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Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioners:

This letter is in response to the FCC's, "In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,' MB Docket No.10-71.

In this letter the Institute for Policy Innovation (IPI)[1] addresses the FCC's examination of the current retransmission rules to determine whether they are working for all interested parties including the broadcasters, content creators, service providers and customers. *IPI believes that, in view of the changes that have occurred since the current regime was put in place, including both market and technological changes, it is appropriate for the Commission to consider improvements in the retransmission regime to facilitate market-based negotiations so that content is appropriately valued while restoring negotiation balance which will minimize consumer anxiety and provider uncertainty.*

Brief History

In 1992, Congress passed into law the Cable television and Consumer Protection Act, in part because of a concern then, nearly 20 years (and several technological centuries) ago, that the "public interest" benefits associated with broadcast, or over the air transmission, might be undercut. Essentially Congress expressed a fear, unrealized, that "local content" or the "local voice" might be at risk without the provision of over the air distribution, as opposed to cable distribution (then), or today cable, fiber optic, satellite or Internet.

This was the justification for "must carry," compelling some non-broadcasters to carry local content on their systems. In this approach local stations opt for "must carry" but receive no payment for their signal, their content.

But Congress did not stop there and created an additional advantage for broadcasters -- the right to bargain for the carriage of their content. The scheme created also disadvantaged cable operators by removing their ability to carry the local signals

[1] The Institute for Policy Innovation (IPI) is a 23 year old free market-oriented public policy think tank with headquarters in Lewisville, Texas. IPI is recognized by the IRS as a 501(c)(3) non-profit organization. IPI has been involved for several years with in-depth evaluation of the communications marketplace. Specifically, we have worked on policy development with regard to opening, expanding, and preserving markets for video, voice, and Internet access, including broadband.

without receiving prior consent. The goal of Congress seemed to be achieving public interest goals, mainly those of diversity and localism.

Today, the result of this regime is occasional disputes between video service providers and broadcasters, disputes that threaten to disrupt the consumer's video entertainment options. Not surprisingly, these disputes typically come to public awareness immediately before a significant "television" event, hence causing concern by the public adding to the businesses challenges presented to both the broadcaster and the video providers.

In the end, the retransmission consent system is far from perfect. That said, to the best of our knowledge, rarely has any retransmission consent negotiation escalated to the point where consumers lost access to the main signal of any local broadcast station for any appreciable period of time. But knowing that improvements could be made to avoid more dramatic results, and simply to smooth the process for all interested parties, the system must be reviewed.

Allow At Least Some Market Mechanisms to Address the Challenges

In general, the entire idea of "must carry" should be challenged. Today its best use is largely as a museum relic rather than a real tool for addressing market challenges. Today it serves as a function for continuing to prop up a certain business model which may or may not be the best way to serve the marketplace. Even yesterday, it was a short-sighted government construct rather than a creation of those who know best how to the public – the public, or consumers, themselves. At the very least, attaching the threat of must carry distorts price mechanisms and thus distorts negotiations.

The heart of the problem in retransmission is that government has inserted a bias that upsets the balance of negotiations and introduces economic distortion by providing greater leverage to the broadcasters. Simply put, the retransmission scheme is a wholly artificial construct built during a time of monopoly technology that bears no resemblance to today's vibrant, competitive video service marketplace.

But in a retransmission negotiation, both of the negotiating parties (setting aside the harm to consumers for a moment) have cause for concern.

Video service programmers are currently forced into an untenable situation – they must enter into negotiations knowing that if they do not ultimately capitulate that the broadcasters can force their hand by virtue of must carry. Nothing could be further from a market or in violation of freedom of contract – allowing two, or more, parties to reach a deal which is mutually beneficial.

On the other hand, content providers, in this case broadcasters, also have a challenge. The broadcasters are entitled to fair value for the use of their content. For those providers to continue to provide the very best content such as prime time shows, sports programming, local news, or other local content, like any other industry, they must invest considerable time, effort and resources and bear the risk of marketability of the content they create. Equally important however, content should have to compete against other content so that the best content is valued by the marketplace, not by the judgment of a bureaucrat. Content should compete in an open market, just as service providers must compete.

Video service providers pay for other content and so should pay broadcasters for content, but not in a regime where the broadcasters can demand to have their content aired and then negotiate the price while the federal government holds a proverbial loaded gun to the heads of the video service providers. Free and direct negotiations should be encouraged, without threats of must carry or other compulsory licensing solutions, and the right to enter into (or to NOT enter into) private contracts should rule the day.

The current system, because of the heavy hand of government regulations, provides a fertile environment for accusations of price gouging, whether in the cost of the content or in the price of provision of video service. The simple fact is that inputs into a business, for which the business must pay, do have an impact on the price charged to consumers. That is not the only price point metric but it is one. The problem comes when the government is *de facto* setting prices, or certainly a range of pricing.

Government should not be in the business of setting or in any other way regulating prices. Congress asserted its business wisdom in this situation believing that "many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system," seeming to completely lack the understanding that entire business models may change but even something as simple as understanding that content may increase in value (as it has, not least in part due to the multiplicity of venues that now, as compared to 1992, need to be filled with compelling content to be viable).

The solution is to leave the negotiation of retransmission consent agreements to the private marketplace with government on the sidelines providing law enforcement against wrongdoing--but to stop there ignores the regulated nature of much of the communications industry. So the solution is not quite as easy as "leaving" it to the marketplace, as a free market needs to be established in this realm in the first place. The special government protections and privileges, including the government created right to exclusive provision of video to an attractive marketplace, or in other words, a government created and protected monopoly, must be acknowledged. Reconsidering

the entire context within which the retransmission issue resides would be a challenge but a worthy one.

Local Content Availability

As technology has changed, so too has the need for broadcasters to be the government protected exclusive outlet for so called "local content." Of course, local content is important, but to suggest that one narrow slice of the video market is responsible for providing local content and then conferring special government advantages to that outlet is an antiquated notion.

Today, a consumer's options for content of any sort, including local content, are abundant. Whether through blogs, local news channels with Web sites, or localized delivery of weather, to name but a few examples, the availability of "local content" has never been greater.

So again, the real issue is government substituting its judgment as to what is "local." Localization should drive from consumer demand, not government regulation.

Technological and Competitive Advance

As compared to 1992, broadcasters today have an array of means for distribution. Of course cable is a major distribution channel but in addition local exchange carriers have added robust video capability such as Verizon's FiOS and AT&T's U-Verse. In addition, two national direct broadcast satellite companies compete alongside a variety of broadband Internet options of local content provided directly by local news, weather and sports outlets.

But the fact of the matter is that rattling off a list of current applicable and able technologies is as wrongheaded as dictating government policy which freezes technology in time. As we have mentioned many times, innovation far outpaces regulation or legislation. The great tech hype of today is tomorrow's boring platform upon which new tech hype is built. Even if some form of government moderated dispute resolution system must exist, then this certainly is not it, if for no other reason than it was crafted during a technological yesteryear and embedded with notions of the marketplace peculiar to that time, not taking into account technological progress.

Technology has moved well past this debate, and shows no signs of doing anything but making this retransmission scheme increasingly less relevant and less effective. The time is now to update the regime to facilitate both good faith negotiations and the supremacy of markets over government regulation.

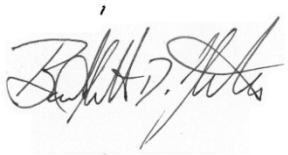
Conclusion

Given the U.S. Supreme Court's very recent decision to not review "must carry" via Cablevision, a thorough review of the system should be undertaken by the FCC.

In the end, Government forced access, "must carry," rules and government dictated amounts of "local programming" should all be scrapped, but an immediate change would be tumultuous and many of the changes would be within the purview of Congress, not the FCC. However, in the interim some explicit glide path toward a free and open market, with an explicit backstop of government if some particular market is not served in a way that meaningfully meets the "localism" requirements of the bygone era, should be adopted.

Currently, consumers lose more than virtually any other party in that they end up with unreliable transmissions and artificially escalating costs which are not tethered to free market demand, to their demand.

Respectfully Submitted,



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