When Silence Isn't Golden: Analogizing the FCC's Discontinuance Regulations to Prevent Retransmission Consent Blackouts

Rachel Noteware*

Table of Contents

I. INTRODUCTION 269

II. BACKGROUND 271

A. *Policy Basis and Evolution of Retransmission Consent Negotiations* 272

1. The Problem with Retransmission Consent: Imbalanced Negotiations 273
2. The Case Made by Broadcasters for Increased Retransmission Consent Fees.. 275
3. The Case Made by MVPDs that Increased Fees and Blackouts Hurt Consumers 276

B. *Regulating Retransmission Consent Negotiations: the Good Faith Standard*... 277

1. FCC Efforts at Strengthening Good Faith Standards........ 278

a. *MVPD Response to the FCC's Proposed Strengthened Good Faith Standards* 280

b. *Broadcasters' Response to FCC's Proposed Strengthened Good Faith Standards* 281

2. Legislative Proposals to Strengthen the FCC's Enforcement Powers in Retransmission Consent Negotiations.............. 282

---

* J.D., The George Washington University Law School; B.A. in Communications and Slavic Languages and Literature, Northwestern University. The author would like to thank Ethan Lucarelli for his guidance in preparing this note, the staff of the *Federal Communications Law Journal*, and Rachel and Aaron for their patience, encouragement, and feedback throughout the writing process.

C. Discontinuance Rules: An Alternative Framework to Discourage Blackouts 284

III. ANALYSIS 286

A. Proposed FCC and Congressional Reforms May Not Be Realistic or Robust Enough to Prevent Blackouts 287

B. The FCC Can and Should Intervene to Prevent Future Blackouts 287

IV. CONCLUSION 291

I. INTRODUCTION

Most cable customers would find it unfathomable that they could fail to receive local weather warnings due to an impasse in negotiations between local broadcasters and cable providers. Yet as more retransmission consent negotiations between broadcasters and cable companies fail to result in an agreement, blackouts of local networks for cable customers will become more frequent, resulting in the loss of local programming for a large cross-section of the community who no longer rely on over-the-air TV signals.

Blackouts have reached an all-time high in recent years, having affected viewers in 91 markets in 2012, almost twice the number of blackouts in 2011.[1] In 2013, there were 19[2] publicized instances of broadcast negotiation impasses that resulted in blackouts of 94 stations.[3] And while broadcasters are quick to point out that most of the 15,000 retransmission disputes from 2009–2012 were resolved without a blackout,[4] the increase in lengthy blackouts suggests that the possibility of being without critical local programming is not an impossibility. In fact, as broadcasters and cable companies consolidate, deeper pockets on both sides will allow parties to dig in their heels to withstand longer blackouts in the future.[5] The 32 days during which CBS was blacked out on Time Warner Cable in August 2013 affected more than three million cable customers and had the potential to prevent local weather warnings from reaching cable subscribers in Dallas, Los Angeles, New York City, and five other markets.[6] During the blackout, wildfires raged in Colorado just a few hours from Denver, one of the affected markets.[7]

---

1. *American Television Alliance Introduction Packet* (June 2013), *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2013/06/ATVA-intro_packet.pdf.

2. Robert C. Kenny, *Guest Blog: Is the Sky Falling on the Retransmission Consent System?*, BROADCASTING & CABLE (June 18, 2014, 9:15 AM), http://www.broadcastingcable.com/blog/bc-dc/guest-blog-sky-falling-retransmission-consent-system/131840.

3. CHARLES B. GOLDFARB, CONG. RESEARCH SERV., R43248, UPDATING THE STATUTORY FRAMEWORK FOR COMMUNICATIONS FOR THE DIGITAL AGE: ISSUES FOR CONGRESS 35 (2013) (citing research data provided by SNL Kagan).

4. Eriq Gardner, *TV Executives Debate Retrans Rules in Congressional Hearing*, THE HOLLYWOOD REPORTER (July 24, 2012, 2:04 PM), *available at* http://www.hollywoodreporter.com/news/retrans-rules-tv-executives-congressional-hearing-353621.

5. GOLDFARB, *supra* note 3, at 7.

6. *See* Michael Calabrese, *The CBS-Time Warner Blackout Battle: Time for Congress to Rescue the Hostages*, SLATE (Aug. 9, 2013, 4:58 PM),

Blackouts were not always the looming threat in negotiations between broadcasters and cable providers that they are now. Congress created the retransmission consent regime for a television market in which broadcasters and cable providers had equal leverage.[8] Cable operators were regional monopolies, with typically only one or two cable companies controlling access to multichannel video programming in each region.[9] Broadcast stations had exclusive regional access to network programming, including high-value sports and entertainment content.[10] This original balance of power no longer exists. Today, four or more multichannel video programming distributors (MVPDs) serve many markets, but broadcasters continue to enjoy exclusive access to network programming.[11] Also, the 1992 Cable Act includes no provision for network-owned stations that also own powerful cable channels.[12] These network-owned and operated stations can use their market power from cable holdings as well as network programming to influence retransmission consent fees.[13]

While the market has changed in recent years, the governmental interest in ensuring public access to local broadcast content from diverse sources remains the same. This compelling interest demonstrates the need for greater oversight of good faith in retransmission consent negotiations. Congress charged the Federal

---

http://www.slate.com/blogs/future_tense/2013/08/09/cbs_time_warner_cable_blackout_battle_congress_should_rescue_hostages.html.

7. *See* Brooke Way, *Red Canyon Fire Grows to 350 Acres: Evacuations Ordered*, KDVR, (Aug. 13, 2013), *available at* http://kdvr.com/2013/08/13/red-canyon-fire-near-glenwood-springs-grows-to-nearly-200-acres/.

8. Richard Greenfield, *The Disequilibrium of Power: How Retransmission Consent Went So Wrong, and How to Fix It*, ALL THINGS D (Aug. 27, 2013, 9:01 AM), http://allthingsd.com/20130827/the-disequilibrium-of-power-how-retransmission-consent-went-so-wrong-and-how-to-fix-it/.

9. *Id.*

10. *Id.*

11. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, FCC 13-99, 28 FCC Rcd. 10496, 10512-13, paras. 35-36 (2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-99A1_Rcd.pdf [hereinafter *Video Competition Report*]. The report notes that in 2011 over 35% of U.S. households had access to at least four MVPDs (a cable MVPD, two satellite MVPDs, and a telephone MVPD). *Id.*

12. *See* Greenfield, *supra* note 8. Greenfield cites Disney's negotiating power that stems from the parent company's ability to pool programming from ESPN, Disney Channel and ABC.

13. CBS, for example, pulled 27 CBS-owned stations as well as CBS Sports Network, Smithsonian Channel, TVGN, and Showtime Networks off of Dish Network during a retransmission consent dispute in December 2014. The blackout lasted just 12 hours before Dish conceded to CBS demands regarding retransmission consent fees and ad skipping. *See* Phillip Swann, *Dish vs. CBS: Who Won?*, TVPREDICTIONS.COM (Dec. 8, 2014), http://tvpredictions.com/dishcbs120814.htm.

Communications Commission (FCC) with overseeing retransmission consent negotiations,[14] and increasingly-frequent blackouts from failed negotiations suggest a need to reexamine the enforcement approach. The policy framework for a stronger enforcement approach can be found in other FCC rules regarding service disruptions that are based on a similar policy rationale.

This note explores how the FCC's policies regarding stations that violate minimum operating schedules by discontinuing service can apply to broadcasters who willingly discontinue broadcasts to MVPD customers during blackouts. Part II discusses, first, the original purposes of retransmission consent and its evolution over time; and second, FCC and legislative efforts to reform retransmission consent negotiations and prevent blackouts. Part III turns to the FCC's rules and policies surrounding discontinuance of service and how enforcement mechanisms in this arena may be wielded against voluntary disruptions of service in retransmission consent negotiation breakdowns. Ultimately, the note concludes that the FCC should uphold the public interest policies that underlie retransmission consent regulations by adopting the intervention framework for discontinuances in the context of voluntary blackouts.

II. BACKGROUND

Retransmission consent is a statutory creation of Congress that requires cable systems to obtain the consent of broadcast stations prior to retransmission of the signal. This requirement, which had applied to broadcasters who sought to use the programming of other stations since 1934, was made applicable to cable systems in 1992 because the absence of this requirement was thought to be distorting the video marketplace and threatening the future of over-the-air television broadcasting.15 Congress found that cable operators benefitted from the local broadcast signals that they were able to carry without broadcaster consent or copyright liability, and legislators adopted retransmission consent to remedy the unfairness to broadcasters. 16 As the video programming market has developed and competition among MVPDs has grown, the disparity between the bargaining positions of MVPDs and broadcasters has increased. While broadcasters have a fair argument that their content is the most demanded

14. *See* 47 U.S.C. § 325(b)(3)(A) (2012).

15. *Cable Carriage of Broadcast Stations*, FCC GUIDE, http://www.fcc.gov/guides/cable-carriage-broadcast-stations (last updated Aug. 15, 2013).

16. Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, FCC 11-31, 26 FCC Rcd. 2718, 2720 (2011), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-31A1_Rcd.pdf [hereinafter *NPRM*].

and valuable, MVPDs suggest that consumers are harmed by rising costs and blackouts.

A. Policy Basis and Evolution of Retransmission Consent Negotiations

Since 1934, broadcast stations that use the programming of other broadcast stations have been required to obtain the prior consent of the originating station.[17] In response to the perceived threat that cable monopolies posed to the governmental interests in preserving free over-the-air local broadcasting and promoting dissemination of information from a multiplicity of sources[18], Congress applied "must-carry" and retransmission consent rules to cable systems as a part of the 1992 Cable Act.[19] Must-carry rules allow broadcasters with less popular programming (that cable providers might decline to carry) to elect mandatory, non-compensated carriage on each cable system operating within its service area.[20] Alternatively, under retransmission consent, broadcasters with popular programming can elect to negotiate a rate of compensation with local cable systems for the right to retransmit the broadcaster's signal.[21] This signal right is recognized as a quasi-property right distinct from copyright licenses, as the local broadcaster is usually not the copyright holder for network programming.[22] Rather, the separate licensing for retransmission consent was designed to promote the availability of broadcast signals.[23]

Congress adopted must-carry and retransmission consent rules to foster localism and diversity. At the time of the Cable Act's adoption, the number of over-the-air broadcast consumers was on the decline, but Congress did not draft the legislation solely to protect a

---

17. *See* 47 C.F.R. § 73.1207(b) (2014); *see also* FCC GUIDE, *supra* note 15.

18. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

19. These rules were placed into §§ 325 and 614 of the Communications Act as amended; *see* 47 U.S.C. § 534 (2012).

20. *See* GOLDFARB, *supra* note 3, at 31.

21. *Id.*

22. *About the Issue*, AMERICAN TELEVISION ALLIANCE, http://www.americantelevisionalliance.org/?page_id=46 (last accessed March 14, 2014); *see also*, Sherwin Siy, *Cable Pays Twice, or, Retransmission Consent Isn't Copyright*, PUB. KNOWLEDGE (Sept. 12, 2013), http://www.publicknowledge.org/news-blog/blogs/cable-pays-twice-or-retransmission-consent-is.

23. Matthew A. Brill & Matthew T. Murchison, *How the FCC Can Protect Consumers in the Battle over Retransmission Consent*, BLOOMBERG LAW (Sept. 11, 2013), http://www.bna.com/how-the-fcc-can-protect-consumers-in-the-battle-over-retransmission-consent/.

minimum of broadcast service for those who could not afford cable.[24] In Turner Broadcasting Systems, Inc. v. FCC, the Supreme Court upheld the constitutionality of must-carry rules, noting that the "greatest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[25] Congress declared one of the goals of the Cable Act to be ensuring the continuation of the local origination of broadcast programming—otherwise known as "localism"—for over-the-air and cable viewers.[26]

1. Imbalanced Negotiations: The Problem with Retransmission Consent

In the early years of the Cable Act, retransmission consent battles were few, as most stations elected for must-carry status.[27] Stations that negotiated for retransmission consent often chose in-kind compensation, such as agreements to carry a broadcaster's affiliated cable network in exchange for signal carriage.[28] The regulations governing retransmission mitigated the leverage of local cable monopolies to give broadcasters sufficient clout to negotiate and preserve access to local broadcast stations.[29]

As competition developed among MVPDs, their bargaining power decreased and retransmission consent allowed broadcasters to demand higher rates of compensation. Due to the proliferation of video programming distribution options, cable companies' market shares have fallen steadily from 95 percent in 1994 to roughly 55 percent today.[30] If a cable provider refuses to pay the retransmission fee demanded, broadcasters can withhold their signal and steer consumers towards another MVPD who is willing to compensate them at that level.[31] Broadcasters have many more options in dealing with MVPDs today. The FCC noted that over 98 percent of homes in

24. 47 U.S.C. § 521 (2012) (as added by Section 2(b) of the 1992 Act).
25. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663-64 (1994).
26. 47 U.S.C. § 325 (2012) (as added by Section 2(a)(10) of the 1992 Act).
27. *See* Brill, *supra* note 23.
28. *Id.*
29. GOLDFARB, *supra* note 3, at 31.
30. *Video Competition Report*, *supra* note 11, at paras. 3, 33.
31. *See* Brill, *supra* note 23; *see also*, Press Release by WNWO, an NBC-affiliate, after a breakdown in negotiations with Buckeye Cable stating, "[o]ur research indicates that better pricing and programming (including WNWO) is available from Buckeye competitors Dish Network, DirecTV and, for some people, AT&T U-verse, and we encourage Buckeye subscribers to find alternative means for receiving our station's programming," *available at* http://www.nbc24.com/community/content.aspx?id=984815.

the U.S. have access to at least three video distribution options, and many homes have access to four or more.[32] Broadcasters can also choose to distribute programming online through their own websites.[33] All of these options make threats of blackouts more credible for cable providers.[34]

That broadcasters possess the most popular program content on television further strengthens their bargaining position. Nine of the top ten most watched television programs in 2012–2013 were on broadcast networks.[35] Broadcasters point to the popularity of their network programming to justify retransmission consent prices, and use these programs as leverage when threatening a blackout.[36]

The increase in bargaining power of broadcasters corresponds with a steady rise in retransmission consent fees. According to industry research, retransmission consent revenues for local broadcast stations have grown more than tenfold since the middle of the last decade, from $215 million in 2006 to $2.4 billion in 2012, and are projected to reach more than $6 billion by 2018.[37] As retransmission fees rise, the likelihood that negotiations will devolve into blackouts increases as well.[38] Broadcasters have increasingly become dependent on retransmission revenue while cable systems do not want to pay higher fees for content that was once distributed free of charge.[39]

---

32. *Video Competition Report*, *supra* note 11, at paras. 35-36.

33. In fact, broadcasters have leveraged their online content as well when negotiations with MVPDs have soured. For instance,when Time Warner Cable dropped the CBS and Showtime signals in most major markets during the August 2013 blackout, CBS blocked access to full-episode viewing on CBS.com for customers with Time Warner Cable internet service. *See* Ryan Lawler, *CBS Blocks Time Warner Cable Subscribers from Watching Full Episodes on CBS.com*, TECHCRUNCH (Aug. 2, 2013), http://techcrunch.com/2013/08/02/cbs-blocks-time-warner-cable-subscribers-from-watching-full-episodes-on-cbs-com/.

34. *See* Brill, *supra* note 23.

35. Michael Schneider, *America's Most Watched: The Top 25 Shows of the 2012-2013 TV Season*, TV GUIDE (June 10, 2013, 12:18 PM), http://www.tvguide.com/news/most-watched-tv-shows-top-25-2012-2013-1066503.aspx. The only cable programming to break into the top ten was AMC's *The Walking Dead*, "a rare feat for a cable series." *Id.*

36. *See* Doug Halonen, *Retrans Reform Heats Up in Washington*, TVNEWSCHECK (Jan. 14, 2014, 5:49 AM), http://www.tvnewscheck.com/article/73261/retrans-reform-heats-up-in-washington/.

37. Robin Flynn, *Retrans Projections Update: $6B by 2018*, SNL KAGAN (Oct. 18, 2012, 7:44 PM), https://www.snl.com/InteractiveX/articleabstract.aspx?id=16003888&KPLT=8.

38. American Television Alliance Introduction Packet, *supra* note 1.

39. Mark Tatge claims that consumers should "expect to see more blackouts. This is a reflection of the changing economics of broadcast TV." Daniel B. Wood & Gloria Goodale, *CBS, Time Warner Head into Week 2 of Standoff*, CHRISTIAN SCI. MONITOR (Aug. 8, 2013), http://www.csmonitor.com/Business/2013/0808/CBS-Time-Warner-head-into-Week-2-of-standoff.

Exacerbating the problem of blackouts is the fact that most consumers view local broadcast channels through their cable or satellite provider. The surge in programming distribution alternatives has led the vast majority of Americans away from traditional over-the-air TV signals.[40] According to a 2013 study, eighty-three percent of U.S. households receive TV programming through cable, satellite, or fiber connections with only seven percent relying on over-the-air transmission.[41] When retransmission consent negotiations break down and a broadcast signal is pulled from a MVPD channel lineup, more consumers are affected than ever before.

2. The Case Made by Broadcasters for Increased Retransmission Consent Fees

As consumers bemoan increased cable subscription costs and more frequent broadcast station blackouts, both broadcasters and MVPDs blame each other for failed retransmission consent negotiations. Broadcasters argue that increasing content costs, the erosion of advertising revenue, and the proliferation of program options have forced broadcasters to rely on a dual income stream of carriage fees and advertising.[42] Because broadcasters still bring in the most viewers and provide local content that is unavailable elsewhere, they argue it is only fair that cable companies acknowledge the value their stations bring with commensurate fees.[43] After years of retransmission with no compensation, broadcasters still receive carriage rates much lower than other cable networks.[44] During a 2012 retransmission consent dispute between the Tribune Company and Cablevision, Tribune argued, "Cablevision has never compensated Tribune for the retransmission of its local stations, which are among the most highly watched channels on Cablevision's line-ups. What we have proposed

---

40. Sean Patterson, *Cable Households Dropping, Over-the-Air Households Down to 7%*, WEBPRONEWS (July 30, 2013), http://www.webpronews.com/cable-households-dropping-over-the-air-households-down-to-7-2013-07.

41. *Id.*

42. *Another Plea for FCC Intervention in Retransmission Consent*, RADIO & TELEVISION BUS. REP. (Aug. 27, 2013), *available at* http://rbr.com/another-plea-for-fcc-intervention-in-retransmission-consent/.

43. David B. Wilkerson, *Disney May Pull ABC Signal from N.Y. Cablevision Systems*, MARKETWATCH (Mar. 2, 2010, 5:13 PM), http://www.marketwatch.com/story/abc-may-pull-its-signal-from-cablevision-systems-2010-03-02?reflink=MW_news_stmp.

44. *See Protect TV Viewers and Allow Broadcasters to Continue Negotiating in the Free Market*, NAB, http://www.nab.org/advocacy/issue.asp?id=1891 (last visited on May 22, 2015). NAB argues that analysts have estimated that, "if broadcasters received retransmission consent payments at a rate comparable to what is paid to cable networks, broadcasters would receive five times their current compensation."

amounts to less than a penny a day per subscriber, well below what Cablevision pays to providers of less well-watched channels."[45]

Broadcasters further argue that though they are asking for more monetary compensation than they have in the past, retransmission consent payments are not responsible for the rising consumer prices charged by cable operators. Broadcasters assert that only two cents of every dollar of cable revenue go to broadcast retransmission consent fees, while twenty cents of every dollar go to cable programming fees, even though broadcast programs remain the most popular with viewers.[46] They remain skeptical that any cost savings from reducing broadcasters' carriage fees would actually result in savings for consumers, citing cable's history of increasing subscriber fees that predates broadcasters' ability to receive monetary compensation for retransmission of broadcast signals.[47]

3. The Case Made by MVPDs that Increased Fees and Blackouts Hurt Consumers

MVPDs, facing more competition from online distributors like Netflix, argue that the current retransmission consent rules are out of touch with changes in the industry and favor broadcasters. Rising retransmission consent fees raise costs that are passed on to subscribers and if a cable provider refuses to give in to demands for higher fees, consumers are the ones who are hurt by station blackouts.[48] During a retransmission consent dispute with ABC, Cablevision spokesman Charles Scheuler said, "[i]t is not fair to force Cablevision customers to pay a new TV tax for programming ABC Disney gives away free, both over-the-air and on the Internet."[49]

Smaller cable providers argue that their retransmission fee burdens are heavier because they lack the negotiating power to bargain for better deals. The American Cable Association, which represents smaller cable companies, claims that broadcasters often demand that "the smaller cable operators pay an exceptionally higher per-customer fee than other larger operators in the same market," and that this harms consumers and reduces

---

45. *Tribune Company Statement on Negotiations with Cablevision*, PR NEWSWIRE (Aug. 17, 2012), http://www.prnewswire.com/news-releases/tribune-company-statement-on-negotiations-with-cablevision-166515786.html.

46. Supp. Comments of the Nat'l Ass'n of Broadcasters at iii-iv, Amendment of the Comm'ns Rules Relating to Retransmission Consent, FCC MB Docket No. 10-71 (May 29, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7022419306.

47. *Id*. at iv.

48. *See* Tom Wheeler, *Protecting Television Consumers by Protecting Competition*, FCC BLOG (Mar. 6, 2014), https://www.fcc.gov/blog/protecting-television-consumers-protecting-competition.

49. Wilkerson, *supra* note 43.

price competition.[50] There is no justification, they argue, for charging smaller companies more, because retransmission costs the broadcaster nothing and it reduces competition among MVPDs by making it too expensive for independent cable companies to stay in business.

B. Regulating Retransmission Consent Negotiations: the Good Faith Standard

To address the challenges in retransmission consent negotiations, Congress and the FCC have developed rules requiring that parties negotiate in good faith. But this standard has proven challenging to implement, and FCC efforts to clarify the rules have not proven sufficient to prevent retransmission-related blackouts.

The Satellite Home Viewer Improvement Act of 1999 (SHVIA) included a two-part framework for determining whether parties negotiate in good faith. First, the FCC considers violations of seven objective good-faith standards to be *per se* breaches of good faith.[51] Second, even if no *per se* violations are found, the FCC may look to the totality of the circumstances in determining whether a party has breached the duty of good faith.[52] Originally derived from labor law precedent,[53] the seven *per se* violations of good faith include: refusal to negotiate retransmission consent; refusal to designate a representative with the authority to make binding representations; refusal to negotiate retransmission consent at reasonable times or causing unreasonable delays; refusal to put forth more than a single, unilateral proposal; failure to respond to a proposal of the other party; execution of an agreement that requires the other party not to enter into a retransmission consent agreement with any other broadcaster or MVPD; and refusal to execute a written retransmission consent agreement.[54]

The SHVIA good faith standard did not address two of the most contentious industry negotiation practices. First, the FCC clarified that it is

---

50. *Retransmission Consent*, AMERICAN CABLE ASS'N, http://www.americancable.org/issues/page/Retransmission_Consent (last visited Mar. 31, 2014).

51. *NPRM*, *supra* note 16, at 2724; *see also*, Implementation of the Satellite Home Viewer Improvement Act of 1999, *First Report and Order*, 15 FCC Rcd. 5445, 5457, 5462 (2000) [hereinafter *Good Faith Order*] (The FCC stated that the *per se* standards "identify . . . situations in which a broadcaster did not enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties.").

52. *See* 47 C.F.R. § 76.65(b)(2) (2014) ("In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith . . . . ").

53. *NPRM*, *supra* note 16, at 2723.

54. 47 C.F.R. § 76.65(b)(1)(i)–(vii) (2014).

not evidence of bad faith if a broadcaster or MVPD enters into agreements at different prices or conditions with different MVPDs or broadcasters if the different terms are based on competitive marketplace considerations.[55] Second, failure to negotiate—and ultimately reach—agreement is not evidence of bad faith.[56] This means that blackouts that occur because of an impasse in negotiations are not *per se* violations of the FCC's good faith standard.

The negotiating parties can enforce the good faith standards by commencing an adjudicatory proceeding with the FCC,[57] but parties rarely invoke them. While the FCC may order forfeitures for MVPDs and broadcasters that fail to negotiate in good faith,[58] in 2011, the Commission noted that few parties had made allegations of good faith violations and only one violation of the good faith standard had been upheld since its adoption.[59] The FCC indicated that uncertainty regarding which market practices constitute a breach of the obligation to negotiate in good faith could be the reason why so few parties lodge complaints.[60]

1. FCC Efforts at Strengthening Good Faith Standards

Industry uncertainty along with the need for good faith standards that addressed particular practices in today's media market led the FCC to issue a Notice of Proposed Rulemaking (NPRM) regarding the rules on retransmission consent in 2011.[61] The FCC justified modifying the good-faith standards by citing the increase in station blackouts and the uncertainty facing consumers regarding their ability to continue receiving certain broadcast television stations during contentious negotiations.[62]

The NPRM sought to update the good faith rules to better utilize the good faith requirement as a consumer protection tool. The FCC proposed the addition of certain *per se* violations of good faith, such as stations giving networks the right to approve an agreement with an MVPD for its affiliates or giving another station, not commonly owned, the power to approve its retransmission consent agreement through a local marketing agreement (LMA). The FCC also proposed that a broadcaster or MVPD's

55. *Id.* § 76.65(a)(1)–(2).
56. *Id.*
57. *Id.* § 76.65(c).
58. *See Good Faith Order*, *supra* note 51, at 5480, 5482; 47 U.S.C. § 325(b)(3)(C).
59. *NPRM*, *supra* note 16, at 2718, 2724.
60. *Id.* at 2730.
61. *Id.*
62. *Id.* at 2727, 2730. The FCC's goal in the rulemaking proceeding was to identify ways to "increase certainty in the marketplace, thereby promoting the successful completion of retransmission consent negotiations and protecting consumers from impasses or near impasses." *Id.*

refusal to submit to non-binding mediation when parties reach an impasse within 30 days of the retransmission consent agreement's expiration be considered a *per se* violation of good faith.[63] The FCC also questioned whether other market practices, such as a broadcaster's requirement that an MVPD not carry a "significantly viewed" out-of-market station or the delay of retransmission consent negotiations, would constitute *per se* violations of the current good faith standards.[64]

In 2014, the FCC announced in a Report and Order (R&O) that joint retransmission consent negotiations between non-commonly owned "Top Four" stations in the same market would also be *per se* violations of the good faith standard.[65] Representing a more limited approach than the NPRM's proposal to make *all* joint negotiations by non-commonly owned stations breaches of good faith, the FCC found a rule banning joint negotiations by Top Four stations to be necessary to prevent competitive harms.[66] The FCC concluded that such joint negotiations allow broadcasters to charge supra-competitive retransmission consent fees and contribute to negotiation breakdowns.[67] The report acknowledges the role that blackouts play in obtaining higher retransmission consent fees by noting that the higher fees in joint negotiations are obtained, in part, from the MVPD's fear of losing two sets of must-have programming.[68]

In the past, the FCC dismissed more interventionist approaches to dealing with retransmission consent, and concluded that Congress did not intend for the good faith negotiation provision to allow for substantial FCC oversight of retransmission negotiations. In its 2011 NPRM, the FCC interpreted the Cable Act provision prohibiting retransmission of a signal without a broadcaster's consent[69] to bar the provision of mandatory interim coverage during a retransmission dispute.[70] In the 2014 R&O, the FCC cited the Congressional purpose in creating a retransmission regime to "establish a marketplace for the disposition of the rights to retransmit broadcast signals," but not authorizing the FCC "to dictate the outcome of

63. *Id.* at 2731–32.

64. *See id*. at 2733.

65. Amendment of the Comm'n's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 14-29, 29 FCC Rcd. 3351 (2014) [hereinafter *R&O*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-29A1_Rcd.pdf.

66. *See id.*

67. *See id.* at 3355-56.

68. *See id.* at 3359; *see also*, CHARLES B. GOLDFARB, CONG. RESEARCH SERV., RL34078, RETRANSMISSION CONSENT AND OTHER FEDERAL RULES AFFECTING PROGRAMMER-DISTRIBUTOR NEGOTIATIONS: ISSUES FOR CONGRESS CRS-70 (2007), *available at* http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf.

69. 47 U.S.C. § 325(b)(1)(A) (2012) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—(A) with the express authority of the originating station").

70. *NPRM*, *supra* note 16, at 2728.

the ensuing marketplace negotiations."[71] Even in the case of a breach of the good faith standards, the FCC interpreted its enforcement power as instructing the parties to renegotiate the agreement in accordance with the rules of good faith, with no statutory authority to compel retransmission absent broadcaster consent.[72] The FCC also found that it lacked the authority to make mandatory binding dispute resolution upon parties, as this was inconsistent with both the Cable Act and the Administrative Dispute Resolution Act (ADRA), which authorizes an agency to use arbitration "whenever all parties consent."[73]

In cases where the FCC has intervened in retransmission consent, it has done so in the interest of preserving competition. As the R&O regarding joint negotiations by unrelated Top Four stations suggests, the FCC infers an implicit authority to regulate price fixing and non-compete agreements from the good faith standard.[74]

a. MVPD Response to the FCC's Proposed Strengthened Good Faith Standards

MVPDs praised the FCC's recognition of needed reforms in retransmission consent but argued that additions should be made to the list of *per se* violations of the duty of good faith. Several providers endorsed Cablevision's blueprint for retransmission reform.[75] The highlights of the blueprint include preventing the bundling of broadcast TV station carriage with co-owned cable channels, requiring broadcasters to publicize their price for TV station carriage, and preventing "discrimination" in price based on the size of an operator.[76] While not as sweeping as MVPD proposals that LMAs should be *per se* violations of good faith,[77] cable operators applauded the 2014 R&O prohibition on joint negotiations by

---

71. *R&O*, *supra* note 65, at 3352 (citing S. Rep. No. 92, 102nd Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169).

72. *NPRM*, *supra* note 16, at 2723–24.

73. 5 U.S.C. § 575(a)(1) (2012).

74. *R&O*, *supra* note 65, at 3358; *see also Good Faith Order*, *supra* note 51, at 5470 ("It is implicit in Section 325(b)(3)(C) that any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement . . . . Conduct that is violative of national policies favoring competition . . . . is not within the competitive marketplace considerations standard included in the statute.").

75. *See, e.g.*, Reply Comments of Charter Communications, Inc., Amendment of the Comm'n's Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. June 28, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021689996.

76. John Eggerton, *Cablevision Makes Its Case for Retrans Reform*, MULTICHANNEL NEWS (May 26, 2011, 12:16 PM), http://www.multichannel.com/news/news/cablevision-makes-its-case-retrans-reform/376922.

77. Ex Parte of Nat'l Cable & Telecomm. Ass'n, Amendment of the Comm'n's Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. July 25, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520933561.

Top Four stations as a move to protect consumers from rising prices that result from collusive negotiating by broadcasters.[78]

The American Cable Association argued further that the FCC could, and should, take immediate action by mandating that broadcasters and MVPDs maintain the status quo and continue to offer a broadcaster's signal to customers after a retransmission consent agreement expires and while negotiations continue. Once the dispute is resolved, the agreement should apply retroactively, including any required price adjustments.[79]

b. Broadcasters' Response to FCC's Proposed Strengthened Good Faith Standards

Broadcasters responded that, as recognized in the NPRM, several of the MVPD proposals constitute FCC interference with the substance of retransmission consent negotiations, contrary to both the statutory language and congressional intent.[80]

Also, broadcasters contend that government intervention to reduce fees paid to broadcasters will ultimately reduce the quality and diversity of broadcast programming and move more quality programming to pay-TV services.[81] Broadcasters argued that there is a public value in free, over-the-air TV for those who cannot afford premium services. In defense of blackouts, broadcasters argue that consumers are never truly "blacked out" from broadcast programming because all pay-TV customers could choose to switch cable providers or watch programming over the air in the event of a retransmission consent dispute.

Broadcasters decried the FCC's 2014 R&O as a job-killing measure that hurts broadcasters and consumers and is purely beneficial to satellite and cable providers.[82] The National Association of Broadcasters responded to the proposed prohibition on joint negotiations by Top Four

---

78. *See* Josh Peterson, *FCC Chief Targets Broadcasters to End TV Blackouts, Helps Cable Industry Friends*, WATCHDOG.ORG (Mar.10, 2014), http://watchdog.org/131534/broadcast-cable-fight/. Matthew Polka, president and CEO of American Cable Association, praised the order stating, "[a]doption of Chairman Wheeler's proposed order would represent a victory not only for fair competition, but also for millions of consumers who are being victimized by TV station conglomerates, which have the perverse idea that collusion is somehow consistent with their legal charter to bargain in good faith." *Id.*

79. *See* Ex Parte of American Cable Ass'n, Amendment of the Comm'ns Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. Aug. 22, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520939380.

80. Nat'l Ass'n of Broadcasters, *supra* note 46, at v.

81. *Id*.

82. *NAB Statement on FCC Chairman Wheeler's Proposal Affecting Broadcaster Sharing Agreements*, NAB.ORG (Mar. 6, 2014) ("The real loser will be local TV viewers, because this proposal will kill jobs, chill investment in broadcasting and reduce meaningful minority programming and ownership opportunities."), *available at* http://www.nab.org/documents/newsRoom/pressRelease.asp?id=3335.

station broadcasters by arguing that broadcasters need to join together to be a competitive force among giants in cable, satellite, and wireless industries.[83] Dismantling joint negotiation agreements that the industry has detrimentally relied upon, NAB argued, will chill investment and cause significant job losses.[84]

2. Legislative Proposals to Strengthen the FCC's Enforcement Powers in Retransmission Consent Negotiations

While many would like the FCC to take additional action to monitor retransmission consent negotiations and prevent impasses that lead to blackouts, there is disagreement about whether the FCC has the authority to do so. The legislative history of the 1992 Cable Act is replete with congressional comments regarding the FCC's obligation to intervene in some retransmission consent negotiations under the Act's provisions. Arguing that the FCC would ensure that retransmission negotiations would not lead to unreasonable rate increases for consumers, former Representative and current Senator Edward Markey (D-MA) stated that "protections for rate increases will stay on the books, and the FCC is mandated in this legislation to ensure that there are reasonable rates for every citizen in America."[85]

In addition to concern over reasonable rates, some members of Congress expressed concern that without FCC intervention, failed negotiations would leave cable subscribers without local broadcast signals. The late Senator Daniel Inouye (D-HI), a sponsor of the Cable Act, responded to these concerns by arguing that the FCC does have authority to resolve disputes between broadcasters and MVPDs by requiring arbitration.[86] Indeed, the language of the Cable Act itself appears to sanction FCC intervention in retransmission consent negotiations, obligating the agency to, "govern . . . the impact that the grant of retransmission consent by television stations may have on the rates."[87]

In more recent years, legislators have taken on the task of giving the FCC explicit authority to intervene in retransmission consent negotiations.[88] Recent congressional proposals address the problem of

83. Letter to Chairman Wheeler by National Association of Broadcasters at 2, *available at* http://apps.fcc.gov/ecfs/document/view?id=7521095036.

84. *See id.*

85. ROBERT E. EMERITZ ET AL., THE 1992 CABLE ACT: LAW & LEGISLATIVE HISTORY 1066 (1992).

86. *Id.*

87. 47 U.S.C. § 325(b)(3)(A) (2012).

88. Some legislative proposals, such as the Local Choice Bill drafted by Sen. John Thune and Sen. Jay Rockefeller, do not explicitly increase FCC oversight but require increased transparency in retransmission consent agreements, including disclosing the

blackouts by strengthening the FCC's enforcement powers in such negotiations. For example, the Video CHOICE (Consumers Have Options in Choosing Entertainment) Act introduced by Representative Anna Eshoo (D-CA) would allow the FCC to intervene in retransmission consent negotiations when it determines that parties have reached an impasse and allow for interim carriage by the MVPD until a new agreement can be reached.[89] Senators John McCain (R-AZ) and Richard Blumenthal (D-CT) also introduced a bill in 2013 proposing to increase the FCC's oversight of retransmission consent disputes.[90] Among other things, the bill would require broadcasters and MVPDs who cannot come to an agreement to disclose the terms of their most recent agreement, including the price, to the FCC.[91]

Predictably, cable companies praised the bills for protecting consumer interests in preventing blackouts and claimed that must-carry and network non-duplication rules already prevent retransmission consent negotiations from being free-market negotiations.[92] Broadcasters, however, claimed that such legislation favors pay-TV by not requiring providers to pay fair market price for programming consumers want and taking away consumer protections, such as refunds, in the event of blackouts.[93]

---

amount of retransmission fees paid. Under the Thune-Rockefeller proposal, broadcasters would set the price they charge individual MVPD subscribers and cable and satellite providers would collect those fees and remit them to broadcasters. Subscribers could select local broadcast stations on an individual basis and opt-out of paying retransmission consent fees for stations they do not select. *See* Timothy H. Lee, *'Local Choice': Bipartisan Senate Proposal Brings Market Reform to Broadcast Industry*, THE HILL (Sept. 09, 2014, 3:00 PM), http://thehill.com/blogs/congress-blog/technology/216969-local-choice-bipartisan-senate-proposal-brings-market-reform. The proposal was ultimately left out of the Satellite Television Access and Viewer Rights Act (STAVRA). *See* Press Release, Sen. John Thune, Rockefeller, Thune Issue Joint Statement on Committee Passage of the Satellite Television Access and Viewer Rights Act (Sept. 17, 2014), *available at* http://www.thune.senate.gov/public/index.cfm/press-releases?ID=6d5f16f5-7d72-481e-955f-9b45495b2dc5.

89. Press Release, Rep. Anna Eshoo, Bill to Eliminate TV Blackouts and Reform the Video Marketplace Introduced (Sept. 9, 2013), *available at* http://eshoo.house.gov/news-stories/press-releases/bill-to-eliminate-tv-blackouts-and-reform-the-video-marketplace-introduced/; *see also, Eshoo Releases Draft Bill to Address TV Programming Pitfalls*, FIERCECABLE (Sept. 9, 2013), http://www.fiercecable.com/press-releases/eshoo-releases-draft-bill-address-tv-programming-pitfalls.

90. Bryce Baschuk, C*ompeting House Bills Would Revise Television Retransmission Consent Rules*, BLOOMBERG LAW (Dec. 20, 2013), http://www.bna.com/competing-house-bills-would-revise-television-retransmission-consent-rules/.

91. Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013), *available at* https://www.congress.gov/113/bills/s912/BILLS-113s912is.pdf.

92. John Eggerton, *Rep. Eshoo Proposes Retransmission Bill*, MULTICHANNEL NEWS (Sept. 9, 2013, 2:24 PM), http://www.multichannel.com/policy/rep-eshoo-proposes-retransmission-bill/145361.

93. Steve Donohue, *Eshoo Bill Triggers Retransmission-Consent Showdown*, FIERCECABLE (Sept. 10, 2013), http://www.fiercecable.com/story/eshoo-bill-triggers-retransmission-consent-showdown/2013-09-10.

In the meantime, the FCC has maintained that it lacks statutory authority to intervene when retransmission consent negotiations fail.[94] The Commission rejected any claims of authority to compel interim carriage of broadcast programming or mandatory arbitration.[95] Some MVPDs see the reluctance of the FCC to interfere in retransmission consent disputes as inconsistent with the agency's prior expansive interpretation of the mandate to ensure that broadcasters operate in the public interest.[96]

C. *Discontinuance Rules: An Alternative Framework to Discourage Blackouts*

A possible tool in the FCC's existing regulatory toolbox that could be used to discourage blackouts in retransmission consent negotiations are regulations regarding discontinuance of service and operating at a variance with a broadcasting license. FCC enforcement of discontinuance regulations is premised on the important role broadcasters play in disseminating information to local communities. When a station discontinues operations or operates at a variance from their license without permission from the Commission, the FCC may take several enforcement actions, including issuing show cause orders or revoking licenses, shortening a station's renewal period, and upwardly adjusting forfeitures based on the egregiousness of the behavior or circumstances.

The FCC's rules on discontinuance of service allow a station to go silent or fail to maintain a minimum operating schedule for up to 30 days without receiving prior FCC authorization, as long as the station notifies the Commission within 10 days and discloses the limited or discontinued operation.[97] By the 30th day, the station must seek Special Temporary Authority to remain silent or operate at

94. *See NPRM*, *supra* note 16, at 2763 (Statement of Chairman Julius Genachowski) (asserting that "[t]he current statutory framework limits the Commission's tools to respond to retransmission consent impasses").

95. *See id*. (Chairman Genchowski stating that "the statute doesn't give the Commission the authority to order interim carriage of broadcast programming or mandatory arbitration. The jury is still out on whether those measures are necessary . . . but if they are, it will require statutory change . . . .").

96. *See* 47 U.S.C. § 309(a) (2012); *Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 379–80 (1969); *see also* Letter from Joseph E. Young, Senior Vice President, Mediacom, to P. Michelle Ellison, Chief of Staff, FCC, (Aug. 12, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520937280 (contrasting FCC's "timidity" with expansive statutory interpretations advanced in areas such as net neutrality and terrestrial program services where there is no authority "apparent on the face of the statute or in the relevant legislative history . . . ").

97. 47 C.F.R. § 73.1740 (2014).

variance from its license.[98] If technical problems make it impossible for a station to operate in accordance with its license, the FCC allows the broadcaster to operate at variance with its license for a period of not more than 30 days without specific authority from the FCC.[99]

The policy rationale for deterring temporary or permanent discontinuance of operations is to prevent public harm.[100] Silent stations do not serve the public interest because they fail to offer community service programming such as news, public affairs, weather information, and emergency alerts.[101] In some cases, the FCC found stations operating at a lower power than the minimal signal level required for service to the community of license to be the functional equivalent of a silent station.[102] Spectrum efficiency policies also underlie the minimum operating schedule and discontinuance rules to ensure "that scarce broadcast spectrum does not lie fallow and unavailable to others capable of instituting and maintaining service to the public."[103]

The FCC has authority to discourage service disruptions by issuing show cause orders and revoking licenses. *Debrine Communications, Inc.* affirmed the FCC's authority to issue orders for a station that had gone silent without authorization to show cause for why the agency should not revoke its license.[104] *Radio Northwest Broadcasting Co.* established the FCC's authority to issue license revocation orders to silent stations.[105]

While license renewal is generally automatic, the FCC has made exceptions in regards to silent stations. Since the 1980s, the license renewal process—traditionally, the time at which the FCC evaluates a station's public interest performance—has been abbreviated and made virtually automatic through a "postcard

98. *Id.*

99. 47 C.F.R. § 73.691(b) (2014).

100. Renewal Reporting Requirements for Full Power, Commercial AM, FM and TV Broad. Stations, *Notice of Proposed Rulemaking*, FCC 92-557, 8 FCC Rcd. 49, 49, para. 5 (1993) [hereinafter *Renewal Reporting Requirements NPRM*]; *see also* Media Bureau Announces Revisions to License Renewal Procedures and Form 303-S, *Public Notice*, DA 11-489, 26 FCC Rcd. 3809, 3810 (2011).

101. *See* LKCM Radio Group, *Memorandum Opinion and Order*, DA 14-122, 29 FCC Rcd. 1045, at 1049 (2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-14-122A1_Rcd.pdf.

102. See *id.* at 1049 n.30.

103. Family Life Ministries, Inc., *Denial of Petition for Reconsideration*, DA 08-2361, 23 FCC Rcd. 15395, 15397 (2008).

104. Debrine Commc'ns, Inc., *Order to Show Cause and Hearing Designation Order*, FCC 92-84, 7 FCC Rcd. 2118, 2118-19 (1992).

105. Radio Nw. Broad. Co., *Order of Revocation*, FCC 88-397, 4 FCC Rcd. 596, 596 (1989).

renewal" process.[106] As part of the license renewal process, the FCC requires stations to note periods of discontinued operations.[107] In *LKCM Radio Group*, the FCC's Media Bureau determined that stations with prolonged periods of silence face a heavy burden in demonstrating that they have served the public interest.[108] While the FCC did renew the license for the station in question in *LKCM Radio Group*, the Media Bureau shortened the renewal period from four years to two years to ensure that the station "endeavors in the future to provide the broadcast service it is licensed to provide."[109]

The most versatile enforcement mechanism the FCC has to deter service disruptions is the agency's ability to upwardly adjust penalties according to various circumstances of the case.[110] The FCC may adjust forfeitures for egregious misconduct, the ability to pay or the relative disincentive to the action sought to be deterred, intentional violations, substantial harm, prior violations of any FCC requirements, substantial economic gain from the prohibited action, and repeated or continuous violations.[111]

III. ANALYSIS

The FCC's proposed enhancements to the good faith standard may not go far enough to prevent blackouts and proposed congressional reforms may not be feasible in the current political climate. At the same time, the FCC does have authority to intervene to prevent service disruptions and ought to intervene to preserve the public's interest in access to local media and diversity of media sources. Intervention in retransmission disputes would be akin to FCC enforcement of discontinuance rules and the agency could implement retransmission intervention in a similar fashion.

106. *See The Public Interest Standard in Television Broadcasting*, BENTON FOUND., https://www.benton.org/initiatives/obligations/charting_the_digital_broadcasting_future/sec2 (last accessed Apr. 30, 2015).

107. Section III, Item 4 of the license renewal application form, FCC Form 303-S, requires that the licensee certify that, during the license term, the radio station has not been silent (or operating for less than its prescribed minimum operating hours) for any period of more than 30 days. If the licensee is not able to so certify, then it must submit an exhibit specifying the exact dates on which the station was silent or operating for less than its prescribed hours. FCC, INSTRUCTIONS FOR FCC 303-S: APPLICATION FOR RENEWAL OF BROAD. STATION LICENSE 9 (Mar. 2011), *available at* https://transition.fcc.gov/Forms/Form303-S/303s.pdf.

108. *See LKCM Radio Group*, *supra* note 101, at 1049.

109. *Id*. at 1050.

110. 47 C.F.R. § 1.80 (2014).

111. *Id*.

A. Proposed FCC and Congressional Reforms May Not Be Realistic or Robust Enough to Prevent Blackouts

The FCC's issuance of the R&O regarding joint negotiations by broadcasters in 2014 demonstrates the agency's preference towards taking incremental steps in addressing retransmission consent. The limited application of the R&O to non-commonly owned Top Four stations more than three years after the FCC's proposed enhancement to the good faith standards makes it unlikely that the agency will adopt the new standards in the near future. While the R&O is a step in the right direction by making it difficult for two major stations to threaten blackouts during retransmission consent negotiations, it does not address blackouts by single broadcasters.[112]

Even if the FCC implements the proposed strengthened good faith standards, there is reason to believe they will not deter blackouts. For FCC enforcement of good faith provisions to prevent blackouts, there must be enough of a disincentive to pursue greater profits from negotiations. The FCC's position that it lacks authority to compel arbitration or alternative dispute resolution takes away a powerful means of enforcing the good faith standards. Additionally, blackouts are not one of the *per se* violations of good faith in the proposed rulemaking and the adoption of the strengthened good faith standards may not deter future blackouts in stalled negotiations.

Similarly, proposed legislative efforts to give the FCC explicit authority to intervene in retransmission consent negotiations will likely be unsuccessful in preventing blackouts. Legislative proposals with overtly interventionist approaches, such as those in the Eshoo and McCain bills, will face strong challenges in the current political climate. In the past, Congress has used FCC action, such as proposed rulemaking, as a justification to stay out of the retransmission fight. Thus, it is unlikely that Congress will intervene with the FCC's notice of proposed rulemaking in regards to the good-faith standards.[113]

B. The FCC Can and Should Intervene to Prevent Future Blackouts

While the FCC shies away from intervention, citing its lack of statutory authority to compel broadcaster consent to retransmission, the Cable Act and its accompanying legislative history seem to mandate that

112. *See generally R&O, supra* note 65.

113. Senator Kerry commented on earlier retransmission consent legislation: "With the FCC taking action and their experts focused on a solution, there's no need to introduce legislation at this time." John Eggerton, *Kerry Won't Proceed with Retrans Legislation*, BROADCASTING & CABLE (Dec. 8, 2010, 1:36 PM), http://www.broadcastingcable.com/news/washington/kerry-wont-proceed-with%C2%A0retrans-legislation/58255.

the agency intervene on behalf of the public interest to prevent blackouts.[114] The debates surrounding the Cable Act show that Congress considered the possibility of consumers being deprived access to broadcast signals should retransmission negotiations fail. Responding to these concerns, the bill's authors reassured fellow lawmakers that the FCC had authority to compel arbitration or alternative dispute resolution, preventing such a deprivation.[115]

The same policy rationale underlies preventing blackouts and ensuring broadcasters follow minimum operating schedules: preventing public harm from diminished service. Because local content and a multiplicity of sources are important for cable subscribers as well as over-the-air viewers, the same financial disincentives that the FCC is permitted to apply when a station discontinues service altogether could apply to broadcasters who effectively discontinue service to cable subscribers. Furthermore, the unwillingness of broadcasters to restore service to pay-TV subscribers has efficiency implications similar to those expressed in discontinuance policies. The harm of diminished service is compounded when another party would be willing to resume service. Though broadcasters have not stopped broadcasting, they serve a significantly smaller percentage of the community and the spectrum is not being used to most effectively serve the public interest.

To be clear, it is unlikely that the FCC could legally revoke a broadcaster's license for an intentional blackout because it has not technically discontinued service or changed its operating schedule. Discontinuance and operation at variance rules concern technical specifications that the FCC has explicit authority to regulate. A reduction in the percentage of the population served by a broadcaster's signal concerns the FCC's ability to regulate carriage more than the signal. Moreover, the

114. 138 CONG. REC. S643 (daily ed. Jan. 30, 1992) (statement of Sen. Inouye) ("There may be times when the Government may be of assistance in helping the parties reach an agreement . . . . [T]he FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers.").

115. *See* 138 CONG. REC. S1006 (daily ed. Jan. 30, 1992) (statement of Sen. Levin) ("[T]he bill does not directly address the possibility that broadcasters and cable operators in a particular market may be unable to reach an agreement, resulting in noncarriage of the broadcast signal via the cable system. I strongly suggest . . . that the FCC should be directed to exercise its existing authority to resolve disputes between cable operators and broadcasters, including the use of binding arbitration or alternative dispute resolution methods in circumstances where negotiations over retransmission rights break down and noncarriage occurs, depriving consumers of access to broadcast signals."). Senator Daniel Inouye responded, "[t]he FCC does have the authority to require arbitration, and I certainly encourage the FCC to consider using that authority if the situation the Senator from Michigan is concerned about arises and the FCC deems arbitration would be the most effective way to resolve the situation." *Id.*

30-day window to obtain FCC authorization of discontinuing service or operating at variance makes this less useful as an enforcement mechanism for retransmission consent negotiations because most blackouts are for a shorter duration.

If the FCC were simply to take any complaints regarding blackouts and failures to negotiate in good faith into consideration when considering license renewal, it would not likely serve as an effective deterrent to blackouts because, as discussed earlier, license renewal is almost always automatic. Nonetheless, as described above, the policy underpinnings of the discontinuance rules are equally relevant in the case of voluntary blackouts, and the FCC practice in the former context should guide the agency's implementation of its broad statutory authority in the latter.

The FCC's ability to upwardly adjust forfeitures for discontinuance of service according to various factors can guide disincentives in blackouts as well. The fact that forfeitures may be set to be a relative disincentive is pertinent to the FCC's ability to dissuade broadcasters from blackouts. The fine could be set according to the amount a broadcaster hopes to gain by a blackout during negotiations, examining the fee demanded in the current stalled negotiations with fees agreed to in the past. The FCC may also upwardly adjust forfeitures for intentional violations of discontinuance rules. The discontinuance of service to cable subscribers during a blackout is voluntary, unlike the technical service disruptions of the discontinuance and operation at variance rules. Even during involuntary service disruptions, stations may face fines if they have not sought FCC authorization or have failed to take prescribed steps. Disruptions due to blackouts are perceived as solely for financial gain.

That the FCC may adjust fines according to substantial harm is also pertinent to blackouts, as they frequently coincide with important sporting and entertainment events. Blackouts, for example, that coincide with the Super Bowl or the Academy Awards may cause more substantial harm to viewers. Or blackouts that may prevent viewers from obtaining important safety information, such as during a wildfire or flooding, may deserve stronger deterrents because of the potential harm. The longer the duration of a blackout, the greater the harm may be to the public as well.

Finally, the provision that allows the FCC to adjust forfeitures for repeated or continuous violations is relevant to broadcasters who regularly use blackouts as a negotiation tool. The FCC may impose greater financial disincentives on broadcasters who have used blackouts in the past to gain the upper hand in negotiations, showing a repeated disregard for the public they serve. Taking into account each of these factors gives the FCC flexibility in creating effective financial deterrents to harmful blackout tactics while respecting the good faith provision's preservation of the competitive market.[116]

The effect of greater FCC enforcement on retransmission consent negotiations might not eliminate blackouts altogether, but financial penalties for service disruptions to cable subscribers will help to restore the balance in bargaining power between broadcasters and MVPDs. When retransmission consent and must-carry rules were developed, broadcasters were concerned about reaching cable customers for their own financial viability and relevance in the community. Without financial disincentives, broadcasters may continue to deny their programming to certain MVPDs in favor of more lucrative deals with others. Denying significant portions of the public the benefits of local programming and a multiplicity of voices clearly goes against the purposes of the Cable Act of preserving a diverse, local media landscape. While it is possible that the prospect of lower retransmission revenues will push broadcast networks to convert to cable networks for higher fees, the complexity and time involved to make that business model shift makes the immediate risk less likely.

As noted earlier, the more broadcasters and cable providers consolidate and gain access to greater financial reserves, the more consumers can expect lengthier blackouts.[117] If more retransmission consent disputes follow the model of the 2013 Time Warner Cable and CBS mega blackout, the FCC's discontinuance rule may be relevant even with its 30-day window provision. Also, with online video distribution becoming a prevalent sticking point in negotiations, retransmission consent negotiations have become more complicated and protracted. For example, in the 32-day CBS-Time Warner Cable blackout, digital video rights were reportedly a major sticking point in the carriage dispute.[118] The terms and conditions of these negotiations have increased exponentially. While the FCC should seek to prevent blackouts, the 30-day window in the discontinuance of service regulations may provide an entry date of FCC intervention into lengthy blackouts.

116. 47 U.S.C. § 325(b)(3)(A) instructs the Commission that broadcasters may enter 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."

117. SNL Financial has identified 35 retransmission consent blackouts between 2005 and 2013 that lasted 28 days or longer. *See* Robin Flynn, *A Brief History of Retrans Blackouts and Where TWC/CBS Ranks*, SNL FINANCIAL (Sept. 6, 2013), http://www.snl.com/InteractiveX/article.aspx?id=24891271&Printable=1.

118. *See* Amol Sharma & Shalini Ramachandran, *Digital Video Rights Are Hurdle in CBS-Time Warner Cable Fight*, WALL ST. J. (Aug. 8, 2013, 8:58 PM), http://www.wsj.com/articles/SB10001424127887323838204579001281120168554.

IV. CONCLUSION

All parties acknowledge the fact that significant market changes have affected retransmission consent negotiations since the adoption of the Cable Act in 1992. Cable companies are no longer an imminent threat to the existence of broadcasters. Outdated policies that refuse to recognize the current reality of how Americans view network television fail to address the large portions of communities that lose access to local stations during blackouts. The FCC has both the mantle, through the authority granted under the Cable Act and its public interest mandate, and the means, through existing discontinuance policies and enforcement mechanisms, to prevent harmful service disruptions for consumers.