Toward a Fairer, Subscriber-Empowered Multichannel Television Regime: Injecting Substance Into the Good-Faith Requirement on Retransmission Consent Negotiations

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I. INTRODUCTION

The wholesale side of multichannel television has always been a war of domination between programming networks (both broadcast and cable systems),[1] on the one hand, and cable providers and other multichannel video programming distributors ("MVPDs"), on the other.[2] Throughout the evolution of the multichannel marketplace, power has shifted back and forth between broadcasters and MVPDs because of a combination of market developments and government regulation.[3] In the past, cable operators, largely viewed as monopolists, were considered kings in whom all the bargaining power resided.[4] Congress then passed the Cable Television Consumer Protection and Competition Act of 1992,[5] which gave life to the must-carry and retransmission consent rules. That same year saw the emergence of direct broadcast satellite ("DBS") as a new industry player that would rapidly inject competition into the MVPD marketplace.[6] Since then, the dynamics between broadcast networks and MVPDs, and the landscape upon which both exist, have forever changed. Some would even

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1. For the purposes of this Note, references to "cable channels" and "cable networks" refer to both cable programing service and per-channel or per-program service. "Cable programming service includes all program channels on the cable system that are not included in basic service, but are not separately offered as per-channel or per-program services." *Evolution of Cable Television*, FCC, http://www.fcc.gov/encyclopedia/evolution-cable-television#sec5 (last visited Sept. 29, 2013) (emphasis deleted). These programs refer to those channels MVPDs offer in addition to "over-the-air television broadcast signals carried pursuant to the must-carry requirements of the Communications Act, and any public, educational, or government access channels required by the system's franchise agreement." *Id.* "Per-channel or per-program service includes those cable services that are provided as single-channel tiers by the cable operator, and individual programs for which the cable operator charges a separate rate." *Id.* (emphases deleted). HBO is an example of a per-channel service, and pay-per-view sports events are examples of pay-per-program services. Broadcast programming, when referenced in this Note, refers to over-the-air programming, accessible free of charge, which is produced by broadcast stations, like NBC, as defined in 47 C.F.R. section 76.5(b).

2. An MVPD is defined as "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming." 47 C.F.R. § 76.1000 (2012). Examples include cable providers (like Time Warner Cable), direct broadcast satellite providers (like DirecTV) and telecommunication companies (like AT&T U-Verse). *See id.*

3. *See* Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 USC § 325(b)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 99, 105 (1997).

4. *See id.* at 106.

5. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.).

6. *See* Ronald Garay, *Direct Broadcast Satellite*, MUSEUM OF BROAD. COMMC'NS., http://www.museum.tv/archives/etv/D/htmlD/directbroadc/directbroadc.htm (last visited Sept. 29, 2013) (stating that the 1992 Cable TV Act made it possible for DBS to grow because the Act prohibited programmers from denying DBS access to their services).

argue that bargaining power has now transferred mostly to broadcast networks, seizing control from MVPDs.[7]

This Note focuses on the dynamics of multichannel video on the wholesale side. Specifically, it parses the relationship between MVPDs and broadcast networks during retransmission consent negotiations. Substantive issues faced by MVPDs during these negotiations ultimately affect the welfare and utility of consumers in terms of programming choice and the prices they pay. These effects, when amalgamated, create a "market defect" that results in "forced bundles" offered to and purchased by multichannel video subscribers.[8] This type of wholesale bundling is inimical not only to MVPDs and their business models, but also to consumers who are forced to purchase bundles containing channels that they do not demand, thereby reducing the overall utility they get from multichannel television.[9]

Part II gives a brief history of cable television, as it relates to the relationship between broadcast networks and cable providers, including a summary of the legislative history of the Cable Television Consumer Protection and Competition Act of 1992 and the FCC rules concerning retransmission consent. Part III expounds on the different iterations of wholesale bundling, its structural premise, and the various interrelated factors and marketplace developments that enable its existence. Part IV reviews certain economic analyses to shed light on how current retransmission consent practices negatively affect consumer welfare and consumer choice. Finally, Part V proposes that Congress authorize the FCC to oversee the substantive aspects of the retransmission consent process. A complementary explication on how the FCC can utilize this authority, through rulemaking, to police unfair and utility-reducing retransmission consent practices concludes the Note.

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7. *See* MICHAEL L. KATZ ET AL., AN ECONOMIC ANALYSIS OF CONSUMER HARM FROM THE CURRENT RETRANSMISSION CONSENT REGIME paras. 30–43 (2009), *available at* http://apps.fcc.gov/ecfs/document/view?id=7020353149 (study commissioned by the National Cable & Telecommunications Association, DIRECTV, and Dish Network); STEVEN C. SALOP ET AL., ECONOMIC ANALYSIS OF BROADCASTERS' BRINKMANSHIP AND BARGAINING ADVANTAGES IN RETRANSMISSION CONSENT NEGOTIATIONS paras. 1–2 (2010), *available at* http://apps.fcc.gov/ecfs/document/view?id=7020499521 (study commissioned by Time Warner Cable).

8. *See* George S. Ford & Thomas M. Koutsky, *A la Carte and "Family Tiers" as a Response to a Market Defect in the Multichannel Video Programming Market*, PHOENIX CTR. POL'Y BULL., Feb. 2006, at 1, 5, *available at* http://www.phoenix-center.org/PolicyBulletin/PCPB14Final.pdf.

9. *See id.* at 1, 4.

II. RETRANSMISSION CONSENT AND THE DUTY TO BARGAIN IN GOOD FAITH

A. The 1992 Cable TV Act

To fully understand the nature of retransmission consent and how it works, it is helpful to look at the landscape upon which MVPDs and broadcast networks operated before the 1992 Cable TV Act's enactment. Broadcast networks produce programming that is transmitted by their respective affiliate broadcast stations to consumers for free over the air.[10] Prior to 1992, cable providers used these signals free of charge and packaged them with other programming for sale to cable subscribers.[11] For a time, broadcast networks and regulators regarded this practice as fostering the development of broadcast networks and the free programming that they produce, in that these programs were able to reach viewers who would otherwise not have access to them through their cable subscription.[12] This was very beneficial for broadcast networks because their income was mainly derived from advertising,[13] and advertising revenue is inevitably affected by the number of viewers reached by the broadcast networks' programming. As cable providers developed, however, they became vertically integrated.[14] It became common practice that one company would own both a cable provider and a cable network,[15] and Congress became wary that this relationship would result in cable providers favoring the carriage of cable programming of an affiliate to the detriment and exclusion of broadcast programming.[16]

Thus ended the symbiotic relationship between cable providers and broadcast networks. Regulators started viewing cable networks as undermining the ongoing viability of free over-the-air broadcasters.[17] The

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10. *See* Pub. L. No. 102-385, § 2(a)(12), 106 Stat. 1461, 1462 (1992) (congressional findings in the 1992 Cable TV Act).

11. ROBERT W. CRANDALL & HAROLD FURCHTGOTT-ROTH, CABLE TV: REGULATION OR COMPETITION? 1–6 (1996).

12. *See* § 2(a)(12), 106 Stat. at 1461; *see also* CRANDALL & FURCHTGOTT-ROTH, *supra* note 11, at 2.

13. § 2(a)(12), 106 Stat. at 1461.

14. § 2(a)(5), 106 Stat. at 1461–62.

15. *See generally* THOMAS W. HAZLETT, VERTICAL INTEGRATION IN CABLE TELEVISION: THE FCC EVIDENCE (2007), *available at* http://www.arlingtoneconomics.com/studies/vertical-integration-in-cable-television.pdf (study commissioned by Comcast and submitted to the FCC in response to the 2006 Quadrennial Regulatory Review – Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Further Notice of Proposed Rulemaking*, FCC 06-93 (2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-06-93A1.pdf.

16. *See* § 2(a)(5), 106 Stat. at 1461–62.

17. § 2(a)(16), 106 Stat. at 1462; *see* S. REP. NO. 102-92, at 35 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1177.

product of this perceived threat was the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable TV Act" or the "Act").[18] Two of the most controversial provisions of the Act were must-carry and retransmission consent.[19] During the drafting period of the Act, the Senate Committee on Commerce, Science, and Transportation noted first that cable providers "use[d broadcast networks'] signals without having to seek the permission of the originating broadcaster or having to compensate the broadcaster for the value its product creates for the cable operator."[20] Because broadcast networks have "been granted an exclusive right by the FCC to broadcast over the limited broadcast spectrum," they have a proprietary interest in those signals that "might be threatened if others could easily duplicate these broadcasts."[21]

Broadcast programming was the most popular content watched on cable TV.[22] Accordingly, cable programming (much of which was affiliated with cable operators) benefited from increased viewership when it was placed on channels adjacent to popular broadcast programming.[23] However, this meant that "broadcasters [were] in effect subsidiz[ing] the

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18. *See* § 2(b), 106 Stat. at 1463. This Act was passed by Congress on October 5, 1992, over President Bush's veto. Lubinsky, *supra* note 3, at 113; CRANDALL & FURCHTGOTT-ROTH, *supra* note 11, at 8.

19. *See* 47 U.S.C. §§ 338, 534 (2006) (must-carry); 47 U.S.C. § 325(b) (2006) (retransmission consent). In fact, as a result of the controversy and the varying positions of many stakeholders and legislators, retransmission consent "was explicitly left out of the companion House bill in order to avoid a jurisdictional dispute," Lubinsky, *supra* note 3, at 116–17, with other committees of the 102nd Congress and to increase the legislation's chances of passing. Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HASTINGS COMM. & ENT. L.J. 305, 333 (1993). So the retransmission consent provision appeared first in the Senate bill and had its origins in the Senate Committee on Commerce, Science, and Transportation. Lubinsky, *supra* note 3, at 119. Senator Daniel Inouye added the provision during the full committee mark-up of the legislation. *Id*; Allard, *supra* note 19, at 334 n.121. The companion House bill can be found at H.R. 4850, 102d Cong. (1992). For a full account of the House and Senate Proceedings, see 138 CONG. REC. S400–33 (daily ed. Jan. 27, 1992); 138 CONG. REC. S561–611 (daily ed. Jan. 29, 1992); 138 CONG. REC. S635–97 (daily ed. Jan. 30, 1992); 138 CONG. REC. S711–70 (daily ed. Jan. 31, 1992); 138 CONG. REC. H6531–44 (daily ed. July 23, 1992); 138 CONG. REC. H8671–87 (daily ed. Sept. 17, 1992); 138 CONG. REC. S14,222–51 (daily ed. Sept. 21, 1992); 138 CONG. REC. S14,600–16 (daily ed. Sept. 22, 1992); and 138 CONG. REC. S16,652–77 and H11,477–88 (daily ed. Oct. 5, 1992).

20. S. REP. NO. 102–92, at 35 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168; Lubinsky, *supra* note 3, at 120.

21. Lubinsky, *supra* note 3, at 107.

22. Pub. L. No. 102-385, § 2(a)(19), 106 Stat. 1460, 1463. "[R]oughly two-thirds of the viewing time on the average cable system" at the time of the Act's enactment were spent on broadcast programming. S. REP. NO. 102–92, at 35 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 116.

23. § 2(a)(19), 106 Stat. at 1462. *See* S. REP. NO. 102–92, at 35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168; Lubinsky, *supra* note 3, at 120. This increased viewership allowed the cable programmer to obtain increased advertising revenues.

establishment of their chief competitors."[24] This free-riding by cable operators was viewed as unfair[25] and against public policy,[26] because cable providers had abandoned their classical business models—repackaging and delivering broadcast signals—and started competing in the market for TV programming.[27] These market developments, coupled with the fact that cable systems rarely had any local competition, resulted in "undue market power for the cable operator as compared to that of consumers and video programmers."[28]

Out of the desire to curb this power and equalize the then pervading market realities, retransmission consent, one of the more controversial provisions of the 1992 Cable TV Act, was born.[29] The retransmission-consent provision provides, "No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station."[30] Retransmission consent was intended to prevent a "distortion in the video marketplace which threaten[ed] the future of over-the-air broadcasting."[31] Because cable operators were already paying for the rights to cable programming, Congress found no reason why this option should not be made available for broadcast programmers.[32]

The 1992 Cable TV Act ushered in a change to the landscape that underpinned the relationship between broadcast networks and cable providers. Cable operators were stripped of the ability to set the conditions upon which broadcast programming carriage were based.[33] As competition emerged and broadcasters were able to play cable operators and other MVPDs off against one another, cable operators were relegated to a defensive position of just anticipating what broadcast networks had in store

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24. § 2(a)(19), 106 Stat. at 1462; *see also* S. REP. NO. 102–92, at 35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168; Lubinsky, *supra* note 3, at 120.

25. § 2(a)(19), 106 Stat. at 1462–63.

26. S. REP. NO. 102-92, at 35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168.

27. § 2(a)(5), (19), 106 Stat. at 1460–61, 1462–63.

28. § 2(a)(2), 106 Stat. at 1460.

29. 47 U.S.C. § 325(b) (2006).

30. 47 U.S.C. § 325(b)(1)(A) (2006).

31. S. REP. NO. 102-92, at 35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168; Lubinsky, *supra* note 3, at 120.

32. S. REP. NO. 102-92, at 35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168.

33.

> What really drives MVPD's crazy, we think, is they are cornered in an industry structure which, at this point in time, put[s] them at a negotiating disadvantage vis-à-vis cable network groups. The networks are the price makers, the MVPD's are the price takers. And they wish the cable network groups would stop exploiting the advantage.

TODD JUENGER, BERNSTEIN RESEARCH, WEEKEND MEDIA BLAST: LOWER YOUR AFFILIATE FEE, OR THE DOG WILL PAY 3 (2012).

for them, instead of being able to dictate the terms of contract and the tenor of negotiations.[34]

B. *FCC's Implementation of Retransmission Consent: The Good-Faith Requirement*[35]

Congress initially provided little guidance as to how retransmission consent negotiations were expected to transpire, aside from the three-year periodic renewal of retransmission consent and the considerations the Commission was to account for when crafting rules.[36] Specifically, Congress directed the Commission to "ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation . . . to ensure that the rates for the basic service tier are reasonable."[37] The FCC also was directed to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier."[38] Beyond these obligations, the FCC was not given directives on how to regulate the manner by which retransmission consent negotiations are conducted.

Congressional silence ended in 1999 when Congress enacted the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), which requires broadcast networks to negotiate retransmission consent in good faith with MVPDs.[39] Codified at 47 U.S.C. section 325(b)(3)(C), SHVIA directed the FCC to "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith"[40] This requirement was "made reciprocal to MVPDs as well as broadcasters by the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA")."[41]

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34. *Id.*

35. The majority of the material in this subsection was derived from Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, FCC 11-31, paras. 9–12 (2011) [hereinafter *Retransmission Consent NPRM*], *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-11-31A1_Rcd.pdf.

36. 47 U.S.C. § 325(b)(3)(C) (2006).

37. 47 U.S.C. § 325(b)(3)(A) (2006).

38. *Id.*

39. SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (codified in scattered sections of 17 and 47 U.S.C.).

40. 47 U.S.C. § 325(b)(3)(C)(ii) (2006); *Retransmission Consent NPRM*, *supra* note 35, at para. 8.

41. *Retransmission Consent NPRM*, *supra* note 35, at para. 8 n.20. "The good faith provision of SHVIA was specifically targeted at constraining unacceptable negotiating conduct on the part of broadcasters, but Congress subsequently recognized that it is necessary to constrain unacceptable retransmission consent negotiating conduct of MVPDs as well as broadcasters, and thus imposed a reciprocal bargaining obligation in SHVERA." *Id.* at para. 20 n.63; *see* Reciprocal Bargaining Obligation, *Report and Order*, FCC 05-119, para. 1 (2005), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-05-

In interpreting Congress's grant of power, however, the FCC limited itself to the oversight of the procedural aspects of retransmission consent negotiations and explicitly disclaimed any authority to regulate the substantive aspects and terms of the negotiations.[42] The FCC reasoned that "Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process."[43] This statutory interpretation proved instructive as the FCC crafted its rules enforcing the duty to negotiate in good faith.

The FCC enforced these congressional directives by paving two avenues through which the good-faith duty can be breached: it can be violated (1) per se when any of the negotiating parties' conduct falls within seven objective breaches of good-faith negotiation set by the Commission;[44] or (2) when the Commission finds that the totality of circumstances surrounding and relating to the negotiations do not comport with the duty of good faith.[45] The seven cardinal actions that constitute a breach of the duty to negotiate in good faith are as follows:

> (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

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119A1.pdf ("[W]e conclude that the most faithful and expeditious implementation of the amendments contemplated in Section 207 of the SHVERA is to extend to MVPDs the existing good faith bargaining obligation imposed on broadcasters under our rules.").

42. "[T]he statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission." Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation & Exclusivity, *First Report and Order*, FCC 00-99, para. 6 (2000) [hereinafter *Good Faith Order*], *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-00-99A1.pdf.

43. *Id.* at para. 24.

44. 47 C.F.R. § 76.65(b)(1) (2012).

45. 47 C.F.R. § 76.65(b)(2) (2012).

> 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.[46]

The second avenue—the totality of circumstances test[47]—"enables the Commission to consider a complaint alleging that, while a Negotiating Entity did not violate the *per se* objective standards, its proposals or actions were 'sufficiently outrageous,' or included terms or conditions not based on competitive marketplace considerations, so as to violate the good faith negotiation requirement."[48]

When the Commission finds that a negotiating party has violated the duty to negotiate in good faith, that party will be instructed "to renegotiate the agreement in accordance with the Commission's rules and Section 325(b)(3)(C)."[49] The FCC, however, interpreted section 325 as "prevent[ing] the Commission from ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement."[50]

To date, there has not developed an expansive body of petitions and FCC decisions dealing directly with the duty to negotiate in good faith. With the exception of the WLII/WSUR Licensee Partnership complaint against Choice Cable TV regarding the parties' negotiations for carriage of WLII-TV and its booster stations WSUR-TV and WORA-TV,[51] complaints were either dismissed by the parties after settlement outside the FCC proceeding,[52] or the Commission itself dismissed the complaint finding no breach.[53]

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46. 47 C.F.R. § 76.65(b)(1) (2012).

47. *Good Faith Order*, *supra* note 42, at para. 32.

48. *Retransmission Consent NPRM*, *supra* note 35, at para. 32.

49. *Good Faith Order*, *supra* note 42, at para. 81.

50. *Retransmission Consent NPRM*, *supra* note 35, at para. 18.

51. *See* Letter from Steven Broeckaert, Deputy Chief, Policy Division, Media Bureau, FCC, to Jorge L. Bauermeister, Counsel for Choice Cable T.V., 22 FCC Rcd. 4933, 4933 (Mar. 12, 2007) (finding that Choice violated its duty to negotiate in good faith).

52. *See, e.g.*, Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc., *Order*, DA 10-66 (2010), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-66A1.pdf (following the complaint filed by Mediacom alleging that Sinclair violated its duty to negotiate in good faith, Mediacom and Sinclair announced completion of a retransmission agreement and later Mediacom filed a Motion to Withdraw the complaint with the Commission).

53. *See, e.g.*, EchoStar Satellite Corp. v. Young Broad., Inc., *Memorandum Opinion and Order*, DA 01-1865 (2001), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-01-1865A1.pdf; Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.,

III. WHOLESALE BUNDLING

A. The Basic Configuration: Horizontal Integration and Leveraging on Intra-Corporate Holdings

Retransmission consent applies only to local broadcast stations (because they control and manage the signals that are then retransmitted), and does not apply to cable networks. The transactions involving cable networks and their carriage by MVPDs are deregulated in most aspects as compared with local broadcast networks. So why are MVPDs complaining about the bundling of cable networks for delivery to specific price tiers as a condition for a broadcast station's retransmission consent? Table 1 helps shed some light on this question.

Table 1: Summary of Big Four Broadcast Networks' Ownership of Significant Cable Networks[54]

ABC/Disney	**FOX**	**NBC**	**CBS**
ESPN/ESPN HD (80%)	Fox Sports Net (100%)	USA (100%)	CBS Sports Network (100%)
Disney Channel (100%)	Fox News (100%)	CNBC (100%)	Smithsonian Channel (90%)
A&E (50%)	Fox Movie Channel (100%)	MSNBC (82%)	Showtime (100%)
Lifetime Television (50%)	Big Ten Network (51%)	Syfy (100%)	Flix (100%)
History Channel (50%)	Fox College Sports (100%)	Bravo (100%)	The Movie Channel (100%)
Biography Channel (50%)	National Geographic Channel (70%)	Oxygen Network (100%)	
Lifetime Movie Network (50%)	Fox Business Network (100%)	NBC Sports Network (formerly VERSUS)	

Memorandum Opinion and Order, DA 07-3 (2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3A1.pdf; ATC Broadband v. Gray TV Licensee, Inc., *Memorandum Opinion and Order*, DA 09-246 (2009), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3A1.pdf.

54. Table 1 was derived from, and is a shortened version of, Figure 9: Summary of Big Four Cable Network Ownership. SALOP ET AL., *supra* note 7, at 50 (derived from Form 10-K Annual Reports for CBS Corp., The Walt Disney Co., NBCUniversal Media, Inc., and NEWS CORP. and a report by SNL Kagan).

Table 1 demonstrates that cable networks have started horizontally integrating with the Big 4 broadcast networks (ABC/Disney, Fox, NBC, and CBS),[55] each of which owns local broadcast stations in many major markets.[56] As can be seen from Table 1, it is commonplace for a single media conglomerate to own multiple cable networks as well as local broadcast networks and stations. For example, ABC/Disney owns twenty-one cable networks[57] and eight local broadcast stations.[58] Comcast owns NBC, which owns twenty-six local broadcast stations,[59] including Telemundo, and has ownership interests in fifteen cable networks.[60] News Corporation owns Fox, which owns twenty-eight local broadcast stations[61] and eighteen cable networks.[62] CBS, which owns twenty-six local broadcast stations,[63] co-owns the CW,[64] and has ownership interests in five cable networks.[65] Viacom, which owns only cable networks, including MTV and Nickelodeon, is CBS's sister company; both are owned with a controlling majority interest by National Amusements.[66] Consequently, media companies that own cable networks have a strong interest in using the bargaining power and leverage of their local broadcast stations to convince MVPDs to carry specific cable channels in exchange for—or, as some claim, as a condition to—the local broadcast station's retransmission consent.[67]

To provide a concrete example, the ABC Network is a Disney company.[68] Disney, through its ABC-owned local stations, can condition those local stations' retransmission consent on the carriage of Disney Channel, Disney XD, and other cable channels that it owns, and it typically can demand that those channels be placed in one of an MVPD's most widely distributed service tiers.[69] Any horizontally integrated media company, including all of the Big Four networks, has the ability to initiate

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55. *See supra* Table 1.
56. *See infra* Table 2 and accompanying notes.
57. *See supra* Table 1.
58. *See infra* Table 2.
59. *See id*.
60. *See supra* Table 1.
61. *See infra* Table 2.
62. *See supra* Table 1.
63. *See infra* Table 2.
64. *See Our Portfolio*, CBS CORP., http://www.cbscorporation.com/portfolio.php?division=95 (last visited Jan. 27, 2013).
65. *See supra* Table 1.
66. *Corporate Information*, SHOWCASE, http://www.showcasecinemas.com/about-us (last visited Sept. 29, 2013).
67. *See infra* Part III.D (noting that this leverage comes from the high viewership ratings of broadcast programming).
68. *Media Networks*, WALT DISNEY CO., http://thewaltdisneycompany.com/disney-companies/media-networks (last visited Sept. 20, 2013).
69. *See infra* note 108.

this kind of business maneuver.[70] This horizontal integration, resulting from complex yet interconnected corporate structures, enables broadcast networks to force bundles during retransmission consent negotiations.

It is from this world of complex corporate structures that the capacity to force network bundles during retransmission consent negotiations originates.

B. *Types of Wholesale Bundling and the Maneuvers Through Which They Are Achieved*

Typically, there are three archetypes of coercive wholesale bundling.[71] First—the simplest kind—is where programmers refuse "to

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70. Although not the central focus of this Note, it is worth mentioning that, in addition to horizontal integration, vertical integration between broadcast stations and MVPDs has also occurred in recent years. An example is the FCC-approved merger in 2010 of NBC Universal, which owns broadcast and cable networks, and Comcast, one of the largest MVPDs and owning various cable, regional, and sports programming. App'ns of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc. for Consent to Assign Licenses & Transfer Control of Licensees, *Memorandum Opinion and Order*, FCC 11-4, paras. 9–11 (2011) [hereinafter *Comcast/NBCU Joint Venture Applications*], *available at* http://transition.fcc.gov/FCC-11-4.pdf; Jonathan B. Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, ANTITRUST, Spring 2011, at 36. Although the exact terms of the retransmission consent agreement between NBCUniversal broadcast stations and Comcast is unclear, NBC broadcast stations and Comcast are currently bound by conditions the FCC imposed due to the significant antitrust implications of the transaction. *Comcast/NBCU Joint Venture Applications*, *supra* note 70, at paras. 3–4. In brief, Comcast is prohibited from discriminatory "video programming distribution on the basis of affiliation or non-affiliation with Comcast-NBCU." *Id.* at para. 4. Discrimination on the basis of affiliation is difficult to prove, and may be confounded with other financial considerations. *See* Tennis Channel, Inc. v. Comcast Cable Comm'ns, L.L.C., *Memorandum Opinion and Order*, FCC 12-78, paras. 45–68 (2012), *available at* http://www.fcc.gov/ document/fcc-releases-decision-tennis-channel-v-comcast-carriage-dispute (holding that circumstantial evidence indicates that Comcast favored the carriage of affiliates over non-affiliates and that Comcast discriminated against Tennis Channel), *rev'd sub nom.* Comcast Cable Comm'ns v. FCC, No. 12-1337 (D.C. Cir. May 28, 2013) (holding that the FCC had not shown sufficient evidence to refute Comcast's argument that the decision to place Tennis Channel in a different tier was a result of financial analysis, not discrimination against a rival). Further, Comcast and NBCU are disallowed to jointly administer their retransmission consent negotiations. *Id.* apps. A at 134 & F at 195. This means that NBCU is "solely responsible for negotiating retransmission consent of NBCU Stations with non-Comcast MVPDs," and Comcast remains "solely responsible for negotiating retransmission consent with non-NBCU Stations." *Id.* Comcast also entered into a collective agreement with the affiliated local broadcast stations of ABC, CBS, and Fox, which guaranteed that Comcast will not "discriminate with respect to its retransmission consent negotiations" with non-NBCU and non-NBCU-affiliated stations. *Id.* app. F at 203. Comcast also agreed to conduct its retransmission consent negotiation with non-NBCU and non-NBCU-affiliated stations at arm's length and in good faith. *Id.*

71. This Note uses the word "coercion" in its ordinary, non-legal sense in its application to the concept of wholesale bundling.

allow the networks . . . to be offered by MVPD's on an a la carte basis."[72] The second type are instances where MVPDs are forced to carry weaker networks in the same package as a strong network; the weak and strong networks are "bundled" and are required to be delivered in the same service tier.[73] Media companies indirectly achieve this result by "establish[ing] a rate structure that makes it decidedly uneconomical" to carry the weaker channel "below a specified penetration threshold."[74] The third type is a "reverse tying arrangement" where "carriage of a weaker service is conditioned on the MVPD's agreement to carry a more expensive 'strong' service."[75] This might seem odd at first, and one might ask why an MVPD would opt for a weaker network than the stronger one. To put this into perspective, it should be pointed out that there are numerous local and regional MVPDs that may find it in their business interest to carry just the weaker service because the stronger service has insufficient subscriber demand in the areas they serve to justify its carriage.[76]

To demonstrate the procedural aspects of coercive bundling, economists Ford and Koutsky of the Phoenix Center for Advanced Legal and Economic Public Policy Studies developed an economic model.[77] The basic premise of this model suggests that a "necessary condition" for forced bundling is for broadcast networks to offer additional profits to MVPDs in exchange for them agreeing to incorporate certain programming into their basic or expanded basic tiers.[78] This additional profit is in the form of "avoided additional cost" for MVPDs.[79]

One of the ways that this is done, the economists argue, is when a local broadcast station (presumably owned by a broadcast network) conditions the carriage of a local ABC or NBC affiliate, both of which are very popular to subscribers,[80] on the acceptance of a bundle containing both desired and undesired programming.[81] The "avoided additional cost" for the MVPD in this instance is the avoidance of the risk of not being able to carry the local ABC or NBC.[82] Alternatively, this end result could be achieved by offering both bundled and a la carte options to cable companies during retransmission consent negotiations in such a manner that the a la carte option would be set at a prohibitive cost compared to the

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72. Comments of Mediacom Commc'ns Corp. at 5–6, Revision of the Comm'n's Program Access Rules, MB Dkt. No. 12-68 (rel. June 23, 2012) [hereinafter *Mediacom Comments*] (emphasis deleted).

73. *Id.*

74. *Id.*

75. *Id.* at 6. In this terminology, a weaker service is one with less viewership.

76. *Id.* at 6–7.

77. Ford & Koutsky, *supra* note 8, at 6–13.

78. *Id.* at 41–42.

79. *Id.* at 42.

80. *See infra* Part IV.B.

81. Ford & Koutsky, *supra* note 8, at 10.

82. *Id.* at 43.

bundled option.[83] Under this scenario, the "avoided additional cost" is the astronomical price that the MVPD would have had to pay if it did not accept the bundle. The offer of the a la carte option may reasonably be construed as a token offer, made only to avoid committing a per se violation of the good-faith requirement during retransmission consent negotiations.[84] In short, broadcast networks create an additional cost that MVPDs may avoid only if they choose the bundle over any other arrangement.

An MVPD, when confronted by bundling, has extremely limited choices because the consent of a local broadcast network is absolute[85]: (1) it can stand its ground, refuse the package offered by the broadcast network (through its local broadcast stations and affiliates), and respond with a more favorable counteroffer with the hope that the local broadcast station would consider it; or (2) it can accept the deal and consequently incur higher costs in conducting its business.[86] MVPDs rarely have the liberty of time to structure a deal that would at least be marginally more favorable than those that the local broadcast stations offered. When the preceding consent deals are about to elapse, the pressure on MVPDs to secure renewals from local broadcast stations reaches its apogee, and MVPDs are more likely to accept the coercive bundle rather than lose access to highly desired programming.[87]

C. *Beyond Mere Bundling: Broadcast Networks' Increasing Market Influence over Conduct of Their Affiliates Regarding Retransmission Consent*

The ability of broadcast companies to coerce MVPD agreement to bundled deals is further strengthened by current market practices that involve cooperation among local broadcast stations in brokering

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83. *See id.* at 10. This has been the crux of the allegations by MVPDs in recent years. *See, e.g.*, *Mediacom Comments*, *supra* note 72, at 5–6.

84. *See* 47 C.F.R. § 76.65(b)(1)(iv) (2012). This provision is discussed further in *infra* Part V.

85. 47 U.S.C. § 325(b) (2006).

86. Implementation of the Cable TV Consumer Prot. & Competition Act of 1992—Dev. of Competition & Diversity in Video Programming Distribution, *Report and Order and Notice of Proposed Rulemaking*, FCC 07-169, para. 120 (2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-07-169A1.pdf, *aff'd sub nom.* Cablevision Sys. Corp. v. FCC, 597 F.3d 1306, 1306 (D.C. Cir. 2010).

87. *See, e.g.*, Chris Cinnamon, Heidi Schmid & Adriana Kissel, *Retransmission-Consent Outlook: Difficult and Costly*, NTCA, http://www.ntca.org/july/august-2010/retransmission-consent-outlook-difficult-and-costly.html (last visited Sept. 29, 2013) (noting that negotiations in recent years have resulted in bitter stalemates that ultimately deprived MVPDs and their subscribers of access to highly desired programming; for example in 2006, Mediacom lost twenty-two stations for two months while its negotiations with Sinclair were pending). "Mediacom reportedly shed over 30,000 customers during and after the dispute." *Id.*

retransmission consent. In recent years, it has become apparent that broadcast companies are able to influence their local station affiliates in the way they conduct their business with MVPDs.[88] These market realities increase the influence of broadcast companies beyond just the markets they control and the local stations they directly own, which buttresses their ability to dictate the terms of negotiations.[89]

Broadcast companies not only get their bargaining power from their own local broadcast stations; they also are able to consolidate their influence by combining with local station affiliates that they do not directly own. Broadcast companies do this in two ways: (1) by fashioning local marketing agreements ("LMAs") with competing broadcast stations other companies own; and (2) by using their bargaining power to influence the conduct of their affiliated local broadcast stations during retransmission consent negotiations.[90]

In the context of retransmission consent, LMAs refer to contracts that allow one local broadcast station to negotiate retransmission consent for another or multiple local broadcast stations in the same market.[91] For example, Sinclair, a conglomerate operating various local broadcast stations in numerous localities, entered into LMAs that gave it the exclusive right to negotiate on behalf of two of the top four stations in several designated market areas ("DMAs") across the country.[92] In entering into LMAs, local broadcast stations further solidify their bargaining power by eliminating competition with other broadcast stations.[93] This then allows local broadcast stations to extract supracompetitive carriage rates from MVPDs because MVPDs could lose the consent of multiple stations operating in a DMA if they do not accede to the rates.[94] A study conducted

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88. Brian Stelter, *Broadcasters Battling for Cable Fees*, N.Y. TIMES (Dec. 29, 2009), http://www.nytimes.com/2009/12/29/business/media/29cable.html; Michael Malone, *Moonves: Give Us Our Retrans Cut*, BROAD. & CABLE (Mar. 1, 2010), http://www.broadcastingcable.com/article/449429-Moonves_Give_Us_Our_Retrans_Cut.php; SALOP ET AL., *supra* note 7, at para. 111.

89. *See* SALOP ET AL., *supra* note 7, at paras. 111–12.

90. *See id.* at paras. 107–08.

91. Margaret L. Tobey & Phuong N. Pham, *The Broadcast Ownership Provisions of the Telecommunications Act of 1996*, 14 COMM. LAW 6, 8 (1996) (noting that the traditional meaning of LMAs outside the context of retransmission consent is those agreements that allow a broker to operate the station of another broadcast licensee); SALOP ET AL., *supra* note 7, at para. 108. It should also be noted that ownership of two of the top-four local broadcast stations is not sanctioned by the FCC, *see* 47 C.F.R. § 73.3555(b) (2012), so these retransmission-consent LMAs are a way to avoid violating the rule since, technically, LMAs do not equate to ownership. Further, LMAs of this type may violate antitrust laws. *See* United States v. Tex. TV, Inc., Civ. No. C-96-64, slip op. at 7, 9 (S.D. Tex. Feb. 2, 1996).

92. SALOP ET AL., *supra* note 7, at para. 108.

93. *Id.*

94. *See Ex Parte* Comments of Suddenlink Commc'ns in Support of Mediacom Commc'ns Corp.'s Retransmission Consent Complaint at 5–6, Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc., CSR Nos. 8233-C & 8234-M (rel. Dec. 14, 2009) ("[W]here a single entity controls retransmission consent negotiations for more than one 'Big 4' station

by Professor William Rogerson of Northwestern University identified fifty-seven instances where Big Four local stations operated under some kind of LMA, which made it "very likely [for those stations] to operate under joint control for purposes of negotiating retransmission consent agreements."[95] At the macro level, "of the 210 DMAs, fully 78, or more than one third of them have one or two pairs of jointly owned or controlled Big 4 stations."[96]

In the second scenario, broadcast networks increasingly have used their leverage in their affiliates—those stations that they do not own but receive their programming—to extract various economic benefits. There are a total of 791 independently owned local broadcast stations licensed by the FCC. As can be seen in Table 2, ABC is affiliated to ninety-one, NBC to 108, Fox to sixty-six, and CBS to ninety-seven independently owned local broadcast stations.

Table 2: Survey of Major Broadcast Networks' Station Ownership and Affiliations[97]

	Total Affiliated Local Broadcast Stations to Big Four Networks	Total Broadcast Stations Directly Owned and Operated by the Big Four
ABC	91	8
CBS	97	14
FOX	66	17
NBC	108	10
Grand Total	362	49

The leverage that the Big Four networks have on local broadcast stations is easy to see. Although they directly own and operate only forty-nine local stations, 362 of the 791 (about forty-five percent) total stations owned and operated by other companies are affiliated with them.[98] Four broadcast networks essentially dominate almost half of the stations owned and operated by forty-three independent companies.

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in a single market, the average retransmission consent fees Suddenlink pays for such entity's 'Big 4' stations . . . is 21.6% higher than the average retransmission consent fees Suddenlink pays for other 'Big 4' stations in those same markets.").

95. WILLIAM P. ROGERSON, JOINT CONTROL OR OWNERSHIP OF MULTIPLE BIG 4 BROADCASTERS IN THE SAME MARKET AND ITS EFFECT ON RETRANSMISSION CONSENT FEES 6 (2010) (footnote omitted) (submitted as an attachment to Comments of Am. Cable Ass'n at app. A, Petition for Rulemaking to Amend the Comm'n's Rules Governing Retransmission Consent, MB 10-71 (rel. May 18, 2010), *available at* http://apps.fcc.gov/ecfs/document/view?id=7020461924).

96. *Id.* at 7.

97. The sums presented in this table are a consolidation of the data available at Station Index. *Television Stations by Owner*, STATION INDEX: THE BROAD. WEBSITE, http://www.stationindex.com/tv/by-owner (last visited Sept. 29, 2013). The numbers for CBS and NBC increase if their ownership of CW and Telemundo, respectively, is accounted for. A similar increase occurs if Fox's ownership stake in MyNetworkTV (considered independent for the purposes of this survey) is incorporated into the analysis.

98. 362 (total affiliations of the Big Four) divided by 791 (total number of local broadcast stations not directly owned and operated by the Big Four). *See supra* Table 2.

Large broadcast networks, especially the Big Four, have successfully involved themselves in the retransmission consent negotiations of their independent local affiliates.[99] The Big Four have started demanding a slice of their affiliates' retransmission fees.[100] Fox also was able to contractually procure veto power over Sinclair's retransmission consent and used it to pressure Sinclair to demand higher retransmission fees to subsequently share with Fox.[101] It seems that the rationale for demanding a slice of retransmission consent fees collected by local broadcast affiliates stems from the Big Four's view that their affiliates should share the cost of programming that they receive.[102] Especially because advertising revenues have started shifting to the Internet in recent years,[103] this demand may even be considered reasonable, an inference supported by the fact that a considerable number of Big Four affiliates actually have been willing to share their retransmission consent fees.[104] However, Fox, for example, not only demands a slice of retransmission fees as they are collected by its affiliates.[105] Fox sets a certain dollar amount that must be paid by its affiliates regardless of the fact that its affiliates' current retransmission fees would not cover, or would only barely cover, that dollar amount.[106] Under this paradigm, a Big Four network actually inserts itself to the business transactions of its affiliates and MVPDs. By threatening to shift affiliation to another local broadcast station if its unyielding stance is not complied with,[107] Fox, at the very least, incentivizes its affiliates to demand higher retransmission fees from MVPDs. If broadcast networks have this much bargaining power over their affiliates, to the extent that they can demand

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99. SALOP ET AL., *supra* note 7, at para. 111.

100. Stelter, *supra* note 88; SALOP ET AL., *supra* note 7, at para. 111.

101. SALOP ET AL., *supra* note 7, at para. 111 n.130 (citing *Ex Parte* Comments of Time Warner Cable Inc. in Support of Mediacom Commc'ns Corp.'s Retransmission Consent Complaint at 3–4, Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc., CSR Nos. 8233-C & 8234-M (rel. Dec 9, 2009)) (stating that "FOX apparently based this veto right on a contractual provision in its affiliation contracts").

102. *See* Joe Flint, *Fox TV Demands Share of Stations' Retransmission Fees*, L.A. TIMES (Feb. 12, 2011), http://articles.latimes.com/2011/feb/12/business/la-fi-ct-fox-affiliates-20110212.

103. *See* Suzanne Vranica & William Launder, *Signals Weak for TV-Ad Market*, WALL ST. J. (Mar. 24, 2013, 7:36 PM), http://online.wsj.com/news/articles/SB1000142412788732437320457837703200506092O.

104. *See* Brian Stelter, *Networks Want Slices of a New Pie*, N.Y. TIMES (July 3, 2011), http://www.nytimes.com/2011/07/04/business/media/04retrans.html?_r=1& (indicating that ABC, at the time of the article's publication, was able to complete negotiations with more that fifty percent of its affiliates); Joe Strupp, *Fox Fee Demand Driving Away Affiliates*, MEDIA MATTERS (Aug. 1, 2011, 12:43 PM), http://mediamatters.org/blog/2011/08/01/fox-fee-demand-driving-away-affiliates/136150 (stating that even after losing certain affiliates because of its fee demand, Fox was able to find other stations as replacement).

105. *See* Stelter, *supra* note 104.

106. *Id.*

107. *Id.* ("[I]f Fox's proposal did not work for some stations, the network would 'pursue different distribution channels.'").

profit shares over signals that they do not even own,[108] it is not improbable that in the future they might also have the power to pressure their affiliates to condition their consent on the carriage of the broadcast networks' affiliated cable programming.

D. Some Relevant Examples

To demonstrate the reality of coercive wholesale bundling beyond mere hypotheticals, below are examples of alleged past and recent practices of local broadcast stations owned by major media companies while conducting retransmission consent negotiations with MVPDs.[109]

Some media companies give their local broadcast stations' retransmission consent only upon the MVPDs' acceptance of additional cable channels tied to broadcast programming. For instance, in March 2004, Viacom was able to tie all of its cable networks to the carriage of fifteen CBS local broadcast stations.[110] Certain commenters also alleged that NBC Universal allowed its local broadcast stations' retransmission consent only after cable providers and other MVPDs purchased Bravo, MSNBC, and SyFy, among other NBC-affiliated cable networks.[111]

The more coercive practice, on the other hand, is that which not only requires the carriage of bundled channels but also the placement of those bundles in specific MVPD package tiers.[112] For example, Disney demands the carriage of the Disney Channel, ABC News Now, various ESPN services, and Toon, among others, on the basic tier as a condition of obtaining retransmission consent from local ABC stations and affiliates.[113] Similarly, Fox forces many smaller operators to carry, and pay for, "unwanted satellite programming" like the Fox Digital Nets, FX, Fox Health Channel, the new Fox "Fuel" extreme sports channel, and the

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108. *Id.* at paras. 113–14.

109. The examples that follow are demonstrative rather than exhaustive.

110. SALOP ET AL., *supra* note 7, at para. 101; *see* Steve Donohue, *EchoStar Loses Viacom Channels*, MULTICHANNEL NEWS (Mar. 8, 2004, 3:14 PM), http://www.multichannel.com/article/67945-EchoStar_Loses _Viacom_Channels.php. CBS and Viacom are sister companies. *See supra* notes 64–66.

111. Comments of the Am. Cable Ass'n at 7, Review of the Comm'n's Program Access Rules & Examination of Programming Tying Arrangements, MB Dkt. No. 07-198 (rel. Jan. 4, 2008), *available at* http://apps.fcc.gov/ecfs/document/view?id=6519821729.

112. For further explanation on why this practice is more coercive, see *infra* Parts IV.A.1 & V.A and accompanying notes.

113. Comments of the Am. Cable Ass'n at 5–6, Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, MB Dkt. No. 03-172 (rel. Sept. 12, 2003) [hereinafter *ACA Comments*], *available at* http://apps.fcc.gov/ecfs/document/view?id=6515082093.

National Geographic Channel before it consents to the carriage of its local broadcast stations' signals.[114]

Meanwhile, alternatives to bundles have also been offered to MVPDs during retransmission consent negotiations, but instead of being a viable option, the terms of the alternatives tend to be geared towards coercing MVPDs to accept the bundle. As far back as 2003, Mediacom, an MVPD, submitted petitions to the FCC concerning forced bundling.[115] In its 2012 comments, Mediacom stated that "the owners of the most popular programming services often use their market power to force MPVDs to purchase and carry unwanted networks by bundling them together with desired 'marquee' networks at a 'discounted' price."[116] Further, Mediacom claimed that the terms of this bundle, touted as having a "discounted" price tag, were such that alternative arrangements were substantially less economical.[117] Thus, Mediacom was effectively coerced into accepting the bundle and its terms.[118] In one instance, when "Mediacom asked for an 'unbundled' price for a programmer's 'strong' network, the price proposal it received raised the percentage of future rate increases (which already were in the double digits) by fifty percent."[119] From a business perspective, Mediacom had to accept the bundled deal even though its subscribers had limited interest in the additional networks.[120] Mediacom not only had to carry these additional networks, but also had to place them into a particular service tier.[121]

For less-established and smaller MVPDs, the terms of negotiations can be all the more skewed in favor of broadcast stations and media companies. The American Cable Association ("ACA") stated that "smaller cable operators are paying, on average, retransmission consent fees that are at least double the amount of larger operators," basing this conclusion on a study it commissioned to Professor William Rogerson.[122] In that study, Professor Rogerson analyzed publicly available data compiled by Kagan

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114. *ACA Comments*, *supra* note 113, at 6. For a detailed discussion of how this process transpires, see generally Am. Cable Ass'n Petition for Inquiry into Retransmission Consent Practices First Supplement, Proceeding No. PRM02MB (rel. Dec. 30, 2002). *See also* Comments of the Am. Cable Ass'n, Carriage of Digital TV Broad. Signals—App'n of Network Non-Duplication, Syndicated Exclusivity & Sports Blackout Rules to Satellite Retransmission of Broad. Signals at 8–10, CS Dkt. Nos. 98-120, 00-96 & 00-2 (rel. June 8, 2001).

115. *Mediacom Comments*, *supra* note 72, at i.

116. *Id.* at ii.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 4.

122. Comments of the Am. Cable Ass'n at 5–6, Petition for Rulemaking to Amend the Comm'n's Rules Governing Retransmission Consent, MB Dkt. No. 10-71 (rel. May 19, 2010).

Research on retransmission fees paid by direct broadcast satellite providers (like DirecTV), cable (like Time Warner), and telecommunications companies (like AT&T).[123] The study found that "[direct broadcast satellite] providers pay retransmission consent fees that on average are 79% higher than those paid by large cable operators and [telecommunications companies] pay fees that are 114% higher than those paid by large cable operators."[124] Professor Rogerson then extrapolated this data based on anecdotes of ACA members, and he argued that small- and medium-sized cable operators pay retransmission fees closer to what telecommunications companies are charged—a full 114% more than what large cable operators are charged.[125] ACA also indicated its knowledge that some of its members are actually charged at $0.75 per subscriber per month, which is $0.45 higher than what, on average, telecommunications companies are charged.[126]

Because of these practices, lawsuits outside the FCC have also been lodged against media companies and their local broadcast stations. Most recently, Cablevision filed an antitrust lawsuit against Viacom, alleging (among other things) that "Viacom abused its market power over commercially critical networks, including must-have networks such as Nickelodeon, Comedy Central, and MTV, to coerce Cablevision into carrying the 14 far less popular ancillary channels," such as Palladia, MTV Hits, and VH1 Classic.[127]

IV. ANALYSIS

A. *Economic Analysis of the Effects of Wholesale Bundling*

1. The Basics: Supply, Demand, and Consequent Welfare Reduction

To accurately portray where MVPD subscribers stand in the big picture of retransmission consent, they must be seen through the lens of economics. In a free market economy, demand for a product would dictate

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123. WILLIAM P. ROGERSON, THE ECONOMIC EFFECTS OF PRICE DISCRIMINATION IN RETRANSMISSION CONSENT AGREEMENTS 10 (2010) (submitted as an attachment to Comments of the Am. Cable Ass'n, Petition for Rulemaking to Amend the Comm'n's Rules Governing Retransmission Consent, MB Dkt. No. 10-71 (rel. May 19, 2010)).

124. *Id.* at 12.

125. *Id.* at 12–13.

126. *Id.* at 13.

127. *Cablevision Files Federal Antitrust Lawsuit Against Viacom for Illegally Forcing Purchase of Programming Services*, CABLEVISION (Feb. 26, 2013), http://www.cablevision.com/pdf/news/022613.pdf. Note that Viacom only supplies cable channels, *see supra* Part III.A, so unlike local broadcast networks, it does not fall squarely under the retransmission consent regime, *see id.* This example is included here to demonstrate the general premise of bundling.

how much of such product is produced and supplied.[128] In the context of multichannel television, MVPDs would only supply channels that have sufficient demand to justify the cost. So if subscribers were willing and able to pay for Disney Channel, MVPDs that want to maximize their profits would include that channel in their package offerings. The difficulty with the business model of MVPDs is that they themselves do not "produce" the channels and the programming contained in them; they are mere intermediaries between the broadcast companies and the viewers.[129] As intermediaries, they would presumably purchase channels that their subscribers demand, but this becomes impossible during retransmission consent negotiations when broadcast companies demand wholesale bundling.[130]

Ford and Koutsky described as "defective" the delivery of programming to consumers because the supplied channels do not wholly reflect the preferences of the market.[131] Instead, "third parties," in this case, broadcast networks, more often than not influence the delivery decisions of cable providers and other MVPDs.[132] Because of wholesale bundling, the delivery of channels to subscribers does not accurately reflect market demand. Delivery of programming is coerced by the broadcast network when the broadcast network "increase[s] the costs of the MVPD for carrying Network A [an in-demand channel] if it does not distribute Network B [a non-demanded channel] on the same tier."[133] The MVPD would typically choose (in order to avoid additional costs[134]) to purchase and distribute a bundle of programming that is not reflective of consumers' actual demand.[135] If Network A is the only channel that consumers

128. WILLIAM A. MCEACHERN, CONTEMPORARY ECONOMICS 101, 134 (3d ed. 2013) (stating that demand indicates "how much of a product consumers are both willing and able to buy at each price during a given time period, other things constant" and that supply indicates "how much of a good producers are willing and able to offer for sale per period at each price, other things constant") (emphases deleted).

129. An intermediary is "any entity that enables the communication of information from one party to another." Thomas F. Cotter, *Some Observations on the Law and Economics of Intermediaries*, 2006 MICH. ST. L. REV. 67, 68 (2006).

130. Intermediaries, because of the very nature of their business structure, have to successfully balance the demands and interests of producers, from which they purchase products, and consumers, to whom they deliver the products, or else they risk losing a portion of both producers and consumers. *Id.* at 70–71. In an imperfect market, of which the regulated market of multichannel video is an example, there is a "risk that intermediaries will bias or skew information in favor of some producers." *Id.* at 71.

131. Ford & Koutsky, *supra* note 8, at 1.

132. *See id.* at 5. "MVPDs do not create their tiers of programming solely by reference to what consumers want to watch (or not watch)--an MVPD establishes tiers in order to maximize profits." *Id.* The implication here is that they can maximize profits through acceding to demands of broadcasters regarding channel and tier placement.

133. *Id.* at 8.

134. *Id.*

135. *Id.* at 12.

demand, the market would direct MVPDs to purchase only the rights to Network A so that it can be delivered to the consumers, whose welfare is ultimately maximized.[136] Since the market is distorted at the wholesale level, it results in the carriage of Network A, conditioned on the carriage of Network B. The distortion is further exacerbated because Networks A and B are placed in the same service tier, "forcing" MVPD subscribers to have both channels in the package they purchase.[137]

Therefore, bundling practices result in the denial to consumers of access to programming of their choice.[138] Instead, programming is dictated, or at least substantially affected, by the decisions of MVPDs and broadcast networks in the wholesale level—decisions that are compelled by the retransmission consent practices of broadcast networks.[139]

It should be noted, though, that some economic articles have argued from an economic-efficiency perspective that the bundling of networks actually benefits consumers. Professor Thom Lambert of the University of Missouri School of Law argued that in the aggregate and in the long-run, bundling has a positive welfare effect on consumers because it encourages the creation and subsequent delivery of more diverse channels in a way that is not possible in the absence of wholesale bundling.[140] The argument is that bundling allows networks to produce and deliver programming that might not have a sufficient subscriber base to justify its production.[141] Professor Lambert posited that bundling makes it possible for networks to produce this additional programming because bundling enables MVPDs to deliver it to consumers who place greater value on desired programming within the bundle than the overall price of the bundle itself.[142] However, Professor Lambert also conceded in his discussion that bundling results in higher, surplus-extractive prices that broadcast networks are able to charge for bundled channels than for independently offered channels.[143]

Professors Crawford and Cullen of the University of Arizona, in an empirical study, found that full a la carte pricing of channels decreases the overall welfare of society because the incremental welfare that consumers gain from an a la carte market does not outweigh the incremental welfare

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136. This is basic demand-supply analysis. "[C]onsumer welfare unambiguously rises if the consumer can avoid purchasing undesirable channels as part of a bundle." *Id.*

137. *Id.* at 37, 40.

138. *See* App'ns of Comcast Corp., General Electric Co. & NBC Universal, Inc., *Memorandum Opinion and Order*, FCC 11-4, paras. 131–40 (2011), *available at* http://transition.fcc.gov/FCC-11-4.pdf.

139. *See supra* Part III.B (discussing Ford and Koutsky's "avoided additional costs" paradigm).

140. Thom Lambert, *The Efficiency of Cable Bundling*, TRUTH ON THE MARKET (July 10, 2011), http://truthonthemarket.com; *see also* Gregory S. Crawford & Joseph Cullen, *Bundling, Product Choice, and Efficiency: Should Cable Television Networks be Offered A La Carte?*, 19 INFO. ECON. & POL'Y 379, 391 (2007).

141. Lambert, *supra* note 140.

142. *Id.*

143. *Id.*

loss suffered by networks.[144] At the end of their analysis, however, the professors concluded that consumer welfare is higher under an a la carte pricing model than under the bundling model.[145] This Note is not advocating for the implementation of a full a la carte regime;[146] hence, the macro-level welfare loss estimated by the professors will likely not arise if the recommendations made in this Note were implemented.

2. Effects-Side Analysis: Practical Consequences of Bundling and Their Economic Bases

a. Increased Operating Costs, Market Inefficiency, and Dampening of Competition

The consequences of wholesale bundling are more than illusory. "Bundling limits the resources and channel capacity that MVPDs have available to carry independent networks" and other networks in general.[147] Channel carriage costs money, and MVPDs have to allocate their respective channel capacities among various channels. Therefore, when an MVPD is required to carry Network B just to have the rights to carry Network A, the allocation becomes inefficient because Network B displaces other in-demand networks.[148] The MVPD then suffers a loss since another in-demand, more profitable channel could have taken Network B's place had the broadcast network not forced the bundle upon the MVPD.[149] This means that the return to MVPDs of carrying Network B does not justify its carriage "cost"—money paid plus the foregone opportunity of using the capacity for a more productive endeavor.[150]

The effect may be even more pronounced in smaller MVPDs that do not have as much channel capacity as large MVPDs. In their case, there may be a scenario where Network B occupies the last slot in their carriage

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144. Crawford & Cullen, *supra* note 140, at 398, 400.

145. *Id.*

146. *See infra* Part V and accompanying notes.

147. *Mediacom Comments*, *supra* note 72, at 6.

148. In the example above, inefficiency results since Network B simply is not the best use of the MVPD's resources; there remain exploitable opportunities that would produce the highest return for the MVPD. Arguing that the MVPD has enough capacity to carry Network B while still carrying all in-demand channels does not eliminate the loss because Network B's placement in the channel lineup is inefficient nonetheless. The MVPD could have chosen another channel to carry or not use the capacity altogether, whichever the market dictates. *See* PAUL KRUGMAN ET AL., MACROECONOMICS 13 (Charles Linsmeler et al. eds., 2d ed. 2010) ("Economic efficiency is achieved when all opportunities are exploited to make everyone better off."); *see also* Ford & Koutsky, *supra* note 8, at 9.

149. *See* KRUGMAN ET AL., *supra* note 148, at 13.

150. *See id.* at 7. This is a form of opportunity cost, i.e., the cost of having to forego one thing in order to get something else. *Id.*

capacity, precluding the carriage of other channels their subscribers demand. To remedy this, they would have to increase their capacity by improving their technical infrastructure to avoid the loss of the more profitable channel from their packages, increasing their operating costs substantially. Such costs would then be passed on to consumers. A corollary result is increased prices for subscribers who have to receive and pay for programming that they did not demand in the first place.[151]

Market competition is also harmed because "bundling practices . . . adversely impact the ability of smaller MVPDs to compete with larger distributors."[152] Bundling forces startup and smaller MVPDs to deliver programming that is not in line with consumer demand, resulting in program delivery and prices that are not wholly reflective of an efficient market.[153] This is because smaller MVPDs, in order to operate efficiently within specific geographic areas with more specialized demographics, would normally have to "fashion[] service offerings more responsive to local needs and interests."[154] This specialized service, however, would never be possible if these small and startup MVPDs are not allowed to carry the niche and specific channels that their subscribers demand unless other channels are also carried.

b. Inflated Prices Passed on to Subscribers

Increased prices of cable services borne by consumers each year as a result of bundling have been economically modeled by Professor Salop, et al., in a study submitted to the FCC at the request of Time Warner Cable,[155] and by Professor Rogerson, in a study attached to an ACA submission to the FCC.[156] To understand the basic framework, know first that television programming, whether cable- or broadcast-based, are "substitutes" in some ways.[157] Substitutes are products that directly compete with each other in a way that the demand for one product is

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151. Ford & Koutsky, *supra* note 8, at 6; *see also Mediacom Comments*, *supra* note 72, at 6.

152. *Mediacom Comments*, *supra* note 72, at 6.

153. Here, small MVPDs can still be made "better off" if they can choose the niche programming they need, *see* KRUGMAN ET AL., *supra* note 148, at 13, driving down their operating costs and enabling them to compete more effectively with giants in the industry. *See Mediacom Comments*, *supra* note 72, at 6.

154. *Mediacom Comments*, *supra* note 72, at 6.

155. SALOP ET AL., *supra* note 7. For a general discussion of commodity bundling, see Mark Armstrong, *A More General Theory of Commodity Bundling* (Oxford Univ. Econ. Series No. 624, Sept. 2012), *available at* http://www.economics.ox.ac.uk/materials/papers/12264/paper624.pdf.

156. ROGERSON, *supra* note 123.

157. *See id.* at 7–8.

affected when the price of its substitute is changed.[158] In terms of channel lineups, one programming, whatever its nature and character, can imperfectly substitute another on an MVPD's package.[159] For example, when a media company increases the carriage fee for Network A (a cable network), the demand for that network would lessen and shift to the same media company's Network B (a broadcast network)—a substitute for and a competitor of Network A.[160] This cannibalization of demand prevents the media company from increasing the price of one of its networks without the consequence of having MVPDs drop that network in favor of another sister network.[161]

But this cannibalization is avoided when the media company conditions its local station's consent on the carriage of its cable networks. In this scenario, the substitutability of the local station's broadcast programming for the cable networks is eliminated, and now the two kinds of programming would not have to compete against each other.[162] So if Network A and Network B are bundled together, the media company can safely increase the price of Network A within the bundle because subscribers cannot just shift to Network B as a substitute.[163] That option is now obliterated because it now is impossible for Network B to be purchased in lieu of Network A—both should now be purchased in tandem or not at all.

The MVPD, meanwhile, cannot drop the bundle altogether, especially if Network A contains in-demand programming, for doing so creates the risk of losing subscribers who prefer to have Network A in their package.[164] Because bundling eliminates the shifting of demand from one network to the other, it enables the media company to charge higher prices for both the local broadcast programming and the cable network in a way

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158. IRVIN B. TUCKER, SURVEY OF ECONOMICS 50 (6th ed. 2009). According to this theory, if Coke increases its price, all things constant and without regard to consumer loyalty and other psychic factors, demand for Pepsi would increase as it is a substitute for Coke. *See id.*

159. Imperfect substitutes are products that can be substituted with each other but only to a certain extent, which means, to simplify, that there comes a point where no amount of price reduction for Product A will induce consumers to purchase more of Product B. *See* SAMPAT MUKHERJEE, MODERN ECONOMIC THEORY 293 (2007).

160. *See* TUCKER, *supra* note 158.

161. For a marginal-profit analysis explaining how media companies can charge inflated prices through bundling, see ROGERSON, *supra* note 95, at 7–10.

162. This non-competition through bundling allows the media company to extract fees from the full surplus of adding the entire bundle to the MVPD's portfolio, which is higher than if the fees are extracted from just the surplus of adding the last programming the MVPD chooses to purchase from that media company. *Id.* at 9.

163. "[T]he MVPD would be willing to pay a higher total price for the package than for each type of programming separately" when the package contains substitutable networks and if that package is offered in an all-or-nothing basis. SALOP ET AL., *supra* note 7, at para. 102.

164. *See infra* Table 3.

that is not possible if each network is offered independently of each other.[165] Higher prices are ultimately passed through to subscribers in the form of higher subscription fees. In fact, a recent study estimated that "about 50 percent in programming costs, [which include increases in retransmission fees], were passed through to subscribers."[166]

B. The Arguments of Local Broadcast Stations and the Media Companies Owning or Affiliated with Them

From the local broadcast stations' perspective, or, more specifically, from the perspective of the media companies that own them, the retransmission consent process is not broken because "the process is operating as Congress intended."[167] As Disney contends, the bargaining power of local broadcast networks is in no way weightier than that of MVPDs, and "it would be incorrect for the Commission to assume that [there is] a shift in the bargaining power [in favor] of broadcasters."[168] If there is a shift in bargaining leverage, Disney claims that it is not the broadcast networks but the market, in the form of increased MVPD competition, which necessitated the shift.[169] As to bundling arrangements,

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165. *See* ROGERSON, *supra* note 95, at 8–9; SALOP ET AL., *supra* note 7, at paras. 104–05. "[W]hen sellers offer substitute products, the negotiated discount overturns the innate substitutability of products, inducing firms to raise prices[,] . . . which harms consumers and overall welfare." Armstrong, *supra* note 155, at 3; *see also* Aaron S. Edlin & Daniel L. Rubinfeld, *The Bundling of Academic Journals*, 95 AM. ECON. REV. 441, 444 (2005) (arguing that a firm selling its products as a bundle "effectively stop[s those products] from competing with each other, which substitutes will otherwise do even when sold by the same firm," and enables the firm to charge a higher price).

166. George S. Ford & John D. Jackson, *Horizontal Concentration and Vertical Integration in the Cable Television Industry*, 12 REV. INDUS. ORG. 501, 513–14 (1997); ROGERSON, *supra* note 95, at 10.

167. Comments of the Walt Disney Co. at 8, Amendment of the Comm'n's Rules Related to Retransmission Consent, MB Dkt. No. 10-71 (rel. May 27, 2011) [hereinafter *Disney Comments*].

168. *Id.*

169. *Id.* at 9. On the more extreme side, the National Association of Broadcasters (NAB) claims that bargaining power is still on the side of MVPDs. NAB argued that, no matter how small an MVPD is, the fact that the number of subscribers that it may serve is unlimited tips the bargaining power to that MVPD. *See* Reply Comments of the Nat'l Ass'n of Broad. at 18–19, Amendment of the Comm'n's Rules Related to Retransmission Consent, MB Dkt. No. 10-71 (rel. June 3, 2010) [hereinafter *NAB Comments*]. NAB stated that it is not uncommon that broadcast stations would "negotiat[e] with a single MVPD that controls a majority—and sometimes an overwhelming majority—of MVPD households in a local market." *Id.* at 19. This power is further strengthened, NAB emphasized, by the practice of MVPDs to cluster based on the regions they serve, therefore belying the argument that small MVPDs and MVPDs in general have lost their bargaining influence during retransmission consent negotiations. *Id.* at 18–19. But MVPD clustering can be seen as just a reprisal to the broadcast networks' combination and co-operation practices discussed in Part III.B, which tend to drive up retransmission consent rates. *See* SALOP ET AL., *supra* note 7, at para. 108.

the broadcast network's position is that payment in kind, *i.e.*, carriage of additional channels as consideration for retransmission consent, is within Congress's expectations and intent when the 1992 Cable TV Act was passed.[170]

Table 3: Percentage of Consumers Who Would Switch Provider if Their MVPD Provider Stopped Offering Certain Channels[171]

Network	**% of Consumers Who Would Switch**
NBC	52
CBS	52
ABC	51
FOX	51
Discovery Channel	40
The History Channel	36
TNT	35
TBS	34
ESPN	33
CNN	32
TLC	31
A&E	31
Food Network	30
Fox News Channel	30

Disney's assertion that it is not the broadcast networks' and the current regime's fault that MVPDs are losing their bargaining power in the wholesale market has some truth. Cable providers, for example, now compete with DBS and broadband MVPDs, among others.[172] In fact, projections show that by 2018, cable MVPDs will have only 57.5% of total television subscribers, and non-cable MVPDs will dominate the rest of the

MVPD clustering just evens up the field and restores, at least to some extent, the bargaining equilibrium between MVPDs and local broadcast stations.

170. *Disney Comments*, *supra* 167, at 13. NAB also highlighted a prior FCC statement to buttress this argument: "Proposals for carriage conditioned on carriage of any other programming, such as . . . another broadcast station either in the same or a different market," i.e., forced bundles, are "presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement." *NAB Comments*, *supra* note 169, at 22.

171. SALOP ET AL., *supra* note 7, at 39 fig. 6 (reprinted with the authors' permission).

172. *See* CHARLES B. GOLDFARB, CONG. RESEARCH SERV., RL34078, RETRANSMISSION CONSENT AND OTHER FEDERAL RULES AFFECTING PROGRAMMER-DISTRIBUTOR NEGOTIATIONS: ISSUES FOR CONGRESS 11 (2007) ("Today, programmers can distribute their product . . . through traditional broadcast television stations[,] cable operators, . . . direct broadcast satellite operators and other satellite companies, the new multichannel video offerings of the major telephone companies, cable 'overbuilders,' on-line video streams, and even cellular telephones.").

pie.[173] But the fact that broadcast networks did not cause the increasing competition in the MVPD market does not authorize broadcasters to act in a coercive manner.

Looking at Table 3 above, no matter how vigorously broadcast networks deny that they have the upper hand during retransmission consent negotiations, the figures show in plain view how they can leverage their local programming to get their way. To illustrate, it was found that fifty-two percent of subscribers would switch to another MVPD if either NBC's or CBS's local programming were dropped by their current MVPDs from their portfolios. The results in Table 3 are certainly indicative of the broadcast networks' market and bargaining power—a power that is commonly wielded to coerce MVPDs to consent to unfair and non-market-driven bundles.

Sinclair, aside from concurring with Disney's position that the retransmission consent process is working as intended,[174] also claims that reforming the process would do more harm than good to MVPD subscribers.[175] It contends that market-driven compensation is the primary preventer of the migration of "premier programs away from free over-the-air broadcasting to the detriment of the more than approximately ten million U.S. households who continue to watch television exclusively in such a manner."[176] Therefore, it argued, the current regime is actually very beneficial for those who are unwilling or unable to pay for MVPD subscription—viewers who, according to Sinclair, were not accounted for by the MVPDs' petition and supporting arguments.[177] Sinclair also pointed out that the concern over the loss of access to broadcast programming resulting from retransmission negotiation impasses is both temporary and rare, lessening the urgency of any FCC intervention.[178]

Sinclair is correct that market-driven compensation in the form of bundling, cash, or a combination of both is proper and economically beneficial for subscribers in general, and this Note does not argue that bundling is per se negative. It is the practice of non-market-driven bundling

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173. Projections were based on the Commission's 2nd and 6th Annual Price Reports and SNL Kagan's Basic & HD Cable Network Economics (2009). SALOP ET AL., *supra* note 7, at 41 fig. 7.

174. Comments of Sinclair Broad. Grp., Inc. at 2–4, Amendment of the Comm'n's Rules Related to Retransmission Consent, MB Dkt. No. 10-71 (rel. May 18, 2011) [hereinafter *Sinclair Comments*].

175. *Id.* at 5–6.

176. *Id.* at 6 n.8.

177. *Id.* at 6.

178. *Id.* The rarity of blackouts is also an arguable point because there are thirty-one documented, highly publicized blackouts from the year 2000 to 2009 involving retransmission consent disputes. *See* SALOP ET AL., *supra* note 7, at paras. 16–17. This number, the authors argued, is understated given that these blackouts account only for the most contentious and the most publicized, leaving open the number of other impasses that settled early and impasses that were not publicized. *Id.*

that creates detrimental effects to the market and to subscribers. When the test of whether a channel is delivered to consumers wholly depends on a channel's affiliation with a local broadcast station, with little regard to whether that channel is actually demanded by subscribers, the market becomes defective and subscribers end up with diminished welfare from multichannel television.[179] As to the urgency of FCC intervention, Sinclair's argument fails because retransmission impasses should not be the primary bases of further regulation. Looking at the frequency of negotiation impasses as an indicator of the need for intervention is improper because an impasse is a result, not the cause, of the current regime's inequities.[180] Further, even were blackouts rare, their effects to subscribers, who are precluded from watching their desired programming,[181] and to MVPDs, which are either coerced to pay for higher retransmission fees passed on to consumers[182] or to shed subscribers who are irked by blackouts,[183] indicate that rarity does not necessarily minimize harms occasioned by blackouts.[184] Ultimately, the fairness and substance of the current retransmission consent regime should be the driving force in determining whether FCC intervention is needed.

V. RECOMMENDATIONS

A. Singling Out the Bad Apples

Not all kinds of bundling practices are inherently coercive and welfare-reducing.[185] Bundling in good faith, without coercion, and consistent with a competitive marketplace can be allowed because that practice still permits MVPDs to structure their programming delivery in a way that would closely reflect consumer demand and rational commerce. Part IV focused on the effect of wholesale bundling on the prices subscribers pay, the coercion-driven delivery of programming to subscribers, and the macroeconomic inefficiency brought about by coercive

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179. *See* Ford & Koutsky, *supra* note 8, at 12 (positing that consumer welfare is increased "if the consumer can avoid purchasing undesirable channels as part of a bundle," which is inhibited if the bundles are coerced to MVPDs).

180. "[A]ny public policy response should be targeted at the root causes or conditions that might lead to inordinate forced bundling." *Id.* at 14.

181. SALOP ET AL., *supra* note 7, at para. 21.

182. *See id.* at para. 29.

183. *Id.* at paras. 22–27; *see* Julianne Pepitone, *Time Warner Cable Lost 300,000 Subscribers Amid CBS Blackout*, CNNMONEY (Oct. 31, 2013, 2:49 PM), http://money.cnn.com/2013/10/31/technology/time-warner-cable-cbs/.

184. *See* SALOP ET AL., *supra* note 7, at paras. 21–27, 29.

185. *See supra* Part IV.A.1 (second part of texts) & notes 140–145 for macroeconomics-based arguments in favor of bundling. For consumer-focused arguments, see *Sinclair Comments*, *supra* note 174, at 6.

wholesale bundling. Therefore, only bundling practices that exhibit these negative results should be prohibited.

There are two bundling practices that have the foregoing effects, both of which were discussed in previous sections. The first practice is when a broadcaster does not offer a comparable a la carte deal alongside the bundled deal. This practice includes unreasonable a la carte offers such as those with exorbitant costs.[186] The second are offers that unilaterally and wholly foreclose the possibility of delivering bundled channels in an unbundled manner to final viewers.[187] This includes offers that condition retransmission consent on an MVPD's agreement to purchase bundled channels and, in addition, also demand that those channels be delivered to subscribers in the basic or expanded basic package.[188]

The first bundling practice results in higher consumer prices.[189] As illustrated in Part IV.A.2.b, when a comparable a la carte deal is not offered, broadcast networks are able to charge higher for the bundle than if the channels remain individually available as substitutes. But even where a la carte is offered, when coercive terms are used to force the MVPDs to purchase the bundle nonetheless, the a la carte deal neither restores competition nor corrects the resultant price problems.[190] In contrast, if the terms of the bundled and a la carte deals were in parity and pursuant to market forces, the price charged to subscribers would not be bloated, because the substitutability of the channels persists. Accordingly, this practice should be disallowed so that MVPDs can have a meaningful choice as to which arrangement to purchase, while accounting for their business strategies and the desires of their subscribers.

The second bundling practice results in coercive programming delivery that is non-reflective of subscriber demand because it cripples the MVPDs' ability to tailor their packages to suit the demands of their respective subscribers.[191] If the MVPDs were able to sell the bundled channels in different package tiers that approximately match the demand for them, then at least a majority of subscribers would not be "forced" to receive and pay for undesired programming.[192] Therefore, this practice should also be proscribed.

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186. *See, e.g.*, *Mediacom Comments*, *supra* note 72, at 6; *see also* Ford & Koutsky, *supra* note 8, at 10.

187. *See, e.g.*, *Mediacom Comments*, *supra* note 72, at 5–6.

188. *See id.*

189. *See supra* Part IV.A.2.b and accompanying notes.

190. *See supra* Part III.B and accompanying notes.

191. *See supra* Part IV.A.1 and accompanying notes.

192. *See* Ford & Koutsky, *supra* note 8, at 16 ("[This would] permit MVPDs to create a variety of programming tiers that might result in placing, for example, ABC Family on a 'family tier' and ABC's SoapNet on an 'adult tier,' rather than have pricing essentially force the MVPD to place both on the 'expanded basic' tier.").

B. Congressional Legislation and FCC Administrative Rulemaking

To finally put to rest the FCC's persistent uncertainty about its ability to oversee and regulate substantive aspects of retransmission consent negotiations, Congress should clarify that the FCC has the power to exercise substantive oversight power over retransmission consent negotiations.[193] Congress should amend 47 U.S.C. section 325 to include an express provision enabling the FCC to address certain substantive aspects of retransmission consent negotiations as they relate to the good-faith requirement, such as the terms, price, and arrangements each side offers during negotiations.[194]

As was mentioned in Part II, the FCC had identified actions that would indicate a violation of the requirement to negotiate in good faith.[195] These have been embodied in the FCC administrative rules but have not been utilized to their full potential. After Congress enacts an explicit authorization for the FCC to monitor the substance of retransmission

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193. This does not mean that Congress should enable the FCC to oversee all substantive issues. Congress could still limit the power to specific circumstances that would include the reasonableness and fairness of the local stations' offers during retransmission consent.

194. The most recent proposed legislation is the Next Generation Television Marketplace Act. H.R. 3675, 112th Cong. (1st Sess. 2011), *available at* http://www.govtrack.us/congress/bills/112/hr3675. This bill is overbroad because it does more than what is actually needed. Granted, the current system might be defective, but the market is not totally failing, and only certain aspects of multichannel television, as they relate to consumer welfare, need to be reformed. *See* Ford & Koutsky, *supra* note 8, at 16 ("[I]ntervention in the wholesale market for MVPD programming may only need to be incremental to cause vast improvement."). Because the proposed legislation will repeal compulsory copyright, 17 U.S.C. § 111 (1988), the only difference will be that courts would be empowered to set rules that follow copyright licensing principles, instead of the FCC crafting administrative rules. *See* Lorna Veraldi, *Newscasts As Property: Will Retransmission Consent Stimulate Production of More Local Television News*?, 46 FED. COMM. L.J. 469, 481–83 (1994) (discussing the process involved under compulsory copyright); *see generally* Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 FED. COMM. L.J. 191 (1990) (discussing cable television, the compulsory copyright, and the relationship between the two); DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT (2006). Forced bundling will still be present because the leverage will be transferred to copyright holders, which may also be owned by media companies controlling, or affiliated with, several local broadcast stations. This regime would give rise to the conditioning of a highly rated show, as opposed to a highly rated network, on the carriage of other shows that have little or no consumer demand—shows that are produced by the same broadcast network or a company that owns that broadcast network. There will be little difference, if at all, to the dynamics among the industry players, with or without the proposed legislation. In the end, consumers will be left to where they presently stand. Therefore, the more effective and prudential approach is for Congress to enact legislation expanding the authority of the FCC to oversee the substance of retransmission consent negotiations.

195. The authority of the Commission to craft these rules stems from 47 U.S.C. § 325(b)(3)(C) (2006). As to the general rulemaking powers of the FCC, see 47 U.S.C. §§ 154, 303 (2006).

consent negotiations, the FCC should expand the interpretation of the good-faith requirement to include forced wholesale bundling as a per se violation. The FCC should rule that both the refusal to offer a la carte deals adjacent to bundled deals and a la carte offers with coercive terms are prohibited by one of the extant rules setting forth a per se violation of the duty to negotiate in good faith.[196]

The closest rule that can be utilized is 47 C.F.R. section 76.65(b)(1)(iv), which provides that "[r]efusal by a Negotiating Entity to put forth more than a single, unilateral proposal is a violation of the good-faith duty." The FCC can expand this rule by concluding that the first bundling practice is equivalent to a "single, unilateral proposal."[197] When a bundle is offered without any alternatives and without even considering the MVPDs' counteroffers, the local broadcast station per se violates its good-faith duty. If, in the alternative, the a la carte option is offered alongside the bundle but with coercive terms that induce MVPDs to choose the bundle, the local broadcast station in reality is still offering a "single, unilateral proposal" in the form of the bundle, so the rule will be violated. Since the a la carte alternative is substantially less desirable than the bundle, it can reasonably be considered as a nominal alternative in the sense that the MVPD is not given a meaningful choice.[198] It may well be the case that the a la carte option is just added to avoid violating the literal meaning of section 76.65(b)(1)(iv) and to reinforce the result that the local broadcast station desires—for the MVPD to purchase the bundle.[199] Therefore, coercive offers would also safely fall under the proposed reinterpretation of section 76.65(b)(1)(iv).

196. Note that the current totality of circumstances test, 47 C.F.R. § 76.65(b)(2) (2001), may, but should not, be used to police these bundling practices. *See supra* Part II.B. There might be offers without an a la carte option, rare as they may be, that would not breach the duty of good faith if mitigating factors are included to prevent the inflated prices that these offers normally entail. In those rare circumstances, this rule would make it possible for the FCC to uphold the offer. More appositely, it can also be used in instances where an a la carte alternative is offered but in a coercive manner. Because the determination of what is coercive would ultimately depend on the facts and circumstances of a given offer, this test can, in theory, accommodate different fact patterns and scenarios. On the other hand, the totality of circumstances rule, sparsely used by the FCC, inherently includes a tinge of ambiguity and uncertainty. The use of this rule would muddle the playing field during retransmission consent negotiations because it provides little guidance on the procedural and substantive manners by which the negotiating parties should conduct themselves. As such, it is a better public policy to per se prohibit the refusal to offer a la carte deals adjacent to bundled deals and a la carte offers with coercive terms, even if it means sacrificing those rare instances where these practices may have been made in good faith because of some mitigating factors and notwithstanding their facially suspect provisions.

197. 47 C.F.R. § 76.65(b)(1)(iv) (2012).

198. *See Mediacom Comments*, *supra* note 72, at 5 (stating that when Mediacom requested a la carte pricing for a strong network, the broadcast network responded with exceedingly uneconomical terms).

199. *See id.*

The only issue that remains under this solution is how the FCC can distinguish a coercive offer from a good-faith offer. The test for good faith on the local broadcast station's side of the bargain should be whether its mixed offer is dictated by considerations of the competitive marketplace.[200] So long as the FCC is satisfied, based on objective evidence, that the offer's terms and provisions are a result of market forces and not of other capricious bases extraneous to the market, that offer would be considered to have been made in good faith.[201] The "market" referenced here focuses on the direct line of economic relationship from the local broadcast station to the MVPD and from the MVPD to its subscribers. If the offer of a local broadcast station to an MVPD is essentially dictated by its affiliation with a cable network (for example), a party that is only incidental to the economic relationship between MVPD subscribers and the local broadcast station as intermediated by the MVDP, then that would be considered as "extraneous."

Meanwhile, to address forced bundling that dictates the tiers in which the channels must be placed, the FCC can create a new category of per se violations of good faith that would prohibit this conduct. It can phrase the rule as follows: "It shall be a failure to negotiate in good faith when a local broadcast station conditions its retransmission consent on the carriage of another network if the local broadcast station also dictates the service tier or tiers in which the networks are to be placed."[202] By implementing this rule, the FCC will be able to ensure that even where the market dictates the purchase of bundled channels, those channels can still be delivered to MVPD subscribers in a way that would closely track the needs and demand of different subscriber groups.[203] Accordingly, if consumer A, a parent with young children, does not want to have MTV Channel or SpikeTV in her package, the MVPD will be able to deliver a package to consumer A that adheres to consumer A's programming choice.[204]

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200. This test is directly taken from 47 U.S.C. section 325(b)(3)(C)(ii), which provides that "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations." 47 U.S.C. § 325(b)(3)(C)(ii) (2006). Following the benchmark standard imposed by this rule would ensure that the FCC would have the preexisting capacity, resources, and experience in deciding whether offers are coercive, and the only remaining task for the FCC would be to transpose this standard and its experience in enforcing it in the context of retransmission consent negotiations.

201. *See infra* Part V.C (providing an example of how an offer will be analyzed under this proposed test).

202. *See* Ford & Koutsky, *supra* note 8, at 17.

203. *See id.*

204. *See id.*

C. FCC Implementation: An Illustration of the New Regime

Under this regime, all offers would be mixed—consisting of an a la carte option and a bundled alternative—because solely offering a bundle would be a per se violation of good faith.[205] Forced bundling that dictates the tiers in which the channels must be placed is just a subset of the practice of not offering a la carte deals side by side bundled deals or of offering a la carte but in a coercive manner. The rule prohibiting this subset is a further limitation on offers made during retransmission consent, and would apply only if the offer passes the reinterpreted section 76.65(b)(1)(iv). Analysis under section 76.65(b)(1)(iv) boils down to whether the offer is mixed and whether the differences in contractual terms, if any, between the various alternatives are dictated by the market. The question of whether the bundled option is improper—whether the bundle also dictates the tiers in which the channels must be placed—would be reached only if the FCC first concludes that the offer is prima facie valid under section 76.65(b)(1)(iv). If, in the first instance, the FCC concludes that the offer violates section 76.65(b)(1)(iv), the inquiry ends there.

To illustrate, assume that a local ABC broadcast station makes the following offer in exchange for its retransmission consent: (1) a bundle of five Disney/ABC cable channels that must be placed in the MVPD's expanded basic tier priced at $5 per subscriber; or (2) the same five cable channels, offered a la carte, each of which priced at $2. If the parties are able to finalize a retransmission consent deal under this offer or under a revised one, then the FCC need not be involved. The only time that would warrant the FCC's attention is where a dispute arises because of this offer or during the course of negotiations commenced after tendering this offer.

This offer, under the proposed interpretation of section 76.65(b)(1)(iv), is superficially valid because it is a mixed offer consisting of bundled and a la carte alternatives. The next question is whether the price differential between the alternatives—$1 unit price (bundle) versus $2 unit price (a la carte)—is dictated by marketplace considerations. To prove this, the local ABC station can proffer reasonably persuasive financial data to show, for example, that the lower unit price for the bundle is a result of a reduction in its overhead costs in producing programming because each channel within the bundle is essentially cross-subsidizing the production and maintenance of the others. If the FCC agrees with the evidence submitted and concludes that the price differential resulted from marketplace considerations, then it can proceed to the next step. If, on the other hand, the FCC is not convinced by the local ABC station's assertion because the MVPD successfully proves, by providing contradicting evidence, that the local ABC station's reasons are just a pretext, then the inquiry ends. This can happen if the MVPD can show that, even accounting

205. *See supra* Part V.B and accompanying notes.

for the reduction of overhead costs because of bundling, the price differential should still not be as high (*i.e.*, 100% markup on each bundled channel's unit price). Alternatively, the MVPD can show that the local ABC station's actual reason for the price differential is to forcibly enable a non-demanded affiliated channel to penetrate the MVPD's market, a reason that is extraneous to the direct economic relationship between the local ABC station and MVPD subscribers.[206] The greater the differences are between the terms of the bundle and the terms of a la carte, the more suspect the offer should appear and the more critical FCC's scrutiny should be.

Assuming that the local ABC station was able to persuade the FCC that its offer is dictated by marketplace considerations, inquiry then shifts to the bundled option: Does it require the placement of the bundled channels in a specific tier? Yes; accordingly, the bundle is invalid, which thus taints the whole offer. To resolve this, the FCC should order ABC to either (1) delete that provision from the offer; or (2) restructure the whole offer, not just the invalid provision, so long as the resulting new offer would comply with the FCC rules on good faith.

VI. CONCLUSION

MVPD subscribers are the ultimate losers when coercive bundling practices are used during retransmission consent negotiations, not only because of the inflated prices that they have to pay, but also because of their inability to receive programming that suits their demand. Broadcast networks have accumulated bargaining power through horizontal integration and affiliation while taking advantage of the increased competition in the MVPD market to further consolidate their dominant position. Bundling has taken over the wholesale business model, coercing MVPDs to carry networks their consumers do not demand on top of paying the rising retransmission fees local stations require. As a result, subscribers are paying higher MVPD subscription fees for a portfolio of channels the majority of which they do not even recognize.[207]

This indeed is the most crucial time for the FCC and Congress to collaboratively take action. Congress should authorize the Commission to evaluate and rule upon certain substantive questions and issues on retransmission consent negotiations, including the carriage terms each side offers the other. This power should extend to the evaluation of the extent to which a given bundled offer is coercive, discriminatory, and capricious. This would then pave the way for the FCC to develop its existing rules and

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206. *See supra* Part V.B and accompanying notes.

207. The FCC estimates that "the typical American consumer is only interested in watching 17 cable channels." *See Wholesale Unbundling*, AM. CABLE ASS'N, http://www.americancable.org/issues/page/Wholesale_Unbundling (last visited Sept. 29, 2013).

to create new ones, fortifying its administration of the reciprocal duty of MVPDs and local broadcast stations to negotiate in good faith. Without administrative or legislative intervention at this critical point, the interests and welfare of MVPD subscribers will be jeopardized, and the very reasons for the adoption of the 1992 Cable TV Act will soon be nullified.