BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

COMMENTS OF FREE PRESS,
PARENTS TELEVISION COUNCIL,
AND CONSUMERS UNION

I. Introduction

Free Press, Parents Television Council, and Consumers Union (hereafter "Commenters") encourage the Commission to ensure that consumers' interests are protected in retransmission consent debates. The Commission's fundamental responsibility as a market overseer and facilitator is to promote the public interest. In retransmission consent negotiations, protecting the interests of consumers is paramount to promoting the public interest – not choosing a winner between sparring industry segments.

The petition at the center of this proceeding comes in the wake of a few high-profile disputes, some of which deprived consumers of access to valuable content for which the consumers have paid substantial sums of money.[1] The Commission must not dismiss these disputes as isolated incidents or ordinary private industry (mis)behavior. The Commission should instead view these incidents as harbingers of greater consumer harm to come, as well as

[1] *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket 10-71, filed Mar. 9, 2010 ("Petition"), at 1-2, 21-23. (describing one major dispute between ABC and Cablevision that resulted in three million affected consumers, and separate disputes between Sinclair and cable companies Cablevision and Time Warner Cable).

compelling evidence of a potentially broken system.[2] Neither party is free from fault here, and neither seems inclined to take the full steps within their power to help consumers.[3] The Commission should therefore ensure consumers are not being held hostage in retransmission consent wars. To protect consumers from limited choice of content, overly expensive cable bills, and risk of regular service disruption, the Commission should institute appropriate dispute resolution processes, to be paid for by the party invoking the process. These procedures should result in mandatory disclosure of the cost of each individual channel included in the retransmission consent dispute, along with a consumer right to opt out of paying for any unwanted channels. Such an action would shift the balance of power to consumers, who would no longer be prisoners of pricey bundles, but would have the freedom to select and pay for only those channels they want, lowering costs to cable operators and consumers alike.

Yet, it appears that comments filed in this proceeding may be moot. A major newspaper reports that the Commission has already decided not to take action to protect consumers in this proceeding,[4] even though initial comments have not yet been filed by the cable industry, the broadcasters, or the public. Commenters believe that this Commission has correctly announced

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[2] *See* Petition at App. A, p. 1 (letter from Senator John Kerry to Chairman Julius Genachowski, Mar. 3, 2010).

[3] *See* Ben Scott, "Free Press Supports Senator Kerry's Call for an End to Fox-TWC Shenanigans," *at* http://www.freepress.net/node/75583 ("Broadcast networks complain about insufficient fees they receive from cable companies -- and yet they insist on bundling a pack of cable networks into the deal that consumers may not even want. Meanwhile, if cable networks were serious about reducing costs, they should publish a per-channel rate card for consumers and let subscribers opt-out of receiving and paying for the content they don't want. We hope Senator Kerry's intervention will serve as a reality check.")

[4] *See* Joe Flint, "FCC not likely to weigh in on retransmission consent issue," *Company Town, Los Angeles Times* (May 12, 2010), *at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/05/fcc-not-likely-to-weigh-in-on-retransmission-consent-issue.html.

that data, analysis and transparency will underlie its policy decision-making.[5] We hope the Commission has not already made up its mind to remain on the sidelines, before first considering the facts or arguments that will be presented in this record; however, we remain concerned that the Commission has fallen short of committing seriously to these matters.

If the Commission accepts its responsibility to promote the public interest and protect consumers from harm, Commenters offer suggestions for the agency to steer through this industry morass and help the public come out ahead. The Commission's primary prerogative should not be to pick winners and losers in industry disputes, but rather to protect consumers. The Commission should seek to ensure that consumers do not become victims of retransmission consent impasses, losing their signals when disputes go unresolved.

Commenters take no position on the negotiating positions or behavior of broadcast and cable companies. Commenters instead encourage the Commission to empower consumers by instituting an arbitration process and making a required outcome of the process the mandatory disclosure of per-channel costs sold by the programmer and offered by the MVPD – with a consumer option to opt out, and neither receive nor pay for each channel at issue in the dispute. Such a solution can help broadcasters receive fair value for their content, without subjecting consumers to unfair prices or loss of service. Commenters also encourage the Commission to consider extending this model to the resolution of disputes over cable carriage more broadly, to ensure a uniform framework that empowers consumers rather than concentrated and conglomerated media.

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[5] *See, e.g.*, Chairman Julius Genachowski, Remarks to the Staff of the Federal Communications Commission, p. 4 (June 30, 2009) ("We will be open and transparent. Our policy decisions will be fact-based and data-driven.").

II. Dispute Resolution Mechanisms Can Help Prevent Consumer Harm.

As one of two proposed reforms, Petitioners request the Commission apply dispute resolution mechanisms to resolve stalled industry negotiations over retransmission consent.[6] Petitioners, including several MVPDs, request that MVPDs be given the ability to trigger Commission dispute resolution merely by showing that an agreement has not been reached, without needing to establish bad faith by the broadcaster.[7] Petitioners also request that demands by broadcasters for mandatory bundling of non-broadcast programming in retransmission consent proceedings be declared to be "bad faith" practices, and that Commission dispute resolution procedures resolve only stand-alone agreements for broadcast signals.[8]

Commission dispute resolution processes as a backstop for carriage negotiations are not without precedent. In fact, the proposals by Petitioners, many of whom are MVPD service providers, bear a strong resemblance to Commission interventions in program carriage disputes – interventions that, in a different context, numerous MVPD providers have gone to great lengths to attempt to limit.[9] The Commission plays an essential role in enforcing statutory obligations that prohibit discrimination in cable carriage,[10] by hearing and adjudicating complaints for violations of these rules that arise from broken-down negotiations. Complaint procedures under

[6] Petition at 31-35.
[7] Petition at 32-33.
[8] Petition at 34-35.
[9] *See e.g.* Ex parte of the National Cable and Telecommunications Association, In the Matter of *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket Nos. 07-29, 07-198 (Jan. 14, 2010).
[10] 47 U.S.C. § 536.

Section 616 are widely criticized as currently implemented;[11] nevertheless, without Commission enforcement, an essential policy goal would not be realized, and consumers would suffer as a result, through reduced cable content offerings and higher prices.

As with cable carriage, Commission action in retransmission consent negotiations can be helpful in achieving important public policy goals. Without Commission oversight of broadcast retransmission, consumers face numerous harms: limited or no control over the offerings they receive; ever more expensive cable service;[12] and, most prominent, a high risk of service disruptions when no agreement can be reached. Commission action can therefore be positive, if and to the extent that it remedies these *consumer* harms. Petitioners include a large number of entities from one side of this dispute; the Commission should therefore independently evaluate the proposed solutions, to ensure that any action focuses on consumer benefits, not merely relief for an industry that has historically claimed it needed none.

The Commission should impose reforms that would ensure more offerings for consumers, more choice and control over what the consumer pays for and receives, more affordable cable service prices, and fewer service disruptions. In general, though, minimal intervention in disputes through appropriate dispute resolution procedures, the framework proposed by Petitioners, can go far to achieve these goals. To prevent the costs of these procedures from falling on the public, the party invoking Commission dispute resolution should bear the costs of the process, or the parties involved can divide the costs among themselves should they agree. Furthermore, the Commission should include a fixed "shot clock" as part of the dispute

[11] *See, e.g.*, Testimony of Andrew J. Schwartzman, President and CEO, Media Access Project, Before the Committee on the Judiciary, U.S. House of Representatives, p. 3, Feb. 25, 2010.
[12] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 – Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 24 FCC Rcd 259, at para. 2 (2009).

resolution process, to prevent delays and obstacles and to avoid abuse of interim carriage requirements such as proposed by Petitioners.

While the bundling of broadcast and non-broadcast content may in some circumstances constitute unfair dealing, Commenters do not agree with Petitioners that attempts by broadcasters to bundle broadcast content with additional content constitute "bad faith" *per se* in all instances.[13] Should an MVPD seek carriage of broadcast content as a stand-alone offering rather than as part of a bundle of content, and should the MVPD believe that the broadcaster refuses to offer the content as a stand-alone offering at a fair price (or at all), the MVPD can make such an assertion and propose a fair price for the broadcast content itself, without a bundle, to the Commission as part of an arbitration proceeding. The Commission can then engage in case-by-case analysis of proposals for stand-alone offerings and content bundles to reach its conclusions.

III. Interim Carriage Prevents Unnecessary Consumer Harm.

The other request from Petitioners is for mandatory interim carriage. Petitioners request interim carriage in two situations: for as long as MVPDs continue to negotiate in "good faith," and during a pending proceeding for dispute resolution.[14] As with dispute resolution, the request mirrors Commission intervention in other processes – Petitioners reference the "temporary stay process" that the Commission has applied to program access complaint proceedings under Section 628(b).[15]

Consumers are harmed when content that they have paid for and expect to receive is made unavailable to them. Commission policy intervention, including appropriate processes for

[13] Petition at 34-35.
[14] Petition at 36-37.
[15] Petition at 38-39.

ensuring interim carriage during the resolution of disputes, can help reduce the risk of service disruptions. Accordingly, we support Petitioners' request for mandatory interim carriage during the pendency of dispute resolution. However, we are concerned that the ability of MVPDs to ensure ongoing carriage for so long as they purport to be acting in "good faith" may provide them too much power to stall negotiations and continue one-sided terms. In particular, should either broadcasters or MVPDs take exception to an FCC determination of "good faith" which triggers automatic interim carriage as proposed in the Petition, the result would be complications and potential litigation. Instead, Commenters propose that interim carriage during Commission dispute resolution processes, coupled with the ability of MVPDs (and broadcasters) to trigger dispute resolution processes, suffice to minimize the risk of service disruptions, without creating unnecessary complexity for the Commission.

IV. Mandatory Disclosure and Opt-Out Are Essential to Remedy Consumer Harm.

As indicated above, Commenters do not believe that the purpose of the Commission should be to intervene for the sake of picking winners and losers in an industry debate. Petitioners assert that the current structure of negotiations for carriage gives too much power to broadcasters through bundling practices, leaving cable operators with a difficult choice between paying too much (for not just the broadcast network, but the entire bundle offered by the broadcaster) and not having must-have content.[16] But the policy problem – and the reason the Commission should be concerned – is not the balance of power between market participants, but the result of a process through which broadcasters can effectively demand carriage of high priced

[16] Petition at 1.

bundles. The result of retransmission consent processes as currently constructed is, all too often, poor options for consumers: an expensive bundle of content, or no content at all. The Commission should therefore ensure that its dispute resolution proceedings result in disclosure of channel costs, and the ability of consumers to opt out of paying for any channels they do not wish to purchase.

Although Commenters share concerns that leverage over must have programming will ultimately result in price increases for consumers, the Commission should recognize that a much more significant problem exists. Cable operators continue to enjoy supracompetitive profits at the expense of consumers. According to SNL Kagan, the average cable network had a profit margin of 38.3 percent in 2009, an industry record.[17] Time Warner Cable, the lead cable company among Petitioners, had a 26.5 percent profit margin on their cable segment in the first quarter of 2010, a 5.6 percent *increase* over 2009.[18] Meanwhile, TWC's Internet and Phone segment margins are at even higher levels, making their latest overall margin 36.3 percent, in line with industry average. While this is great news for investors, the Commission's focus should be on consumers, who continue to see their cable bill go up and up.[19] Any actions taken by the Commission under the guise of controlling cable costs for consumers must take account of this market environment.

Petitioners recognize and offer solutions to clear consumer harms from retransmission processes as currently constructed; however, the precise solutions as proposed in the Petition may be overly one-sided in favor of MVPDs. Moving to binding arbitration would not

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[17] Derek Baine, "Cable net post record cash flow margin in 2009," *SNL Kagan,* April 28, 2010.
[18] Michelle Ow, "Time Warner Cable Q1 margins led by broadband," *SNL Kagan,* May 6, 2010.
[19] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 – Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 24 FCC Rcd 259, at para. 2 (2009).

necessarily, by itself, suffice to remedy the consumer harms of limited choice and high prices; it would only directly help reduce the risk of service disruptions. As Commenters have noted previously, the market for MVPD services is not sufficient to keep prices in check.[20] As alluded to above, it appears unlikely that any cost savings achieved through the proposed reforms will be passed along to consumers, or whether consumers would receive any greater control over the selection of content that they pay for and receive.

The Commission should strive to institute procedural reform that would be balanced, and should provide asymmetric benefits, if any, to consumers. For example, the Commission should not preempt negotiations by setting *per se* rules, for all proceedings involving all participants, on bundles that broadcasters may offer;[21] however, should either broadcasters or cable companies feel that arbitration and Commission intervention is needed, then the Commission should help resolve the dispute, and should make sure that consumers are not caught in the middle.

But, more importantly, the Commission should include as a component of any dispute resolution mandatory public disclosure and consumer opt-out. MVPDs should be required to publish the final price for the individual channels included in the retransmission consent bundle, both broadcast and non-broadcast. Transparency as to channel pricing will accelerate future negotiations, and help avoid unnecessary Commission arbitration resources by limiting the ability of broadcasters to demand unfair prices, or of MVPDs to refuse to pay fair prices. Consumers should also have an opt-out for each channel included in the bundle, exercise of which would result in a discount from the consumer's monthly bill, and from the price paid by the MVPD to the broadcaster. Rather than prohibiting bundling *per se*, opt-out would permit

[20] Reply Comments of Free Press, In the Matter of *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, pp. 4-6 (Aug. 28, 2009) ("*Free Press MVPD Competition Reply Comments*").
[21] Petition at 35.

carriage bundles to be provided by the broadcaster and the MVPD, yet would prevent the bundle from imposing an onerous and unavoidable burden on the consumer.

Only with mandatory disclosure and opt-out can consumers avoid becoming the victim of retransmission consent processes, and be spared from the ever-increasing costs for bundles demanded by broadcasters and passed on through an uncompetitive MVPD market.

Commenters further note that consumers should not be forced to pay for access to content actively taken from them. Should retransmission negotiations and/or dispute resolution processes result in loss of service for channels that the consumers have paid for, either temporary loss of service or permanent loss of carriage, affected consumers should receive an appropriate refund from their MVPD service provider, who would not be paying for those channels from the broadcaster and thus should not be charging the consumer for them.

V. The Commission Should Consider Mandatory Disclosure and Opt-Out as a Component of Program Carriage Dispute Resolution.

Commenters also wish to remind the Commission that complicated, harmful disputes arise in other contexts, beyond broadcast retransmission: specifically, program carriage complaints based on discrimination.[22] The Commission has procedures to facilitate resolution of these disputes; however, in many cases, procedural complexities can make the resolution process very difficult and lengthy in practice.[23] Although the legal framework is different for these

[22] *See, e.g., In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, MB Docket 08-214 (rel. Oct. 10, 2008) (designating six separate program carriage complaints for hearing by the Commission's Administrative Law Judge).

[23] *Compare In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Order, DA 09-55, MB Docket 08-214 (rel. Jan. 16, 2009) (action by the FCC's Media Bureau to take authority from the FCC's ALJ and proceed to direct resolution by the Media Bureau of the disputes) *with*

disputes, the market power dynamics are comparable, and the processes pose identical harms for consumers: limited choice of content offerings, higher prices for content, and hefty risk of service disruptions. Commenters have called for reform of these procedures in the past.[24] As the Commission considers reforms in retransmission consent, we encourage the Commission to consider similar reforms, including mandatory disclosure and opt-out rules, to its processes for resolution of disputes over program carriage arrangements as well. Such a move would ensure a uniform framework that empowers consumers to choose the content they receive and pay for, without unduly interfering with market operations or the ability of programmers to receive fair value for their content.

In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al., Order, FCC 09-4, MB Docket 08-214 (rel. Jan. 27, 2009) (rescinding prior Media Bureau orders and restoring authority to the ALJ). In some of these disputes, issuance and release of the recommended decision by the ALJ took several additional months. *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 09 D-01, MB Docket 08-214 (rel. Oct. 14, 2009).

[24] *See e.g.* Free Press MVPD Competition Reply Comments at 1.