ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 14-1088

SINCLAIR BROADCAST GROUP, INC.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

**1. Parties.**

All parties and intervenors appearing in this Court are listed in the petitioner's brief.

**2. Rulings under review.**

*Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd 3351 (2014) (JA ___).

**3. Related cases.**

This case has not previously been before this Court or any other court. We are aware of no pending cases related to this one.

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# GLOSSARY

| | |
|---|---|
| APA | Administrative Procedure Act |
| DMA | designated market area; a local television market area designated by Nielsen Media Research |
| FCC | Federal Communications Commission |
| JSA | joint sales agreement; an agreement that authorizes one broadcast station to sell some or all of the advertising time on another broadcast station |
| MDU | multiple dwelling unit (*e.g.*, an apartment building) |
| MVPD | multichannel video programming distributor; a person who makes available for purchase, by subscribers or customers, multiple channels of video programming (*e.g.*, a cable operator) |
| NAB | National Association of Broadcasters |

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BRIEF FOR RESPONDENTS

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**JURISDICTION**

Sinclair Broadcast Group, Inc. ("Sinclair") seeks review of a final order of the Federal Communications Commission ("FCC" or "Commission"): *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd 3351 (2014) (JA ___) ("*Order*"). This Court has jurisdiction to review the *Order* pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The *Order* was published in the Federal Register on May 19, 2014. *See* 79 Fed. Reg. 28,615 (2014). As required by 28 U.S.C.

§ 2344 and 47 C.F.R. § 1.4(b)(1) & (d), Sinclair filed its petition for review within 60 days of the *Order*'s publication in the Federal Register.

## QUESTIONS PRESENTED

Cable operators and other providers of subscription video services may not retransmit the signal of a broadcast television station without the station's consent. 47 U.S.C. § 325(b)(1)(A). Most stations negotiate the terms of retransmission with the providers of cable and satellite television service in their local market. Typically, those providers obtain retransmission consent by paying fees to the broadcast stations they wish to carry. These fees are substantial; they topped $1 billion in 2010, and some economists project that they will exceed $2.5 billion in 2016. *Order* n.68 (JA ___).

In recent years, the FCC has witnessed an increase in the joint negotiation of retransmission consent fees by multiple stations serving the same market. The record in this proceeding indicated that such joint negotiation led to much higher retransmission fees than when stations negotiated separately, frustrating the proper functioning of a competitive market. In response to this record, the Commission adopted a narrow, targeted rule designed to address the competitive harm caused by this negotiation practice.

Section 325 of the Communications Act directs the FCC "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent." 47 U.S.C. § 325(b)(3)(A). More specifically, the statute authorizes the Commission to make rules that "prohibit a television broadcast station that provides retransmission consent from … failing to negotiate in good faith." 47 U.S.C. § 325(b)(3)(C)(ii). Exercising its authority under section 325, the agency adopted a rule barring "joint negotiation" of retransmission consent by separately owned "stations that are ranked among the top four stations in a market as measured by audience share." *Order* ¶ 1 (JA ___). These "Top Four" stations are usually network affiliates. The Commission determined that joint negotiation by separately owned Top Four stations in the same geographic market "constitutes a violation of the statutory duty to negotiate retransmission consent in good faith." *Id.*

Sinclair's petition for review presents two issues:

(1) whether the Commission has authority to prohibit joint negotiation of retransmission consent by separately owned Top Four stations serving the same geographic market; and

(2) whether the Commission reasonably concluded that joint negotiation by such stations violates the statutory duty to negotiate retransmission consent in good faith.

## STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an appendix to this brief.

## COUNTERSTATEMENT

### A. Statutory And Regulatory Background

In 1992, Congress created a framework for commercial broadcast television stations to obtain carriage on cable systems.[1] Under this framework, a broadcast station seeking cable carriage has two options. It can demand carriage from the cable operator serving its local market under the Communications Act's cable "must-carry" provision, 47 U.S.C. § 534. Or it can negotiate carriage arrangements with the cable operator under the Act's "retransmission consent" provision, 47 U.S.C. § 325(b).

A station "that exercises its statutory must-carry right … to cable carriage in its local market … does not receive compensation therefor from the cable operator." *Costa de Oro Television, Inc. v. FCC*, 294 F.3d 123, 124 (D.C. Cir. 2002). By contrast, a station that exercises its right to

[1] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4, 6, 106 Stat. 1460, 1471-77, 1482-83.

"retransmission consent" may "receive compensation" from a cable operator "in return" for consenting to retransmission under terms negotiated with the cable operator. *Id.* (citing 47 U.S.C. § 325(b)). "Major network affiliates" – which "have bargaining power" and are "carried voluntarily in most instances" – "normally elect to proceed under the retransmission consent provision." *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 350 (4th Cir. 2001) ("*SBCA*") (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 191 (1997)).

Section 325 requires each broadcast television station "to make an election between the must-carry and the retransmission consent options" every three years. *Costa de Oro*, 294 F.3d at 124 (citing 47 U.S.C. § 325(b)(3)(B)). The statute also directs the FCC "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent." 47 U.S.C. § 325(b)(3)(A).[2]

[2] The agency first adopted such regulations in 1993. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 2996-3006 ¶¶ 129-181 (1993) ("*1993 Implementation Order*").

Congress later extended similar must-carry and retransmission consent options to broadcast stations seeking carriage on satellite television systems.[3] At the same time, Congress directed the FCC to revise its regulations to "prohibit a television broadcast station that provides retransmission consent from … failing to negotiate in good faith" with multichannel video programming distributors ("MVPDs"). 47 U.S.C. § 325(b)(3)(C)(ii).[4]

In response to this mandate, the Commission promulgated a rule requiring broadcasters to negotiate retransmission consent in good faith. *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd 5445, 5488 (2000) ("*Good Faith Order*"); 47 C.F.R. § 76.65(a) (2000). The rule identified seven different "actions or practices" that "violate a broadcast television station's duty to negotiate retransmission consent agreements in good faith." *Good Faith Order*, 15 FCC Rcd at 5488;

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[3] *See* Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-531-34 (must-carry) (codified at 47 U.S.C. § 338), 1501A-537-43 (retransmission consent) (codified in amendments to 47 U.S.C. § 325).

[4] The Communications Act defines a "multichannel video programming distributor" as "a person … who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13). As this Court has noted, "MVPDs include not only cable operators like Comcast but also direct broadcast satellite companies like DirecTV." *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 662 (D.C. Cir. 2009) ("*NCTA*").

47 C.F.R. § 76.65(b)(1) (2000).[5] The rule further provided that whether or not a station engaged in such practices, an MVPD "may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation," that a station "breached its duty to negotiate in good faith." *Good Faith Order*, 15 FCC Rcd at 5489; 47 C.F.R. § 76.65(b)(2) (2000). The rule also established procedures for MVPDs to file complaints concerning a station's failure to negotiate in good faith. *Good Faith Order*, 15 FCC Rcd at 5489; 47 C.F.R. § 76.65(c)-(e) (2000).

In 2004, Congress amended section 325 to require that MVPDs as well as broadcasters negotiate retransmission consent in good faith.[6] The FCC thereafter revised its rules to extend the good faith negotiation requirement to MVPDs. *Implementation of Section 207 of the Satellite Home Viewer*

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[5] These practices include: (1) refusal to negotiate retransmission consent with any MVPD; (2) refusal to designate a representative with authority to make binding representations regarding retransmission consent; (3) refusal to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays negotiations; (4) refusal to offer more than a single, unilateral proposal; (5) failure to respond to an MVPD's retransmission consent proposal; (6) execution of an agreement that requires a station not to enter into a retransmission consent agreement with any MVPD; and (7) refusal to execute a written retransmission consent agreement reflecting the full understanding of the parties. *Good Faith Order*, 15 FCC Rcd at 5488-89; 47 C.F.R. § 76.65(b)(1)(A)-(G) (2000).

[6] *See* Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-477, § 207, 118 Stat. 2809, 3393 (2004) (codified at 47 U.S.C. § 325(b)(3)(C)(iii)).

*Extension and Reauthorization Act of 2004*, 20 FCC Rcd 10339, 10357-58 (2005); 47 C.F.R. § 76.65 (2005).[7]

**B. The Order On Review**

In defining the scope of the good faith negotiation requirement, section 325 states that "it shall not be a failure to negotiate in good faith" for a broadcast station to enter into "retransmission consent agreements containing different terms and conditions, including price terms, with different [MVPDs] if such different terms and conditions are based on competitive marketplace considerations." 47 U.S.C. § 325(b)(3)(C)(ii). The FCC has construed this language to mean that "any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement" because any agreement negotiated under conditions "designed to frustrate the functioning of a competitive market" would not be based on "competitive marketplace considerations." *Order* ¶ 11 (JA ___) (quoting *Good Faith Order*, 15 FCC Rcd at 5470 ¶ 58). This statutory interpretation formed the foundation for the rule at issue here.

[7] The statutory provisions requiring broadcasters and MVPDs to negotiate retransmission consent in good faith are scheduled to expire on January 1, 2015. *See* 47 U.S.C. § 325(b)(3)(C)(ii)-(iii). Congress is considering legislation that would reauthorize these provisions for another five years.

In 2010, a number of MVPDs and public interest groups filed a rulemaking petition asking the FCC to reform its rules governing retransmission consent. Petition for Rulemaking, MB Docket No. 10-71 (filed March 9, 2010) (JA ___). After soliciting comment on this petition, the Commission in 2011 issued a notice of proposed rulemaking seeking comment on several proposed revisions to the rules. *Amendment of the Commission's Rules Related to Retransmission Consent*, 26 FCC Rcd 2718 (2011) (JA ___) ("*NPRM*").

Among other things, the Commission requested comment on a proposal that "would effectively prohibit joint retransmission consent negotiations by stations that are not commonly owned." *NPRM* ¶ 23 (JA ___). Specifically, the agency asked "whether it should be a *per se* violation" of the duty to negotiate in good faith "for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned." *Id.*

Parties submitted extensive comments reflecting "divergent views about whether a rule prohibiting joint negotiation advances the public interest." *Order* ¶ 7 (JA ___). The "record amassed in this proceeding" focused primarily on "evidence regarding the impact of joint negotiation by

Top Four broadcast stations" (*i.e.*, stations ranked in the top four in a market as measured by audience share). *Order* ¶ 10 (JA ___).

After reviewing the record, the Commission opted "to take a more limited approach" to banning joint negotiation than it had originally proposed. *Order* ¶ 10 (JA ___). Rather than bar joint negotiation by *any* broadcast stations that are separately owned, the agency decided to prohibit "only" Top Four stations "from negotiating retransmission consent jointly" with other Top Four stations "if the stations are not commonly owned and serve the same geographic market." *Id.* Top Four stations tend to be affiliates of the four major broadcast networks (NBC, CBS, ABC, and Fox). Under the new rule, such stations may not engage in any conduct or practice (whether formal or informal) that "is designed to facilitate collusion regarding retransmission terms or agreements between or among" those stations. *Order* ¶ 27 (JA ___); *see* 47 C.F.R. § 76.65(b)(1)(viii).[8]

[8] For purposes of this rule, stations "are not 'commonly owned'" if they are not "deemed to be under common ownership, operation or control" under the FCC's broadcast attribution rule, 47 C.F.R. § 73.3555. *Order* ¶ 24 (JA ___). And "stations are deemed to serve the same geographic market if they operate in the same DMA [Designated Market Area]." *Order* ¶ 25 (JA ___). "A DMA is a local television market area designated by Nielsen Media Research. There are 210 DMAs in the United States." *Order* n.25 (JA ___); *see also Costa de Oro*, 294 F.3d at 125.

The Commission took this narrower approach because it was persuaded by the market analysis in some economic studies filed in the record. *Order* ¶ 13 (JA ___-___).[9] On the basis of that analysis, the FCC found that "joint negotiation" by separately owned Top Four stations serving the same market "gives such stations both the incentive and the ability to impose on MVPDs higher fees for retransmission consent than they otherwise could impose if the stations conducted negotiations for carriage of their signals independently." *Id*. The Commission explained: "[I]f two broadcasters can collectively threaten to withdraw their signals unless they are each satisfied, then they will be able to negotiate higher fees for everyone than if each broadcaster can only threaten to withdraw its own signal unless [it] is satisfied." *Order* ¶ 14 (JA ___) (quoting Rogerson Coordinated Negotiation Analysis at 11 (JA ___)).

"Empirical data in the record" supported this finding. *Order* ¶ 16 (JA ____). For example, the American Cable Association presented data from Suddenlink (a cable operator) showing that "where a single entity controls

[9] *See* Rogerson, Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees, May 18, 2010 (JA ___-___) ("Rogerson Joint Control Analysis"); Rogerson, Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market, May 27, 2011 (JA ___-___) ("Rogerson Coordinated Negotiation Analysis"). These studies were prepared for the American Cable Association by William Rogerson, a professor of economics at Northwestern University.

retransmission consent negotiations for more than one Top Four station in a single market, the average retransmission consent fees paid for such stations [were] more than twenty percent higher than the fees paid for other Top Four stations in those same markets." *Id.* (citing Rogerson Joint Control Analysis at 11-12 (JA ___-___)). Similarly, data submitted by three other cable operators documented that when separately owned Top Four stations in the same market jointly negotiated retransmission consent, they obtained fees ranging from 19 to 43 percent higher than the fees paid to Top Four stations that negotiated separately. *Order* ¶ 16 & n.66 (JA ___).[10] The Commission found these data "to be persuasive evidence" that joint negotiation by separately owned Top Four stations in the same market "leads to supra-competitive increases in retransmission consent fees." *Order* ¶ 16 (JA ___).

In the Commission's assessment, the higher fees that Top Four stations obtain via joint negotiation are "supra-competitive" because joint negotiation "eliminate[s] competition among" the stations for carriage on MVPD systems. *Order* ¶ 20 (JA ___). The agency found that because Top Four stations in the same market "are considered by an MVPD seeking carriage

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[10] *See* Letter from Scott Ulsaker, Pioneer Telephone Cooperative, to Marlene Dortch, FCC, Feb. 20, 2014 (JA ___-___); Letter from Christopher A. Dyrek, Cable America Missouri LLC, to Marlene Dortch, FCC, Feb. 20, 2014 (JA ___-___); Letter from Stuart Gilbertson, USA Communications, to Marlene Dortch, FCC, Feb. 24, 2014 (JA ___).

rights to be at least partial substitutes for one another, their joint negotiation prevents an MVPD from taking advantage of the competition or substitution between or among the stations to hold retransmission consent payments down." *Order* ¶ 13 (JA ___). The result is "artificially higher retransmission rates," which "increase input costs for MVPDs." *Order* ¶ 17 (JA ___).

In light of these findings, the Commission concluded that joint negotiation by separately owned Top Four stations in the same market violates the stations' "duty to negotiate in good faith" under section 325. *Order* ¶ 9 (JA ___). The Commission found that joint negotiation by such stations "is not consistent with 'competitive marketplace considerations' within the meaning of Section 325(b)(3)(C) because it eliminates price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent revenues." *Order* ¶ 13 (JA ___). In support of its decision to ban joint negotiation by these stations, the agency cited its "previous determination … that agreements not to compete or to fix prices are 'inconsistent with competitive marketplace considerations and the good faith negotiation requirement.'" *Order* ¶ 11 (JA ___) (quoting *Good Faith Order*, 15 FCC Rcd at 5470 ¶ 58).

Some broadcasters argued that the Commission should not ban joint negotiation because the practice "promotes efficiency by reducing transaction costs." *Order* ¶ 18 (JA ___). The Commission determined, however, that the only "claimed efficiencies" resulting from joint negotiation are "savings of transaction costs in connection with isolated transactions that occur … at three-year or even longer intervals." *Id.* Finding that "any such efficiencies are likely to be modest," the Commission concluded that the small cost savings associated with joint negotiation are "outweighed" by the "supra-competitive retransmission consent fees" it produces. *Id.*

Because joint negotiation of retransmission consent produces no "ongoing operational efficiencies," *Order* ¶ 18 (JA ___), it may differ from other agreements between television stations – *e.g.*, agreements to sell advertising time jointly or to share services and facilities. The *Order* placed no restrictions on any such agreements.[11] The rule adopted in this proceeding prohibits only joint negotiation of retransmission consent by separately owned Top Four stations in the same market.

The Commission found that it had authority to adopt the new rule under section 325(b)(3)(A), which "directs the Commission 'to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent.'" *Order* ¶ 30 (JA ___) (quoting 47 U.S.C. § 325(b)(3)(A)). It concluded that "this provision grants the Commission authority to adopt rules governing retransmission consent negotiations," including a rule barring joint negotiation. *Id.*

The agency also determined that section 325(b)(3)(C)(ii) provided "an independent statutory basis" for the new rule. *Order* ¶ 30 (JA ___). The FCC had long interpreted that provision to prohibit "any effort to stifle

[11] In a separate proceeding, the Commission decided to treat certain joint sales agreements ("JSAs") between television stations as attributable interests for purposes of its media ownership rules. *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 29 FCC Rcd 4371, 4527-42 ¶¶ 340-367 (2014), *petitions for review pending*, *Howard Stirk Holdings, LLC v. FCC*, D.C. Cir. No. 14-1090 (and consolidated cases) (filed May 30, 2014). "A JSA is an agreement that authorizes a broker to sell some or all of the advertising time on the brokered station." *Id.* at 4527 ¶ 342. The Commission is also considering "whether to require broadcast stations to disclose agreements" under which "one station shares studio space, operational support, staff, programming, and/or other services or support with a separately owned station." *Id.* at 4518 ¶ 320.

competition through the negotiation process," finding that anticompetitive negotiating tactics are "inconsistent with competitive marketplace considerations and the good faith negotiation requirement." *Order* ¶ 11 (JA ___) (quoting *Good Faith Order*, 15 FCC Rcd at 5470 ¶ 58). The Commission concluded that section 325(b)(3)(C)(ii) authorized a ban on joint negotiation by separately owned Top Four stations in the same market because such negotiation "undermines competition among … stations that otherwise would compete for carriage on MVPD systems," resulting in "terms and conditions" that "are not based on competitive marketplace considerations." *Order* ¶ 30 (JA ___).

The National Association of Broadcasters ("NAB"), Sinclair, and other station owners asserted that the FCC could not prohibit "joint negotiation by broadcasters without addressing joint negotiation by MVPDs." *Order* ¶ 33 (JA ___). The Commission disagreed. It observed that the record contained no evidence of "a widespread practice" of joint negotiation by MVPDs in the same geographic market. *Id.* Because the record did not document "the extent to which [any] such joint negotiation affects retransmission consent fees obtained by broadcasters," the agency "decline[d] to address at this time whether joint negotiation by same market MVPDs should be considered a violation of the duty to negotiate retransmission consent in good faith." *Id.*

(JA ___-___). But it left open the possibility that it could address the issue in the future, noting in particular that it might give "close scrutiny" to any subsequent complaints involving joint negotiation by MVPDs in the same market. *Id.* (JA ___).

## SUMMARY OF ARGUMENT

Over the years, the FCC has seen an increase in the joint negotiation of retransmission consent by multiple broadcast stations serving the same market. Such joint negotiation has led to supra-competitive increases in retransmission fees.

The anticompetitive impact of joint negotiation is particularly pernicious when two or more of the four most popular broadcast stations in a market team up to negotiate retransmission consent. "[T]he threat" to MVPDs "of simultaneously losing the programming" of multiple Top Four stations "gives those stations undue bargaining leverage in negotiations with MVPDs." *Order* ¶ 13 (JA ___). By coordinating their negotiations, Top Four stations can command significantly higher retransmission fees than they could obtain if each station negotiated separately. Those higher fees are not attributable to "competitive marketplace considerations." *Order* ¶ 30 (JA ___). They are the product of the stations' decision to collaborate rather than compete for carriage. *Id.*

To prevent the competitive harm caused by this practice, the Commission adopted a narrow, targeted rule banning joint negotiation of retransmission consent by separately owned Top Four stations in the same market. The rule focuses solely on joint negotiation of retransmission consent; it does not bar broadcasters from entering into other types of sharing agreements (*e.g.*, an agreement between two stations to sell advertising time jointly or to share a traffic helicopter).

Sinclair challenges the new rule on two grounds. First, it asserts that the FCC lacks authority to ban joint negotiation. Second, it contends that the ban is arbitrary and capricious. Sinclair is wrong on both counts.

I. Two separate provisions of section 325 independently authorize the FCC to ban joint negotiation of retransmission consent by broadcasters.

Section 325(b)(3)(A) empowers the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent." 47 U.S.C. § 325(b)(3)(A). Because stations typically "exercise" this right by negotiating agreements with MVPDs, the Commission reasonably read section 325(b)(3)(A) as a grant of authority "to adopt rules governing retransmission consent negotiations, including [a] rule barring joint negotiation." *Order* ¶ 30 (JA ___).

Section 325(b)(3)(C)(ii) provides another "independent statutory basis" for the ban on joint negotiation. *Order* ¶ 30 (JA ___). It directs the FCC to adopt rules that "prohibit a television broadcast station that provides retransmission consent from … failing to negotiate in good faith." 47 U.S.C. § 325(b)(3)(C)(ii). It also specifies that stations that negotiate "different terms and conditions" of carriage with different MVPDs do not violate the duty to negotiate in good faith "if such different terms and conditions are based on competitive marketplace considerations." *Id.* In construing this provision, the Commission has long maintained that "any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement" because any agreement produced by such an anticompetitive process would *not* be based on "competitive marketplace considerations." *Good Faith Order*, 15 FCC Rcd at 5470 ¶ 58.

Consistent with this longstanding statutory interpretation, the FCC reasonably concluded that it has authority under section 325(b)(3)(C)(ii) to ban joint negotiation by separately owned Top Four stations in the same market. The record showed that this sort of joint negotiation "leads to supra-competitive increases in retransmission consent fees." *Order* ¶ 16 (JA ___). As the Commission explained, such fee increases "are not based on competitive marketplace considerations." *Order* ¶ 30 (JA ___). Joint negotiation generates higher fees because it "undermines competition among … stations that otherwise would compete for carriage on MVPD systems." *Id.* This kind of anticompetitive practice violates the duty to negotiate in good faith. Therefore, section 325(b)(3)(C)(ii) authorizes the Commission to prohibit the practice.

II. In conducting its analysis of the competitive impact of joint negotiation, the Commission properly turned to economics for guidance. Economic theory establishes that "when providers of inputs that are at least partial substitutes for one another bargain jointly with a downstream user of the inputs, the returns to the input providers are higher than if the input providers negotiated separately with the downstream user." *Order* ¶ 14 (JA ___). The Commission also understood that "collaboration by competing broadcast stations could harm competition." *Id.* (JA ___) (internal quotation marks omitted). Consistent with these fundamental principles, the Commission found that joint negotiation by separately owned Top Four stations in the same market "leads to supra-competitive increases in retransmission consent fees." *Order* ¶ 16 (JA ___).

Empirical evidence in the record supported this conclusion. Data from four different cable operators showed that when separately owned Top Four stations in the same market coordinated their negotiations, they obtained retransmission consent fees ranging from 19 to 43 percent higher than the fees paid to Top Four stations that negotiated separately. *Order* ¶ 16 & nn.65-66 (JA ___). On the basis of this record, the Commission reasonably concluded that joint negotiation by separately owned Top Four stations in the same market violates the statutory duty to negotiate in good faith.

There is no basis for Sinclair's claim (Br. 38-43) that the Commission misapplied principles of antitrust law. The Commission did not actually apply antitrust law in this proceeding; nor was it required to do so. It did not find that joint negotiation by broadcasters violates the antitrust laws. Rather, the agency merely took antitrust principles into account when it interpreted the phrase "competitive marketplace considerations" in the Communications Act. The FCC's authority under section 325 of the Communications Act "is not limited to the prohibition of conduct that falls within the scope of the Sherman Act." *Order* n.87 (JA ___). Contrary to Sinclair's suggestion, the Commission was not required to find a violation of antitrust law before it imposed a ban on joint negotiation under section 325.

Finally, the FCC's new rule does not conflict with any Commission precedent. Sinclair's claims to the contrary are unfounded.

## STANDARD OF REVIEW

Sinclair's challenge to the FCC's statutory authority is reviewed under *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). If "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question" for the Court is whether the agency has adopted "a permissible construction of the statute." *Id.* at 843. If the implementing agency's reading of an ambiguous statute is reasonable, the Court must "accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). This deference applies to the FCC's interpretation of an ambiguous statute concerning "the scope of the agency's jurisdiction." *Verizon v. FCC*, 740 F.3d 623, 635 (D.C. Cir. 2014) (citing *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013)).

Under the Administrative Procedure Act ("APA"), Sinclair cannot prevail unless it demonstrates that the FCC's new rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this highly deferential standard of review," the

Court "presumes the validity of agency action." *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotation marks omitted). "In assessing whether [the] rule is reasonable and reasonably explained," the Court "must not substitute [its] judgment for that of the agency." *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009) (internal quotation marks omitted).

In reviewing the FCC's *Order*, the Court does "not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority." *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011) (internal quotation marks omitted). The *Order* must be upheld "as long as it 'examine[s] the relevant data and articulate[s] a satisfactory explanation for [the FCC's] action including a rational connection between the facts found and the choice made.'" *Sioux Valley Rural Television, Inc. v. FCC*, 349 F.3d 667, 674 (D.C. Cir. 2003) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

## ARGUMENT

### I. THE COMMISSION HAS AUTHORITY TO PROHIBIT JOINT NEGOTIATION OF RETRANSMISSION CONSENT AGREEMENTS BY BROADCAST STATIONS

Two different provisions of the Communications Act – section 325(b)(3)(A) and section 325(b)(3)(C)(ii) – independently authorize the FCC to ban broadcasters from jointly negotiating retransmission consent. *Order* ¶ 30 (JA ___).

"When an agency offers multiple [independent] grounds for a decision," the Court "will affirm the agency so long as any one of the grounds is valid." *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003). To succeed in its challenge to the FCC's authority, Sinclair must establish that neither section 325(b)(3)(A) nor section 325(b)(3)(C)(ii) authorizes the Commission's new rule. It cannot make that showing. Each of these provisions gave the FCC ample authority to adopt the rule.

#### A. Section 325(b)(3)(A) Of The Communications Act Authorizes The Ban On Joint Negotiation.

Section 325(b)(3)(A) empowers the FCC "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent." 47 U.S.C. § 325(b)(3)(A). "Retransmission consent is typically granted through a retransmission consent contract." *Cedar Rapids Television Co. v. MCC Iowa LLC*, 560 F.3d 734, 735 (8th Cir. 2009).

Because negotiation plays such an integral part in broadcasters' "exercise … of the right to grant retransmission consent," 47 U.S.C. § 325(b)(3)(A), the Commission reasonably concluded that its authority to regulate this exercise includes the "authority to adopt rules governing retransmission consent negotiations," such as a "rule barring joint negotiation." *Order* ¶ 30 (JA ___). The Court should uphold this reasonable statutory interpretation.

Sinclair maintains that it is "perfectly clear" (Br. 27) that section 325(b)(3)(A) only authorizes the agency to require stations to elect between must-carry and retransmission consent every three years. Br. 26-29; *see also* NAB Br. 21. "To prevail at *Chevron* step one," however, Sinclair "must show" that the statute "is unambiguously limited to" requiring stations to make an election. *NCTA*, 567 F.3d at 666. This it cannot do.

Sinclair points out (Br. 27-28) that section 325(b)(3)(B) states: "The regulations required by [section 325(b)(3)(A)] shall require that television stations, within one year after [the date of enactment] and every three years thereafter, make an election between the right to grant retransmission consent under this subsection and the right to [must-carry] under [47 U.S.C. § 534]." 47 U.S.C. § 325(b)(3)(B). While that provision makes clear that the rules adopted under section 325(b)(3)(A) *must* require broadcasters to make a triennial election, the statute is silent as to whether those rules *may only* regulate the election process. Faced with this statutory ambiguity, the Commission reasonably found that its rulemaking authority under section 325(b)(3)(A) is not confined to requiring broadcasters to choose between must-carry and retransmission consent.

The statute's language supports the Commission's interpretation. Although Sinclair argues that the agency's authority under section 325(b)(3)(A) is restricted to regulating only "the *election* of retransmission consent" or must-carry (Br. 28), section 325(b)(3)(A) does not even use the word "election." It calls for the FCC "to establish regulations to govern" broadcasters' "*exercise*" of their "right to grant retransmission consent." 47 U.S.C. § 325(b)(3)(A) (emphasis added). In this context, the term "exercise" is broader than "election." A station does not "exercise" its "right to grant retransmission consent" merely by electing to proceed under the retransmission consent statute. As the legislative history of section 325 makes clear, a station typically does not consent to retransmission until it negotiates the terms of carriage with an MVPD. *See* S. Rep. No. 102-92, at 37 (for stations "electing to exercise retransmission consent," carriage "will be entirely a matter of negotiation between" them and MVPDs). Therefore, the Commission reasonably construed the word "exercise" in section 325(b)(3)(A) to encompass retransmission consent negotiations.

The second sentence of section 325(b)(3)(A) reinforces the reasonableness of the agency's reading of the statute. It directs the FCC to "consider … the impact that the grant of retransmission consent … may have on the rates for the basic [cable] service tier" and to "ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under [47 U.S.C. § 543(b)(1)] to ensure that the rates for the basic service tier are reasonable." 47 U.S.C. § 325(b)(3)(A). By instructing the agency to consider the impact of the *grant* of retransmission consent on basic cable service rates, Congress plainly contemplated that the rules adopted under section 325(b)(3)(A) would regulate the process for granting consent, including the negotiation of retransmission agreements.

Congress understood that a station could condition its consent on the payment of retransmission fees, which could lead to higher cable rates. For that reason, Congress admonished the FCC to craft retransmission consent rules that "do not conflict with" the agency's statutory obligation to ensure that basic cable service rates are "reasonable." 47 U.S.C. § 325(b)(3)(A). Such an admonition would have been unnecessary if (as Sinclair claims) the rules implementing section 325(b)(3)(A) could do no more than require broadcasters to choose between retransmission consent and must-carry. Rules of such limited scope would not perceptibly affect basic cable rates.

Thus, under Sinclair's reading of the statute, the second sentence of section 325(b)(3)(A) would become superfluous. The Commission rightly rejected Sinclair's cramped construction. "The statute should be read in a manner that gives effect to all of its provisions." *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 421 (D.C. Cir. 2009).

Contrary to Sinclair's assertion (Br. 28), there is no inconsistency between the FCC's determination that it has "broad discretion to adopt rules implementing Section 325," *Order* ¶ 31 (JA ___), and its previous statement that it has "minimal discretion in implementing the general must-carry obligation provisions." *1993 Implementation Order*, 8 FCC Rcd at 2972 ¶ 27. As the Commission properly recognized, the Act's detailed must-carry provisions afford the agency little discretion in implementing them. *See* 47 U.S.C. § 534 (cable must-carry); 47 U.S.C. § 338 (satellite must-carry). Section 325, on the other hand, merely directs the FCC to adopt rules governing "the exercise by television broadcast stations of the right to grant retransmission consent." 47 U.S.C. § 325(b)(3)(A). The Commission reasonably found that this broad directive authorizes regulation of the negotiation process by which stations "exercise" their "right to grant retransmission consent." The agency's decision to ban certain broadcasters from jointly negotiating retransmission consent falls well within the rulemaking authority granted by section 325(b)(3)(A).

### B. Section 325(b)(3)(C)(ii) Of The Communications Act Provides An Independent Basis For The Ban On Joint Negotiation.

Section 325(b)(3)(C)(ii) grants the FCC rulemaking authority to "prohibit a television broadcast station that provides retransmission consent from … failing to negotiate in good faith." 47 U.S.C. § 325(b)(3)(C)(ii). It further provides that a broadcaster does not violate the duty to "negotiate in good faith" by negotiating agreements with different MVPDs that contain "different terms and conditions," so long as "such different terms and conditions are based on competitive marketplace considerations." *Id.*

The FCC has long construed this provision to prohibit broadcasters from adopting anticompetitive negotiating practices. In the Commission's view, such practices do "not meet the good faith negotiation requirement" because they "frustrate the functioning of a competitive market" and produce agreements that are not based on "competitive marketplace considerations." *Order* ¶ 11 (JA ___) (quoting *Good Faith Order*, 15 FCC Rcd at 5470 ¶ 58).

Consistent with this settled interpretation of the statute, the Commission reasonably found that it had authority under section 325(b)(3)(C)(ii) to ban joint negotiation of retransmission consent by separately owned Top Four stations in the same market. The agency explained that such joint negotiation "eliminates price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent revenues." *Order* ¶ 13 (JA ___). As a result, joint negotiation enables Top Four stations in the same market "to impose on MVPDs higher fees for retransmission consent than they otherwise could impose if the stations conducted negotiations for carriage of their signals independently." *Id.* (JA ___-___). Because "the terms and conditions resulting from such [joint] negotiation are not based on competitive marketplace considerations," the Commission concluded that it had authority to ban such joint negotiation under section 325(b)(3)(C)(ii). *Order* ¶ 30 (JA ___).[12]

There is no basis for Sinclair's claim that the Commission's new rule "goes far beyond" the grant of authority in section 325(b)(3)(C)(ii). Br. 30. According to Sinclair, the statute's "reference to 'competitive marketplace [considerations]' is limited to an evaluation of whether different terms in

[12] The Commission has reasonably construed the statutory phrase "competitive marketplace considerations" to implicate "national policies favoring competition." *Good Faith Order*, 15 FCC Rcd at 5470 ¶ 58. In light of the statute's reference to the "competitive marketplace," NAB cannot plausibly claim that Congress intended for the FCC to rely exclusively on labor law to construe the phrase "negotiate in good faith" in section 325(b)(3)(C)(ii). NAB Br. 16-22.

agreements with different MVPDs violate the good faith obligation," and the FCC may only find "that different terms in different agreements are bad faith if they are not based on 'competitive marketplace' conditions." *Id.* That is precisely what the Commission found here.

The record contained evidence that when separately owned Top Four stations in the same market jointly negotiate, retransmission fees are much higher than when Top Four stations negotiate separately. *Order* ¶ 16 & n.66 (JA ___-___). The Commission reasonably determined that this difference in fees is not attributable to competitive marketplace considerations, but instead stems from the decision by some stations to coordinate their efforts rather than compete for carriage: "[J]oint negotiation enables Top Four stations to obtain higher retransmission consent fees because the threat of simultaneously losing the programming of the stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs." *Order* ¶ 13 (JA ___).

Sinclair contends that the FCC exceeded its authority under section 325 by "tampering with the outcome of [retransmission consent] negotiations." Br. 25. Not so. This argument rests on the flawed premise that the Commission's new rule regulates the substance of retransmission agreements.

To the contrary, the rule governs only the process for negotiating retransmission consent, not the substance of the negotiations.

The ban on joint negotiation is designed to ensure that negotiations are conducted in good faith (regardless of their outcome). As long as broadcasters comply with the FCC's rules regarding good faith negotiation (including the ban on joint negotiation), they are free to agree to any terms and conditions they can obtain through the negotiation process. Thus, the ban on joint negotiation does not involve "'substantive oversight' of retransmission agreements." Br. 53 (quoting *Good Faith Order*, 15 FCC Rcd at 5448 ¶ 6). Nor does the new rule "dictate the outcome" of retransmission consent negotiations in contravention of Congressional intent. Br. 24 (quoting S. Rep. No. 102-92, at 36).[13]

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[13] To be sure, the Commission expects that its "rule barring joint negotiation" will have the effect of "preventing supra-competitive increases in retransmission consent fees." *Order* ¶ 17 (JA ___). But a rule that regulates the negotiation process – and thereby incidentally affects the outcome of negotiations – is a far cry from a rule that "dictates" the outcome of negotiations by, for example, imposing a cap on retransmission fees. The rule barring joint negotiation does not regulate the terms of retransmission agreements, even if its "practical effect" is to reduce retransmission fees. *See Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999) (the Court does not "view the regulatory scope of agency actions in terms of their practical or even foreseeable effects").

The FCC has reasonably construed two separate provisions of section 325(b)(3) to authorize a ban on joint negotiation of retransmission consent by broadcast stations. The Court should affirm that the agency has authority to impose such a ban. *See City of Arlington*, 133 S. Ct. at 1868-75.

## II. THE COMMISSION REASONABLY FOUND THAT JOINT NEGOTIATION OF RETRANSMISSION CONSENT BY SEPARATELY OWNED TOP FOUR STATIONS IN THE SAME MARKET VIOLATES THE STATUTORY DUTY TO NEGOTIATE IN GOOD FAITH

In addition to its statutory claims, Sinclair asserts that the *Order* is arbitrary and capricious for three reasons: (1) the FCC lacked an adequate record to justify its new rule (Br. 44-46); (2) it "misapplied" antitrust principles (Br. 38-43); and (3) it deviated from past practice without explanation (Br. 34, 37-39, 51-56). These arguments have no merit.

Section 325 specifies that broadcasters that negotiate "different terms and conditions" of retransmission consent with different MVPDs do not violate the statutory duty "to negotiate in good faith … if such different terms and conditions are based on competitive marketplace considerations." 47 U.S.C. § 325(b)(3)(C)(ii). When it first adopted rules implementing section 325(b)(3)(C), the Commission found it "implicit" in the statute that "any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement" because the use of anticompetitive negotiation techniques would yield agreements that are *not* based on "competitive marketplace considerations." *Good Faith Order*, 15 FCC Rcd at 5470 ¶ 58.

Consistent with its longstanding interpretation of section 325, the Commission in this case explicitly concluded that when separately owned Top Four stations in the same market jointly negotiate retransmission consent, they violate the duty to negotiate in good faith. The agency explained that such joint negotiation "eliminates price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent revenues." *Order* ¶ 13 (JA ___). Consequently, "the terms and conditions resulting from such negotiation are not based on competitive marketplace considerations." *Order* ¶ 30 (JA ___).

Specifically, the Commission found that because Top Four stations in the same market "are considered by an MVPD seeking carriage rights to be at least partial substitutes for one another, their joint negotiation prevents an MVPD from taking advantage of the competition or substitution between or among the stations to hold retransmission consent payments down." *Order* ¶ 13 (JA ___). *See* Salop, *et al.*, Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent

Negotiations, June 3, 2010, at 53 ¶ 108 (JA ___) ("joint negotiation eliminates competition between" local broadcast stations serving the same market; an MVPD negotiating with those stations "is unable to gain a bargaining advantage by playing one broadcaster off against another").[14]

The agency also determined that when Top Four stations in the same market jointly negotiate, they have "both the incentive and the ability to impose on MVPDs higher fees for retransmission consent than they otherwise could impose" if they negotiated separately. *Order* ¶ 13 (JA ___-___). These "artificially higher retransmission rates … increase input costs for MVPDs." *Order* ¶ 17 (JA ___).

In light of these findings, the FCC reasonably concluded that "a rule prohibiting joint negotiation" by separately owned Top Four stations in the

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[14] NAB – but not Sinclair – disputes the FCC's finding that Top Four stations are substitutes for each other. NAB Br. 30-33. That issue is not properly before the Court. As an intervenor, NAB "may join issue only on a matter that has been brought before the court by another party." *Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 145-46 (D.C. Cir. 2010) (quoting *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)). In any event, contrary to NAB's claim, the Commission had a solid basis for concluding that Top Four stations are "at least partial substitutes for one another." *Order* ¶ 13 (JA ___). As the agency observed, "all Top Four broadcast stations in a market" typically offer "local news and weather." *Order* n.51 (JA ___). Moreover, the record supports the finding that when multiple Top Four stations jointly negotiate carriage rights, an MVPD will pay those stations higher retransmission fees rather than "risk … losing two [or more] highly desirable signals" by rejecting the stations' demands. *Order* ¶ 15 (JA ___).

same market was "necessary to prevent the competitive harms resulting from such negotiation." *Order* ¶ 9 (JA ___). Sinclair's arguments to the contrary are unavailing.

### A. The Commission Based Its Conclusion On Sound Economic Theory And Substantial Record Evidence.

Although Sinclair claims otherwise (Br. 44-46), "economic principles" support the FCC's finding that "joint negotiation results in higher retransmission consent fees." *Order* ¶ 14 (JA ___-___). That finding is consistent with a proposition that "has been validated in other economic contexts": "[W]hen providers of inputs that are at least partial substitutes for one another bargain jointly with a downstream user of the inputs, the returns to the input providers are higher than if the input providers negotiated separately with the downstream user." *Id.* (JA ___).[15] Applying this principle to retransmission consent, one economist concluded : "[I]f two broadcasters can collectively threaten to withdraw their signals unless they are each satisfied, then they will be able to negotiate higher fees for everyone

[15] "The quintessential example of joint negotiation by input providers is collective bargaining by union members." *Order* n.57 (JA ___) (citing Henrik Horn & Asher Wolinsky, *Worker Substitutability and Patterns of Unionisation*, 98 THE ECONOMIC JOURNAL 484-497 (1988)). The general concept that input providers can obtain higher returns through joint negotiation is also reflected in the merger and collaboration guidelines employed by the Federal Trade Commission and the Department of Justice. *See Order* nn.58-59 (JA ___-___).

than if each broadcaster can only threaten to withdraw its own signal unless [it] is satisfied." Rogerson Coordinated Negotiation Analysis at 11 (JA ___) (quoted in *Order* ¶ 14 (JA ___)). The Commission adopted this sensible conclusion.[16]

The Commission also agreed with the Department of Justice that collaboration by competing broadcast stations could "harm competition by increasing the potential for firms to coordinate over price or other strategic dimensions, and/or by reducing incentives of firms to compete with one another." *Order* ¶ 14 (JA ___) (quoting *Ex Parte* Submission of the United States Department of Justice, MB Docket Nos. 09-182, 07-294, 04-256, Feb. 20, 2014, at 17 (JA ___) ("DoJ *Ex Parte*")). Recognizing the threat that collaboration by competing broadcast stations poses to competition, and having found that broadcast stations compete for retransmission consent, *Order* ¶ 13 (JA ___), the Commission was justified in finding that broadcasters' joint negotiation of retransmission consent "eliminate[s]

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[16] The agency reached a similar conclusion when it reviewed the Comcast-NBCU merger. It "concluded that coordinated negotiations of carriage rights for two blocks of 'must-have' programming … would give increased bargaining leverage to the programmer and lead to higher prices for an MVPD buyer, who would be at risk of losing two highly desirable signals if negotiations failed to yield an agreement." *Order* ¶ 15 (JA ___) (citing *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 FCC Rcd 4238, 4294 ¶¶ 135-136 (2011)).

competition among them and thereby generate[s] supra-competitive retransmission consent fees." *Order* ¶ 20 (JA ___).

As the Commission noted, economic theory supports a finding that joint negotiation by *any* separately owned stations in the same market will "tend to yield retransmission consent fees that are higher than … if the stations competed against each other in seeking fees." *Order* ¶ 10 (JA ___-___). Nonetheless, because "the record amassed in this proceeding" focused on "evidence regarding the impact of joint negotiation by Top Four broadcast stations," the Commission decided to adopt a more targeted approach, prohibiting only Top Four stations from jointly negotiating with other Top Four stations if they "are not commonly owned and serve the same geographic market." *Id.* (JA ___-___). The record contained substantial evidence that joint negotiation by such stations "leads to supra-competitive increases in retransmission consent fees." *Order* ¶ 16 (JA ___). Empirical data from four different cable operators showed that when separately owned Top Four stations in the same market coordinated their negotiations, retransmission consent fees were 19 to 43 percent higher than when Top Four stations negotiated separately. *Order* ¶ 16 & nn.65-66 (JA ___).

Sinclair contends that this empirical evidence is insufficient to warrant a ban on joint negotiation (Br. 44-46; *see also* NAB Br. 28-30), but "the widespread use of non-disclosure clauses in retransmission consent agreements limits the amount of publicly available information that would permit a more comprehensive analysis of how joint negotiation affects retransmission consent fees." *Order* n.65 (JA ___) (citing Rogerson Joint Control Analysis at 11 (JA ___)).[17] Under the circumstances, the Commission reasonably relied on the evidence that was available. All of that evidence pointed in one direction: It verified the prediction that joint negotiation by separately owned Top Four stations in the same market produces substantial increases in retransmission consent fees.

Broadcasters "did not lack the means to challenge" the evidence or to present contrary evidence; they "had access" to all the retransmission agreements they negotiated. *See Cable & Wireless*, 166 F.3d at 1234. If they knew of any jointly negotiated agreements that did *not* result in substantially

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[17] *See also* Government Accountability Office, *Media Ownership: FCC Should Review the Effects of Broadcaster Agreements on Its Media Policy Goals*, GAO-14-558, at 22 (June 2014) ("GAO Report") ("comprehensive data" on "retransmission consent fees are not available, because retransmission consent fee negotiations are subject to non-disclosure agreements"). Sinclair asserts that the GAO Report found that the FCC lacked sufficient information to assess the competitive impact of joint negotiation. Br. 50-51. As Sinclair acknowledges, however, the GAO Report "was issued three months after" the FCC adopted the *Order*. Br. 51. Because the Commission had no opportunity to address the GAO Report in the *Order*, any claim based on the GAO Report is barred by 47 U.S.C. § 405(a). *Globalstar, Inc. v. FCC*, 564 F.3d 476, 483-85 (D.C. Cir. 2009).

higher retransmission fees, they presumably would have brought such agreements to the FCC's attention. The record contains no evidence of any such agreements.

The Commission previously faced a similar evidentiary quandary when it decided to prohibit "exclusivity agreements" giving cable operators "the exclusive right to provide service to the residents" of multiple dwelling units ("MDUs"). *See NCTA*, 567 F.3d at 661-62. Record evidence of such agreements was sparse because "many MDU owners [were] unwilling or legally unable to make public the contracts containing them." *Id.* at 669 (internal quotation marks omitted). Nonetheless, the Court held in *NCTA* that "the Commission used the evidence before it to make a reasonable prediction" that exclusivity agreements would harm competition in the MVPD market. *Id.* "In that setting," the Court explained, "[s]ubstantial evidence does not require a complete factual record – [the Court] must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency." *Id.* (internal quotation marks omitted).

Here, as in *NCTA*, the FCC used the best available evidence to make a reasonable predictive judgment that a particular practice, if left unchecked, would harm competition. Here, as in *NCTA*, the Court should uphold the agency's decision to prohibit the practice in question.

The Commission had good reason to believe that joint negotiation by Top Four stations was especially harmful. Such stations are typically affiliated with one of the four major broadcast networks. Due to their popularity, these "network affiliates have bargaining power" when they negotiate retransmission consent. *SBCA*, 275 F.3d at 350. That power is magnified when two or more Top Four stations in the same market jointly negotiate carriage. The record indicated that "the threat" to MVPDs "of simultaneously losing the programming of [Top Four] stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs." *Order* ¶ 13 (JA ___); *see id.* n.53 (JA ___). Thus, it was reasonable for the Commission "to infer that the magnitude of fee increases derived from joint negotiation is larger for Top Four station combinations than for other stations." *Order* ¶ 15 (JA ___).[18]

Sinclair complains that the Commission refused to consider record evidence that MVPDs typically have "greater bargaining leverage" than broadcasters. Br. 46; *see also* NAB Br. 36-37. That evidence was irrelevant to the agency's analysis here. The Commission rightly rejected the notion that it "should permit joint negotiation" to promote "a level playing field for stations in … markets where an MVPD has significant bargaining leverage." *Order* ¶ 20 (JA ___). It is not "the Commission's role in the retransmission consent process to adjust bargaining power between suppliers and their customers by countenancing anticompetitive practices." *Id.* The FCC's role in this context is simply to ensure that broadcasters and MVPDs negotiate in good faith pursuant to section 325(b)(3)(C). As long as the parties to

[18] Sinclair asserts (Br. 49) that joint negotiation agreements have proliferated among Top Four stations because "the FCC still prohibits broadcasters from owning two stations in most television markets under the local ownership rule" this Court remanded in *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). Although Sinclair questions the need for the local ownership rule (Br. 48-50), that rule is not at issue in this case (Br. 2). Insofar as Sinclair insinuates that the Commission has not properly responded to the remand in *Sinclair*, that claim is misplaced. The Third Circuit expressly rejected Sinclair's claim that the FCC's decision to retain the local television ownership rule violated this Court's mandate in *Sinclair*. *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 460 (3d Cir. 2011) (holding that the agency had "offered a new and reasonable rationale" for the rule).

retransmission consent negotiations do not employ anticompetitive tactics to enhance their bargaining power, they may satisfy their statutory duty to negotiate in good faith even if one party has greater bargaining leverage than the other.[19]

Sinclair argues that the FCC acted improperly when it banned joint negotiation by broadcasters without imposing a corresponding ban on MVPDs. Br. 31-34. That claim is baseless. In crafting its new rule, the Commission reasonably exercised its discretion to take "one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind." *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (internal quotation marks omitted). As the Commission explained, the record here did "not establish" that joint negotiation was a "widespread practice" among MVPDs in the same market; nor did it document "the extent to which [any] such joint negotiation affects retransmission consent fees obtained by broadcasters." *Order* ¶ 33 (JA

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[19] NAB faults the FCC for declining to address arguments that joint negotiation does not result in service disruptions or higher retail rates for cable service. NAB Br. 23-27. As an intervenor, NAB is barred from raising these claims because Sinclair did not raise them. *Illinois Bell*, 911 F.2d at 786. In any event, the FCC explained that it did not need to address the arguments concerning carriage disruptions and cable rate increases because it did not rely on either of those rationales for banning joint negotiation. *Order* n.49 (JA ___); *see also id.* ¶ 17 & n.70 (JA ___).

___).[20] Given these gaps in the record, the FCC reasonably "decline[d] to address at this time whether joint negotiation by same market MVPDs should be considered a violation of the duty to negotiate retransmission consent in good faith." *Id.* (JA ___-___).

The Commission indicated, however, that it could revisit this issue "should circumstances warrant." *Order* ¶ 33 (JA ___). In particular, it said that it could "give close scrutiny" to a future complaint involving joint negotiation by MVPDs in the same market. *Id.* (JA ___). In the meantime, the agency reminded MVPDs that they (like broadcasters) "are obligated by the statute to negotiate retransmission consent in good faith." *Id.*

### B. The Commission Did Not Misapply Antitrust Principles.

There is no basis for Sinclair's assertion (Br. 38-43) that the FCC misapplied antitrust principles in the *Order*. The FCC's authority to prohibit anticompetitive practices under section 325 "does not depend on a showing"

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[20] Sinclair fails to substantiate its claim that "MVPDs routinely hire the same bargaining agent to represent MVPDs located in the same market." Br. 33. It purports to base that claim on comments filed by NBC-affiliated stations. Those comments merely stated that "MVPDs *sometimes*" use "a third party as an agent to assist in negotiating retransmission consent." Comments of NBC Television Affiliates, May 27, 2011, at 18 (JA ___) (emphasis added). The comments did not specify whether any MVPDs that compete in the same market use the same agent. The Commission reasonably determined that this sort of vague "anecdotal evidence" could not support a finding that joint negotiation is a "widespread practice" among MVPDs in the same market. *Order* ¶ 33 (JA ___).

that those practices "constitute a violation of the antitrust laws." *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 223 (1943) ("*NBC*") (internal quotation marks omitted). As this Court has emphasized, the Commission is "not strictly bound by the dictates of [the antitrust] laws." *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc) (internal quotation marks omitted). Rather, it is "entrusted with the responsibility to determine when and to what extent the public interest would be served by competition" in the industries within its purview. *Id.* In assessing "the proper role of competitive forces in an industry" it regulates, the FCC must base its analysis "not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry." *Id.* (quoting *FCC v. RCA Commc'ns, Inc.*, 346 U.S. 86, 98 (1953)).

Although "the Commission is not charged with enforcement of the antitrust laws," antitrust considerations can inform the agency's evaluation of the public interest in implementing the provisions of the Communications Act. *Equip. Distributors' Coal. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987); *see also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) (the FCC may "take antitrust policies into account in making licensing decisions pursuant to the public-interest standard"). In this case, antitrust principles helped shape the agency's assessment of the competitive impact of joint negotiation.

The FCC sought guidance from the merger and collaboration guidelines adopted by the Federal Trade Commission and the Department of Justice. *Order* nn.58-59 (JA ___-___). Those guidelines are consistent with the proposition that "when providers of inputs that are at least partial substitutes for one another bargain jointly with a downstream user of the inputs, the returns to the input providers are higher than if the input providers negotiated separately with the downstream user." *Order* ¶ 14 (JA ___). Applying that principle to retransmission consent, the FCC reasonably concluded that joint negotiation by separately owned Top Four stations in the same market "results in higher retransmission consent fees." *Id.*

The FCC also noted that "collaboration by competing broadcast stations could 'harm competition by increasing the potential for firms to coordinate over price or other strategic dimensions, and/or by reducing incentives of firms to compete with one another.'" *Order* ¶ 14 (JA ___) (quoting DoJ *Ex Parte* at 17 (JA ___)). "[T]his theory of harm is a well-established concern in antitrust enforcement." *Order* ¶ 15 (JA ___) (internal quotation marks omitted).

The Commission reasoned that joint negotiation by separately owned Top Four stations in the same market "is akin to the type of coordinated conduct disfavored by antitrust law." *Order* ¶ 22 (JA ___). If such stations did not coordinate their negotiations, they "would compete head-to-head for distribution on MVPD systems and the associated retransmission consent revenues." *Id.* (JA ___). The Commission reasonably concluded that "the terms and conditions resulting from such [joint] negotiation are not based on competitive marketplace considerations." *Order* ¶ 30 (JA ___).

In arguing that the FCC misapplied antitrust principles (Br. 38-43), Sinclair misapprehends the agency's mandate. Congress charged the FCC with implementing the Communications Act, *not* enforcing the antitrust laws. The Commission's task in this proceeding was to determine whether joint negotiation by broadcasters violates the duty to negotiate retransmission consent in good faith under section 325 of the Act. The answer to that question hinged on whether joint negotiation produces retransmission agreements that are not "based on competitive marketplace considerations." 47 U.S.C. § 325(b)(3)(C)(ii).

In construing that statutory language, the FCC sensibly looked to antitrust principles for guidance. But it was not required to base its reading of the statute "exclusively on the letter of the antitrust laws." *United States v.*

*FCC*, 652 F.2d at 88. The FCC's authority under section 325 of the Communications Act "is not limited to the prohibition of conduct that falls within the scope of the Sherman Act." *Order* n.87 (JA ___). If a negotiating practice yields retransmission agreements that are not based on competitive marketplace considerations, the practice violates section 325 even if it does not violate antitrust law. *See NBC*, 319 U.S. at 223; *United States v. FCC*, 652 F.2d at 88.[21]

There is no merit to Sinclair's assertion (Br. 38) that the FCC acted improperly by adopting "a *per se* rule" instead of employing "case-by-case adjudication." The Commission "has very broad discretion to decide whether to proceed by adjudication or rulemaking." *Conference Group, LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013). Exercising that discretion here, the Commission reasonably found that a rule will be "more administratively efficient" and "more effective in preventing … competitive harms … than case-by-case adjudication." *Order* ¶ 12 (JA ___). Although Sinclair suggests otherwise, the rule is reasonably designed "to identify conduct that amounts to bad faith in *all* circumstances." Br. 38. The Commission has the discretion to prohibit by rule conduct that would not be deemed *per se*

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[21] *Cf. Prometheus Radio Project v. FCC*, 373 F.3d 372, 413-14 (3d Cir. 2004) (the FCC's rule restricting ownership of local television stations is not duplicative of antitrust regulation).

unlawful under antitrust law. For that reason, Sinclair's extended discussion of the antitrust "rule of reason" (Br. 40-42) is beside the point.[22]

Sinclair suggests that the Commission's finding of competitive harm did not adequately account for "any efficiencies that might result from joint negotiations." Br. 41; *see also* NAB Br. 33-36. The record showed, however, that the only efficiencies associated with joint negotiation are "savings of transaction costs in connection with isolated transactions that occur … at three-year or even longer intervals." *Order* ¶ 18 (JA ___). Because such cost savings "are likely to be modest," the FCC reasonably concluded that any efficiencies resulting from joint negotiation are "outweighed" by the "supra-competitive retransmission consent fees" it generates. *Id.*

[22] The Department of Justice "has brought one antitrust action based on the theory that joint negotiation results in anticompetitive increases in retransmission consent fees." *Order* n.87 (JA ___) (citing *United States v. Texas Television, Inc.*, 1996 WL 859988 (S.D. Tex. Feb. 15, 1996)). While *Texas Television* involved a different "factual scenario" than this proceeding, the Government's decision to take enforcement action in that case supports the FCC's conclusion that joint negotiation by separately owned Top Four stations "is harmful to competition." *Id.*

### C. The Commission Did Not Deviate From Past Practice.

Sinclair makes a number of claims that the FCC's new rule represents an unexplained departure from past practice. None of these claims can withstand scrutiny.

1. Sinclair maintains that it was arbitrary for the agency to ban joint negotiation by broadcasters when the Commission had never before found that any broadcaster negotiated in bad faith. Br. 37-38. As the Commission explained, however, "there is little Commission precedent regarding the good faith rules" because the FCC has received "very few complaints" alleging violations of those rules. *NPRM* ¶ 12 (JA ___). Consequently, the FCC's decision to ban joint negotiation by certain broadcasters did not conflict with any agency precedent. Indeed, the agency has never had an opportunity to rule on any complaint involving joint negotiation by broadcasters. The absence of past complaints, however, in no way diminishes the reasonableness of the Commission's decision to adopt a rule to address a problem whose existence was established by the record here.

2. Sinclair and NAB purport to find a conflict between the ban on joint negotiation and the FCC's *Good Faith Order*. Br. 34; NAB Br. 37-39. In that order, the Commission stated that "[p]roposals for carriage conditioned on carriage of … another broadcast station either in the same or a different

market" are "presumptively … consistent with competitive marketplace considerations and the good faith negotiation requirement." *Good Faith Order*, 15 FCC Rcd at 5469 ¶ 56. Sinclair and NAB construe this statement as a finding by the Commission that section 325 generally permits joint negotiation by broadcasters.

As the Commission explained, however, the statement in the *Good Faith Order* was meant "to address the issue of whether broadcasters may lawfully seek in-kind retransmission consent compensation in the form of carriage of other programming owned by the broadcaster itself, not programming owned by other entities." *Order* ¶ 21 (JA ___-___). The agency further observed that construing the statement to authorize joint negotiation would create a conflict "with the Commission's statement later in the *Good Faith Order* that 'an agreement not to compete or to fix prices …is not within the competitive marketplace considerations standard'" of section 325. *Id.* (JA ___) (quoting *Good Faith Order*, 15 FCC Rcd at 5470 ¶ 58). For these reasons, the Commission properly declined to read the *Good Faith Order* to permit joint negotiation by separately owned stations.

An agency's interpretation of its own orders and rules is entitled to a "high level of deference." *Cellco P'ship v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (quoting *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d

542, 548 (D.C. Cir. 2001)). The Court should defer to the Commission's reasonable determination that its rule banning joint negotiation does not conflict with the *Good Faith Order*.[23]

3. Sinclair contends that the Commission "abandon[ed]" its "prior reliance" on labor law "as the basis for its good faith bargaining rules." Br. 39. But the Commission has never relied solely on labor law to interpret the scope of the good faith negotiation requirement under section 325. In its first order construing that requirement, the FCC properly recognized that the statute's reference to "competitive marketplace considerations" implicated not just labor law, but also antitrust law and "national policies favoring competition." *Good Faith Order*, 15 FCC Rcd at 5470 ¶ 58. For that reason, the Commission long ago determined that "any effort to stifle competition through the negotiation process would not meet the good faith negotiation

[23] Sinclair also suggests that the new rule is inconsistent with the FCC's past statement that the right to retransmission consent "can be 'bargained away.'" Br. 34 (quoting *1993 Implementation Order*, 8 FCC Rcd at 3005 ¶ 173). Sinclair interprets this statement to give broadcasters unfettered freedom to transfer their right to negotiate retransmission consent to any third party. The Commission made this statement in 1993, before Congress amended section 325 to require good faith negotiation by broadcasters. The statute now authorizes the FCC to bar broadcasters from engaging in any conduct (including a transfer of negotiating rights) that violates the duty to negotiate in good faith.

requirement." *Id.* The agency's new rule banning joint negotiation is fully consistent with that precedent.

4. Sinclair asserts that the FCC in this case acted inconsistently with its prior determinations regarding the scope of its authority. Br. 51-55. That is not true. The Commission has consistently taken the position that its rulemaking authority under section 325(b)(3)(C) is confined to regulating the process for granting retransmission consent, not the substance of retransmission agreements. *See Good Faith Order*, 15 FCC Rcd at 5448, 5450 ¶¶ 6, 13. The agency did not diverge from that position here. As we explained in Part I.B above, the FCC's new rule does not "subject retransmission consent negotiation to detailed substantive oversight." *Id.* at 5448 ¶ 6. Nor does the rule "*dictate the outcome*" of negotiations. *Id.* at 5450 ¶ 13 (quoting S. Rep. No. 102-92, at 36). The ban on joint negotiation regulates the process for negotiating retransmission consent, *not* the substance of the negotiations.

5. Finally, Sinclair complains that in the *Order*, the FCC relied on a different rationale for banning joint negotiation than the one it offered when it first proposed a ban. Originally, the Commission was concerned that joint negotiation might cause "delays" in carriage negotiations. *NPRM* ¶ 23 (JA ___). Ultimately, however, the agency decided that a ban on joint negotiation

by separately owned Top Four stations in the same market was necessary to prevent "supra-competitive increases in retransmission consent fees." *Order* ¶ 17 (JA ___). Sinclair argues that this "shift in rationale" was arbitrary. Br. 55-56.

Sinclair is precluded from making this argument because no party raised the issue before the Commission. 47 U.S.C. § 405(a); *Globalstar*, 564 F.3d at 483-85. Even if this argument were not procedurally barred, it lacks merit.

The FCC did not violate the APA when it based its new rule on a different rationale from the one it first proposed. The APA does not require that an agency's final rule be identical to its initial proposal. The rule "need only be a logical outgrowth of [the agency's] notice." *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013). During the course of a rulemaking, an agency may permissibly change its rationale for taking action, so long as its "eventual rationale" for adopting a rule "follow[s] logically" from concerns identified in the notice. *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 339 (D.C. Cir. 1985) (internal quotation marks omitted). That is exactly what happened here.

This proceeding began with a petition for rulemaking. As the Commission noted in the *NPRM*, the petition argued that a "recent shift of bargaining power to broadcasters has resulted in retransmission consent negotiations in which MVPDs must either agree to the significantly higher fees requested by broadcasters or lose access to programming." *NPRM* ¶ 13 (JA ___) (citing Petition for Rulemaking at 5 (JA ___)). This concern that broadcasters were using "undue bargaining leverage" to obtain "higher retransmission consent fees" led the agency to adopt the rule banning joint negotiation. *Order* ¶ 13 (JA ___). Thus, the rationale for the rule was a logical outgrowth of both the petition for rulemaking and the *NPRM*.

## CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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November 17, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

| | |
|---|---|
| SINCLAIR BROADCAST GROUP, INC.,<br>PETITIONER,<br>v.<br>FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,<br>RESPONDENTS. | NO. 14-1088 |

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 11,688 words.

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November 17, 2014

14-1088

IN THE
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| | | |
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| v. | ) | No. 14-1088 |
| | ) | |
| FEDERAL COMMUNICATIONS COMMISSION | ) | |
| AND UNITED STATES OF AMERICA, | ) | |
| RESPONDENTS. | ) | |

## **CERTIFICATE OF SERVICE**

I, James M. Carr, hereby certify that on November 17, 2014, I electronically filed the foregoing Brief For Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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STATUTORY APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 14-1088

SINCLAIR BROADCAST GROUP, INC.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
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# STATUTORY AND REGULATORY APPENDIX

Contents:

47 U.S.C. § 325

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

**§ 325. False, fraudulent, or unauthorized transmissions**

(a) False distress signals; rebroadcasting programs

No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

(b) Consent to retransmission of broadcasting station signals

**(1)** No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except

**(A)** with the express authority of the originating station;

**(B)** under section 534 of this title, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section; or

**(C)** under section 338 of this title, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section.

**(2)** This subsection shall not apply--

**(A)** to retransmission of the signal of a noncommercial television broadcast station;

**(B)** to retransmission of the signal of a television broadcast station outside the station's local market by a satellite carrier directly to its subscribers, if--

**(i)** such station was a superstation on May 1, 1991;

**(ii)** as of July 1, 1998, such station was retransmitted by a satellite carrier under the statutory license of section 119 of Title 17; and

**(iii)** the satellite carrier complies with any network nonduplication, syndicated exclusivity, and sports blackout rules adopted by the Commission under section 339(b) of this title;

**(C)** until December 31, 2014, to retransmission of the signals of network stations directly to a home satellite antenna, if the subscriber receiving the signal--

**(i)** is located in an area outside the local market of such stations; and

**(ii)** resides in an unserved household;

**(D)** to retransmission by a cable operator or other multichannel video provider, other than a satellite carrier, of the signal of a television broadcast station outside the station's local market if such signal was obtained from a satellite carrier and--

**(i)** the originating station was a superstation on May 1, 1991; and

**(ii)** as of July 1, 1998, such station was retransmitted by a satellite carrier under the statutory license of section 119 of Title 17; or

**(E)** during the 6-month period beginning on November 29, 1999, to the retransmission of the signal of a television broadcast station within the station's local market by a satellite carrier directly to its subscribers under the statutory license of section 122 of Title 17.

For purposes of this paragraph, the terms “satellite carrier” and “superstation” have the meanings given those terms, respectively, in section 119(d) of Title 17, as in effect on October 5, 1992, the term “unserved household” has the meaning given that term under section 119(d) of such title, and the term “local market” has the meaning given that term in section 122(j) of such title.

**(3)(A)** Within 45 days after October 5, 1992, the Commission shall commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 534 of this title, and such other regulations as are necessary to administer the limitations contained in paragraph (2). The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 543(b)(1) of this title to ensure that the rates for the basic service tier are reasonable. Such rulemaking proceeding shall be completed within 180 days after October 5, 1992.

**(B)** The regulations required by subparagraph (A) shall require that television stations, within one year after October 5, 1992, and every three years thereafter, make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under section 534 of this title. If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems.

**(C)** The Commission shall commence a rulemaking proceeding to revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent under this subsection, and such other regulations as are necessary to administer the limitations contained in paragraph (2). Such regulations shall--

**(i)** establish election time periods that correspond with those regulations adopted under subparagraph (B) of this paragraph;

**(ii)** until January 1, 2015, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and 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; and

**(iii)** until January 1, 2015, prohibit a multichannel video programming distributor from failing to negotiate in good faith for retransmission consent under this section, and it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations.

**(4)** If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 534 of this title shall not apply to the carriage of the signal of such station by such cable system. If an originating television station elects under paragraph (3)(C) to exercise its right to grant retransmission consent under this subsection with respect to a satellite carrier, section 338 of this title shall not apply to the carriage of the signal of such station by such satellite carrier.

**(5)** The exercise by a television broadcast station of the right to grant retransmission consent under this subsection shall not interfere with or supersede the rights under section 338, 534, or 535 of this title of any station electing to assert the right to signal carriage under that section.

**(6)** Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of Title 17 or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.

**(7)** For purposes of this subsection, the term--

**(A)** “network station” has the meaning given such term under section 119(d) of Title 17; and

**(B)** “television broadcast station” means an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station.

(c) Broadcast to foreign countries for rebroadcast to United States; permit

No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor.

(d) Application for permit

Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of section 309 of this title with respect to applications for station licenses or renewal or modification thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the Commission, after hearings, shall find its continuation no longer in the public interest.

(e) Enforcement proceedings against satellite carriers concerning retransmissions of television broadcast stations in the respective local markets of such carriers

(1) Complaints by television broadcast stations

If after the expiration of the 6-month period described under subsection (b)(2)(E) of this section a television broadcast station believes that a satellite carrier has retransmitted its signal to any person in the local market of such station in violation of subsection (b)(1) of this section, the station may file with the Commission a complaint providing--

**(A)** the name, address, and call letters of the station;

**(B)** the name and address of the satellite carrier;

**(C)** the dates on which the alleged retransmission occurred;

**(D)** the street address of at least one person in the local market of the station to whom the alleged retransmission was made;

**(E)** a statement that the retransmission was not expressly authorized by the television broadcast station; and

**(F)** the name and address of counsel for the station.

(2) Service of complaints on satellite carriers

For purposes of any proceeding under this subsection, any satellite carrier that retransmits the signal of any broadcast station shall be deemed to designate the Secretary of the Commission as its agent for service of process. A television broadcast station may serve a satellite carrier with a complaint concerning an alleged violation of subsection (b)(1) of this section through retransmission of a station within the local market of such station by filing the original and two copies of the complaint with the Secretary of the Commission and serving a copy of the complaint on the satellite carrier by means of two commonly used overnight delivery services, each addressed to the chief executive officer of the satellite carrier at its principal place of business, and each marked “URGENT LITIGATION MATTER” on the outer packaging. Service shall be deemed complete one business day after a copy of the complaint is provided to the delivery services for overnight delivery. On receipt of a complaint filed by a television broadcast station under this subsection, the Secretary of the Commission shall send the original complaint by United States mail, postage prepaid, receipt requested, addressed to the chief executive officer of the satellite carrier at its principal place of business.

(3) Answers by satellite carriers

Within five business days after the date of service, the satellite carrier shall file an answer with the Commission and shall serve the answer by a commonly used overnight delivery service and by United States mail, on the counsel designated in the complaint at the address listed for such counsel in the complaint.

(4) Defenses

(A) Exclusive defenses

The defenses under this paragraph are the exclusive defenses available to a satellite carrier against which a complaint under this subsection is filed.

(B) Defenses

The defenses referred to under subparagraph (A) are the defenses that--

**(i)** the satellite carrier did not retransmit the television broadcast station to any person in the local market of the station during the time period specified in the complaint;

**(ii)** the television broadcast station had, in a writing signed by an officer of the television broadcast station, expressly authorized the retransmission of the station by the satellite carrier to each person in the local market of the television broadcast station to which the satellite carrier made such retransmissions for the entire time period during which it is alleged that a violation of subsection (b)(1) of this section has occurred;

**(iii)** the retransmission was made after January 1, 2002, and the television broadcast station had elected to assert the right to carriage under section 338 of this title as against the satellite carrier for the relevant period; or

**(iv)** the station being retransmitted is a noncommercial television broadcast station.

(5) Counting of violations

The retransmission without consent of a particular television broadcast station on a particular day to one or more persons in the local market of the station shall be considered a separate violation of subsection (b)(1) of this section.

(6) Burden of proof

With respect to each alleged violation, the burden of proof shall be on a television broadcast station to establish that the satellite carrier retransmitted the station to at least one person in the local market of the station on the day in question. The burden of proof shall be on the satellite carrier with respect to all defenses other than the defense under paragraph (4)(B)(i).

(7) Procedures

(A) Regulations

Within 60 days after November 29, 1999, the Commission shall issue procedural regulations implementing this subsection which shall supersede procedures under section 312 of this title.

(B) Determinations

(i) In general

Within 45 days after the filing of a complaint, the Commission shall issue a final determination in any proceeding brought under this subsection. The Commission's final determination shall specify the number of violations committed by the satellite carrier. The Commission shall hear witnesses only if it clearly appears, based on written filings by the parties, that there is a genuine dispute about material facts. Except as provided in the preceding sentence, the Commission may issue a final ruling based on written filings by the parties.

(ii) Discovery

The Commission may direct the parties to exchange pertinent documents, and if necessary to take prehearing depositions, on such schedule as the Commission may approve, but only if the Commission first determines that such discovery is necessary to resolve a genuine dispute about material facts, consistent with the obligation to make a final determination within 45 days.

(8) Relief

If the Commission determines that a satellite carrier has retransmitted the television broadcast station to at least one person in the local market of such station and has failed to meet its burden of proving one of the defenses under paragraph (4) with respect to such retransmission, the Commission shall be required to--

**(A)** make a finding that the satellite carrier violated subsection (b)(1) of this section with respect to that station; and

**(B)** issue an order, within 45 days after the filing of the complaint, containing--

**(i)** a cease-and-desist order directing the satellite carrier immediately to stop making any further retransmissions of the television broadcast station to any person within the local market of such station until such time as the Commission determines that the satellite carrier is in compliance with subsection (b)(1) of this section with respect to such station;

**(ii)** if the satellite carrier is found to have violated subsection (b)(1) of this section with respect to more than two television broadcast stations, a cease-and-desist order directing the satellite carrier to stop making any further retransmission of any television broadcast station to any person within the local market of such station, until such time as the Commission, after giving notice to the station, that the satellite carrier is in compliance with subsection (b)(1) of this section with respect to such stations; and

**(iii)** an award to the complainant of that complainant's costs and reasonable attorney's fees.

(9) Court proceedings on enforcement of Commission order

(A) In general

On entry by the Commission of a final order granting relief under this subsection--

**(i)** a television broadcast station may apply within 30 days after such entry to the United States District Court for the Eastern District of Virginia for a final judgment enforcing all relief granted by the Commission; and

**(ii)** the satellite carrier may apply within 30 days after such entry to the United States District Court for the Eastern District of Virginia for a judgment reversing the Commission's order.

(B) Appeal

The procedure for an appeal under this paragraph by the satellite carrier shall supersede any other appeal rights under Federal or State law. A United States district court shall be deemed to have personal jurisdiction over the satellite carrier if the carrier, or a company under common control with the satellite carrier, has delivered television programming by satellite to more than 30 customers in that district during the preceding 4-year period. If the United States District Court for the Eastern District of Virginia does not have personal jurisdiction over the satellite carrier, an enforcement action or appeal shall be brought in the United States District Court for the District of Columbia, which may find personal jurisdiction based on the satellite carrier's ownership of licenses issued by the Commission. An application by a television broadcast station for an order enforcing any cease-and-desist relief granted by the Commission shall be resolved on a highly expedited schedule. No discovery may be conducted by the parties in any such proceeding. The district court shall enforce the Commission order unless the Commission record reflects manifest error and an abuse of discretion by the Commission.

(10) Civil action for statutory damages

Within 6 months after issuance of an order by the Commission under this subsection, a television broadcast station may file a civil action in any United States district court that has personal jurisdiction over the satellite carrier for an award of statutory damages for any violation that the Commission has determined to have been committed by a satellite carrier under this subsection. Such action shall not be subject to transfer under section 1404(a) of Title 28. On finding that the satellite carrier has committed one or more violations of subsection (b) of this section, the District Court shall be required to award the television broadcast station statutory damages of $25,000 per violation, in accordance with paragraph (5), and the costs and attorney's fees incurred by the station. Such statutory damages shall be awarded only if the television broadcast station has filed a binding stipulation with the court that such station will donate the full amount in excess of $1,000 of any statutory damage award to the United States Treasury for public purposes. Notwithstanding any other provision of law, a station shall incur no tax liability of any kind with respect to any amounts so donated. Discovery may be conducted by the parties in any proceeding under this paragraph only if and to the extent necessary to resolve a genuinely disputed issue of fact concerning one of the defenses under paragraph (4). In any such action, the defenses under paragraph (4) shall be exclusive, and the burden of proof shall be on the satellite carrier with respect to all defenses other than the defense under paragraph (4)(B)(i). A judgment under this paragraph may be enforced in any manner permissible under Federal or State law.

(11) Appeals

(A) In general

The nonprevailing party before a United States district court may appeal a decision under this subsection to the United States Court of Appeals with jurisdiction over that district court. The Court of Appeals shall not issue any stay of the effectiveness of any decision granting relief against a satellite carrier unless the carrier presents clear and convincing evidence that it is highly likely to prevail on appeal and only after posting a bond for the full amount of any monetary award assessed against it and for such further amount as the Court of Appeals may believe appropriate.

(B) Appeal

If the Commission denies relief in response to a complaint filed by a television broadcast station under this subsection, the television broadcast station filing the complaint may file an appeal with the United States Court of Appeals for the District of Columbia Circuit.

(12) Sunset

No complaint or civil action may be filed under this subsection after December 31, 2001. This subsection shall continue to apply to any complaint or civil action filed on or before such date.

47 U.S.C. § 338

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

**§ 338. Carriage of local television signals by satellite carriers**

(a) Carriage obligations

(1) In general

Each satellite carrier providing, under section 122 of Title 17, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b) of this title.

(2) Remedies for failure to carry

In addition to the remedies available to television broadcast stations under section 501(f) of Title 17, the Commission may use the Commission's authority under this chapter to assure compliance with the obligations of this subsection, but in no instance shall a Commission enforcement proceeding be required as a predicate to the pursuit of a remedy available under such section 501(f).

(3) Low power station carriage optional

No low power television station whose signals are provided under section 119(a)(14) of Title 17 shall be entitled to insist on carriage under this section, regardless of whether the satellite carrier provides secondary transmissions of the primary transmissions of other stations in the same local market pursuant to section 122 of such title nor shall any such carriage be considered in connection with the requirements of subsection (c) of this section.

(4) Carriage of signals of local stations in certain markets

A satellite carrier that offers multichannel video programming distribution service in the United States to more than 5,000,000 subscribers shall (A) within 1 year after December 8, 2004, retransmit the signals originating as analog signals of each television broadcast station located in any local market within a State that is not part of the contiguous United States, and (B) within 30 months after December 8, 2004, retransmit the signals originating as digital signals of each such station. The retransmissions of such stations shall be made available to substantially all of the satellite carrier's subscribers in each station's local market, and the retransmissions of the stations in at least one market in the State shall be made available to substantially all of the satellite carrier's subscribers in areas of the State that are not within a designated market area. The cost to subscribers of such retransmissions shall not exceed the cost of retransmissions of local television stations in other States. Within 1 year after December 8, 2004, the Commission shall promulgate regulations concerning elections by television stations in such State between mandatory carriage pursuant to this section and retransmission consent pursuant to section 325(b) of this title, which shall take into account the schedule on which local television stations are made available to viewers in such State.

(5) Nondiscrimination in carriage of high definition signals of noncommercial educational television stations

(A) Existing carriage of high definition signals

If, before the date of enactment of the Satellite Television Extension and Localism Act of 2010, an eligible satellite carrier is providing, under section 122 of Title 17, any secondary transmissions in high definition format to subscribers located within the local market of a television broadcast station of a primary transmission made by that station, then such satellite carrier shall carry the signals in high-definition format of qualified noncommercial educational television stations located within that local market in accordance with the following schedule:

**(i)** By December 31, 2010, in at least 50 percent of the markets in which such satellite carrier provides such secondary transmissions in high definition format.

**(ii)** By December 31, 2011, in every market in which such satellite carrier provides such secondary transmissions in high definition format.

(B) New initiation of service

If, on or after the date of enactment of the Satellite Television Extension and Localism Act of 2010, an eligible satellite carrier initiates the provision, under section 122 of Title 17, of any secondary transmissions in high definition format to subscribers located within the local market of a television broadcast station of a primary transmission made by that station, then such satellite carrier shall carry the signals in high-definition format of all qualified noncommercial educational television stations located within that local market.

(b) Good signal required

(1) Costs

A television broadcast station asserting its right to carriage under subsection (a) of this section shall be required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier or to another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market.

(2) Regulations

The regulations issued under subsection (g) of this section shall set forth the obligations necessary to carry out this subsection.

(c) Duplication not required

(1) Commercial stations

Notwithstanding subsection (a)(1) of this section, a satellite carrier shall not be required to carry upon request the signal of any local commercial television broadcast station that substantially duplicates the signal of another local commercial television broadcast station which is secondarily transmitted by the satellite carrier within the same local market, or to carry upon request the signals of more than one local commercial television broadcast station in a single local market that is affiliated with a particular television network unless such stations are licensed to communities in different States.

(2) Noncommercial stations

The Commission shall prescribe regulations limiting the carriage requirements under subsection (a) of this section of satellite carriers with respect to the carriage of multiple local noncommercial television broadcast stations. To the extent possible, such regulations shall provide the same degree of carriage by satellite carriers of such multiple stations as is provided by cable systems under section 535 of this title.

(d) Channel positioning

No satellite carrier shall be required to provide the signal of a local television broadcast station to subscribers in that station's local market on any particular channel number or to provide the signals in any particular order, except that the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local market on contiguous channels and provide access to such station's signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.

(e) Compensation for carriage

A satellite carrier shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local television broadcast stations in fulfillment of the requirements of this section or for channel positioning rights provided to such stations under this section, except that any such station may be required to bear the costs associated with delivering a good quality signal to the local receive facility of the satellite carrier.

(f) Remedies

(1) Complaints by broadcast stations

Whenever a local television broadcast station believes that a satellite carrier has failed to meet its obligations under subsections (b) through (e) of this section, such station shall notify the carrier, in writing, of the alleged failure and identify its reasons for believing that the satellite carrier failed to comply with such obligations. The satellite carrier shall, within 30 days after such written notification, respond in writing to such notification and comply with such obligations or state its reasons for believing that it is in compliance with such obligations. A local television broadcast station that disputes a response by a satellite carrier that it is in compliance with such obligations may obtain review of such denial or response by filing a complaint with the Commission. Such complaint shall allege the manner in which such satellite carrier has failed to meet its obligations and the basis for such allegations.

(2) Opportunity to respond

The Commission shall afford the satellite carrier against which a complaint is filed under paragraph (1) an opportunity to present data and arguments to establish that there has been no failure to meet its obligations under this section.

(3) Remedial actions; dismissal

Within 120 days after the date a complaint is filed under paragraph (1), the Commission shall determine whether the satellite carrier has met its obligations under subsections (b) through (e) of this section. If the Commission determines that the satellite carrier has failed to meet such obligations, the Commission shall order the satellite carrier to take appropriate remedial action. If the Commission determines that the satellite carrier has fully met the requirements of such subsections, the Commission shall dismiss the complaint.

(g) Carriage of local stations on a single reception antenna

(1) Single reception antenna

Each satellite carrier that retransmits the signals of local television broadcast stations in a local market shall retransmit such stations in such market so that a subscriber may receive such stations by means of a single reception antenna and associated equipment.

(2) Additional reception antenna

If the carrier retransmits the signals of local television broadcast stations in a local market in high definition format, the carrier shall retransmit such signals in such market so that a subscriber may receive such signals by means of a single reception antenna and associated equipment, but such antenna and associated equipment may be separate from the single reception antenna and associated equipment used to comply with paragraph (1).

(h) Additional notices to subscribers, networks, and stations concerning signal carriage

(1) Notices to and elections by subscribers concerning grandfathered signals

Any carrier that provides a distant signal of a network station to a subscriber pursuant [FN1]section 339(a)(2)(A) of this title shall--

**(A)** within 60 days after the local signal of a network station of the same television network is available pursuant to section 338 of this title, or within 60 days after December 8, 2004, whichever is later, send a notice to the subscriber--

**(i)** offering to substitute the local network signal for the duplicating distant network signal; and

**(ii)** informing the subscriber that, if the subscriber fails to respond in 60 days, the subscriber will lose the distant network signal but will be permitted to subscribe to the local network signal; and

**(B)** if the subscriber--

**(i)** elects to substitute such local network signal within such 60 days, switch such subscriber to such local network signal within 10 days after the end of such 60-day period; or

**(ii)** fails to respond within such 60 days, terminate the distant network signal within 10 days after the end of such 60-day period.

(2) Notice to station licensees of commencement of local-into-local service

(A) Notice required

Within 180 days after December 8, 2004, the Commission shall revise the regulations under this section relating to notice to broadcast station licensees to comply with the requirements of this paragraph.

(B) Contents of commencement notice

The notice required by such regulations shall inform each television broadcast station licensee within any local market in which a satellite carrier proposes to commence carriage of signals of stations from that market, not later than 60 days prior to the commencement of such carriage--

**(i)** of the carrier's intention to launch local-into-local service under this section in a local market, the identity of that local market, and the location of the carrier's proposed local receive facility for that local market;

**(ii)** of the right of such licensee to elect carriage under this section or grant retransmission consent under section 325(b) of this title;

**(iii)** that such licensee has 30 days from the date of the receipt of such notice to make such election; and

**(iv)** that failure to make such election will result in the loss of the right to demand carriage under this section for the remainder of the 3-year cycle of carriage under section 325 of this title.

(C) Transmission of notices

Such regulations shall require that each satellite carrier shall transmit the notices required by such regulation via certified mail to the address for such television station licensee listed in the consolidated database system maintained by the Commission.

(i) Privacy rights of satellite subscribers

(1) Notice

At the time of entering into an agreement to provide any satellite service or other service to a subscriber and at least once a year thereafter, a satellite carrier shall provide notice in the form of a separate, written statement to such subscriber which clearly and conspicuously informs the subscriber of--

**(A)** the nature of personally identifiable information collected or to be collected with respect to the subscriber and the nature of the use of such information;

**(B)** the nature, frequency, and purpose of any disclosure which may be made of such information, including an identification of the types of persons to whom the disclosure may be made;

**(C)** the period during which such information will be maintained by the satellite carrier;

**(D)** the times and place at which the subscriber may have access to such information in accordance with paragraph (5); and

**(E)** the limitations provided by this section with respect to the collection and disclosure of information by a satellite carrier and the right of the subscriber under paragraphs (7) and (9) to enforce such limitations.

In the case of subscribers who have entered into such an agreement before the effective date of this subsection, such notice shall be provided within 180 days of such date and at least once a year thereafter.

(2) Definitions

For purposes of this subsection, other than paragraph (9)--

**(A)** the term “personally identifiable information” does not include any record of aggregate data which does not identify particular persons;

**(B)** the term “other service” includes any wire or radio communications service provided using any of the facilities of a satellite carrier that are used in the provision of satellite service; and

**(C)** the term “satellite carrier” includes, in addition to persons within the definition of satellite carrier, any person who--

**(i)** is owned or controlled by, or under common ownership or control with, a satellite carrier; and

**(ii)** provides any wire or radio communications service.

(3) Prohibitions

(A) Consent to collection

Except as provided in subparagraph (B), a satellite carrier shall not use any facilities used by the satellite carrier to collect personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned.

(B) Exceptions

A satellite carrier may use such facilities to collect such information in order to--

**(i)** obtain information necessary to render a satellite service or other service provided by the satellite carrier to the subscriber; or

**(ii)** detect unauthorized reception of satellite communications.

(4) Disclosure

(A) Consent to disclosure

Except as provided in subparagraph (B), a satellite carrier shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or satellite carrier.

(B) Exceptions

A satellite carrier may disclose such information if the disclosure is--

**(i)** necessary to render, or conduct a legitimate business activity related to, a satellite service or other service provided by the satellite carrier to the subscriber;

**(ii)** subject to paragraph (9), made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed;

**(iii)** a disclosure of the names and addresses of subscribers to any satellite service or other service, if--

**(I)** the satellite carrier has provided the subscriber the opportunity to prohibit or limit such disclosure; and

**(II)** the disclosure does not reveal, directly or indirectly, the--

**(aa)** extent of any viewing or other use by the subscriber of a satellite service or other service provided by the satellite carrier; or

**(bb)** the nature of any transaction made by the subscriber over any facilities used by the satellite carrier; or

**(iv)** to a government entity as authorized under chapter 119, 121, or 206 of Title 18, except that such disclosure shall not include records revealing satellite subscriber selection of video programming from a satellite carrier.

(5) Access by subscriber

A satellite subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a satellite carrier. Such information shall be made available to the subscriber at reasonable times and at a convenient place designated by such satellite carrier. A satellite subscriber shall be provided reasonable opportunity to correct any error in such information.

(6) Destruction of information

A satellite carrier shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under paragraph (5) or pursuant to a court order.

(7) Penalties

Any person aggrieved by any act of a satellite carrier in violation of this section may bring a civil action in a United States district court. The court may award--

**(A)** actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

**(B)** punitive damages; and

**(C)** reasonable attorneys' fees and other litigation costs reasonably incurred.

The remedy provided by this subsection shall be in addition to any other lawful remedy available to a satellite subscriber.

(8) Rule of construction

Nothing in this subchapter shall be construed to prohibit any State from enacting or enforcing laws consistent with this section for the protection of subscriber privacy.

(9) Court orders

Except as provided in paragraph (4)(B)(iv), a governmental entity may obtain personally identifiable information concerning a satellite subscriber pursuant to a court order only if, in the court proceeding relevant to such court order--

**(A)** such entity offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case; and

**(B)** the subject of the information is afforded the opportunity to appear and contest such entity's claim.

(j) Regulations by Commission

Within 1 year after November 29, 1999, the Commission shall issue regulations implementing this section following a rulemaking proceeding. The regulations prescribed under this section shall include requirements on satellite carriers that are comparable to the requirements on cable operators under sections 534(b)(3) and (4) and 535(g)(1) and (2) of this title.

(k) Definitions

As used in this section:

(1) Distributor

The term “distributor” means an entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers or indirectly through other program distribution entities.

(2) Eligible satellite carrier

The term “eligible satellite carrier” means any satellite carrier that is not a party to a carriage contract that--

**(A)** governs carriage of at least 30 qualified noncommercial educational television stations; and

**(B)** is in force and effect within 150 days after the date of enactment of the Satellite Television Extension and Localism Act of 2010.

(3) Local receive facility

The term “local receive facility” means the reception point in each local market which a satellite carrier designates for delivery of the signal of the station for purposes of retransmission.

(4) Local market

The term “local market” has the meaning given that term under section 122(j) of Title 17.

(5) Low power television station

The term “low power television station” means a low power television station as defined under section 74.701(f) of title 47, Code of Federal Regulations, as in effect on June 1, 2004. For purposes of this paragraph, the term “low power television station” includes a low power television station that has been accorded primary status as a Class A television licensee under section 73.6001(a) of title 47, Code of Federal Regulations.

(6) Qualified noncommercial educational television station

The term “qualified noncommercial educational television station” means any full-power television broadcast station that--

**(A)** under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational broadcast station and is owned and operated by a public agency, nonprofit foundation, nonprofit corporation, or nonprofit association; and

**(B)** has as its licensee an entity that is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(6)(B) of this title.

(7) Satellite carrier

The term “satellite carrier” has the meaning given such term under section 119(d) of Title 17.

(8) Secondary transmission

The term “secondary transmission” has the meaning given such term in section 119(d) of Title 17.

(9) Subscriber

The term “subscriber” has the meaning given that term under section 122(j) of Title 17.

(10) Television broadcast station

The term “television broadcast station” has the meaning given such term in section 325(b)(7) of this title.

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

**§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order**

**(a)** After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

**(b)(1)** Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

**(2)** Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 534

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART II. USE OF CABLE CHANNELS AND CABLE OWNERSHIP RESTRICTIONS

**§ 534. Carriage of local commercial television signals**

(a) Carriage obligations

Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b) of this title.

(b) Signals required

(1) In general

**(A)** A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.

**(B)** A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.

(2) Selection of signals

Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such stations shall be carried on its cable system, except that--

**(A)** under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station; and

**(B)** if the cable operator elects to carry an affiliate of a broadcast network (as such term is defined by the Commission by regulation), such cable operator shall carry the affiliate of such broadcast network whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (in effect on January 1, 1991), or any successor regulation thereto, is closest to the principal headend of the cable system.

(3) Content to be carried

**(A)** A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking internal or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.

**(B)** The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto.

(4) Signal quality

(A) Nondegradation; technical specifications

The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.

(B) Advanced television

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

(5) Duplication not required

Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation). If a cable operator elects to carry on its cable system a signal which substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry on its system the signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted toward the number of signals the operator is required to carry under paragraph (1).

(6) Channel positioning

Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a local commercial television station shall be resolved by the Commission.

(7) Signal availability

Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 543(b)(3) of this title.

(8) Identification of signals carried

A cable operator shall identify, upon request by any person, the signals carried on its system in fulfillment of the requirements of this section.

(9) Notification

A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

(10) Compensation for carriage

A cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section, except that--

**(A)** any such station may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system;

**(B)** a cable operator may accept payments from stations which would be considered distant signals under section 111 of Title 17 as indemnification for any increased copyright liability resulting from carriage of such signal; and

**(C)** a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a local commercial television station entered into prior to June 26, 1990.

(c) Low power station carriage obligation

(1) Requirement

If there are not sufficient signals of full power local commercial television stations to fill the channels set aside under subsection (b) of this section--

**(A)** a cable operator of a cable system with a capacity of 35 or fewer usable activated channels shall be required to carry one qualified low power station; and

**(B)** a cable operator of a cable system with a capacity of more than 35 usable activated channels shall be required to carry two qualified low power stations.

(2) Use of public, educational, or governmental channels

A cable operator required to carry more than one signal of a qualified low power station under this subsection may do so, subject to approval by the franchising authority pursuant to section 531 of this title, by placing such additional station on public, educational, or governmental channels not in use for their designated purposes.

(d) Remedies

(1) Complaints by broadcast stations

Whenever a local commercial television station believes that a cable operator has failed to meet its obligations under this section, such station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that the cable operator is obligated to carry the signal of such station or has otherwise failed to comply with the channel positioning or repositioning or other requirements of this section. The cable operator shall, within 30 days of such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of this section. A local commercial television station that is denied carriage or channel positioning or repositioning in accordance with this section by a cable operator may obtain review of such denial by filing a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

(2) Opportunity to respond

The Commission shall afford such cable operator an opportunity to present data and arguments to establish that there has been no failure to meet its obligations under this section.

(3) Remedial actions; dismissal

Within 120 days after the date a complaint is filed, the Commission shall determine whether the cable operator has met its obligations under this section. If the Commission determines that the cable operator has failed to meet such obligations, the Commission shall order the cable operator to reposition the complaining station or, in the case of an obligation to carry a station, to commence carriage of the station and to continue such carriage for at least 12 months. If the Commission determines that the cable operator has fully met the requirements of this section, it shall dismiss the complaint.

(e) Input selector switch rules abolished

No cable operator shall be required--

**(1)** to provide or make available any input selector switch as defined in section 76.5(mm) of title 47, Code of Federal Regulations, or any comparable device; or

**(2)** to provide information to subscribers about input selector switches or comparable devices.

(f) Regulations by Commission

Within 180 days after October 5, 1992, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section. Such implementing regulations shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations.

(g) Sales presentations and program length commercials

(1) Carriage pending proceeding

Pending the outcome of the proceeding under paragraph (2), nothing in this chapter shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or program length commercials.

(2) Proceeding concerning certain stations

Within 270 days after October 5, 1992, the Commission, notwithstanding prior proceedings to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity, shall complete a proceeding in accordance with this paragraph to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity. In conducting such proceeding, the Commission shall provide appropriate notice and opportunity for public comment. The Commission shall consider the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming. In the event that the Commission concludes that one or more of such stations are serving the public interest, convenience, and necessity, the Commission shall qualify such stations as local commercial television stations for purposes of subsection (a) of this section. In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because their programming consisted predominantly of sales presentations or program length commercials.

(h) Definitions

(1) Local commercial television station

(A) In general

For purposes of this section, the term "local commercial television station" means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 535*(l)*(1) of this title, licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

(B) Exclusions

The term "local commercial television station" shall not include--

**(i)** low power television stations, television translator stations, and passive repeaters which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto;

**(ii)** a television broadcast station that would be considered a distant signal under section 111 of Title 17, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system; or

**(iii)** a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, if such station does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

(C) Market determinations

**(i)** For purposes of this section, a broadcasting station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns, except that, following a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

**(ii)** In considering requests filed pursuant to clause (i), the Commission shall afford particular attention to the value of localism by taking into account such factors as--

**(I)** whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

**(II)** whether the television station provides coverage or other local service to such community;

**(III)** whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

**(IV)** evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

**(iii)** A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this subparagraph.

**(iv)** Within 120 days after the date on which a request is filed under this subparagraph (or 120 days after February 8, 1996, if later), the Commission shall grant or deny the request.

(2) Qualified low power station

The term "qualified low power station" means any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations, only if--

**(A)** such station broadcasts for at least the minimum number of hours of operation required by the Commission for television broadcast stations under part 73 of title 47, Code of Federal Regulations;

**(B)** such station meets all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license;

**(C)** such station complies with interference regulations consistent with its secondary status pursuant to part 74 of title 47, Code of Federal Regulations;

**(D)** such station is located no more than 35 miles from the cable system's headend, and delivers to the principal headend of the cable system an over-the-air signal of good quality, as determined by the Commission;

**(E)** the community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on such date did not exceed 35,000; and

**(F)** there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.

Nothing in this paragraph shall be construed to change the secondary status of any low power station as provided in part 74 of title 47, Code of Federal Regulations, as in effect on October 5, 1992.

47 U.S.C. § 543

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART III. FRANCHISING AND REGULATION

**§ 543. Regulation of rates**

(a) Competition preference; local and Federal regulation

(1) In general

No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.

(2) Preference for competition

If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition--

**(A)** the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b) of this section; and

**(B)** the rates for cable programming services shall be subject to regulation by the Commission under subsection (c) of this section.

(3) Qualification of franchising authority

A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A) shall file with the Commission a written certification that—

**(A)** the franchising authority will adopt and administer regulations with respect to the rates subject to regulation under this section that are consistent with the regulations prescribed by the Commission under subsection (b) of this section;

**(B)** the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and

**(C)** procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.

(4) Approval by Commission

A certification filed by a franchising authority under paragraph (3) shall be effective 30 days after the date on which it is filed unless the Commission finds, after notice to the authority and a reasonable opportunity for the authority to comment, that--

**(A)** the franchising authority has adopted or is administering regulations with respect to the rates subject to regulation under this section that are not consistent with the regulations prescribed by the Commission under subsection (b) of this section;

**(B)** the franchising authority does not have the legal authority to adopt, or the personnel to administer, such regulations; or

**(C)** procedural laws and regulations applicable to rate regulation proceedings by such authority do not provide a reasonable opportunity for consideration of the views of interested parties.

If the Commission disapproves a franchising authority's certification, the Commission shall notify the franchising authority of any revisions or modifications necessary to obtain approval.

(5) Revocation of jurisdiction

Upon petition by a cable operator or other interested party, the Commission shall review the regulation of cable system rates by a franchising authority under this subsection. A copy of the petition shall be provided to the franchising authority by the person filing the petition. If the Commission finds that the franchising authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with the regulations prescribed by the Commission under subsection (b) of this section, the Commission shall revoke the jurisdiction of such authority.

(6) Exercise of jurisdiction by Commission

If the Commission disapproves a franchising authority's certification under paragraph (4), or revokes such authority's jurisdiction under paragraph (5), the Commission shall exercise the franchising authority's regulatory jurisdiction under paragraph (2)(A) until the franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph (3). Such new certification shall be effective upon approval by the Commission. The Commission shall act to approve or disapprove any such new certification within 90 days after the date it is filed.

(7) Aggregation of equipment costs

(A) In general

The Commission shall allow cable operators, pursuant to any rules promulgated under subsection (b)(3) of this section, to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category. Such aggregation shall not be permitted with respect to equipment used by subscribers who receive only a rate regulated basic service tier.

(B) Revision to Commission rules; forms

Within 120 days of February 8, 1996, the Commission shall issue revisions to the appropriate rules and forms necessary to implement subparagraph (A).

(b) Establishment of basic service tier rate regulations

(1) Commission obligation to subscribers

The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

(2) Commission regulations

Within 180 days after October 5, 1992, the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission--

**(A)** shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;

**(B)** may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and

**(C)** shall take into account the following factors:

**(i)** the rates for cable systems, if any, that are subject to effective competition;

**(ii)** the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B), and changes in such costs;

**(iii)** only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

**(iv)** the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

**(v)** the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

**(vi)** any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

**(vii)** a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

(3) Equipment

The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for--

**(A)** installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8); and

**(B)** installation and monthly use of connections for additional television receivers.

(4) Costs of franchise requirements

The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise.

(5) Implementation and enforcement

The regulations prescribed by the Commission under this subsection shall include additional standards, guidelines, and procedures concerning the implementation and enforcement of such regulations, which shall include--

**(A)** procedures by which cable operators may implement and franchising authorities may enforce the regulations prescribed by the Commission under this subsection;

**(B)** procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations;

**(C)** standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this section, which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method; and

**(D)** standards and procedures to assure that subscribers receive notice of the availability of the basic service tier required under this section.

(6) Notice

The procedures prescribed by the Commission pursuant to paragraph (5)(A) shall require a cable operator to provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier.

(7) Components of basic tier subject to rate regulation

(A) Minimum contents

Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

**(i)** All signals carried in fulfillment of the requirements of sections 534 and 535 of this title.

**(ii)** Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.

**(iii)** Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

(B) Permitted additions to basic tier

A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection.

(8) Buy-through of other tiers prohibited

(A) Prohibition

A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

(B) Exception; limitation

The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after--

**(i)** the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or

**(ii)** 10 years after October 5, 1992, subject to subparagraph (C).

(C) Waiver

If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.

(c) Regulation of unreasonable rates

(1) Commission regulations

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish the following:

**(A)** criteria prescribed in accordance with paragraph (2) for identifying, in individual cases, rates for cable programming services that are unreasonable;

**(B)** fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any franchising authority (in accordance with paragraph (3)) alleging that a rate for cable programming services charged by a cable operator violates the criteria prescribed under subparagraph (A), which procedures shall include the minimum showing that shall be required for a complaint to obtain Commission consideration and resolution of whether the rate in question is unreasonable; and

**(C)** the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by subscribers after the filing of the first complaint filed with the franchising authority under paragraph (3) and that are determined to be unreasonable.

(2) Factors to be considered

In establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable under paragraph (1)(A), the Commission shall consider, among other factors--

**(A)** the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;

**(B)** the rates for cable systems, if any, that are subject to effective competition;

**(C)** the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;

**(D)** the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis;

**(E)** capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and

**(F)** the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.

(3) Review of rate changes

The Commission shall review any complaint submitted by a franchising authority after February 8, 1996, concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

(4) Sunset of upper tier rate regulation

This subsection shall not apply to cable programming services provided after March 31, 1999.

(d) Uniform rate structure required

A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

(e) Discrimination; services for the hearing impaired

Nothing in this subchapter shall be construed as prohibiting any Federal agency, State, or a franchising authority from--

**(1)** prohibiting discrimination among subscribers and potential subscribers to cable service, except that no Federal agency, State, or franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts; or

**(2)** requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.

(f) Negative option billing prohibited

A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

(g) Collection of information

The Commission shall, by regulation, require cable operators to file with the Commission or a franchising authority, as appropriate, within one year after October 5, 1992, and annually thereafter, such financial information as may be needed for purposes of administering and enforcing this section.

(h) Prevention of evasions

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section and shall, thereafter, periodically review and revise such standards, guidelines, and procedures.

(i) Small system burdens

In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.

(j) Rate regulation agreements

During the term of an agreement made before July 1, 1990, by a franchising authority and a cable operator providing for the regulation of basic cable service rates, where there was not effective competition under Commission rules in effect on that date, nothing in this section (or the regulations thereunder) shall abridge the ability of such franchising authority to regulate rates in accordance with such an agreement.

(k) Reports on average prices

The Commission shall annually publish statistical reports on the average rates for basic cable service and other cable programming, and for converter boxes, remote control units, and other equipment, of--

**(1)** cable systems that the Commission has found are subject to effective competition under subsection (a)(2) of this section, compared with

**(2)** cable systems that the Commission has found are not subject to such effective competition.

(l) Definitions

As used in this section--

**(1)** The term "effective competition" means that--

**(A)** fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

**(B)** the franchise area is--

**(i)** served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

**(ii)** the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

**(C)** a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

**(D)** a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

**(2)** The term "cable programming service" means any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.

(m) Special rules for small companies

(1) In general

Subsections (a), (b), and (c) of this section do not apply to a small cable operator with respect to--

**(A)** cable programming services, or

**(B)** a basic service tier that was the only service tier subject to regulation as of December 31, 1994,

in any franchise area in which that operator services 50,000 or fewer subscribers.

(2) "Small cable operator" defined

For purposes of this subsection, the term "small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.

(n) Treatment of prior year losses

Notwithstanding any other provision of this section or of section 532 of this title, losses associated with a cable system (including losses associated with the grant or award of a franchise) that were incurred prior to September 4, 1992, with respect to a cable system that is owned and operated by the original franchisee of such system shall not be disallowed, in whole or in part, in the determination of whether the rates for any tier of service or any type of equipment that is subject to regulation under this section are lawful.

47 C.F.R. § 73.3555

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 73. RADIO BROADCAST SERVICES
SUBPART H. RULES APPLICABLE TO ALL BROADCAST STATIONS
**Effective: June 19, 2014**

**§ 73.3555 Multiple ownership.**

(a)(1) Local radio ownership rule. A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits:

(i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM); and

(iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

(b) Local television multiple ownership rule. An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) only under one or more of the following conditions:

(1) The Grade B contours of the stations (as determined by § 73.684) do not overlap; or

(i) At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination.

(2) [Reserved]

(c) Radio-television cross-ownership rule.

(1) This rule is triggered when:

(i) The predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with § 73.313) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompasses the entire community of license of the FM station; or

(ii) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with § 73.183 or § 73.386), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompass(es) the entire community of license of the AM station.

(2) An entity may directly or indirectly own, operate, or control up to two commercial TV stations (if permitted by paragraph (b) of this section, the local television multiple ownership rule) and 1 commercial radio station situated as described in paragraph (c)(1) of this section. An entity may not exceed these numbers, except as follows:

(i) If at least 20 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to:

(A) Two commercial TV and six commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule); or

(B) One commercial TV and seven commercial radio stations (to the extent that an entity would be permitted to own two commercial TV and six commercial radio stations under paragraph (c)(2)(i)(A) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(ii) If at least 10 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to two commercial TV and four commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(3) To determine how many media voices would remain in the market, count the following:

(i) TV stations: independently owned and operating full-power broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license that have Grade B signal contours that overlap with the Grade B signal contour(s) of the TV station(s) at issue;

(ii) Radio stations:

(A)(1) Independently owned operating primary broadcast radio stations that are in the radio metro market (as defined by Arbitron or another nationally recognized audience rating service) of:

(i) The TV station's (or stations') community (or communities) of license; or

(ii) The radio station's (or stations') community (or communities) of license; and

(2) Independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron or another nationally recognized audience rating service.

(B) When a proposed combination involves stations in different radio markets, the voice requirement must be met in each market; the radio stations of different radio metro markets may not be counted together.

(C) In areas where there is no radio metro market, count the radio stations present in an area that would be the functional equivalent of a radio market.

(iii) Newspapers: Newspapers that are published at least four days a week within the TV station's DMA in the dominant language of the market and that have a circulation exceeding 5% of the households in the DMA; and

(iv) One cable system: if cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA.

(d) Daily newspaper cross-ownership rule.

(1) No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(i) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or

(ii) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or

(iii) The Grade A contour of a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(2) Paragraph (d)(1) of this section shall not apply in cases where the Commission makes a finding pursuant to Section 310(d) of the Communications Act that the public interest, convenience, and necessity would be served by permitting an entity that owns, operates or controls a daily newspaper to own, operate or control an AM, FM, or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (d)(1) of this section.

(3) In making a finding under paragraph (d)(2) of this section, there shall be a presumption that it is not inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control a daily newspaper in a top 20 Nielsen DMA and one commercial AM, FM or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (d)(1) of this section, provided that, with respect to a combination including a commercial TV station,

(i) The station is not ranked among the top four TV stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) At least 8 independently owned and operating major media voices would remain in the DMA in which the community of license of the TV station in question is located (for purposes of this provision major media voices include full-power TV broadcast stations and major newspapers).

(4) In making a finding under paragraph (d)(2) of this section, there shall be a presumption that it is inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control a daily newspaper and an AM, FM or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (d)(1) of this section in a DMA other than the top 20 Nielsen DMAs or in any circumstance not covered under paragraph (d)(3) of this section.

(5) In making a finding under paragraph (d)(2) of this section, the Commission shall consider:

(i) Whether the combined entity will significantly increase the amount of local news in the market;

(ii) Whether the newspaper and the broadcast outlets each will continue to employ its own staff and each will exercise its own independent news judgment;

(iii) The level of concentration in the Nielsen Designated Market Area (DMA); and

(iv) The financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in financial distress, the proposed owner's commitment to invest significantly in newsroom operations.

(6) In order to overcome the negative presumption set forth in paragraph (d)(4) of this section with respect to the combination of a major newspaper and a television station, the applicant must show by clear and convincing evidence that the co-owned major newspaper and station will increase the diversity of independent news outlets and increase competition among independent news sources in the market, and the factors set forth above in paragraph (d)(5) of this section will inform this decision.

(7) The negative presumption set forth in paragraph (d)(4) of this section shall be reversed under the following two circumstances:

(i) The newspaper or broadcast station is failed or failing; or

(ii) The combination is with a broadcast station that was not offering local newscasts prior to the combination, and the station will initiate at least seven hours per week of local news programming after the combination.

(e) National television multiple ownership rule.

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners,

members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

(2) For purposes of this paragraph (e):

(i) National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

(3) Divestiture. A person or entity that exceeds the thirty-nine (39) percent national audience reach limitation for television stations in paragraph (e)(1) of this section through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.

(f) The ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations. However, the attribution standards set forth in the Notes to this section will be used to determine attribution for noncommercial educational FM and TV applicants, such as in evaluating mutually exclusive applications pursuant to subpart K of part 73.

Note 1 to § 73.3555: The words “cognizable interest” as used herein include any interest, direct or indirect, that allows a person or entity to own, operate or control, or that otherwise provides an attributable interest in, a broadcast station.

Note 2 to § 73.3555: In applying the provisions of this section, ownership and other interests in broadcast licensees, cable television systems and daily newspapers will be attributed to their holders and deemed cognizable pursuant to the following criteria:

a. Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper will be cognizable;

b. Investment companies, as defined in 15 U.S.C. 80a–3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper, or if any of the officers or directors of the broadcast licensee, cable television system or daily newspaper are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

c. Attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. For purposes of paragraph i. of this note, attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening organizations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, and the ownership percentage for any link in the chain that exceeds 50% shall be included for purposes of this multiplication. [For example, except for purposes of paragraph (i) of this note, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of “Licensee,” then X's interest in “Licensee” would be 25% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in “Licensee” would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X's interest in “Licensee” would be cognizable, while A's interest would not be cognizable. For purposes of paragraph i. of this note, X's interest in “Licensee” would be 15% (0.6 x 0.25) and A's interest in “Licensee” would be 1.5% (0.1 x 0.6 x 0.25). Neither interest would be attributed under paragraph i. of this note.]

d. Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee, cable television system or daily newspaper are subject to said trust.

e. Subject to paragraph i. of this note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph i. of this note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

f. 1. A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company (“LLC”) or Registered Limited Liability Partnership (“RLLP”) shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

2. For a licensee or system that is a limited partnership to make the certification set forth in paragraph f. 1. of this note, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. For a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph f. 1. of this note, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the media activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83–46, FCC 85–252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83–46, FCC 86–410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the media-related businesses of the partnership or LLC or RLLP.

3. In the case of an LLC or RLLP, the licensee or system seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

g. Officers and directors of a broadcast licensee, cable television system or daily newspaper are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting, cable television service or newspaper publication, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a broadcast licensee, cable television system or daily newspaper, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee, cable television system or daily newspaper subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report.] The officers and directors of a sister corporation of a broadcast licensee, cable television system or daily newspaper shall not be attributed with ownership of these entities by virtue of such status.

h. Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

1. The sum of the interests held by or through "passive investors" is equal to or exceeds 20 percent; or

2. The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

3. The sum of the interests computed under paragraph h. 1. of this note plus the sum of the interests computed under paragraph h. 2. of this note is equal to or exceeds 20 percent.

i.1. Notwithstanding paragraphs e. and f. of this Note, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:

A. The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet; and

B.(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this note other than this paragraph i.; or

(ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple ownership rule or cross-ownership rule that is being applied, except that for television stations, the term "market," will be defined by reference to the definition contained in the local television multiple ownership rule contained in paragraph (b) of this section.

2. Notwithstanding paragraph i.1. of this Note, the interest holder may exceed the 33 percent threshold therein without triggering attribution where holding such interest would enable an eligible entity to acquire a broadcast station, provided that:

i. The combined equity and debt of the interest holder in the eligible entity is less than 50 percent, or

ii. The total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity. For purposes of this paragraph i.2, an “eligible entity” shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 CFR 121.201, at the time the transaction is approved by the FCC, and holds:

A. 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet; or

B. 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or

C. More than 50 percent of the voting power of the corporation that will own the media outlet if such corporation is a publicly traded company.

j. “Time brokerage” (also known as “local marketing”) is the sale by a licensee of discrete blocks of time to a “broker” that supplies the programming to fill that time and sells the commercial spot announcements in it.

1. Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a), (c), and (d) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

2. Where two television stations are both located in the same market, as defined in the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b), (c), (d) and (e) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

3. Every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraphs (b), (c), and (d) of this section if the brokering station is a television station or with paragraphs (a), (c), and (d) of this section if the brokering station is a radio station.

k. “Joint Sales Agreement” is an agreement with a licensee of a “brokered station” that authorizes a “broker” to sell advertising time for the “brokered station.”

1. Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station sells more than 15 percent of the advertising time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a), (c), and (d) of this section.

2. Where two television stations are both located in the same market, as defined for purposes of the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station sells more than 15 percent of the advertising time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b), (c), (d), and (e) of this section.

3. Every joint sales agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the limitations set forth in paragraphs (b), (c), and (d) of this section if the brokering station is a television station or with paragraphs (a), (c), and (d) of this section if the brokering station is a radio station.

Note 3 to § 73.3555: In cases where record and beneficial ownership of voting stock is not identical (e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of these rules.

Note 4 to § 73.3555: Paragraphs (a) through (d) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, if no new or increased concentration of ownership would be created among commonly owned, operated or controlled media properties. Paragraphs (a) through (d) of this section will apply to all applications for new stations, to all other applications for assignment or transfer, to all applications for major changes to existing stations, and to applications for minor changes to existing stations that implement an approved change in an FM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties. Commonly owned, operated or controlled media properties that do not comply with paragraphs (a) through (d) of this section may not be assigned or transferred to a single person, group or entity, except as provided in this Note or in the Report and Order in Docket No. 02–277, released July 2, 2003 (FCC 02–127).

Note 5 to § 73.3555: Paragraphs (b) through (e) of this section will not be applied to cases involving television stations that are “satellite” operations. Such cases will be considered in accordance with the analysis set forth in the Report and Order in MM Docket No. 87–8, FCC 91–182 (released July 8, 1991), in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. An authorized and operating “satellite” television station, the Grade B contour of which overlaps that of a commonly owned, operated, or controlled “non-satellite” parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated, or controlled daily newspaper, or the community of license of a commonly owned, operated, or controlled AM or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station, may subsequently become a “non-satellite” station under the circumstances described in the aforementioned Report and Order in MM Docket No. 87–8. However, such commonly owned, operated, or controlled “non-satellite” television stations and AM or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 4 of this section. Nor shall any application for assignment or transfer concerning such “non-satellite” stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated, or controlled newspaper is proposed to be transferred, except as provided in Note 4 of this section.

Note 6 to § 73.3555: For purposes of this section a daily newspaper is one which is published four or more days per week, which is in the dominant language in the market, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

Note 7 to § 73.3555: The Commission will entertain applications to waive the restrictions in paragraph (b) and (c) of this section (the local television ownership rule and the radio/television cross-ownership rule) on a case-by-case basis. In each case, we will require a showing that the in-market buyer is the only entity ready, willing, and able to operate the station, that sale to an out-of-market applicant would result in an artificially depressed price, and that the waiver applicant does not already directly or indirectly own, operate, or control interest in two television stations within the relevant DMA. One way to satisfy these criteria would be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received.

We will entertain waiver requests as follows:

1. If one of the broadcast stations involved is a “failed” station that has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application.

2. For paragraph (b) of this section only, if one of the television stations involved is a “failing” station that has an all-day audience share of no more than four per cent; the station has had negative cash flow for three consecutive years immediately prior to the application; and consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

3. For paragraph (b) of this section only, if the combination will result in the construction of an unbuilt station. The permittee of the unbuilt station must demonstrate that it has made reasonable efforts to construct but has been unable to do so.

Note 8 to § 73.3555: Paragraph (a)(1) of this section will not apply to an application for an AM station license in the 535–1605 kHz band where grant of such application will result in the overlap of 5 mV/m groundwave contours of the proposed station and that of another AM station in the 535–1605 kHz band that is commonly owned, operated or controlled if the applicant shows that a significant reduction in interference to adjacent or co-channel stations would accompany such common ownership. Such AM overlap cases will be considered on a case-by-case basis to determine whether common ownership, operation or control of the stations in question would be in the public interest. Applicants in such cases must submit a contingent application of the major or minor facilities change needed to achieve the interference reduction along with the application which seeks to create the 5 mV/m overlap situation.

Note 9 to § 73.3555: Paragraph (a)(1) of this section will not apply to an application for an AM station license in the 1605–1705 kHz band where grant of such application will result in the overlap of the 5 mV/m groundwave contours of the proposed station and that of another AM station in the 535–1605 kHz band that is commonly owned, operated or controlled. Paragraphs (d)(1)(i) and (d)(1)(ii) of this section will not apply to an application for an AM station license in the 1605–1705 kHz band by an entity that owns, operates, controls or has a cognizable interest in AM radio stations in the 535–1605 kHz band.

Note 10 to § 73.3555: Authority for joint ownership granted pursuant to Note 9 will expire at 3 a.m. local time on the fifth anniversary for the date of issuance of a construction permit for an AM radio station in the 1605–1705 kHz band.

47 C.F.R. § 76.65 (2000)

CODE OF FEDERAL REGULATIONS
TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C—BROADCAST RADIO SERVICES
PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE
SUBPART D—CARRIAGE OF TELEVISION BROADCAST SIGNALS
**Current through September 29, 2000**

§ **76**. **65** Good faith and exclusive retransmission consent complaints.

(a) Duty to negotiate in good faith. Television broadcast stations that provide retransmission consent shall negotiate in good faith the terms and conditions of such agreements to fulfill the duties established by section 325(b)(3)(C) of the Communciations Act 47 U.S.C. 325; provided, however, that it shall not be a failure to negotiate in good faith if the television broadcast station proposes or 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. If a television broadcast station negotiates with multichannel video programming distributors in accordance with the rules and procedures set forth in this section, failure to reach an agreement is not an indication of a failure to negotiate in good faith.
(b) Good faith negotiation.—
(1) Standards. The following actions or practices violate a broadcast television station's duty to negotiate retransmission consent agreements in good faith:
(i) Refusal by a television broadcast station to negotiate retransmission consent with any multichannel video programming distributor;
(ii) Refusal by a television broadcast station to designate a representative with authority make binding representations on retransmission consent;
(iii) Refusal by a television broadcast station to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;
(iv) Refusal by a television broadcast station to put forth more than a single, unilateral proposal.
(v) Failure of a television broadcast station to respond to a retransmission consent proposal of a multichannel video programming distributor, including the reasons for the rejection of any such proposal;
(vi) Execution by a television broadcast station of an agreement with any party, a term or condition of which, requires that such television broadcast station not enter into a retransmission consent agreement with any multichannel video programming distributor; and
(vii) Refusal by a television broadcast station to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.

(2) Totality of the circumstances. In addition to the standards set forth in section **76**. **65**(b)(1), a multichannel video programming distributor may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station breached its duty to negotiate in good faith as set forth in section **76**. **65**(a).
(c) Good faith negotiation and exclusivity complaints. Any multichannel video programming distributor aggrieved by conduct that it believes constitutes a violation of the regulations set forth in this § 76.64(m) may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7.
(d) Burden of proof. In any complaint proceeding brought under this section, the burden of proof as to the existence of a violation shall be on the complainant.
(e) Time limit on filing of complaints. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:
(1) A complainant multichannel video programming provider enters into a retransmission consent agreement with a television broadcast station that the complainant alleges to violate one or more of the rules contained in this subpart; or
(2) A television broadcast station engages in retransmission consent negotiations with a complainant that the complainant alleges to violate one or more of the rules contained in this subpart, and such negotiation is unrelated to any existing contract between the complainant and the television broadcast station; or
(3) The complainant has notified the television broadcast station that it intends to file a complaint with the Commission based on a request to negotiate retransmission consent that has been denied, unreasonably delayed, or unacknowledged in violation of one or more of the rules contained in this subpart.
(f) Termination of rules. This section shall terminate at midnight on December 31, 2005.

47 C.F.R. § 76.65 (2005)

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TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
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PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE
SUBPART D—CARRIAGE OF TELEVISION BROADCAST SIGNALS
**Current through October 6, 2005**

§ **76**. **65** Good faith and exclusive retransmission consent complaints.

(a) Duty to negotiate in good faith. Television broadcast stations and multichannel video programming distributors shall negotiate in good faith the terms and conditions of retransmission consent agreements to fulfill the duties established by section 325(b)(3)(C) of the Act; provided, however, that it shall not be a failure to negotiate in good faith if:

(1) The television broadcast station proposes or 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; or
(2) The multichannel video programming distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations. If a television broadcast station or multichannel video programming distributor negotiates in accordance with the rules and procedures set forth in this section, failure to reach an agreement is not an indication of a failure to negotiate in good faith.
(b) Good faith negotiation.
(1) Standards. The following actions or practices violate a broadcast television station's or multichannel video programming distributor's (the “Negotiating Entity”) duty to negotiate retransmission consent agreements in good faith:
(i) Refusal by a Negotiating Entity to negotiate retransmission consent;
(ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent;
(iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;
(iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal;
(v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal;
(vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor; and

(vii) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.
(2) Totality of the circumstances. In addition to the standards set forth in § **76**. **65**(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § **76**. **65**(a).
(c) Good faith negotiation and exclusivity complaints. Any television broadcast station or multichannel video programming distributor aggrieved by conduct that it believes constitutes a violation of the regulations set forth in this section or § 76.64(l) may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7.
(d) Burden of proof. In any complaint proceeding brought under this section, the burden of proof as to the existence of a violation shall be on the complainant.
(e) Time limit on filing of complaints. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:
(1) A complainant enters into a retransmission consent agreement with a television broadcast station or multichannel video programming distributor that the complainant alleges to violate one or more of the rules contained in this subpart; or
(2) A television broadcast station or multichannel video programming distributor engages in retransmission consent negotiations with a complainant that the complainant alleges to violate one or more of the rules contained in this subpart, and such negotiation is unrelated to any existing contract between the complainant and the television broadcast station or multichannel video programming distributor; or
(3) The complainant has notified the television broadcast station or multichannel video programming distributor that it intends to file a complaint with the Commission based on a request to negotiate retransmission consent that has been denied, unreasonably delayed, or unacknowledged in violation of one or more of the rules contained in this subpart.
(f) Termination of rules. This section shall terminate at midnight on December 31, 2009.

47 C.F.R. § 76.65 (2014)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 76. MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE
SUBPART D. CARRIAGE OF TELEVISION BROADCAST SIGNALS
**Effective: June 18, 2014**

**§ 76.65 Good faith and exclusive retransmission consent complaints.**

(a) Duty to negotiate in good faith. Television broadcast stations and multichannel video programming distributors shall negotiate in good faith the terms and conditions of retransmission consent agreements to fulfill the duties established by section 325(b)(3)(C) of the Act; provided, however, that it shall not be a failure to negotiate in good faith if:

(1) The television broadcast station proposes or 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; or

(2) The multichannel video programming distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations. If a television broadcast station or multichannel video programming distributor negotiates in accordance with the rules and procedures set forth in this section, failure to reach an agreement is not an indication of a failure to negotiate in good faith.

(b) Good faith negotiation.

(1) Standards. The following actions or practices violate a broadcast television station's or multichannel video programming distributor's (the "Negotiating Entity") duty to negotiate retransmission consent agreements in good faith:

(i) Refusal by a Negotiating Entity to negotiate retransmission consent;

(ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent;

(iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;

(iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal;

(v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal;

(vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor;

(vii) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor; and

(viii) Joint negotiation.

(A) Joint negotiation includes the following activities:

(1) Delegation of authority to negotiate or approve a retransmission consent agreement by one Top Four broadcast television station (or its representative) to another such station (or its representative) that is not commonly owned, operated, or controlled, and that serves the same designated market area ("DMA");

(2) Delegation of authority to negotiate or approve a retransmission consent agreement by two or more Top Four broadcast television stations that are not commonly owned, operated, or controlled, and that serve the same DMA (or their representatives), to a common third party;

(3) Any informal, formal, tacit or other agreement and/or conduct that signals or is designed to facilitate collusion regarding retransmission terms or agreements between or among Top Four broadcast television stations that are not commonly owned, operated, or controlled, and that serve the same DMA. This provision shall not be interpreted to apply to disclosures otherwise required by law or authorized under a Commission or judicial protective order.

(B) For the purpose of applying this paragraph (b)(1)(viii):

(1) Whether a station is not commonly owned, operated, or controlled is determined based on the Commission's broadcast attribution rules. See the Notes to 47 CFR 73.3555.

(2) A station is deemed to be a Top Four station if it is ranked among the top four stations in a DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(3) DMA is determined by Nielsen Media Research or any successor entity.

(2) Totality of the circumstances. In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.65(a).

(c) Good faith negotiation and exclusivity complaints. Any television broadcast station or multichannel video programming distributor aggrieved by conduct that it believes constitutes a violation of the regulations set forth in this section or § 76.64(l) may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7.

(d) Burden of proof. In any complaint proceeding brought under this section, the burden of proof as to the existence of a violation shall be on the complainant.

(e) Time limit on filing of complaints. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) A complainant enters into a retransmission consent agreement with a television broadcast station or multichannel video programming distributor that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) A television broadcast station or multichannel video programming distributor engages in retransmission consent negotiations with a complainant that the complainant alleges to violate one or more of the rules contained in this subpart, and such negotiation is unrelated to any existing contract between the complainant and the television broadcast station or multichannel video programming distributor; or

(3) The complainant has notified the television broadcast station or multichannel video programming distributor that it intends to file a complaint with the Commission based on a

request to negotiate retransmission consent that has been denied, unreasonably delayed, or unacknowledged in violation of one or more of the rules contained in this subpart.

(f) Termination of rules. This section shall terminate at midnight on February 28, 2010, provided that if Congress further extends this date, the rules remain in effect until the statutory authorization expires.

14-1088

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

| | | |
|---|---|---|
| SINCLAIR BROADCAST GROUP, INC. | ) | |
| PETITIONER, | ) | |
| | ) | |
| v. | ) | No. 14-1088 |
| | ) | |
| FEDERAL COMMUNICATIONS COMMISSION | ) | |
| AND UNITED STATES OF AMERICA, | ) | |
| RESPONDENTS. | ) | |

## CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on November 17, 2014, I electronically filed the foregoing Statutory Appendix with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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