Docket 07-42 that would set the rules for expedited consideration of Section 616 complaints. Consistent with the interim carriage rules that PK seeks in this docket, the Commission should, among other things, preserve the *status quo* pending expedited review of Section 616 complaints.²⁹

III. THE PROPOSED INTERIM CARRIAGE RULE IS PERMISSIBLE UNDER THE FIRST AMENDMENT

Broadcasters claim that Petitioners’ proposal to require interim carriage during a good faith negotiation or dispute resolution is impermissible under the First Amendment.³⁰ This argument fails because the interim carriage rule is content-neutral and achieves an important government interest without unnecessarily burdening free expression. The Supreme Court has held that the government may require a free over-the-air broadcaster, as a licensee, to “conduct [itself] as a proxy or fiduciary with obligations to present those views and voices which are representative of [its] community and which would otherwise, by necessity, be barred from the airwaves.”³¹ Although regulations that introduce unique obligations on broadcasters are subject to “at least some degree of heightened First Amendment scrutiny,” under *Turner Broadcasting System, Inc. v. FCC*, content-neutral regulations need only further an important government interest without creating unnecessary incidental burdens on free speech.³²

²⁷ 47 U.S.C. § 536(a)(4).

²⁸ See Reply Comments of HDNet, LLC at 4, cited *supra* note 23.

²⁹ *Id.* at 5-6.

³⁰ Comments of CBS Corporations, FOX Entertainment Group, Inc., FOX Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., The Walt Disney Co., and Univision Communications, Inc. at 11-12, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010).

³¹ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969).

³² *Turner Broad. Sys. Inc.*, 512 U.S. at 640.

The proposed interim carriage rule is content-neutral because the benefits and burdens it creates are completely without regard to the ideas and viewpoints expressed in the free over-the-air broadcasters' programming.³³ On its face, no provision in the rule is based on the content of the programming free over-the-air broadcasters provide.³⁴ There is furthermore absolutely no contention in the present proceeding that the rule is based upon agreement or disagreement with the messages conveyed by broadcasters, or upon any other content-based purpose.³⁵ Indeed, the real purpose of the rule, ensuring access for the public to free over-the-air broadcasting, actually promotes free speech by creating a marketplace where a diversity of voices can be heard without imposing unreasonable costs on consumers.³⁶

An interim carriage rule would further the important government interests of “promoting the widespread dissemination of information from a multiplicity of sources”³⁷ and “promoting fair competition in the marketplace for television programming”³⁸ while still protecting broadcasters' programming.³⁹ Under *United States v. O'Brien*, a regulation need not be the least restrictive means of advancing the governmental interest, so long as the “regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”⁴⁰ The interim carriage rule does not substantially burden more speech than necessary to further the important government interest at issue here, because it only affects the programming for which free over-the-air broadcasters receive their statutory protections and the carriage by definition

³³ *Id.* at 643.

³⁴ *Id.* at 642.

³⁵ *See id.* at 642-43.

³⁶ *Id.* at 646.

³⁷ *See* discussion *supra* Part II.C.

³⁸ *See* discussion *supra* Part II.A-B.

³⁹ *See id.* at 662.

⁴⁰ *Id.* at 662 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968), *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (holding that municipal noise regulation did not violate performers' free speech rights)).

would be temporary while disputes are being resolved. Additionally, it is important to note that the proposed rules would not require free over-the-air broadcasters to provide interim carriage for their commonly-owned channels, only the basic broadcast programming for which they received their license.⁴¹ For these reasons the proposed interim carriage rule passes First Amendment scrutiny.

IV. CONCLUSION

For the reasons stated above, Public Knowledge requests that the Commission grant the Petition for Rulemaking, initiate a rulemaking to establish a new retransmission consent dispute resolution structure as set forth therein, and require broadcasters to provide interim carriage during good faith negotiations or dispute resolution proceedings. Additionally, PK urges the Commission to adopt rules requiring transparency in retransmission consent agreements and requiring that retransmission consent fees be reasonable and nondiscriminatory.

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⁴¹ See *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that regulations prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion counseling do not violate the First Amendment as conditioning receipt of a benefit on relinquishment of the First Amendment right, because regulations merely require that such activities be kept separate and distinct from activities of the Title X project.).