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

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 07-269
Competition in the Market for the	)	
Delivery of Video Programming	)	

To: The Commission

JOINT REPLY COMMENTS OF THE BROADCASTER ASSOCIATIONS

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

David Kushner
BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, LLP
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, NC 27602
(919) 839-0300

Counsel for the ABC Television Affiliates Association and the FBC Television Affiliates Association

Jennifer Johnson
Lindsey Tonsager
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-6000

Counsel for the CBS Television Network Affiliates Association and the NBC Television Affiliates

August 28, 2009

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EXECUTIVE SUMMARY

The Broadcaster Associations submit this reply to certain comments on the Commission's *Notices of Inquiry* requesting data and information on the status of competition in the market for the delivery of video programming as of June 30, 2009.

In initial comments, the American Cable Association ("ACA") and DISH Network, LLC ("DISH") both make the unsubstantiated assertion that the current free marketplace for retransmission of broadcast signals, a market that has operated as Congress intended and served the public interest for 17 years, is now broken and in need of radical change. These proposals should be rejected as lacking any legal basis and contrary to the public interest.

As broadcasters have demonstrated in the past, the retransmission consent marketplace benefits consumers, provides a fair, efficient, and equitable process for carriage of broadcasters' valuable signals and serves the public interest by ensuring the continued viability of broadcast outlets. In short, the retransmission consent marketplace established by Congressional action continues to work as Congress intended. Nothing ACA or DISH has provided in this proceeding justifies unnecessary government intervention in the free marketplace for retransmission of broadcaster signals.

ACA provides no evidence that supports its call for an FCC investigation into the prices, terms and conditions of retransmission consent agreements. ACA's "evidence" – primarily a self-interested opinion poll of its membership – actually contradicts its claim that broadcasters exert undue leverage over multichannel video programming distributors ("MVPDs") in retransmission consent negotiations. ACA further provides no

support for its claims that broadcasters are receiving above-market prices for the value of their signals or that retransmission consent agreements harm ACA members' ability to provide broadband services. Indeed, as broadcasters have previously shown, stations ask for only a fraction of the relative value for their programming compared to the per-subscriber fees willingly paid by MVPDs to cable networks.

Similarly, DISH's erroneous contention that broadcasters are making unreasonable and anti-consumer demands is directly contradicted by DISH's own ability to successfully negotiate hundreds of retransmission consent agreements with very few consumer disruptions. DISH's hollow argument that the good faith standard should be altered is, in fact, a thinly veiled attempt to tilt the negotiating process further in MVPDs' favor.

Finally, the Broadcaster Associations urge the Commission to reject DISH's proposed changes to the structure of television Designated Market Areas. These proposals would undermine local stations' economic viability and the valuable service they provide to local audiences.

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The National Association of Broadcasters ("NAB"),[1] ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and the NBC Television Affiliates (collectively, the "Broadcaster Associations") submit this reply to certain comments on the Commission's request for data and information on the status of competition in the market for the delivery of video programming as of June 30, 2009.[2] Although the majority of commenters focus on new developments in their product and service offerings since 2008, two commenters proffer proposals that are wholly inconsistent with the current free-market system of

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

[2] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Notice of Inquiry, MB Docket No. 07-269, FCC 07-207 (rel. Jan. 16, 2009) ("*Notice*"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Supplemental Notice of Inquiry, MB Docket No. 07-269, FCC 07-207 (rel. Apr. 9, 2009) ("*Supplemental Notice*").

retransmission consent. These proposals should be rejected as unlawful and contrary to the public interest.

The American Cable Association's ("ACA") request that the Commission "investigate" prices, terms and conditions of retransmission agreements misconstrues the legal standards governing retransmission consent, while proposals advanced by DISH Network, LLC ("DISH") would replace arms-length negotiations between broadcasters and multichannel video programming distributors ("MVPDs") with extensive governmental oversight of the prices, terms and conditions of retransmission consent. Congress considered and rejected a more intrusive regulatory system for retransmission consent, and the Commission determined many years ago that regulatory intrusion into the prices, terms and conditions of retransmission consent is not what Congress intended. Accordingly, the DISH and ACA proposals should be rejected as lacking any legal basis.

The record in this proceeding also demonstrates that the current retransmission consent regime is benefiting viewers and serving the public interest. Broadcasters continue to satisfy their statutory obligation to carry out retransmission consent negotiations in good faith, even though certain MVPDs have either failed to do so or have abused the good faith complaint process. Upsetting this well-functioning mechanism with governmental interference into retransmission consent agreement pricing would be harmful to a system that has, for years, enhanced the quantity, diversity, and quality of available programming.

I. Commenters Provide No Evidence Challenging Congress' and the Commission's Determinations that Retransmission Consent Serves the Public Interest

Certain cable and satellite interests have yet again utilized the Commission's annual video competition inquiry to urge radical governmental intrusion into the Congressionally-designed free market for retransmission of broadcast signals—a market which has benefited MVPDs, local broadcaster television stations and, most importantly, consumers. As discussed below, none of these commenters provide either a factual or legal basis for their proposals, which should therefore be denied.

A. Commenters Proposing Revisions to Retransmission Consent Fail to Acknowledge the Public Interest Benefits Derived From the Current System

Commenters attacking the retransmission consent process do not address, let alone refute, evidence that broadcast stations, MVPDs and most importantly, consumers have benefited from the retransmission consent process. The process provides consumers with more programming options for both over-the-air and pay television viewing, more local programming, and greater programming diversity. Commenters fail to address broadcasters' prior showings or the Commission's past determination that the retransmission consent system is serving the public interest.

Earlier in this proceeding, NAB submitted an empirical economic analysis demonstrating that the retransmission consent process is fair, balanced and a benefit to consumers.[3] The analysis finds that the retransmission consent process benefits television viewers by "enriching the quantity, diversity, and quality of available

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[3] Empiris, LLC, *The Economics Of Retransmission Consent,* Jeffrey A. Eisenach, Ph.D. (Mar. 2009) (filed as Appendix A of NAB Reply Comments in MB Docket No. 07-269 on Jun. 22, 2009)("Eisenach Study")).

programming, including local programming"[4] and that proposals to modify the system are therefore misguided and would harm consumers.[5] This evidence remains uncontroverted. Retransmission consent expands consumer choice and contributes to localism and diversity of available programming in a variety of ways. For example, broadcasters previously have demonstrated the consumer benefits arising from their ability to negotiate for carriage of additional programming through retransmission consent.[6] Through such agreements, broadcasters have launched new and diverse program services, including local news services; stations whose programs are directed to minority viewers (such as the Univision, Telemundo and Azteca America-affiliated stations); and new programming channels (such as Home and Garden, Lifetime and the A&E Television Networks).[7] Consumers have clearly benefited from broadcasters' launch of these popular and diverse programming networks via the retransmission consent process.

Retransmission consent also provides viewers with greater diversity and localism by allowing local stations to obtain carriage of their digital multicast channels. As local broadcasters have shown in the past, in a number of markets, newer networks (such as CW or MyTV) and many foreign language, religious and other "niche" programming services may be available only on a digital multicast channel.[8] There are clear public

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[4] NAB Comments at 12-13 (citing Eisenach Study at 41).

[5] *Id.*

[6] *See, e.g.* NAB Program Tying Comments at 27-29; NAB Program Tying Reply comments at 29-30.

[7] NAB Program Tying Reply comments at 29-30.

[8] NAB Program Tying Reply comments at 29-30 (citing *Retransmission Consent And Exclusivity Rules: Report To Congress Pursuant To Section 208 of the Satellite Home*

interest benefits to allowing local broadcast stations to negotiate in the marketplace for the carriage of this additional, diverse programming (particularly absent full carriage rights for local stations' digital multicast streams).

Retransmission consent also contributes to the diversity of programming by facilitating an alternative to vertically integrated cable content for MVPD subscribers. As NAB previously explained in this proceeding, "[i]n an era of increasing MVPD concentration, the broadcast stations carried on MVPD systems also provide a guaranteed minimum of local and diverse voices for subscribers."[9] We again urge the Commission to continue recognizing the significant role of broadcasters in providing local, diverse programming (as well as vital emergency information and alerts) to *all* television households, whether or not they subscribe to an MVPD service.[10] Retransmission consent is, moreover, an economically efficient vehicle by which broadcasters and MVPDs can arrange for broadcast signals to be delivered to MVPD subscribers.[11] Compensation derived from retransmission consent agreements helps broadcasters create the unique mix of news, informational, and entertainment

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Viewer Extension and Reauthorization Act of 2004, 2005 WL 220670 ¶ 35 (Sept. 8, 2005) ("*SHVERA Report*") and other sources).

[9] NAB Comments in MB Docket No. 07-269 (filed Jul. 29, 2009) at 13 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, 24 FCC Rcd 542 ¶¶ 9, 180 (2009); Eisenach Study at 18-21. This is even more important now that the only limitation on unfettered concentration in the cable industry has been vacated by the Court of Appeals for the D.C. Circuit. *See Comcast Corp. v. FCC,* No. 08-1114, slip. op. (D.C. Cir. Aug. 28, 2009).

[10] NAB Comments in MB Docket No. 07-269 (filed Jul. 29, 2009) at 13.

[11] The retransmission consent system "provides a market-based mechanism for broadcasters to obtain an economically efficient level of compensation for the value of their signals." NAB Comments in MB Docket No. 07-269 (filed Jul. 29, 2009) at 13 (citing Eisenach Study at 41).

programming, including growing numbers of multicast channels, they deliver to both MVPD subscribers and over-the-air viewers.

As broadcasters observed during the initial comment phase, the Commission's most recent examination of the statutory and regulatory regime governing retransmission consent led it to conclude that there are multiple public interest benefits and that revisions were not necessary or appropriate.[12] Specifically, the Commission found that, "the station benefits from carriage because its programming and advertising will be carried as part of the MVPD's service, and the MVPD benefits because the station's programming makes the MVPD's offerings more appealing to consumers."[13] Most importantly, the Commission found that the system benefits consumers by ensuring their access to broadcasters' programming via MVPDs.[14] Nothing in the record controverts this prior Commission determination.

B. ACA's Unsupported and Recycled Assertions Again Fail to Support its Request for Commission Intervention in the Retransmission Marketplace

ACA's comments contain no new evidence, or any evidence at all, that there exists a market failure in the retransmission consent marketplace.[15] Nothing provided by ACA or any other commenter in this proceeding, or numerous other ACA filings that assert similar claims, offer credible evidence to warrant Commission intervention in the free marketplace. Indeed, the "study" upon which ACA bases most of its arguments

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[12] *See, e.g.,* NAB Comments in MB Docket No. 07-269 (filed Jul. 29, 2009) at 13; NAB Program Tying Reply Comments at 27-28 (citing *SHVERA Report* at ¶ 44).

[13] *SHVERA Report* at ¶ 44.

[14] *Id.*

[15] *See* Comments of the American Cable Association in MB Docket No. 07-269 (filed Jul. 29, 2009) ("ACA Comments").

amounts to little more than a self-interested opinion poll of less than one-third of its membership.[16] NAB identified several flaws in this same survey when ACA filed it in connection with comments on video competition for 2007 and 2008.[17] While we believe it is unnecessary and redundant to provide the Commission with an exhaustive recounting of our previous and numerous refutations of ACA's repetitive assertions,[18] we will nonetheless address some of its more egregious claims.

First, as broadcasters have shown numerous times before,[19] there is no evidence to support ACA's contention that local stations have market power over MVPDs, even smaller MVPDs, or that broadcasters use the popularity of their programming to exert undue leverage over small cable operators compared to larger cable operators.[20] The Broadcaster Associations do not dispute that broadcast programming is popular. It is, however, counterfactual to assert that broadcasters in 2009 have more market power than they did when Congress first created the free marketplace for retransmission of

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[16] *See* ACA Comments, Appendix 1.

[17] *See* NAB Reply Comments in MB Docket No. 07-269 (filed Jun. 22, 2009) at 10-11 (the survey "contains flaws ranging from unexplained gaps to subjective and leading questions that do not appear designed to elicit objective responses").

[18] *See, e.g.,* NAB Comments in MB Docket No. 07-269 (filed May 20 and Jul. 29, 2009); NAB Reply Comments in MB Docket No. 07-269 (filed Jun. 22, 2009); NAB Comments in MB Docket No. 07-198 (filed Jan. 4, 2008)("NAB Program Tying Initial Comments"); and NAB Reply Comments in MB Docket No. 07-198 (filed Feb. 12, 2008)("NAB Program Tying Reply Comments").

[19] *See, e.g.,* NAB Reply Comments in MB Docket No. 07-269 at 4-8 (discussing relative competitiveness of MVPD market and markets in which broadcasters compete); Eisenach Study at 21-23 (discussing broadcaster incentives to negotiate agreements); Letter from Erin L. Dozier, Associate General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC in MB Docket No. 07-198 (filed Dec. 5, 2008) at 2-3 (discussing cable operators' continuing dominance relative to broadcasters); NAB Program Tying Reply Comments at 14-23 (refuting claims about broadcasters' relative power vis-à-vis MVPDs).

[20] *See* ACA Comments at 5.

broadcast signals nearly two decades ago. Today, the vast majority of television viewers watch programming, including local programming, through a pay TV provider like cable or satellite. Those operators wield increasingly powerful bottleneck authority over the viewing habits of American consumers.[21] And with "triple play" discounts for television programming, broadband Internet and phone service, cable operators have become increasingly successful at locking-in consumers and preventing migration to other services, presuming comparable services are even available.[22]

Contrary to ACA's claims, MVPDs in fact enjoy increased bargaining power vis-à-vis broadcasters. As we have noted multiple times previously, broadcasters rely almost exclusively on advertising revenue and are therefore heavily dependent on MVPDs to reach the largest audience possible.[23] Financial analysts have concluded that retransmission negotiating leverage is "steeply asymmetrical" in favor of cable operators and that broadcast stations lack bargaining power vis-à-vis cable operators in these

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[21] The Commission recently observed that cable operators are gatekeepers with the incentive and ability to "silence the voice of competing speakers with a mere flick of the switch." *See Carriage of Digital Television Broadcast Signals*, Third Report and Order, 22 FCC Rcd 21064 (2007) at ¶ 50 (citing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 197 (1997) (internal quotes and citations omitted)).

[22] *See, e.g.,* Serrano, Robert*, Cable Bundling Strategy Pays Off With Lower Churn*, SNL Financial, Jan. 30, 2009 ("The cable industry's bet on the churn-busting benefits of its bundling strategy has borne fruit, as the triple-play's value proposition . . . has delivered on the expectations of consumer 'stickiness.'").

[23] *See, e.g.,* NAB Reply Comments in MB Docket No. 07-269 (filed Jun. 22, 2009) at 14 ("For MVPDs, the potential loss associated with carriage interruptions is a loss of subscribers—which is an eventual loss, not an immediate one. For a broadcaster, on the other hand, failure to successfully reach agreement means both lost retransmission consent compensation *and* lost advertising revenue—and the losses are immediate. Broadcasters thus have a strong incentive to remain at the table during retransmission negotiations and not to withhold their programming even temporarily."); Eisenach Study at 21-23; NAB Program Tying Reply Comments at 15.

negotiations.[24] While ACA argues that the "must-have programming" of broadcasters allows stations to force cable operators to accept "unconscionable" retransmission consent fees, ACA Comments at 12, ACA's own member survey, if accurate, directly contradicts this argument. Perhaps the most striking data reported in this survey is the fact that fully 35 percent of all respondents, including *more than half* of the cable systems with more than 25,000 subscribers, chose to "permanently drop a broadcast station after the old agreement expired" during last year's retransmission consent negotiations.[25] This remarkable statistic shows that many cable systems are willing to walk away from the retransmission bargaining table if their demands are not met. Whereas a cable system without a particular broadcast channel can still offer its customers hundreds of other channels, broadcasters suffer greatly when the principal means for access into viewers' homes is suddenly cut-off.

Second, there is no evidence to support ACA's contention that the retransmission consent marketplace "impedes broadband deployment." ACA Comments at 2. This assertion is a politically-motivated red herring. ACA alleges, for example, that its attached member survey "reveals that retransmission consent practices of powerful broadcast groups and networks . . . impede broadband deployment." ACA Comments at 4. However, the survey as published contains no question about broadband deployment, and no conclusion about broadband deployment can be reasonably drawn

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[24] *See, e.g.,* Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming* at 42 ("Criterion Economics Study"), attached as Ex. A to Walt Disney Co. Comments in MB Docket No. 07-198 (filed Jan. 4, 2008), citing Bernstein Research, *Cable and Satellite: Asymmetrical "Retrans" Leverage Favors Cable over Satellite and Telcos* at 1 (Mar. 21, 2006) and Merrill Lynch, *Brief Thoughts on Media* at 2 (Mar. 16, 2006).

[25] ACA Comments, Appendix 1, Question 8.

from the poll data. ACA offers no evidence to demonstrate any connection between retransmission consent and any impediments to broadband deployment. To the extent that ACA is suggesting that capacity constraints impede broadband, it is fundamentally unfair and inaccurate to single out broadcasters, among the hundreds of other channels cable systems also choose to carry, as the reason for a lack of broadband in rural markets.[26]

Finally, the Commission should ignore ACA's suggestion that broadcasters are now receiving retransmission consent fees above fair market value. As NAB and others have previously demonstrated, broadcasters ask for only a fraction of the relative value for their programming compared to the per-subscriber fees willingly paid by MVPDs to cable networks.[27] In truth, broadcast signals represent a tremendous value for MVPDs relative to other programming. For the 2008-2009 television season, 197 out of the top 200 rated programs aired during primetime television were broadcast programs.[28] And yet retransmission consent fees for broadcast programming, by far the most popular programming carried by MVPDs, represents only two-tenths of one percent of cable revenues today.[29] The Commission moreover has noted that "it is reasonable that the fair market value of any source of programming would be based in large part on the

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[26] NAB has demonstrated on numerous occasions that carriage of broadcast stations (whether retransmission consent or must carry) does not burden the capacity of cable systems, especially in light of recent technological advances. *See, e.g.,* NAB Program Tying Reply Comments at 25-26.

[27] *See* NAB Program Tying Reply Comments at 10.

[28] *See* Television Bureau of Advertising, *Broadcast TV Dominated Program Rankings In 2008-09 Season*, press release, May 28, 2009, available at: http://www.tvb.org/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2008-2009.asp.

[29] *See* Eisenach Study at 32-33. Even ACA's own survey showed that broadcast programming accounts for only eight percent or less of cable's video programming costs. ACA Comments, Appendix 1, Question 5.

measured popularity of such programming."[30] ACA is clearly hoping that the Commission will ignore its own precedent. The Commission should instead reject ACA's repeated and unjustified calls for government involvement in the free marketplace for broadcast signal carriage.

C. DISH Offers No Evidence to Support its Proposals for Sweeping Alteration of the Retransmission Consent System

As discussed further below, DISH similarly seeks sweeping revisions to current retransmission consent law and regulation. To support its request, DISH cites an analyst's prediction that retransmission consent fees will rise in the future[31] and describes a single retransmission consent dispute,[32] which has since been resolved. DISH fails to provide credible support for its contention that the retransmission consent system is "broken" and is failing consumers. As shown by DISH's successful negotiations for retransmission consent with broadcasters in television markets throughout the U.S., the current system works.

By its own count, DISH carries local broadcast stations in 180 Nielsen Designated Market Areas ("DMAs") serving 97% of U.S. households.[33] To do this, DISH must successfully negotiate retransmission consent agreements involving literally *hundreds* of television broadcast stations across the country. Though its comments suggest that all broadcasters are involved in "egregious conduct" and "unreasonable

[30] *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, DA 07-3 at ¶18 (Media Bur. rel. Jan. 4, 2007)(*"Mediacom-Sinclair Order")*

[31] Comments of DISH in MB Docket No. 07-269 (filed Jul. 29, 2009) ("DISH Comments") at 6.

[32] DISH Comments at 7-8.

[33] *Id.* at 3.

and anti-consumer demands,"[34] DISH provides only one example of negotiations that resulted in viewers losing any broadcast signals—and it involved a total of nine stations.[35] DISH asserts that the broadcaster in that case sought an "80% increase,"[36] but offers no explanation of numerous other market factors that might be relevant to this proposal. For example, DISH does not explain: 1) whether this was an increase from a fee negotiated only one year earlier, versus an increase from a figure negotiated several years ago; 2) whether there were any changes in the subject stations' offerings or performance; or 3) whether DISH actually paid more once negotiations resumed and an agreement was finalized. Further undercutting the credibility of this showing as "proof" of this alleged broadcaster proposal, DISH cites nothing more than an article that quotes its own corporate communications manager.[37] Finally, at no point in these negotiations did DISH apparently complain to the FCC of the broadcaster's alleged failure to negotiate in good faith.

To the extent that some broadcasters are able to secure higher retransmission consent fees through arms-length negotiations with some MVPDs, those payments reflect MVPDs' valuation of broadcast signals, not any improper behavior by broadcasters. The retransmission fees currently being paid may reflect increased demand arising from broadcaster upgrades to high definition ("HD") television and expanded HD content on broadcast channels. Any increases may be a simple market correction reflecting the fact that MVPDs have been underpaying (or not paying cash)

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[34] DISH Comments at 8.

[35] *Id.* at 7-8.

[36] *Id.* at 8.

[37] *Id.*

for retransmission consent for many years. As NAB and others have previously demonstrated, when analyzed on a per channel, per rating point basis, MVPDs routinely pay many times more for nonbroadcast programming networks than they pay for carriage of broadcast signals.[38] At most, ACA's examples of retransmission consent compensation show that, at long last, *some* broadcasters are being compensated by *some* MVPDs at levels closer to what has been paid for far less popular programming for many years. DISH's single "example" shows that, in negotiating for retransmission consent with hundreds of stations in 180 markets, on rare occasion these negotiations can break down.[39] These very limited examples do not show that the retransmission consent process is "broken," that the Commission should intrude in the marketplace by investigating the prices, terms, or conditions of retransmission consent agreements, or that the good faith complaint process should be transmogrified into an unlawful system of government regulation of the prices, terms and conditions of broadcast signal carriage.

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[38] NAB Reply Comments in MB Docket No. 07-269 (filed Jun. 22, 2009) at 8-10 (citing Reply Comments of Hearst-Argyle Television, Inc. ("Hearst-Argyle"), MB Docket No. 07-198 at 7-10 (filed Feb. 12, 2008) (analysis of fees and ratings for nonbroadcast programming networks showed an average fee of $0.91 per subscriber/month and an average rating of 0.696, while average rating for ten local television broadcast stations was 15.525, equating–theoretically, and not in actual negotiations–to a retransmission fee of $20.00 per subscriber/month for each station)). And many MVPDs refused for years to pay any cash for the retransmission of local broadcast signals. *SHVERA Report* at ¶ 10 (finding that during the first round of retransmission negotiations, most cable operators "were not willing to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross-promotions, and carriage of affiliated channels" and "[t]welve years later, cash still has not emerged as a principal form of consideration for retransmission consent.").

[39] Empirical analysis of retransmission consent disputes from January 2006 through December 2008 has shown that service interruptions affected only **0.0089 percent**—that is, less than one one-hundredth of one percent—of annual television viewing hours in the United States. *See* Eisenach Study at 40.

II. ACA Has Not Presented a Factual or Legal Basis for its Request for an Investigation into Alleged "Price Discrimination"

As discussed above, ACA has not provided a shred of credible evidence to support its contention that ACA members are paying different rates than other MVPDs for the retransmission of local broadcast stations. Even if ACA could demonstrate that different MVPDs were compensating broadcasters differently, it would not give rise to a need for the Commission to "investigate" retransmission consent negotiations or compensation. In making this request, ACA is asking the Commission to alter the legal standards that apply to the retransmission consent regime without any basis for doing so.

When Congress adopted the good faith negotiation standard, it explicitly stated that: "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."[40] The Commission identified a number of factors that it presumes consistent with competitive marketplace considerations when it adopted its order implementing the good faith negotiation requirement, and has applied this standard in the context of other decisions since that time. Among the proposals that the Commission deems to be presumptively consistent with competitive marketplace conditions are "[p]roposals for compensation above that agreed to with other MVPDs in the same market;" and "[p]roposals for compensation that are different from the

[40] 47 U.S.C. §325(b)(3)(C)(ii).

compensation offered by other broadcasters in the same market."[41] The Commission also held that conduct that violates national policies favoring competition is not within the competitive marketplace considerations standard included in the statute, and provided examples of conduct that would not meet the statutory standard.[42]

In adopting good faith rules, the Commission expressly rejected the requests of several commenters that it go further by, for example, prohibiting broadcasters from seeking minimum subscriber penetration levels; prohibiting broadcaster proposals for different compensation from different MVPDs based on factors other than cost; prohibiting proposals offering retransmission consent in exchange for carriage of other programming; or mandating that broadcasters offer smaller MVPDs prices, terms and conditions "at least as favorable as those offered to competitors."[43] The Commission declined to adopt such proposals, citing Congress' express rejection of a more intrusive retransmission consent regime under which the Commission would have been involved in regulating prices, terms and conditions of carriage.[44] As the Commission explained, "[w]here Congress expressly considers and rejects such an approach, the rules of

[41] *First Good Faith Order* at ¶ 56.

[42] *First Good Faith Order* at ¶ 58. Cited examples of proposals that presumptively are not consistent with competitive marketplace considerations and the good faith negotiation requirement include: (i) proposals that specifically foreclose carriage of other programming services by the MVPD that do not substantially duplicate the proposing broadcaster's programming; (ii) proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (*e.g.*, other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition; (iii) proposals that result from agreements not to compete or to fix prices; and (iv) proposals for contract terms that would foreclose the filing of complaints with the Commission. ACA has not shown that any broadcaster has made such proposals. *Id.*

[43] *First Good Faith Order* at ¶¶ 37, 39.

[44] *Id.* at ¶¶ 14, 18-20, 39.

statutory construction do not favor interpreting a subsequent statutory provision to require the rejected alternative."[45] The Commission also stated that placing arbitrary limits on the range or type of proposals that the parties may raise in the context of retransmission consent negotiations would make it more difficult for broadcasters and MVPDs to reach agreement.[46]

By requesting a sweeping review of retransmission consent pricing, ACA is attempting to re-argue matters settled almost ten years ago when the Commission considered and rejected proposals that it become involved in the prices, terms and conditions of retransmission consent agreements. Much like Mediacom's failed attempt to secure Commission intervention into price negotiations for retransmission of broadcast signals, ACA's argument, "at bottom, arises from a fundamental disagreement … over the appropriate valuation of [broadcast] signals."[47] ACA makes no attempt to show that any broadcaster is involved in any activity that fails to meet the "competitive marketplace considerations" standard, which is *the only standard* applicable to the prices, terms, and conditions for retransmission consent. Instead, what ACA "seems to protest is the price [broadcasters] seek[] for retransmission of

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[45] *First Good Faith Order* at ¶ 14, citing *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling that the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Slaven v. BP America, Inc.*, 973 F.2d 1468, 1474 (9th Cir. 1992) ("Congress's earlier express rejection of certain statutory language counsels strongly against interpreting the statute in a manner consistent with the rejected language."). The Commission observed that "when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity." *First Good Faith Order* at ¶ 23 (citing program access provisions of the Communications Act, 47 U.S.C. § 548).

[46] *First Good Faith Order* at ¶ 56.

[47] *Mediacom-Sinclair Order* at ¶ 24.

[their] signals."[48] As the Commission held in the *Mediacom-Sinclair Order*, "[s]uch disagreements, without more, however, are not indicative of a lack of good faith."[49] Like Mediacom and Sinclair, the thousands of individual MVPDs and broadcasters engaged in retransmission consent negotiations are "sophisticated, well established media corporations that can determine for themselves whether particular proposals reflect market conditions."[50] Commission intervention, or even investigation, is not necessary or appropriate under current law.

ACA has presented no factual basis or legal rationale for the "investigation" that it requests. If ACA members believe that they are engaged in negotiations with broadcasters who are not meeting the good faith standard, then the appropriate recourse is for any aggrieved member to file a good faith negotiation complaint. The Commission can evaluate whether the dispute at issue rises to the level of a failure to negotiate in good faith under well-established rules and precedents. If prices, terms and conditions of carriage are not based on competitive marketplace considerations, the Commission will act to protect MVPDs. There is no other standard that parties to retransmission consent negotiations can or should be required to meet with regard to prices, terms, and conditions of carriage. The statute simply does not authorize the Commission to become involved in the valuation of broadcast signals.

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[48] *Id.* at ¶ 15.

[49] *Id.* at ¶ 24.

[50] *Id.* at ¶ 15.

III. DISH Would Replace Good Faith Negotiation with Price Regulation in the Free Market for Retransmission Consent

While the overwhelming majority of retransmission consent agreements are negotiated successfully without the filing of complaints, the existing good faith negotiation standard and complaint process provide a check against the potential for any abuses in retransmission consent negotiations. DISH's proposed revisions to the good faith standard and complaint process would skew negotiations in favor of MVPDs and interfere with the system of free market-based negotiations for retransmission consent. The proposal would violate Section 325, its legislative history, and the Commission's implementation of the statute, and would be harmful to the public interest. Because the system is functioning effectively, no revisions to the applicable statutory or regulatory standards are needed.

As DISH correctly points out, Section 325 of the Communications Act requires the Commission to promulgate regulations that prohibit broadcasters and MVPDs from "failing to negotiate in good faith for retransmission consent."[51] The Commission has done so,[52] and has addressed a handful of "good faith" complaints on the merits (often, complaints are withdrawn prior to FCC action because the parties reach agreement). In the nine years since the Commission implemented the good faith negotiation requirement—including *five* years when the requirement *only* applied to broadcasters and not MVPDs—no broadcaster has ever been found to have violated the good faith

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[51] DISH Comments at 7 (citing 47 U.S.C. § 325(b)(3)(C)(ii)).

[52] *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 (2000) ("*First Good Faith Order*"); *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, 20 FCC Rcd 5448 (2005); 47 C.F.R. §76.65.

negotiation standard.[53] Indeed, the only cases decided on their merits resulted in a finding that a cable operator failed to negotiate in good faith and a determination that DISH abused Commission processes and "failed in its duty of candor to the Commission."[54]

Unable to swim against the tide of evidence that broadcasters are negotiating in good faith, DISH proposes revisions to the standard that would call for direct government intrusion in the prices, terms and conditions for retransmission agreements in contravention of Section 325.[55] Apparently, it is not the current standard that DISH thinks broadcasters are failing to meet, but a new, "tougher" (and presumably not reciprocal) standard. In spite of clear Congressional intent to avoid governmental

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[53] NAB Comments at 13-14, citing *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (Cable Bur. 2001)(broadcaster met good faith standard while complaining MVPD was admonished for abuse of Commission processes and lack of candor); *Mediacom-Sinclair Order* at ¶¶ 6, 24 (Media Bur. rel. Jan. 4, 2007)(holding that broadcaster met good faith standard and that "[e]ven with good faith, impasse is possible" in marketplace retransmission consent negotiations); *Letter from Steven F. Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable TV*, 22 FCC Rcd 4933 (2007) (cable operator failed to meet good faith standard); *ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, 24 FCC Rcd 1645 (2009)(broadcaster met good faith standard).

[54] *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (Cable Bur. 2001) (FCC admonished DISH, f/k/a EchoStar, for abuse of Commission processes, and "caution[ed] EchoStar to take greater care with regard to future filings"); *Letter from Steven F. Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable TV*, 22 FCC Rcd 4933 (2007) (cable operator failed to meet good faith standard).

[55] DISH suggests that its proposal will effectuate "clear congressional intent to provide some oversight of *broadcaster* conduct in retransmission consent negotiations." DISH Comments at 8 (emphasis added). This mischaracterizes the current statutory scheme and the intent of Congress. The good faith negotiation requirement is reciprocal under Section 325 and relevant FCC rules and procedures, and places obligations on both broadcasters and MVPDs. *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, 20 FCC Rcd 5448 (2005).

"intru[sion] in the negotiation of retransmission consent,"[56] DISH urges the Commission to modify the good faith standard to regulate the amount of compensation broadcasters can seek during retransmission negotiations,[57] and to establish a "standstill provision" allowing an MVPD to continue to carry broadcast signals—even without the broadcaster's consent—during any breakdowns in negotiations.[58] It is not very thinly veiled: rather than operate in a free market and engage in arms-length negotiations, DISH would prefer that the government cap the prices it pays for inputs into the product it sells.[59] Further, if negotiations stall, rather than reaching short-term solutions that may involve paying different rates, DISH seeks government authorization to continue to pay whatever it was paying the last time agreements were negotiated, regardless of current marketplace conditions.[60]

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[56] *First Good Faith Order,* 15 FCC Rcd at 5450. *Accord Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 3006 (1993).

[57] DISH Comments at 8 (the good faith obligation should provide a "regulatory check" against increases in retransmission fees).

[58] *Id.* at 8-9.

[59] It is unclear how this proposal would be reciprocated by MVPDs. Would the government also set a minimum retransmission consent compensation price through the good faith complaint process? It is ironic that DISH wants to limit what others can charge for inputs into the MVPD service it sells, when it is not subject to any regulation or even monitoring of its consumer prices. Between 2002 and 2008, DISH's subscriber-related revenue increased by 158%. *See* DISH DBS Corp, Amended Annual Report for Year Ending December 31, 2008 on SEC Form 10-K/A (filed Mar. 31, 2009) at 26 (showing subscriber-related revenues and expenses for 2007 and 2008); EchoStar Communications Corporation, Amended Annual Report for Year Ending December 31, 2006 on SEC Form 10-K/A (filed Mar. 6, 2007) at 38 (showing subscriber-related revenues and expenses for 2002-2006). Though it contends that broadcast programming is an ever-increasing expense it can barely afford, DISH's reported subscriber-related expenses (which include programming) have hovered steadily at about 50% of subscriber-related revenue. *Id.*

[60] If DISH considers this an appropriate change to the current system of market-based negotiations, perhaps DISH would assent to a regulatory regime where, if it increases

DISH's proposals would violate Section 325 on its face and would be inconsistent with the statute's legislative history. Congress specifically granted broadcast stations the right to control others' retransmission of their signals, and to negotiate the terms of such retransmission through private agreements.[61] There is nothing in the statute or its legislative history to suggest that Congress intended the Commission to entertain complaints about compensation levels or to somehow suspend broadcasters' statutory retransmission consent rights for *any* length of time—as the proposed "standstill" provision would require.[62] To the contrary, legislative history of Section 325 demonstrates that Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals" and did not intend the government to "dictate the outcome of ensuing marketplace negotiations."[63] As the Commission has consistently and correctly concluded, Congress did not intend for it to intrude in these negotiations,[64] but for the terms and conditions of carriage to be negotiated by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith. Any proposal that

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its rates and some subscribers do not like the new rates, it must continue to offer those subscribers the same DISH Network services on a "standstill" basis and the aggrieved subscribers continue paying the old rates until an agreement is reached.

[61] 47 U.S.C. § 325(b). Section 325 of the Communications Act of 1934, as amended, unequivocally states that no MVPD "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station." 47 U.S.C. § 325(b)(1)(A).

[62] The Commission considered and rejected similar proposals when it first implemented the good faith negotiation requirement. *First Good Faith Order* at ¶ 60 ("we see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission").

[63] S. Rep. No. 92, 102d Cong., 1st Sess. 1 (1991) at 36.

[64] *First Good Faith Order,* 15 FCC Rcd at 5450. *Accord Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 3006 (1993).

would place the Commission in the position of enforcing a "standstill" that has not been negotiated by the affected parties, or evaluating proposals for specific levels of compensation (by either broadcasters *or* MVPDs), would directly contravene the statute, its legislative history, and prior Commission decisions.

Because DISH's proposals also would not serve the public interest, they should not form the basis for any changes to Commission regulations or Section 325. Broadcasters that receive retransmission consent compensation rely upon this revenue to finance their operations and programming—the news, information and entertainment that meets the needs and interests of their local communities. A thumb on the scales in favor of MVPDs will interfere with current market-based system of negotiations, harming the public interest. As Congress understood when it established the retransmission consent system, market-based negotiations are the most effective means of determining the appropriate amount and type of compensation for carriage of broadcast signals.

IV. The DMA Structure is Neither Arbitrary Nor Static and Proposals to Alter Current Exclusivity Rules Would Severely Damage the Public's Local Broadcasting Service

In its comments, DISH further incorrectly asserts that DMAs are "arbitrary" and that "adjacent market reform" is needed to ensure that DISH subscribers, and presumably all MVPD subscribers, are able to receive the programming of in-state television stations. DISH Comments at 9. This argument is based on the mistaken belief that DMA boundaries are static "1950s" designations that ignore the realities of 21st century viewing patterns. That is not the case. In fact, Nielsen Media Research adjusts DMAs based on government-designated Metropolitan Statistical Areas and uses

new "tuning data" to update DMA boundaries every year.[65] The DISH proposal would needlessly undermine these carefully measured market designations reflective of the public's actual viewing practices. More importantly, it also would eviscerate the exclusive rights of local stations to air certain network and syndicated programming, thereby undermining those stations' economic viability and their ability to finance local programming, including local news. In short, DISH's proposal would undermine local broadcast stations and the public they serve. Especially during these challenging economic conditions for all locally-oriented, advertising-supported outlets, including broadcast stations, such a change is unwarranted.

Local media, including newspapers, radio and television, have always been based around population centers. It would be illogical, for example, to have residents in Belleville, Illinois, just across the Mississippi River from St. Louis, Missouri, routinely receive television stations other than their local St. Louis-based stations. The notion that residents in the St. Louis metro area who happen to live in Illinois are craving Chicago television is a fiction created by MVPDs eager to import out-of-market network programming and undermine local stations' ability to negotiate for carriage of their signals.

There is no public policy reason for viewers to see two versions of the same network or syndicated program. While access to the local news or sports programming of distant, but in-state, stations may be desirable in limited circumstances, no changes to current law are needed to bring in such non-duplicating out-of-market programming. DISH already can import the local news or sports programming of television stations in

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[65] *See* Nielsen Local Reference Supplement, 2008-2009, pp. 1-2, 1-5.

adjacent DMAs. Cable systems around the country have in fact negotiated deals to carry the local news of out-of-market stations.[66] Satellite television providers can do the same thing. But thus far, overtures from stations willing to work with satellite companies to supply out-of-DMA, but in-state, news and other programming have gone unanswered.

The proposed DMA changes would undermine localism. These proposed alterations would destroy quality local programming in many markets, leaving citizens with fewer local news and programming options. As the market for advertising becomes more fragmented, and as competition for viewers becomes more intense, local broadcasters and their viewers can ill afford proposals that would endanger the ad revenues supporting their local news and other local programming and services. The proposal that DISH is advocating would affect nearly 50 percent of the DMAs in the United States, splitting DMAs in some cases by more than half, and forcing local television stations to compete against out-of-market signals providing identical programming. The resulting math is simple – local broadcasters would lose large percentages of their audiences as viewership for popular network and syndicated programming naturally splinters. Loss of viewership means a loss of advertising. In an

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[66] For example, Time Warner Cable, in Robeson and Scotland Counties, North Carolina, both of which are located in the Myrtle Beach, South Carolina, television market, imports into those two North Carolina counties the local news and weather programming of in-state Station WECT-TV from the adjacent Wilmington, North Carolina, market; Time Warner Cable in Palm Springs imports the local news from television stations in the adjacent Los Angeles television market; The Cable One cable system in Texarkana, Arkansas, in the Shreveport, Louisiana, television market, imports the local news from KATV from the adjacent Little Rock television market; and cable companies in the southern Colorado counties of Montezuma and La Plata, in the Albuquerque, New Mexico, television market, import the local, in-state news from the adjacent market Denver television stations.

economic environment where even a small percentage drop in advertising dollars could mean lost jobs and fewer resources for local news, proposals to radically alter the DMA structure, if implemented, would prove devastating to many stations. Those stations and their viewers in smaller cross-state DMAs would be particularly harmed by the importation of stations' signals from larger DMAs.

V. Conclusion

Commenters who would rewrite the statutory retransmission consent regime must first overcome overwhelming evidence that the system is working. The system provides both MVPD subscribers and free over-the-air viewers with enhanced quality, quantity and diversity of programming. Arms-length negotiations allow parties the flexibility to develop creative market-based exchanges for the value of broadcast signals. Any party that fails to negotiate in good faith faces the possibility of a complaint and, with it, inconvenience, negative publicity, and most of all, the potential for Commission sanctions. For years, broadcasters have met the good faith standard. All of this shows that retransmission consent is functioning as Congress intended and is serving the public interest. Accordingly, the Broadcaster Associations urge the Commission to continue to reject the repetitive and baseless claims by a few commenters that the existing retransmission consent rules need to be modified to provide MVPDs an advantage in free-market retransmission negotiations.

Respectfully submitted,

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

_____________/s/_______________
David Kushner
BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, LLP
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, NC 27602
(919) 839-0300

Counsel for the ABC Television Affiliates Association and the FBC Television Affiliates Association

_____________/s/_______________
Jennifer Johnson
Lindsey Tonsager
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-6000

Counsel for the CBS Television Network Affiliates Association and the NBC Television Affiliates

August 28, 2009