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## Reforming Retransmission Consent

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# Reforming Retransmission Consent

Meg Burton\*

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## I. INTRODUCTION

On October 16, 2010, approximately three million cable TV subscribers across the New York metropolitan area lost access to their local Fox stations and missed the first two games of the World Series.<sup>1</sup> Previously, on March 7, 2010, nearly 3.1 million households lost their local ABC signal and missed the first fourteen minutes of the Academy Awards.<sup>2</sup> In 2008, 1.5 million Time-Warner subscribers lost access to fifteen broadcast stations in fifteen local markets for one month.<sup>3</sup> For nearly one month in 2007, seven hundred thousand Mediacom subscribers in twelve states lost access to twenty-three stations including affiliates of Fox, ABC, NBC, CBS, and the CW.<sup>4</sup> In 2005, seventy-five thousand cable subscribers in Missouri, Louisiana, and Texas lost access to their local Nexstar broadcast affiliates for nearly one year.<sup>5</sup> Examples of these types of signal blackouts date back even further.<sup>6</sup>

More recently, on February 18, 2011, Univision pulled its broadcast signal from 7,000 Rhode Island households for three months.<sup>7</sup> In March 2011, DISH Network consumers in seventeen markets lost their CBS, FOX, NBC, and CW signals for six days.<sup>8</sup> In September 2011, LIN TV pulled eight broadcast signals from the Mediacom cable systems in Florida, Michigan, and Indiana causing blackouts for nearly 1.2 million subscribers that lasted nearly six weeks.<sup>9</sup> Multiple other blackouts have occurred this year.<sup>10</sup> Each of these blackouts was the result of failed negotiations between the cable or satellite provider and the broadcaster.<sup>11</sup>

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1. Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 F.C.C.R. 2718, para. 15 (2011) [hereinafter *NPRM*].

2. *Id.*

3. MICHAEL L. KATZ ET AL., AN ECONOMIC ANALYSIS OF CONSUMER HARM FROM THE CURRENT RETRANSMISSION CONSENT REGIME 44 tbl.6 (2009), [http://97.74.209.146/downloads/analysis\\_consumer\\_harm.pdf](http://97.74.209.146/downloads/analysis_consumer_harm.pdf).

4. *Id.* at 43 tbl.6.

5. *Id.* at 42 tbl.6.

6. *Id.*

7. Deborah D. McAdams, *Full Channel Cuts Deal with Univision to Replace WUNI-TV*, TVTECHNOLOGY (May 16, 2011, 2:50 PM), <http://www.televisionbroadcast.com/article/120480>.

8. See Comments of The United States Telecom Ass'n at Exhibit 1, Amendment of the Comm'n's Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011) [hereinafter *Telecom Comments*].

9. *LIN Pulls Stations from Mediacom*, TVTECHNOLOGY (Sept. 1, 2011 10:15 AM), <http://www.tvtechnology.com/article/123970>; Merrill Knox, *LIN Stations Restored for Mediacom Subscribers*, TVSPY (Oct. 17, 2011, 10:26 AM), [http://www.mediabistro.com/tvspy/lin-stations-restored-for-mediacom-subscribers\\_b25517](http://www.mediabistro.com/tvspy/lin-stations-restored-for-mediacom-subscribers_b25517).

10. See, e.g., *Telecom Comments*, *supra* note 8, at Exhibit 1.

11. *NPRM*, *supra* note 1, at para. 15.

Under the current regulatory scheme, broadcasters and cable providers must enter into negotiations with each other for permission to retransmit a broadcast signal over a cable system.<sup>12</sup> The vast majority of these retransmission consent negotiations are resolved privately, without government intervention and without the loss of broadcast signals to cable subscribers.<sup>13</sup> However, sometimes the negotiations reach an impasse, and the result can be signal blackouts for cable subscribers. When this happens, consumers are inevitably harmed.

Recently, there has been a growing dispute between cable providers and broadcasters about how to deal with such breakdowns in negotiations. While cable providers call for reform of the retransmission consent regulations, broadcasters resist government intervention.<sup>14</sup> Meanwhile, the FCC has recognized the problem facing consumers and recently initiated proceedings to try to solve it.<sup>15</sup> This Note will examine the contours of the dispute between cable providers and broadcasters and discuss the possible solutions to this growing crisis. In Part II, a brief history of the retransmission consent regulations of the 1992 Cable Act is put forth as necessary background information.<sup>16</sup> Part III of the Note addresses the positions that cable companies and broadcasters have taken in the dispute. Part IV will discuss possible solutions to the dispute. Finally, Part V will offer some recommendations and conclusions as to what the best solution may be.

## II. RETRANSMISSION CONSENT

Originally, cable television existed to serve locations that could not receive broadcast signals.<sup>17</sup> The cable company's job was to take the signal from the airwaves and retransmit it to a subscriber's household.<sup>18</sup> Initially, the FCC maintained it had no authority over cable television because it was

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12. 47 U.S.C. § 325(b)(1)(A)(2006).

13. *NPRM*, *supra* note 1, at 2769 (statement of Comm'r Meredith Attwell Baker).

14. *See generally* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent at 2, *Petition for Rulemaking*, MB Docket No. 10-71, 1 (filed Mar. 9, 2010) [hereinafter *Petition*]; Reply Comments of Nat'l Ass'n of Broadcasters at I, Exec. Summary, Amendment of the Comm'n's Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (June 27, 2011) [hereinafter *NAB Comments*].

15. *See NPRM*, *supra* note 1.

16. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.) [hereinafter 1992 Act].

17. 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, 101 (1996).

18. *Id.* at 104.

not a “broadcaster” covered under the 1934 Communications Act.<sup>19</sup> But as cable systems added “distant” signals, broadcasters began to view cable as a viable alternative; and the FCC, to avoid disturbance of its broadcast regulation, decided to regulate cable as well.<sup>20</sup>

In the mid-1960s, in order to protect local broadcasting, the FCC required cable companies to carry the local broadcast signal when the cable signal competed for audience with the broadcast signal.<sup>21</sup> Noting the vast growth of the CATV industry (the equivalent of cable) and the value of broadcasting, the Supreme Court in *Southwestern Cable* upheld these must-carry rules as within the FCC’s authority.<sup>22</sup> However, the Court restricted the authority to regulate cable to “that reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.”<sup>23</sup>

In 1984, Congress amended the Communications Act of 1934 to provide a national policy regarding cable television, effectively eliminating the “reasonably ancillary” standard required by *Southwestern Cable* and allowing for direct regulation.<sup>24</sup> However, in 1985, the D.C. Circuit held that the must-carry rules as implemented “are fundamentally at odds with the First Amendment” and struck them down.<sup>25</sup> The FCC scaled down the rules, but in 1987, the same court struck them down again.<sup>26</sup> This set the stage for the next wave of regulation.

In 1992, Congress passed the Cable Television Consumer Protection and Competition Act (“1992 Act”).<sup>27</sup> Congress found that broadcast programming was the most popular programming on cable systems and that cable systems obtained great benefits from local broadcast signals, which had historically been obtained without the consent of the

19. *Id.*

20. *Id.* at 105.

21. See Amendment of Subpart L, Part 11, to Adopt Rules and Regs. to Govern the Grant of Authorizations in the Bus. Radio Serv. for Microwave Stations to Relay TV Signals to Cmty. Antenna Sys., *First Report & Order*, 38 F.C.C. 683, paras. 85, 87 (1965); Amendment of Subpart L, Part 91, to Adopt Rules and Regs. to Govern the Grant of Authorizations in the Bus. Radio Serv. for Microwave Stations to Relay TV Signals to Cmty. Antenna Sys., *Second Report & Order*, 2 F.C.C.2d 725, paras. 48–49 (1966).

22. *United States v. Sw. Cable Co.*, 392 U.S. 157, 162, 178 (1968).

23. *Id.* at 178.

24. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

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

26. *Century Comm. Corp. v. FCC*, 835 F.2d 292, 293 (D.C. Cir. 1987).

27. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.).

broadcaster.<sup>28</sup> The system resulted in an effective subsidy of the development of cable systems by local broadcasters, which in turn resulted in a competitive imbalance between the two industries.<sup>29</sup> To right this imbalance, Congress amended Section 325 of the Communications Act to enable each local commercial broadcast station to elect every three years whether to proceed under the revised must-carry requirements of Section 534 or the new retransmission consent requirements of Section 325.<sup>30</sup>

The policy of the 1992 Act was to “promote the availability to the public of a diversity of views and information” and “ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.”<sup>31</sup> The FCC and Congress have consistently maintained that there is an interest in protecting local broadcast stations because of the perceived special role that broadcast television plays in civic life.<sup>32</sup> Together, must-carry and retransmission consent rights provide significant benefits for broadcasters by ensuring they can obtain carriage and continue to provide important local programming to viewers.<sup>33</sup>

Imposing modified must-carry rules, the 1992 Act requires each cable operator to carry the signals of local commercial broadcast television stations.<sup>34</sup> The must-carry rules were enacted out of the concern that without intervention, cable’s dominance in the market could result in local broadcasting being blacked out.<sup>35</sup> The 1992 Act’s version of the must-carry rules was upheld as consistent with the First Amendment by the Supreme Court in *Turner Broadcasting Systems v. FCC* in 1997.<sup>36</sup> In the early years after the adoption of the Act, most broadcasters selected must-carry status, but by 2009, only 37 percent of stations relied on must-carry.<sup>37</sup>

The second option available for broadcasters under the 1992 Act is retransmission consent.<sup>38</sup> Under Section 325(b), cable operators cannot retransmit a commercial broadcast signal without the station’s express

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28. *Id.* § 2(a)(19), 106 Stat. at 1462.

29. *Id.* § 2(a)(19), 106 Stat. at 1462–63.

30. 47 U.S.C. § 325(b)(3)(B) (2006).

31. § 521(a)(21)(b)(1), (5).

32. Barbara S. Esbin et al., *Retransmission Consent: A System in Need of Reform*, 1032 PLI/Pat 205, 213 (2011).

33. *Id.* at 214.

34. *See* 47 U.S.C. § 534(a).

35. Randolph J. May, *Broadcast Retransmission Negotiations and Free Markets*, PERSPECTIVES FROM FSF SCHOLARS (Free State Foundation, Potomac, Md.), Oct. 18, 2010, at 2, [http://www.freestatefoundation.org/images/Broadcast\\_Retransmission\\_Consent\\_Negotiations\\_and\\_Free\\_Markets\\_101610.pdf](http://www.freestatefoundation.org/images/Broadcast_Retransmission_Consent_Negotiations_and_Free_Markets_101610.pdf).

36. *Turner Brdcast. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997).

37. *NPRM*, *supra* note 1, at para. 5 n.13.

38. *See* 47 U.S.C. § 325(b).

consent.<sup>39</sup> Thus, a broadcaster who chooses retransmission consent over must-carry must negotiate with cable companies and other multichannel video programming distributors (“MVPDs”) for consent to retransmit its signal.<sup>40</sup> Recognizing the benefits cable providers obtained from carrying broadcast signals, “Congress adopted its retransmission consent provisions to allow broadcasters to negotiate to receive compensation for the value of their signals.”<sup>41</sup> Congress intended to establish a marketplace for retransmission rights, but did not intend to “dictate the outcome of the ensuing marketplace negotiations.”<sup>42</sup>

Originally, Congress provided no substantive standards governing retransmission consent negotiations.<sup>43</sup> However, in 1999, Congress adopted new regulations, which required broadcasters engaged in retransmission consent negotiations with MVPDs to negotiate in good faith.<sup>44</sup> The FCC believed that “by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.”<sup>45</sup> However, this statute was not intended “to subject the retransmission consent negotiations to detailed substantive oversight by the Commission.”<sup>46</sup>

Under Section 325(b)(1)(A), if a broadcaster and an MVPD are unable to reach an agreement, then the MVPD may not retransmit the broadcaster’s signal.<sup>47</sup> Because the plain language of the statute says that a broadcaster’s signal cannot be retransmitted without consent, when negotiations between broadcasters and MVPDs break down, the lack of consent leads to a possible blackout of the broadcast signal.<sup>48</sup> When retransmission consent is revoked as a result of failed negotiations, “the result is to leave consumers literally in the dark, a result hard to square with the Commission’s overall mission to protect the public interest.”<sup>49</sup>

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39. *Id.* § 325(b)(1)(a).

40. *See NPRM, supra* note 1, at paras. 2–3.

41. *Id.* at para. 4.

42. *Id.* at para. 7 (quotation mark omitted).

43. *Id.* at para. 8.

44. *Id.*; *see also* 47 U.S.C. § 325(b)(3)(C).

45. Implementation of the Satellite Home Viewer Improvement Act of 1999, *First Report and Order*, 15 F.C.C.R. 5445, para. 24 (2000) [hereinafter *Good Faith Order*].

46. *Id.* at para. 6.

47. 47 U.S.C. § 325(b)(1)(A).

48. Petition for Rulemaking to Amend the Comm’n’s Rules Governing Retransmission Consent, *Petition for Rulemaking*, MB Docket No. 10-71, 26–27 (filed Mar. 9, 2010) [hereinafter *Petition*].

49. Esbin, *supra* note 32, at 238.

### III. THE CURRENT DISPUTE: WHAT EACH PARTY WANTS

Since the 1992 Act, the marketplace has changed considerably. Historically, MVPDs compensated broadcasters for retransmission consent through in-kind compensation, but today, “broadcasters are increasingly seeking and receiving monetary compensation.”<sup>50</sup> Additionally, in 1992, broadcasters often only had a single local cable provider that could retransmit their signal, but the rise of competitive video programming providers means that broadcasters now have more options.<sup>51</sup> Consumers also have more options for receiving programming.<sup>52</sup>

Partly as a result of these market changes, retransmission consent negotiations between broadcasters and MVPDs “have become more contentious and more public.”<sup>53</sup> While the 1992 Act was intended to protect consumers by ensuring them cable access to their local TV stations, the retransmission consent issue has “morphed over the years into a fight between well-financed special interests to see who could best game the rules to their own advantage.”<sup>54</sup> This section of the Note examines the positions of the major players in the dispute.

#### A. Cable Providers

According to cable providers, the retransmission consent scheme is broken.<sup>55</sup> In March 2010, fourteen cable companies, MVPDs, and interest groups filed a Petition for Rulemaking (“Petition”) arguing that the retransmission consent regulations are outdated and harming consumers.<sup>56</sup> They believe that the current rules, largely unchanged since 1992, “are ill-suited to curb the negotiating tactics employed by broadcasters that place consumers in a no-win position.”<sup>57</sup> “[B]roadcasters’ manipulation of the current regime,”<sup>58</sup> along with consumer harm and changes in the media landscape, mean it is time to reconsider the retransmission regulations.<sup>59</sup>

In 1992, Congress acted out of concern that cable companies were acting as monopolies that threatened the public interest benefits associated

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50. *NPRM*, *supra* note 1, at para. 2.

51. *See id.*

52. These options include direct broadcast satellite (“DBS”) providers, telephone providers that offer video programming, and the Internet. *Id.*

53. *Id.*

54. *Id.* at 47 (statement of Comm’r Michael J. Copps).

55. *See Petition*, *supra* note 48, at 35.

56. *Id.* at 1.

57. *Id.* at 5.

58. *Id.* at 7–8.

59. *Id.* at 1.

with broadcasting.<sup>60</sup> But today, the increased number of cable providers in the market means that it is the broadcasters that enjoy distribution options far beyond incumbent cable companies.<sup>61</sup> Because of this, broadcasters have more “incentive and ability to hold up MVPDs for ever-higher retransmission fees,”<sup>62</sup> and can easily exploit their new-found bargaining leverage to harm consumers.<sup>63</sup> While Congress originally expected broadcaster demands for compensation to be modest,<sup>64</sup> the shift in negotiating power to broadcasters has resulted in considerably higher fees.<sup>65</sup>

The problem is that negotiations between broadcasters and cable providers do not take place in a free market.<sup>66</sup> “Rather, . . . negotiations occur in the context of a federal law and regulation overlay that mixes elements of private bargaining with forced-access and protectionist elements.”<sup>67</sup> These artificial constraints result in cable providers being unable to freely negotiate in the bargaining process.<sup>68</sup> Thus, cable providers are caught “between a rock and a hard place: pay spiraling carriage fees and raise consumer rates, or be forced by broadcasters to drop local signals.”<sup>69</sup> In both situations, the consumer is harmed.

Cable providers proposed that the FCC adopt solutions that will keep consumer costs low and eliminate a broadcaster’s incentive and ability to use signal blackouts as a negotiating tactic.<sup>70</sup> They believe the current rules fail to give the FCC the tools to battle “unreasonable price demands and hold-up threats” by broadcasters.<sup>71</sup> First, they propose that the FCC adopt a new dispute resolution framework, including “compulsory arbitration, an expert tribunal, or similar mechanisms.”<sup>72</sup> To trigger such mechanisms, an

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60. *Id.* at 2.

61. *Id.* at 4.

62. *Id.* at 5.

63. *Id.* at 7.

64. *Id.* at 4.

65. *NPRM*, *supra* note 1, at para. 13; *see also* Press Release, SNL Kagan, SNL Kagan Releases Broadcast Retransmission Fee Projections Through 2017 (May 25, 2011)(on file with Press Release Distribution, <http://www.prweb.com/pdfdownload/8483711.pdf>) (reporting one consulting firm’s estimate that retransmission fees could rise 28% this year, from \$1.14 billion to \$1.46 billion).

66. *Petition*, *supra* note 48, at 7.

67. *May*, *supra* note 35, at 2.

68. *Id.*

69. *Petition*, *supra* note 48, at 1.

70. *Id.* at 5.

71. *Id.* at 16.

72. *Id.* at 32.

MVPD would merely need to show that negotiations had broken down.<sup>73</sup> A showing of bad faith would not be required.<sup>74</sup> Cable providers argue that the FCC's authority to adopt such mechanisms stems from Section 303(r), which states that the FCC can make such regulations and prescribe restrictions and conditions as may be necessary to carry out the provisions of Section 325, which includes establishing dispute resolution procedures.<sup>75</sup> The FCC has ordered similar arbitration in the past.<sup>76</sup>

Second, cable providers urge the FCC to adopt interim carriage. Where a cable provider shows a willingness to negotiate for continued carriage of a broadcast station, the broadcaster "should not be permitted to withhold retransmission consent while such negotiations are pending."<sup>77</sup> Interim carriage should be provided for in two situations: 1) while broadcasters and MVPDs continue to negotiate a renewal agreement in good faith, and 2) while a dispute resolution proceeding is pending.<sup>78</sup> Similar, to the proposed dispute resolution mechanisms, interim carriage would be available on a simple showing that negotiations had broken down and would not require showing bad faith.<sup>79</sup>

Interim carriage would eliminate "brinkmanship as a negotiating tool" and ensure "that negotiations produce reasonable and noncoercive rates."<sup>80</sup> It also would prevent broadcasters from "undermining the government's interest in localism by . . . withholding their signal from a substantial portion of the viewing public."<sup>81</sup> Cable providers argue that authority to adopt interim carriage stems from Section 325(b)(3)(A).<sup>82</sup> When faced with practices adversely affecting basic cable rates, the FCC is justified in ordering interim carriage to protect consumers.<sup>83</sup>

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73. *Id.*

74. *See id.* at 32–33.

75. *Id.* at 33; 47 U.S.C. § 303(r) (2010).

76. *See* General Motors Corp. & Hughes Elec. Corp., Transferors & The News Corp. Ltd., Transferee, for Auth. to Transfer Control, *Memorandum Opinion and Order*, 19 F.C.C.R. 473, para. 222 (2004) [hereinafter *News Corp. Order*] (requiring News Corp. to submit to binding arbitration with DirecTV or any other requesting MVPD and establishing rules for such arbitration).

77. *Good Faith Order*, *supra* note 45, at para. 59.

78. *Petition*, *supra* note 48, at 36.

79. *Id.*

80. *Id.* at 37.

81. *Id.*

82. *See* 47 U.S.C. § 325(b)(3)(A) (2010). Providers point to the statute's mandate that the FCC "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent." *Id.*

83. *Petition*, *supra* note 48, at 38.

Blackouts and related broadcaster tactics increase pressure on MVPDs to accept less than favorable offers.<sup>84</sup> It is clear that “MVPDs today devote substantial time, money and energy to retransmission consent negotiations.”<sup>85</sup> Also adding to the costs of retransmission consent negotiations is the fact that “[w]hen those negotiations break down . . . , they devote additional resources to managing the impact of that dispute on their subscribers and the marketplace.”<sup>86</sup> The increasingly high costs to MVPDs of both the negotiation process and the final negotiated price are one reason cable providers strongly believe that government intervention is now necessary.

### *B. Broadcasters*

On the other hand, broadcasters, argue that the retransmission consent scheme is working as intended.<sup>87</sup> They urge the FCC to resist MVPD requests to get involved.<sup>88</sup> They believe that changes to the system are unnecessary, outside the FCC’s authority, and would be harmful to the public interest.<sup>89</sup> As the National Association of Broadcasters (“NAB”) puts it, “there is no legal, factual, or policy reason that broadcasters . . . should not be permitted to negotiate for compensation for the signals that MVPDs are reselling to their subscribers, or to be uniquely limited in the type or amount of compensation they may even request.”<sup>90</sup>

The comments of the NAB are largely indicative of the industry’s opinion.<sup>91</sup> NAB argues that when Congress adopted the 1992 Act, it did so

84. STEVEN C. SALOP, ET AL., *ECONOMIC ANALYSIS OF BROADCASTERS’ BRINKMANSHIP AND BARGAINING ADVANTAGES IN RETRANSMISSION CONSENT NEGOTIATIONS* 28 (2010), [www.americantelevisionalliance.org/downloads/Broadcaster\\_brinkmanship.pdf](http://www.americantelevisionalliance.org/downloads/Broadcaster_brinkmanship.pdf) [hereinafter *BRINKMANSHIP STUDY*].

85. Comments of Cablevision Sys. Corp. at 11, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 26, 2011) [hereinafter *Cablevision Comments*].

86. *Id.*

87. *NPRM*, *supra* note 1, at para. 14.

88. See Reply Comments of Nat’l Ass’n of Brdcsters at i, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71, (rel. June 27, 2011) [hereinafter *NAB Comments*].

89. *Id.*

90. *Id.* at 12.

91. See generally Reply Comments of Tribune Brdcasting. Co., Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. June 27, 2011) [hereinafter *Tribune Comments*]; Comments of McGraw-Hill Brdcasting. Co., Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011) [hereinafter *McGraw-Hill Comments*]; Comments of AllBritton Comm., Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011); Comments of Comm. Corp. of Am. FCC MB Docket No. 10-71 (rel. May 27, 2011); Comments of Granite Brdcast. Corp., Amendment

to ensure that broadcasters were not required to subsidize the establishment of cable.<sup>92</sup> Also, noting that a substantial portion of the fees MVPDs collect represents the value of broadcast signals, Congress gave broadcasters the ability to negotiate for compensation for that signal.<sup>93</sup> Thus, the decision to enact the retransmission consent provisions was an attempt to fix a market imbalance and was grounded in notions of equity and fair competition between broadcasters and MVPDs.<sup>94</sup> NAB argues those policy rationales of the 1992 Act remain equally compelling today.<sup>95</sup>

While cable providers have two revenue streams, broadcasters have only one and yet face similar programming costs.<sup>96</sup> Undeniably, broadcasters provide valuable content to pay television providers.<sup>97</sup> Broadcasters use retransmission consent fees to continue to deliver this high-quality content to viewers by covering the high costs of producing local news.<sup>98</sup> The fees also enable them to produce more and better local programming.<sup>99</sup> Depriving broadcasters of retransmission fees would thus reduce the quantity and quality of content.<sup>100</sup> Furthermore, without these fees, “[broadcast] stations could not compete on level terms with MVPDs for viewers and advertising revenues.”<sup>101</sup> While fees have increased in recent years,<sup>102</sup> the higher price broadcasters demand today merely reflects a “market correction.”<sup>103</sup>

NAB argues that the FCC has correctly concluded that it lacks the authority to mandate interim carriage or binding dispute resolution.<sup>104</sup> Section 325(b)(3)(A) provides no authority for the FCC to adopt changes that would “override the clear congressional intent to establish a free marketplace in which broadcasters could negotiate compensation” and cannot “‘trump’ the absolute retransmission consent right in Section

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of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011).

92. NAB Comments, *supra* note 88, at 4.

93. *Id.* at 5–6.

94. *Id.* at 4, 6.

95. *Id.* at 4.

96. *NPRM*, *supra* note 1, at 2763 (statement of Chairman Julius Genachowski).

97. *Id.*; *see also* McGraw-Hill Comments, *supra* note 91, at 1. The comments note that “[l]ocal broadcasters consistently and overwhelmingly deliver the most popular programming available on any MVPD’s platform.” *Id.* at 2.

98. NAB Comments, *supra* note 88, at i.

99. *Id.* at 7.

100. *Id.* at 10.

101. *See id.* at 6.

102. McGraw-Hill Comments, *supra* note 91, at 2.

103. *NPRM*, *supra* note 1, at para 14.

104. NAB Comments, *supra* note 88, at 24.

325(b)(1).”<sup>105</sup> Even if the FCC did have such authority, it should not micromanage retransmission consent negotiations<sup>106</sup> because government intervention, or even an indication of government intervention, would slow down negotiations.<sup>107</sup>

NAB believes that adoption of many of the MVPD proposals would “effectively amount to a government takeover of the substance of retransmission consent negotiations.”<sup>108</sup> Instead, NAB argues that “the FCC should focus on revising its notice rules . . . to ensure that consumers have adequate information to make informed decisions in the event of a rare retransmission consent impasse.”<sup>109</sup> With adequate notice, a subscriber can take action to protect access to programming it deems “must-have.”<sup>110</sup> This is the only proposed solution that will “directly impact and benefit consumers.”<sup>111</sup>

Additionally, NAB denies that broadcasters have increased leverage due to increased MVPD competition,<sup>112</sup> that retransmission prices are “too high,”<sup>113</sup> and that “retransmission consent fees raise costs to consumers.”<sup>114</sup> Furthermore, service disruptions occur in only a handful of instances, while thousands of agreements are reached uneventfully.<sup>115</sup> As such, the position of broadcasters is overwhelmingly to resist government intervention in negotiations.<sup>116</sup> Interference in the retransmission marketplace would “undermine [the] system of free, local television broadcasting that has served the American public so effectively.”<sup>117</sup>

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105. *Id.* at 20.

106. *See id.* at 3.

107. Letter from Gordon H. Smith, President and CEO, Nat’l Ass’n of Brdcsts., to Julius Genachowski, Chairman, FCC (Oct. 3, 2011).

108. NAB Comments, *supra* note 88, at 34.

109. *Id.* at iii.

110. Comments of Nexstar Brdesting., Inc. at v, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011) [hereinafter Nexstar Comments].

111. NAB Comments, *supra* note 88, at 71.

112. *See id.* at 13.

113. *Id.* at 16.

114. *Id.* at 2.

115. Comments of CBS Corp. at ii, Amendment of Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011) [hereinafter CBS Comments].

116. *See* NAB Comments, *supra* note 88, at i.

117. Joint Reply Comments of Barrington Brdesting. Grp., LLC at 1, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. June 27, 2011).

### C. Consumers

One consumer affected by the Academy Awards blackout is quoted as writing: “[c]onsidering what I pay for cable . . . and the fact that if I didn’t have cable, ABC would be free, I am having a hard time understanding the issue.”<sup>118</sup> Her concerns are echoed by many other consumers.<sup>119</sup> Consumers are the innocent bystanders when broadcasters and MVPDs fail to reach an agreement.<sup>120</sup>

The primary harms facing consumers caught in the middle of a retransmission dispute are potential or actual signal blackouts, rising cable costs, and switching costs.<sup>121</sup> During contentious retransmission consent disputes, consumers are faced with uncertainty about their ability to receive certain broadcast stations.<sup>122</sup> Threatened blackouts “may lead to consumer uncertainty, anxiety, and anger.”<sup>123</sup> Actual blackouts cause cable subscribers to lose access to desirable programming, especially when timed to coincide with popular viewing events.<sup>124</sup>

One study predicts that total industry retransmission fees will increase from \$1.14 billion in 2010 to \$3.61 billion by 2017, causing average cable subscriber fees to more than double.<sup>125</sup> Cable subscription prices rise because retransmission consent fees are typically structured as a per-subscriber fee.<sup>126</sup> Longer disputes or threatened disputes could cause consumers to switch their cable provider and incur switching costs.<sup>127</sup> But,

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118. Matea Gold, *Cablevision Customers Fume About Missing Oscar Telecast*, L.A. TIMES: COMPANY TOWN (Mar. 7, 2010, 4:45 PM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/03/cablevision-customers-fume-about-missing-oscar-telecast.html> (quoting Kristin Barbetta).

119. See Comments of Michelle Erb, Amendment of Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. Sept. 13, 2011) (“As a consumer, I’d like to express our frustration at not being able to view certain programming that our local Cable provider . . . is able to ‘blackout’ . . . .”); Comments of George Despotakis, Amendment of Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 31, 2011) (“How could this have escalated so badly and put the consumer, the guy who ultimately pays the bills, in such a terrible position?”); Comments of H. Freeman, Amendment of Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. Mar. 10, 2011) (“It’s grossly unfair for us to be held captive while corporate greed controls the negotiations.”).

120. *NPRM*, *supra* note 1, at para. 17.

121. See BRINKMANSHIP STUDY, *supra* note 84, at paras. 20, 23.

122. *Id.* at para. 16.

123. BRINKMANSHIP STUDY, *supra* note 84, at para. 14.

124. *Id.* at para. 21.

125. SNL Kagan Releases Brdcast. Retransmission Fee Projections Through 2017, *supra* note 65.

126. BRINKMANSHIP STUDY, *supra* note 84, at para. 48.

127. *Id.* at para. 23; *Petition*, *supra* note 48, at 36.

early termination fees may cause them to be unwilling or unable to switch cable providers.<sup>128</sup> In every situation the consumer incurs costs.

Consumers generally take the side of the cable companies, arguing that their interests are being ignored. One group argues that the FCC “should not lose sight of the fact that the viewing public is the intended beneficiary of the system of must-carry and retransmission consent.”<sup>129</sup> After all, failure to protect consumers from actual or threatened blackouts is not in the public interest.<sup>130</sup> Thus, consumer groups ask the FCC to resolve the dispute without using consumers as “pawns in the battles between giant cable, satellite, and telecommunications companies on the one hand and massive broadcasting conglomerates on the other.”<sup>131</sup>

#### IV. POSSIBLE SOLUTIONS

While Congress did not intend the FCC to sit in judgment of the terms of every retransmission agreement,<sup>132</sup> it is clearly time to address the problem. The FCC has already proposed some possible changes to the regulations that it believes might help resolve the issue. There are also two other proposed rule changes, suggested by parties other than the FCC, which are arguably outside the FCC’s authority and thus will necessarily require action by Congress to implement.<sup>133</sup> This section of the Note discusses these two groups of proposed solutions.

##### A. *FCC Proposals*

On March 3, 2011, the FCC released a Notice of Proposed Rulemaking in the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent (“NPRM”) to assess whether the current retransmission consent regulations were working effectively.<sup>134</sup> The FCC proposed, and requested comment on, four rule changes it believes will allow negotiations to proceed more smoothly.<sup>135</sup> These proposed changes are: 1) providing more guidance on good faith requirements; 2) improving advance notice of possible service disruptions to consumers; 3)

128. *NPRM*, *supra* note 1, at para. 16 n.50.

129. Reply Comments of Media Access Project at 1, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. June 27, 2011).

130. Comments of Consumer Action at 2, Amendment of Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 31, 2011).

131. Comments of Nat’l Consumers League at 2, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011).

132. *Good Faith Order*, *supra* note 45, at para. 23.

133. *NPRM*, *supra* note 1, at 2763 (statement of Chairman Julius Genachowski).

134. *Id.* at para. 1.

135. *See id.* at para. 3.

extending to non-cable entities the prohibition on deleting or repositioning a station during “sweeps”; and 4) eliminating the network nonduplication and syndicated exclusivity rules.<sup>136</sup> The FCC believes that under the current statutory framework, it has limited tools to respond to impasses.<sup>137</sup> Thus, the NPRM focuses only on those tools currently within the FCC’s authority.<sup>138</sup>

### 1. Improving Good Faith Standards

To determine whether negotiations are conducted in good faith, the FCC established seven objective good faith negotiation standards. A violation of any of these seven negotiation standards constitutes a per se breach of good faith.<sup>139</sup> The FCC then uses a totality of circumstances test to determine if good faith exists.<sup>140</sup> There have been very few complaints filed alleging violations of the good faith rules, and only one finding that a party to a retransmission consent negotiation had negotiated in bad faith.<sup>141</sup> The FCC intended to provide broad standards, but generally left negotiations to the parties.<sup>142</sup>

The FCC believes that additional per se good faith negotiation standards would increase certainty of what constitutes a failure to negotiate in good faith and would promote the successful completion of negotiations.<sup>143</sup> As such, it seeks comment on additional per se standards,<sup>144</sup> whether there are additional actions that might constitute rebuttable presumptions of bad faith,<sup>145</sup> and whether the FCC should impose additional penalties for failure to negotiate in good faith.<sup>146</sup> Finally,

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136. *Id.*

137. *Id.* at 46 (statement of Chairman Julius Genachowski).

138. *Id.* (“The Notice we issue today asks whether there are changes *within the Commission’s existing authority* that can improve the process for companies negotiating commercial deals . . . .”) (emphasis added).

139. 47 C.F.R. § 76.65(b)(1) (2010).

140. *Id.* § 76.65(b)(2).

141. Choice Cable T.V. was found to have breached the duty to negotiate in good faith when it replaced WLII’s station signal with WORA’s station signal without a valid retransmission consent agreement with WORA. *See* Letter from Steven Broeckaert, Deputy Chief, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable T.V., 22 F.C.C.R. 4933 (2007).

142. *NPRM*, *supra* note 1, at para. 20.

143. *Id.* at para. 21.

144. These include the proper scope of network involvement in negotiations, joint retransmission consent negotiations by stations not commonly owned, refusals to put forth bona fide proposals, refusals to agree to nonbinding arbitration, and what constitutes unreasonable delay. *Id.* at paras. 22–26.

145. *Id.* at para. 30.

146. *Id.*

the FCC seeks comment on revising the “‘totality of the circumstances’ standard,” keeping in mind that it “[did] not intend the totality of the circumstances test to serve as a “back door” inquiry into the substantive terms negotiated between the parties.”<sup>147</sup>

Both sides of the dispute generally agree that modifying the existing good faith regulations would be helpful. Many parties suggest their own specific per se violations.<sup>148</sup> Others put forth suggestions of what should *not* be a per se violation of good faith.<sup>149</sup> While obviously all of the suggested violations or nonviolations could not be included within the regulations, it is clear that more guidance is necessary in the area of good faith requirements.

## 2. Revision of Notice Requirements

Under Section 534(b)(9), a cable operator must provide notice to a local commercial TV station thirty days before deleting or repositioning the station.<sup>150</sup> Notice must also be provided to the cable subscribers.<sup>151</sup> The current notice requirements apply only to cable operators (not to other MVPDs) and are only required when service is actually disrupted.<sup>152</sup> Only when the station both fails to give proper notice and the station is *actually* deleted is there a violation.<sup>153</sup>

The FCC seeks comment on whether to revise the notice requirements so as to provide notice of a potential deletion and whether such notice should be given regardless of whether the station’s signal is ultimately deleted.<sup>154</sup> Under the proposed approach, if the parties have not reached a new agreement prior to thirty days from the agreement’s expiration, notice

147. *Id.* at paras. 31–32 (quoting *Good Faith Order*, *supra* note 45, at para. 32).

148. Cablevision Comments, *supra* note 85, at 2–3 (suggesting that broadcasters must charge nondiscriminatory and transparent rates without tying consent to carriage of other programming); Telecom Comments, *supra* note 8, at 24 (suggesting that networks should be prohibited from interfering in retransmission consent negotiations); Comments of Public Knowledge and New Am. Found. at 8, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011) [hereinafter Public Knowledge Comments] (suggesting that repeatedly insisting on month-to-month retransmission consent agreements or the purchase of other programming services to retransmission consent should be per se violations).

149. *E.g.*, Nexstar Comments, *supra* note 110, at 23 (suggesting that there should be no per se violation for refusal to put forth bona fide proposals because this would inject the FCC into the middle of negotiations).

150. 47 U.S.C. § 534(b)(9) (2006).

151. 47 C.F.R. § 76.1601 (2010).

152. *NPRM*, *supra* note 1, at para. 35.

153. *Id.*

154. *Id.* at para. 37.

must be given to consumers.<sup>155</sup> The FCC also seeks comment on whether such notice would help avoid station deletions; by what means such notice should be given; how to prevent notice from becoming so frequent that consumers discount the notice; and whether notice is required if parties agree to an extension pending further negotiations.<sup>156</sup>

In the NPRM, the FCC noted that benefits to enhanced notice include “providing consumers with sufficient time to obtain access to particular broadcast stations by alternative means, and encouraging the successful completion of renewal retransmission consent agreements more than 30 days before an existing agreement expires.”<sup>157</sup> Lack of notice deprives consumers of the necessary information needed to make informed decisions.<sup>158</sup> The point of advanced notice requirements is to protect the consumers who lose stations, not the broadcasters or MVPDs.<sup>159</sup> Broadcasters overwhelmingly support advanced notice requirements as their preferred solution in the current dispute.<sup>160</sup>

However, notice might be unnecessarily costly and disruptive, especially when no disruption occurs.<sup>161</sup> Some commenters think enhanced notice would result in “unnecessarily alarming consumers and public officials, making negotiations increasingly contentious, providing broadcasters and rival MVPDs with more time to encourage customers to switch MVPDs, and causing customers who do switch to bear the associated costs unnecessarily if the negotiations are resolved without service disruption.”<sup>162</sup> Enhanced notice requirements might also “sow confusion and fear amongst consumers.”<sup>163</sup> Additionally, notice of impending impasses can serve as a “further front in the retransmission consent war” if it is used primarily as an “ad hominem attack[.]” on the other party.<sup>164</sup> Cable providers generally oppose notice requirements, believing they would cause MVPDs to be more vulnerable to broadcaster demands.<sup>165</sup>

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155. *Id.*

156. *Id.*

157. *Id.* at para. 36.

158. Nexstar Comments, *supra* note 110, at 26.

159. *Id.* at 27.

160. *See e.g.*, NAB Comments, *supra* note 88, at iii, 71; Nexstar Comments, *supra* note 110, at v.

161. *NPRM*, *supra* note 1, at para. 34.

162. *Id.* at para. 36.

163. Telecom Comments, *supra* note 8, at 29.

164. *NPRM*, *supra* note 1, at para. 37.

165. Cablevision Comments, *supra* note 85, at 4.

### 3. Extending “Sweeps” Prohibition to Non-Cable MVPDs

Currently, Section 534(b)(9) provides that there can be no deletion or repositioning of a station during a period in which major television ratings services measure the size of audiences of local TV stations (“sweeps”).<sup>166</sup> But there is some confusion as to whether a broadcaster can force a cable provider to delete the broadcaster’s signal when the retransmission agreement expires during sweeps.<sup>167</sup> This sweeps prohibition is imposed on cable operators only, and nothing in the statute suggests that Congress intended to impose a reciprocal obligation on broadcasters.<sup>168</sup> Prohibiting broadcasters from withholding retransmission consent during sweeps would be contrary to the requirement in Section 325(b) of express consent by the broadcaster.<sup>169</sup>

The FCC notes existing confusion about the current sweeps rule and invites comment on whether to extend the sweeps rule to broadcasters and non-cable MVPDs (such as DBS providers).<sup>170</sup> The FCC would extend the sweeps prohibition to non-cable MVPDs in order to “achieve regulatory parity between cable systems and other MVPDs.”<sup>171</sup> However, the FCC doubts its authority to impose a sweeps limitation on broadcasters.<sup>172</sup> The NPRM invites comments on this analysis.

Cable providers suggest the rule should be either eliminated or applied in a more reciprocal manner.<sup>173</sup> As one commenter puts it, “[c]hanges that may assist only some and not others, whether a broadcaster or a MVPD, will not serve the public interest.”<sup>174</sup> The current rule does little to encourage market-based negotiations and instead places yet another burden on MVPDs.<sup>175</sup> Assuming that MVPDs are already at a disadvantage in market negotiations, this gives broadcasters additional leverage.<sup>176</sup>

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166. 47 U.S.C. § 534(b)(9) (2006).

167. *NPRM*, *supra* note 1, at para. 39.

168. *Id.* (“[T]he legislative history explains that ‘[a] cable operator may not drop or reposition any such station during a “sweeps” period when ratings services measure local television audiences.’” (quoting S. REP. NO. 102-92, at 86 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1219)).

169. *Id.*

170. *Id.* at paras. 40–41.

171. *Id.* at para. 41.

172. *Id.* at para. 40.

173. *E.g. id.*

174. Reply Comments of Hubbard Brdcasting., Inc. at 2, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. June 27, 2011).

175. Telecom Comments, *supra* note 8, at 28.

176. *Id.*

#### 4. Elimination of Network Nonduplication and Syndicated Exclusivity Rules

Network nonduplication rules permit a broadcast station with exclusive rights to network programming to prohibit a cable system from carrying the programming as broadcast by any other station within a designated area.<sup>177</sup> Syndicated exclusivity rules allow a station “within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.”<sup>178</sup> Together, these “exclusivity rules” give broadcasters the ability to “prohibit a cable system from carrying another station with the same programming.”<sup>179</sup>

The FCC seeks comment on whether eliminating the rules would “help to minimize regulatory intrusion in the market, thus better enabling free market negotiations.”<sup>180</sup> It also seeks comment on whether the benefits of the rules are outweighed by the negative impact on retransmission consent negotiations, whether exclusivity should be left completely to the private market with no FCC enforcement mechanism, and whether the rules have a negative impact on localism.<sup>181</sup> Alternatively, the FCC suggests changing the rules so that they only extend to television stations that have already granted retransmission consent and are actually carried on the cable system.<sup>182</sup>

Broadcasters argue that the exclusivity rules should not be eliminated, citing that their purpose has historically always been to preserve localism.<sup>183</sup> The rules are “essential to the health of local television stations and their ability to serve the public.”<sup>184</sup> The rules also protect investments in programming, and its elimination would merely permit duplication of already existing programming.<sup>185</sup> Furthermore, eliminating the rules might have little effect on retransmission consent negotiations because private exclusive contracts between the parties would still exist.<sup>186</sup> Eliminating the rules will not give MVPDs more partners to negotiate with, but would rather raise the cost of enforcing the contractual right, which in turn would raise retransmission fees.<sup>187</sup>

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177. *NPRM*, *supra* note 1, at para. 42.

178. *Id.*

179. Telecom Comments, *supra* note 8, at 22–23.

180. *NRPM*, *supra* note 1, at para. 44.

181. *Id.*

182. *Id.*

183. *E.g.*, Public Knowledge Comments, *supra* note 148, at 10.

184. Tribune Comments, *supra* note 91, at 1.

185. *Id.* at 5–6.

186. *NPRM*, *supra* note 1, at para. 43.

187. Nexstar Comments, *supra* note 110, at 28.

Cable providers believe the FCC should eliminate the exclusivity rules and allow them to import distant signals when retransmission consent impasses occur.<sup>188</sup> Even without exclusivity rules, MVPDs will prefer local broadcast stations over out-of-market stations.<sup>189</sup> MVPDs will only turn to out-of-market stations when the price demanded by the broadcaster exceeds the value of its signal.<sup>190</sup> Therefore, eliminating the exclusivity rules would ensure the local station gets the value from retransmission consent it deserves without demanding too high a price.<sup>191</sup> This will not adversely affect localism because “local broadcasters would be incentivized to invest more in local programming in order to make the adjacent market affiliate’s [programming] a poor substitute.”<sup>192</sup> Eliminating the exclusivity rules “will foster more market-based negotiations” and “will enable video providers to deliver must-have programming content to their subscribers.”<sup>193</sup>

### *B. Non-FCC Proposals*

In addition to the FCC’s proposals, which have yet to be acted upon, there are two other proposed solutions. Specifically, they are interim carriage and mandatory binding arbitration.<sup>194</sup> While MVPDs pushing for these two solutions argue the FCC does indeed have the authority to implement them, the FCC itself regularly denies such authority.<sup>195</sup> Thus, any implementation of these two proposals will require action by Congress. This section of the Note discusses these two additional proposals and examines whether the FCC has the necessary authority to implement them.

#### 1. Interim Carriage

Currently, once the retransmission agreement between a broadcaster and cable provider expires, the broadcaster can immediately pull the signal.<sup>196</sup> Harm is immediate—consumers lose stations, broadcasters suffer from declines in ratings and advertising revenue,<sup>197</sup> and cable providers

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188. Cablevision Comments, *supra* note 85, at 4; Telecom Comments, *supra* note 8, at 22, 24.

189. Cablevision Comments, *supra* note 85, at 24–25.

190. *Id.* at 24–25.

191. *Id.* at 25.

192. Reply Comments of Dish Network L.L.C. at 6, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. June 27, 2011).

193. *Telecom Comments*, *supra* note 8, at 22.

194. *See, e.g., Petition*, *supra* note 48.

195. *NPRM*, *supra* note 1, at 2763 (statement of Chairman Julius Genachowski).

196. *Petition*, *supra* note 48, at 35.

197. Comments of Comm Corp. of Am. at 3, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011) [hereinafter CCA Comments].

lose their ability to compete effectively on price.<sup>198</sup> Interim carriage would override the requirement of express consent of the broadcaster in retransmitting the signal and would require the signal to be kept on the cable system after the agreement expires.

In the Petition, cable providers argue that interim carriage is a fitting solution to the retransmission consent dispute, as it will “curb broadcaster misconduct under the current system.”<sup>199</sup> They believe that interim carriage “would serve the essential function of maintaining the *status quo*,”<sup>200</sup> as well as help achieve the dual goals of eliminating broadcaster brinkmanship and fulfilling the government’s interest in localism.<sup>201</sup> Interim carriage would “promote an environment in which good faith negotiations between parties could occur.”<sup>202</sup> More importantly, interim carriage would protect consumers from the loss of valued broadcast stations while providers work out the details of their agreements,<sup>203</sup> and would preserve the public interest.<sup>204</sup>

Broadcasters oppose interim carriage.<sup>205</sup> They believe that when government intervention is imminent, MVPDs have no incentive to compromise or to avoid delay.<sup>206</sup> As one commenter put it, “[i]f MVPDs can invoke federal power to *compel* carriage, they will have very little incentive to *negotiate* for carriage.”<sup>207</sup> Broadcasters also argue that decisions to withhold retransmission consent are consistent with their public interest obligations, and therefore, interim carriage cannot be imposed on the basis of such obligations.<sup>208</sup>

## 2. Mandatory Binding Arbitration

The second proposed solution would require parties to submit to mandatory arbitration whenever an impasse occurs in the retransmission

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198. *Petition*, *supra* note 48, at 36.

199. *Id.* at 31.

200. *Id.* at 37.

201. Telecom Comments, *supra* note 8, at 21.

202. Comments of the Org. for the Promotion & Advancement of Small Telecomms. Cos. et al., at 25, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011).

203. Comments of Am. Cable Ass’n at 76, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011).

204. Public Knowledge Comments, *supra* note 148, at 4.

205. See NAB Comments, *supra* note 88.

206. CCA Comments, *supra* note 197, at 3.

207. Joint Comments of Small- & Mid-Sized Mkt. Brdcasters. at 9, Amendment of the Comm’n’s Rules Governing Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011).

208. NAB Comments, *supra* note 88, at 21.

consent negotiation. Arbitration would be necessary once it was shown that “negotiations had broken down and that the parties could not agree on price or other terms and conditions of carriage.”<sup>209</sup> The proponents of this solution argue that no showing of bad faith should be required to trigger dispute resolution proceedings.<sup>210</sup>

Cable providers argue that mandatory binding arbitration would serve the same purposes as interim carriage, namely tackling rising retransmission rates and broadcaster brinkmanship.<sup>211</sup> Mandatory binding arbitration is one way to address the abuse of market power that “animate[s] many retransmission consent negotiations today.”<sup>212</sup> Additionally, the FCC has at least once before ordered mandatory binding arbitration and provided procedures for a remedy.<sup>213</sup> Although that dispute involved consent to transfer control, not retransmission consent, it signals that such procedures are at least feasible. Without mandatory binding arbitration or interim carriage, the FCC’s only enforcement mechanism is the “imposition of forfeiture penalties.”<sup>214</sup>

Broadcasters oppose mandatory binding arbitration as they do interim carriage. They believe that encouraging parties to wait for the conclusions of a third party will result in *more* blackouts.<sup>215</sup> This is because bringing a third party into the negotiation would likely introduce more delays<sup>216</sup> and create incentives for MVPDs to refuse to come to reach agreements.<sup>217</sup> Furthermore, mediation would pit the parties as adversaries rather than focusing their efforts on reaching an agreement.<sup>218</sup> While mediation should still be available to those parties who choose it, it should not be required, as it “introduces far more risk of delay and doubt than likelihood of success.”<sup>219</sup> Rather, “the FCC should defer to the parties to choose their own forum and procedures for handling retransmission consent negotiations and disputes.”<sup>220</sup>

209. *Petition*, *supra* note 48, at 32.

210. *Id.* at 32–33.

211. *Id.* at 31.

212. Public Knowledge Comments, *supra* note 148, at 6.

213. News Corp. Order, *supra* note 76, at para. 222.

214. Public Knowledge Comments, *supra* note 148, at 9.

215. *See* CBS Comments, *supra* note 115, at 18, 23.

216. Comments of Fox Entm’t Grp., Inc. & Fox TV Stations, Inc. at 24, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011) [hereinafter Fox Comments].

217. Comments of The Walt Disney Co. at 4, Amendment of the Comm’n’s Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. May 27, 2011).

218. Fox Comments, *supra* note 216, at 24.

219. *Id.* at 26.

220. NAB Comments, *supra* note 88, at 30.

### 3. Does the FCC Have the Necessary Authority?

Those advocating for interim carriage and mandatory binding arbitration insist the FCC can derive such authority from Section 325 or Section 303(r) of the Communications Act.<sup>221</sup> However, and much more importantly, the FCC doubts its own authority to enact rule changes outside the four proposed in the NPRM.<sup>222</sup> Quite often throughout the NPRM, the FCC asserts that it does not have the power to enact certain regulations.<sup>223</sup> Chairman Genachowski explicitly states that the FCC does not have the authority to adopt interim carriage mechanisms or mandatory binding dispute resolution procedures.<sup>224</sup>

While the FCC recognizes that interim carriage might best protect consumers, it concludes that the statute does not authorize such a mandate.<sup>225</sup> The plain language of the statute prohibits retransmission without the broadcaster's express consent, and the legislative history indicates that Section 325(b) was not intended to dictate the outcome of any negotiations.<sup>226</sup> Therefore, the FCC's interpretation of Section 325(b) prevents it from ordering carriage over the objection of the broadcaster, even if the requirement of good faith has been violated.<sup>227</sup> The FCC sees no authority "to adopt regulations permitting retransmission during good faith negotiation."<sup>228</sup> The FCC also believes ordering mandatory binding arbitration would be inconsistent with Section 325, which opts for retransmission consent negotiations to be handled by private parties, and the Administrative Dispute Resolution Act, which only authorizes an agency to use arbitration when all parties consent.<sup>229</sup>

Whatever one's personal opinions about the power of the FCC to enact these two proposals, it is clear that so long as it denies its own power to do so, the FCC will be very unlikely to enact such. Therefore, if interim carriage and mandatory binding arbitration are desirable solutions, it will

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221. *Petition*, *supra* note 48, at 38.

222. *NPRM*, *supra* note 1, at para. 3 n.6.

223. *See id.* at 50–51 (statement of Comm'r Mignon L. Clyburn) ("[U]nder current authority given to us by Congress we may not intervene outside of or further than the aforementioned good faith considerations."); *see also id.* at 49 (statement of Comm'r Robert M. McDowell) ("I agree with the conclusion . . . that the Commission lacks authority to mandate interim carriage.").

224. *Id.* at 46 (statement of Chairman Julius Genachowski).

225. *Id.* at paras. 17–18.

226. *Id.* at para. 18.

227. *Id.*

228. *Good Faith Order*, *supra* note 45, at para. 60.

229. *NPRM*, *supra* note 1, at para. 18.

require statutory change by Congress.<sup>230</sup> Congress must choose to “overhaul” the rules the FCC uses to address retransmission negotiations, and the FCC can “react accordingly.”<sup>231</sup>

At least one Senator, John Kerry (D-MA), has proposed a bill that makes “the [FCC] a mediator, but not arbitrator, of the disputes.”<sup>232</sup> Frank Lautenberg (D-NJ) has also agreed to work on a legislative change to the rules.<sup>233</sup> At the same time, however, other policymakers continue to urge the FCC to act upon the NPRM,<sup>234</sup> possibly indicating that they either believe the FCC has more authority than it realizes, or that interim carriage and mandatory binding arbitration are not desirable solutions. The current lack of consensus by Congress to inquire into their own role in the retransmission consent problem further complicates the issue of what the proper solution is.

## V. RECOMMENDATIONS AND CONCLUSIONS

While the NPRM is pending, FCC Chairman Julius Genachowski has cautioned that the proceeding is not a signal or excuse for parties to “drag their feet on reaching retransmission consent agreements.”<sup>235</sup> Commissioner Robert M. McDowell cautioned that negotiating parties should not use the NPRM as an excuse to stop negotiating and that nobody should assume the FCC will act in a particular way.<sup>236</sup> However, the recent blackouts show that without immediate action, these cautions are falling on deaf ears. The FCC has consistently emphasized its commitment to the public interest, but signal blackouts are clearly harming the public interest. The time for inaction is over, and something must be done.

In the majority of retransmission consent negotiations, an agreement is reached peaceably. In these negotiations, the current rules are working as intended. It is only the highly contentious disputes—the ones that lead to threatened or actual blackouts—that require government intervention. The changes adopted must then serve two primary purposes: to clarify the role of the negotiating parties in a retransmission consent negotiation; and to

230. *Id.* at 46 (statement of Chairman Julius Genachowski).

231. *Id.* at 2767 (statement of Comm’r Mignon L. Clyburn).

232. *Is There a Role for Government in Retransmission Disputes?*, BENTON FOUND. (Nov. 18, 2010, 9:37 AM), <http://benton.org/node/45181>.

233. Dave Seyler, *New Jersey Senator Signs on for Legislated Retransmission Solution*, RBR-TVBR (Oct. 30 2010), <http://rbr.com/new-jersey-senator-signs-on-for-legislated-retransmission-solution/>.

234. John Eggerton, *Rep Bass Asks FCC to Complete Retransmission Proceeding*, BENTON FOUND. (Oct. 22, 2011, 2:20 PM), <http://benton.org/node/94808>.

235. *NPRM*, *supra* note 1, at 2763 (statement of Chairman Julius Genachowski).

236. *Id.* at 2766 (statement of Comm’r Robert M. McDowell).

prevent signal blackouts. Clarifying the parties' roles will ensure that negotiations that can be solved amicably remain so, as well as provide guidance for future negotiations to follow this peaceful pattern. It will also, to the extent possible, ensure that the negotiations take place primarily between private parties. Preventing signal blackouts will eliminate consumer harm caused by cable provider and broadcaster conduct.

Some of the FCC proposals should be adopted. Current confusion regarding good faith<sup>237</sup> makes it necessary that good faith standards are revised. The FCC should take into account good faith proposals of cable providers, broadcasters, and consumers, and then determine which of them will best promote the goals of "honesty, purpose and clarity of process."<sup>238</sup> By revising the good faith standards, each party becomes more aware of its responsibilities in the negotiation, and agreements can be reached without the use of harmful bad faith tactics.

The notice requirements should be expanded to reduce consumer confusion. Consumers deserve to know when they are about to be subjected to a signal blackout. This transparency of information will incentivize cable providers to reach new agreements before the expiration of their existing agreements. To ensure that this tool is not abused by broadcasters, the revised good faith requirements should emphasize that notice is not a weapon, and that the parties should be acting in good faith long before notice is necessary. Finally, the exclusivity rules should not be eliminated, because the interests of localism outweigh other interests implicated by this proposal. Since they arise out of contractual right, the elimination of the exclusivity rules will have minimal effect.<sup>239</sup> Moreover, as discussed below, concerns of cable providers regarding the exclusivity rules will largely be alleviated by the imposition of interim carriage.

These changes, which arguably favor broadcasters, must be counteracted by legislative action. As long as the foregoing solutions are the only ones available to the FCC, it is arguable that they further tip the balance in favor of broadcasters. To prevent this, the FCC needs to be able to order the drastic solutions of interim carriage and mandatory binding arbitration when negotiations become contentious. These two solutions will level the playing field and prevent cable providers from accepting unfavorable proposals.<sup>240</sup> The two solutions are of the type that would not be adopted unless there were truly no amicable solution in the retransmission negotiation. These solutions—especially interim carriage—

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237. See *NPRM*, *supra* note 1, at para. 21.

238. *Good Faith Order*, *supra* note 45, at para. 24.

239. *NPRM*, *supra* note 1, at para. 43.

240. See *BRINKMANSHIP STUDY*, *supra* note 84, at para. 53.

would eliminate blackouts and threatened blackouts, thus fulfilling the second purpose of the solutions.<sup>241</sup>

For these two solutions to be adopted, Congress must legislate. Congress, in the way it finds most beneficial, must extend to the FCC the necessary authority to adopt interim carriage and mandatory binding arbitration. How it does so remains a question for the debate floor. But Congress needs to give the FCC the authority that the FCC believes it lacks. The FCC could then implement these two solutions to appease cable providers and hopefully solve otherwise irreconcilable negotiations.

As this year's retransmission negotiations come to a close, predictably with some ending peaceably and others ending in signal blackouts, the FCC and Congress remain poised to finally adopt changes to ensure the system of retransmission continues to run smoothly in the current marketplace and fulfills the goals of the system. A combination of proposals adopted from the NPRM, as well as legislative change providing for interim carriage and mandatory binding arbitration in extreme circumstances, may well be the best option to level the playing field and eliminate consumer harm.

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241. *Id.* at para. 50.