Before the
NATIONAL TELECOMMUNICATIONS
AND INFORMATION ADMINISTRATION
Washington, D.C. 20230

In the Matter of	)	
	)	
Rural and Small Market Access to Local Television Broadcast Signals	)	Docket No. 000208032-0032-01
	)	

COMMENTS

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the National Telecommunications and Information Administration's "Request for Public Comment" in the above-captioned proceeding.[1/] Per the instructions set forth in the Request, WCA's comments have been organized to provide direct responses to certain of the specific questions raised in the Request.

QUESTION #1: IS IT TECHNOLOGICALLY FEASIBLE TODAY TO DELIVER LOCAL-INTO-LOCAL BROADCAST SERVICE TO RURAL REGIONS, SMALL MARKETS AND OTHER UNSERVED AREAS?

Yes. In fact, fixed wireless providers who utilize MDS and ITFS spectrum at 2150-2162 MHz and 2500-2690 MHz have long been a vital source of competitive multichannel video service in rural areas and smaller markets where cable overbuilds and/or DBS "local into local"

[1/] *See* <http://www.ntia.doc.gov/ntiahome/ruraltvroundtable/fedreg21400.htm>. WCA, formerly known as The Wireless Cable Association International, Inc., is the principal trade association of the fixed wireless broadband industry. Its membership includes virtually every terrestrial wireless video provider in the United States; the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators; Local Multipoint Distribution Service ("LMDS") licensees; producers of video programming; and manufacturers of wireless broadband transmission and reception equipment.

service may not be available for the foreseeable future. Indeed, the largest provider of analog MDS/ITFS multichannel video service in the United States, Nucentrix Broadband Networks, Inc., currently serves over 150,000 subscribers, many of whom reside in rural and smaller markets in Texas, Oklahoma, Kansas, Iowa, Missouri, Arkansas, Illinois and Ohio.[2] In addition, operators that utilize MDS and ITFS spectrum such as CNI Wireless (Somerset, Kentucky), W.A.T.C.H. TV (Lima, Ohio), CFW Cable (Charlottesville, Virginia), and Wireless One (various communities throughout the state of Mississippi) remain the only *bona fide* competition to incumbent cable operators in their respective markets. In total, approximately 1,000,000 subscribers currently receive competitive multichannel video service via MDS/ITFS, a substantial percentage of which reside in markets outside of Nielsen's top 100 DMAs.[3] Given Congress's ongoing concern as to the lack of multichannel video competition in more sparsely populated areas, the need to preserve the competitive viability of rural and small market MDS/ITFS providers should not be underestimated.[4]

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[2] *See* <http://www.nucentrix.com/site/television/service/index.html>.

[3] Sources: *Television & Cable Factbook 2000*, p. A-5; *Wireless-Private Cable Investor*, at 6 (Nov. 5, 1999); Kagan, *The 1999 Wireless Cable Databook*, pp.28-32.

[4] *See, e.g.*, Remarks of Rep. Rick Boucher, 145 Cong. Rec. H2319 (daily ed. Apr. 27, 1999) ("I am concerned, however, that the business plans of the [DBS] carriers that have announced an interest in offering the local-to-local services extend only to the largest 67 out of 211 local television markets around the country. Under this plan, most of rural America simply will not receive the benefit of this local-into-local service."); Remarks of Rep. Christopher B. Cannon, 145 Cong. Rec. H2320 (daily ed. Apr. 27, 1999) ("Unfortunately, . . ., many [in rural Utah] still do not have access to local network programming. This means they cannot be informed about their communities and State without installing an antenna or other additional equipment, and even then a clear signal is difficult. Rural residents should have the same convenient access to television programming as those who live in urban areas."). *See also* "Potential for Cable Overbuilds Grows With Size of Market and Services

QUESTION #2: WHAT ARE THE TRADE-OFFS BETWEEN THE TECHNOLOGY OPTIONS?

Generally, MDS/ITFS operators are better suited than "hard wire" cable systems to the rural/small market environment because "fixed wireless systems can often be constructed in less time, at lower cost, and in smaller increments than wireline networks, especially where the cost of wireline links is especially high."[5] As noted above, though DBS may have the technological capability of providing "local-into-local" service in rural and smaller markets, there is every indication that such service will remain confined to the largest, most densely populated markets for the foreseeable future.[6]

Moreover, by virtue of the superior propagation characteristics of the 2150-2162 MHz and 2500-2690 MHz bands, MDS and ITFS stations can readily achieve a coverage radius of 35 miles from a single transmission site, thus facilitating provision of service to a large geographic area with a relatively small number of transmission sites. Conversely, because of the less

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Provided, The Strategis Group Reports," *Strategis Group Press Release* (March 8, 2000) <http://www.Strategisgroup. com/press/pubs/overbuild.html> ("[C]able overbuilds in small markets do not make sense for either public or private overbuilders. Medium market overbuilds appear highly questionable at best; while in large markets there appears some potential, albeit slim, to construct a competing system.").

[5] *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd 12673, 12684 (1999); *see also* Statement of Thomas Sugrue, Chief, Wireless Telecommunications Bureau, before the Subcommittee on Telecommunications, Trade and Consumer Protection, United States House of Representatives, re: Access to Buildings and Facilities by Telecommunications Providers (May 13, 1999) ("Because their technology enables them to avoid the installation of new wireline networks, wireless service providers may be among those with the greatest potential quickly and efficiently to offer widespread competitive facilities-based services to end users.").

[6] *See* n. 4 *supra.*

favorable propagation characteristics at 28 GHz, LMDS path lengths must be kept short in order to provide reliable service, which means more cells are required to serve a given region.[7] In turn, the high initial cost of constructing additional cells, coupled with the ongoing costs of operating and maintaining each cell and the higher costs of consumer premises equipment at higher frequencies,[8] make it uneconomic to deploy LMDS cells in low-density (and therefore, low-revenue) areas. Indeed, the Federal Communications Commission (the "Commission")

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[7] *See* Dawson, "Broadband Wireless: A Question of Frequency,"*Inter@ctive Week* (available at <http://www.zdnet.com/filters/ printerfriendly/0,6061,2388683-35,00.html>) ("MMDS is one of several fixed wireless spectrums used for Internet access. Another common spectrum is LMDS, or *Local Multipoint Distribution System*. The key difference is that LMDS covers a smaller radius than MMDS. As a result, LMDS is more expensive to deploy, since more transmission towers are needed to cover an area."). As reported by ADC Telecommunications, Inc., a leading developer of telecommunications equipment, in its comparison of the utility of the 2 GHz and 28 GHz bands for broadband wireless services, "the LMDS network is not very attractive in areas where the population density of users is very low. The MMDS network can cover large areas when the population density of users is low." In supporting this conclusion, ADC Telecommunications noted:

> The radio propagation loss and rain attenuation is much higher at 28 GHz compared to 2 GHz. Also it is more expensive to get improved performance power and low noise amplifiers at 28 GHz than at 2 GHz. These and other factors have lead to MMDS networks using cell radius of about 30-100 Km and LMDS networks using 2-8 Km. Thus, a typical large metropolitan area may require 50-100 cells to cover the entire city with LMDS (if ubiquitous coverage was desired) versus 1-8 cells with the MMDS network. Based on these numbers the cost of deploying services using LMDS spectrum for the entire city can be 5-15 times higher than cost of deploying services using MMDS spectrum.

"Broadband wireless services based on combined use of MMDS, LMDS and unlicensed band spectrum," Technical Paper at 5th Annual Technical Symposium of the Wireless Communications Association International, Inc., at 1 (delivered Nov. 2, 1998).

[8] *See* Smith, "'Broad' is Key Word in Definition of Broadband Wireless," *Radio Comm. Report*, at 16 (Mar. 13, 2000) ("The cost of building a [fixed wireless] receiver . . . is greater as the frequency increases.").

recently conceded that LMDS operators are no longer focusing on providing multichannel video service to the residential market.[9]

QUESTION #6: WHAT ARE THE LEGAL IMPEDIMENTS, IF ANY, TO THE USE OF ANY OF THE TECHNOLOGIES THAT MIGHT BE USED TO FACILITATE LOCAL TELEVISION SERVICE TO RURAL REGIONS, SMALL MARKETS, AND OTHER UNSERVED AREAS?

Generally, Section 325(b)(1) of the Communications Act of 1934, as amended, requires MDS/ITFS providers to obtain retransmission consent from local television stations as a *quid pro quo* for the right to deliver local television programming to their subscribers.[10] However, in Section 1009 of the recently-passed Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Congress amended Section 325 in an attempt to provide more clarity as to the obligations of local television stations during retransmission consent negotiations with MDS/ITFS providers, DBS operators and other multichannel video programming distributors ("MVPDs").[11] Specifically, Congress directed the Commission to adopt new retransmission consent rules that, until January 1, 2006, (1) prohibit local broadcasters from entering into

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[9] *See Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band to Reallocate the 29.5 - 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service,* CC Docket No. 92-297, FCC 99-379, at ¶ 39 (rel. Dec. 13, 1999) ("[Wireless operators using MDS/ITFS] do not have the rain-fade, propagation and high-equipment cost problems that LMDS licensees experience. Thus, MMDS could be positioned as a service provider for work-at-home or single-office/home-office markets.").

[10] 47 U.S.C. § 325(b)(1).

[11] The SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. 106-113, 113 Stat. 1501, Appendix I (1999).

exclusive retransmission consent agreements with any MVPD, and (2) require local broadcasters to negotiate retransmission consent agreements with cable's competitors in "good faith."[12]

Unfortunately, in its March 16, 2000 *First Report and Order* in CS Docket No. 99-363, the Commission construed its authority under the SHVIA very narrowly and declared that Congress intended to divest the agency of any authority whatsoever to regulate exclusive retransmission consent agreements after January 1, 2006.[13] Moreover, citing the absence of any explicit non-discrimination language in the statute, the Commission refused to include any categorical non-discrimination requirements in its definition of "good faith."[14]

For the reasons set forth in WCA's comments in CS Docket No. 99-363 (attached hereto as Exhibit 1), unless the Commission reconsiders its decision in the *First Report and Order*, MDS/ITFS providers will face the very real possibility that they will be denied full and fair access to local broadcast programming that is essential to the thousands of rural and small market subscribers who otherwise have little or no access to alternative sources of local television service. In no respect would the public interest be served by that result.

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[12] 47 U.S.C. § 325(b)(C)(3).

[13] *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, at ¶ 94 (rel. Mar. 16, 2000)

[14] *Id.* at ¶¶ 39-46. Indeed, the Commission emphasized that it will presume that a local broadcaster is in compliance with the "good faith" requirement where it insists that MDS/ITFS providers comply with terms and conditions not required of other MVPDs in the same market. *Id.* at ¶ 56.

QUESTION #7: WHAT LEGAL MEASURES, IF ANY, SHOULD BE TAKEN TO FOSTER THE DELIVERY OF LOCAL TELEVISION SERVICE TO RURAL REGIONS, SMALL MARKETS, AND OTHER UNSERVED AREAS?

To the extent that the Commission decides not to modify its new retransmission consent rules during the pending reconsideration phase of CS Docket No. 99-363, WCA believes that NTIA can and should address the problem by making specific recommendations that Congress strengthen the exclusivity and "good faith" language in the SHVIA. First, NTIA should recommend that Congress eliminate the January 1, 2006 sunset date in the statute, thereby assuring that MDS/ITFS operators will not be victimized by exclusive retransmission consent agreements between local broadcasters and other distributors of multichannel video programming after 2005. Second, NTIA should recommend that Congress incorporate specific anti-discrimination language in Section 325 so as to eliminate any doubts as to the Commission's authority to add such language to its retransmission consent rules. A possible model for this approach is Section 628(c)(2) of the Cable Consumer Protection and Competition Act of 1992 (47 U.S.C. § 548(c)(2)) and the associated Commission rule (47 C.F.R. § 76.1002), which set forth a variety of nondiscrimination criteria that must be observed by vertically integrated cable programmers when selling cable network programming to MDS/ITFS operators and other alternative providers of multichannel video programming. Though these criteria themselves include loopholes that have proven to be problematic for alternative MVPDs, WCA believes they provide a useful starting point for securing a stronger legislative solution to the problem of discriminatory retransmission consent agreements.

In conclusion, WCA wishes to emphasize that MDS/ITFS operators are willing to negotiate with local broadcasters for retransmission consent rights on nondiscriminatory terms and conditions. The issue here, however, is whether MDS/ITFS operators and other alternative MVPDs will continue to have the opportunity to do so. Therefore, WCA believes it is essential that NTIA make the legislative recommendations set forth above and thereby send a strong and unequivocal statement to Congress and the Commission that the interests of viewers in rural and smaller markets should not be held hostage to the unreasonable demands of local broadcasters during the retransmission consent process.

Respectfully submitted,

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April 14, 2000

EXHIBIT 1

STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home	)	
Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

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COMMENTS

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EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. ("WCA") has an immediate and substantial interest in the Commission's resolution of the retransmission consent issues raised in the *Notice of Proposed Rulemaking* ("*NPRM*") in this proceeding. Nondiscriminatory access to local broadcast programming continues to be of critical importance to fixed wireless broadband providers, and to a large extent the Commission's existing rule prohibiting exclusive retransmission consent agreements between broadcasters and incumbent multichannel video programming distributors ("MVPDs") ensures that such programming will remain available to competitors. Thus, the possibility that the Commission might eventually repeal the rule or authorize discriminatory retransmission consent agreements is a matter of paramount concern to WCA.

Above all else, the Commission must remember that its 1993 decision to ban exclusive retransmission consent agreements was tied to Congress's concern that competing MVPDs would be denied access to programming absent regulatory constraints on the anticompetitive behavior of incumbent cable operators. At no point in the Satellite Home Viewer Improvement Act of 1999 (the "SHVIA") did Congress retreat from that position, nor did it express any intent to divest the Commission of its authority to ensure that customers of *all* types of MVPDs enjoy unimpeded access to local broadcast programming. Indeed, in marked contrast to other situations where Congress has used specific statutory language to repeal the Commission's Rules, Section 1009 of the SHVIA merely states that the Commission *must* prohibit exclusive retransmission consent agreements until January 1, 2006. The statute does not say that the Commission cannot prohibit such agreements after that date, and there is nothing in the legislative history of the SHVIA which suggests that Congress wants or expects the Commission to cease any and all regulation of exclusive retransmission consent contracts. Given that the overall objective of the statute is to *promote* competition to cable, this is the only sensible reading of the exclusivity language in Section 1009.

WCA also urges the Commission to bear in mind that the major broadcast networks *already* are surrendering exclusivity to incumbent cable operators as a *quid pro quo* for carriage. NBC and CBS, for example, have surrendered exclusivity with respect to the MSNBC and Eye On People cable networks in exchange for carriage of local NBC and CBS stations. All that stops cable from demanding exclusivity against terrestrial competitors with respect to NBC and CBS *broadcast* programming is the Commission's ban on exclusive retransmission consent agreements. Against this backdrop, the need to preserve the ban becomes even more pronounced.

Equally important, it is well settled that the Commission's ban on exclusive retransmission consent agreements does not prevent incumbent cable operators and the major broadcast networks from entering into retransmission consent agreements that are nominally "nonexclusive" but nonetheless discriminate against fixed wireless broadband providers who compete with cable and DBS. To alleviate this problem, the SHVIA directs the Commission to adopt rules that, "until January 1, 2006, prohibit a television broadcast station that provides

retransmission consent from . . . failing to negotiate in good faith." However, while the Commission correctly notes that Congress intended to "impose some heightened duty of negotiation on broadcasters in the retransmission consent process," many of the Commission's proposed "good faith" criteria in essence merely require broadcasters to observe proper protocol during the negotiating process. Conversely, the legislative history of the SHVIA reflects that discrimination as to contractual terms and conditions, and not merely a television network's behavior during the negotiating process, should be the cornerstone of the "good faith" analysis.

At least to some extent, the Commission appears to have recognized as much and thus has suggested that it might rely on the nondiscrimination criteria set forth in the federal program access statute (Section 628 of the Cable Consumer Protection and Competition Act of 1992) and the associated Commission rule (47 C.F.R. 76.1002) when determining whether a broadcaster has acted in "good faith" during retransmission consent negotiations. Unfortunately, history has shown that the Section 628 nondiscrimination criteria are riddled with loopholes that defeat the purpose of the statute (particularly as to price discrimination), and thus those criteria are at best a flawed solution to the problem of discriminatory retransmission consent agreements. By the same token, WCA is aware that the Commission is operating under extremely tight time constraints in this proceeding, and that reliance on the Section 628 nondiscrimination criteria may represent the most practical option at this time. Accordingly, subject to the reservations stated herein, WCA tentatively supports incorporation of the Section 628 nondiscrimination criteria into the Commission's definition of "good faith" for purposes of retransmission consent, provided that the Commission also declares that any attempt by a television network to "tie" retransmission consent to carriage of other broadcast or cable programming is a *per se* violation of the good faith requirement and shall be actionable as such.

Finally, WCA supports the Commission's proposal to use its Section 76.7 special relief procedures when reviewing alleged violations of the exclusivity or good faith provisions of the SHVIA, so long as those procedures (1) provide for expedited processing of Section 76.7 retransmission consent complaints; (2) require defendant broadcasters to produce any retransmission consent agreement in dispute for review by the plaintiff and the Commission, subject to whatever type of protective order the agency deems appropriate under the circumstances; and (3) require a defendant broadcaster to automatically extend any existing retransmission consent agreement with an aggrieved MVPD during the pendency of the MVPD's complaint, such that the *status quo* as to carriage of the broadcaster's signal is maintained until the MVPD's complaint is denied by the Cable Services Bureau and, if reconsideration is requested, the full Commission.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home	)	
Viewer Improvement Act of 1999	)	CS Docket No. 99-263
	)	
Retransmission Consent Issues	)	

COMMENTS

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1/]

I. INTRODUCTION.

For many in the fixed wireless broadband industry, the *NPRM* is a watershed phase of the Commission's ongoing effort to ensure that consumers enjoy the widest possible selection of competing multichannel video providers in local markets. While it is true that fixed wireless operators now have unprecedented opportunities to utilize their spectrum for non-video services, the fact remains that many of those same operators continue to offer packages of multichannel video programming in direct competition with incumbent cable and DBS providers, using both

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[1/] FCC 99-406 (rel. Dec. 22, 1999). WCA is the principal trade association of the fixed wireless broadband industry. Its membership includes virtually every terrestrial wireless video provider in the United States; the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators; Local Multipoint Distribution Service ("LMDS") licensees; producers of video programming; and manufacturers of wireless broadband transmission and reception equipment.

traditional analog and more advanced digital technologies.[2] By way of example, BellSouth recently launched an all-digital wireless cable television service with over 160 channels of local, cable and satellite programming to residential and commercial customers in Orlando, FL.[3] BellSouth's Orlando launch was preceded by successful digital wireless cable roll-outs in New Orleans and Atlanta,[4] and GTE continues to offer digital wireless cable service in Honolulu. Last year, People's Choice TV Corp. (recently acquired by Sprint) unveiled its digital wireless cable service in the Phoenix market ("DigitalChoice"), which allows consumers to customize their video channel line-ups using advanced interactive capabilities.[5]

Moreover, fixed wireless broadband providers remain a vital source of competitive multichannel video service in smaller markets and rural areas where cable overbuilds and/or DBS "local into local" service may not be available for the foreseeable future. Indeed, MDS

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[2] *Cf.* Breznick, "A Wireless Explosion," *Cable World*, at 1, 123 (Dec. 6, 1999) (quoting Bob Wright, president/CEO of NBC, as saying that he expects to see "tremendous development of wireless as a delivery vehicle" for TV programming.").

[3] *See* "BellSouth Introduces Wireless Digital TV Service in Orlando," BellSouth News Release, dated Oct. 15, 1998 (viewed July 28, 1999) <http://www.bellsouthcorp.com/proactive/documents/render/21942.vtml>

[4] *See id.; see also* Kanell, "'We Were Deluged All Day Long,' Hopeful Customers Flood Switchboard for BellSouth's Wireless TV Service," Atlanta Journal Constitution, at F1 (June 5, 1998). Analog technology also continues to be a vital method for the distribution of competitive multichannel video services by fixed wireless broadband providers. For instance, in addition to its digital systems, BellSouth operates analog wireless cable systems in Louisville, KY, Ft. Myers, FL and Lakeland, FL.

[5] *See* Taylor, "Digital TV Availability Expands in Valley," *Phoenix (AZ) Tribune*, at B1 (June 1999)(discussing SpeedChoice launch of 200 channel digital offering, including local broadcast TV stations and 40 music channels); "SpeedChoice Unveils 100% Digital 'Build Your Own Basic℠' Television and Music Programming Service," SpeedChoice News Release, dated May 3, 1999 (viewed July 29, 1999) <http://www.speedchoice.com/newsroom/1999/release050399.html>.

operators such as CNI Wireless (Somerset, Kentucky), W.A.T.C.H. TV (Lima, Ohio), CFW Cable (Charlottesville, Virginia and the surrounding area), Wireless One (various communities throughout the state of Mississippi)[6] and WHTV Broadcasting Corp. (various communities in Puerto Rico) have long been the only *bona fide* competition to incumbent cable operators in their respective markets. In total, MDS operators provide competitive multichannel video service to approximately 1,000,000 subscriber throughout the United States.[7] Given Congress's ongoing concern as to the lack of multichannel video competition in more sparsely populated areas, the need to preserve the competitive viability of these entities should not be underestimated.[8]

WCA therefore views with considerable concern the Commission's preliminary interpretation of Section 1009 of the Satellite Home Viewer Improvement Act of 1992 (the "SHVIA"), which in relevant part requires the Commission to adopt new retransmission consent rules that, until January 1, 2006, (1) prohibit local broadcasters from entering into exclusive retransmission consent agreements with any MVPD, and (2) require local broadcasters to negotiate such agreements with cable's competitors in "good faith." At various points in the *NPRM*, the Commission appears to suggest that by these provisions Congress intended to divest

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[6] Recently acquired by MCI Worldcom. *See* Farrell, "MCI Buys Another MMDS Operator," *Multichannel Online*, (viewed July 26, 1999) <http://www.multichannel.com>.

[7] *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, Table C-1 (1998).

[8] *See, e.g.*, Remarks of Rep. Christopher B. Cannon, 145 Cong. Rec. H2320 (daily ed. April 27, 1999) ("Unfortunately, . . ., many [in rural Utah] still do not have access to local network programming. This means they cannot be informed about their communities and State without installing an antenna or other additional equipment, and even then a clear signal is difficult. Rural residents should have the same convenient access to television programming as those who live in urban areas.").

the agency of any authority whatsoever to regulate exclusive retransmission consent agreements after January 1, 2006, and that the statute's "good faith" requirement merely mandates that broadcasters observe proper protocol during retransmission consent negotiations, without reference to whether the broadcasters are offering retransmission consent to cable's competitors on discriminatory terms and conditions. This reading of Section 1009 is not only plainly at odds with the legislative history of the SHVIA and well-established rules of statutory interpretation, but, if incorporated into the Commission's Rules, presents the very real possibility that fixed wireless broadband operators will be denied full and fair access to network and local broadcast programming that is critical to their survival. In no respect would the public interest be served by that result.

Accordingly, for the reasons set forth below, WCA submits that the Commission should not surrender its authority to regulate exclusive retransmission contracts after January 1, 2006 absent an explicit Congressional mandate to do otherwise. Further, consistent with the legislative history of the SHVIA, the Commission should declare that discrimination as to contractual terms and conditions, and not merely a broadcaster's network's behavior during the negotiating process, will be the cornerstone of the "good faith" analysis. To that end, WCA tentatively agrees that the nondiscrimination criteria for program access, flawed as they are, might constitute an acceptable "baseline" standard of "good faith," provided that the Commission also declares that any attempt by a television network to "tie" retransmission consent to carriage of other broadcast or cable programming is a *per se* violation of the good faith requirement and shall be actionable as such. Finally, WCA urges the Commission to adopt

expedited retransmission consent complaint procedures that (1) provide for expedited processing of Section 76.7 retransmission consent complaints; (2) require defendant broadcasters to produce any retransmission consent agreement in dispute for review by the plaintiff and the Commission, subject to whatever type of protective order the agency deems appropriate under the circumstances; and (3) require a defendant broadcaster to extend any existing retransmission consent given to an alternative MVPD while that MVPD's complaint remains pending before the Cable Services Bureau or the full Commission.

II. DISCUSSION.

A. Congress Did Not Mandate That The Commission Surrender Its Jurisdiction Over Exclusive Retransmission Consent Agreements After January 1, 2006.

Section 325(b)(3)(C)(ii) of the Communications Act of 1934, as amended by Section 1009(a) of the SHVIA, requires the Commission to adopt regulations that, "until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith."[9] While acknowledging that the SHVIA Conference Report "contains no language to clarify or explain the prohibition [on agreement exclusivity],"[10] the Commission states that Section 1009 "would seem to sunset any prohibition on exclusive retransmission consent contracts for all multichannel video program distributors," and, under this reading of the statute, "the Commission's rule prohibiting exclusive retransmission consent agreements for cable operators would be deemed abrogated as of January

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[9] 47 U.S.C. § 325(b)(3)(C).

[10] *NPRM* at ¶ 21.

1, 2006."[11] For the reasons set forth below, the Commission's preliminary interpretation of the exclusivity language in Section 1009(a) reads far more into the statute than what Congress had intended, and, if incorporated into the Commission's Rules, will defeat the statute's broader objective of promoting MVPD competition for the benefit of all consumers.

Section 1009 notwithstanding, the Commission's authority to regulate exclusive retransmission contracts arises first and foremost from Section 1 of the Communications Act, which directs the Commission to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service . . . ."[12] The United States Supreme Court has confirmed that Congress meant to confer "broad authority" on the Commission, so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[13] Thus, Section 4(i) of the Act states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[14] Similarly, Section 303 gives the Commission the power to issue rules and regulations "as public convenience, interest and necessity requires."[15]

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[11] *Id.* at ¶ 24.

[12] 47 U.S.C. § 151.

[13] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (citations omitted); *see also National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (Congress granted the Commission "expansive powers" through the Communications Act).

[14] 47 U.S.C. § 154(i).

[15] *Id.* at § 303.

There is nothing whatsoever in the text or legislative history of the SHVIA which suggests that Congress, in directing the Commission to extend its existing ban on retransmission consent agreements to January 1, 2006, intended to take the far more dramatic step of repealing all of the Commission's authority under the above-cited statutory provisions to regulate such agreements after that date. It appears, then, that the Commission has implied such an intent solely from the statute's reference to January 1, 2006, and nothing else. As noted by the United States Supreme Court, however, "[i]t is a cardinal principal of [statutory] construction that repeals by implication are not favored," and that "[t]he intention of the legislature to repeal 'must be clear and manifest.'"[16] Such "clear and manifest" intent is noticeably absent in the statutory language at issue here.

Moreover, where Congress has previously chosen to repeal a Commission rule or otherwise sunset the Commission's regulatory authority in a particular area, it has repeatedly done so with language far less equivocal that in Section 1009(a). For instance, in establishing a sunset date for retransmission consent complaints filed by broadcasters under Section 325(e), as amended by Section 1009(b) of the SHVIA, Congress stated that "No complaint or civil action may be filed under this subsection after December 31, 2001." Similarly, in eliminating the Commission's authority to issue pioneer's preferences, Congress stated that such authority "shall expire on August 5, 1997."[17] And, in enacting the March 31, 1999 sunset of "upper tier" rate

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[16] *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (citations omitted). *See also Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942) (ruling that Congress's inclusion of stay authority in Section 402(a) and but not 402(b) did not reflect an intent to divest D.C. Court of Appeals of its customary power to stay orders under review).

[17] 47 U.S.C. § 309(j)(13)(F).

regulation of cable television systems, Congress simply declared that such regulation "shall not apply to cable programming services provided after March 31, 1999."[18] That Congress specifically chose not to use such directives in Section 1009 strongly suggests that, contrary to the Commission's preliminary interpretation of the statute, it did not intend to repeal any and all Commission regulation of exclusive retransmission consent contracts after January 1, 2006.

Furthermore, whereas local broadcast stations once had opportunities to sell their programming to multiple cable operators in a local market, in many cases they are now and will continue to be forced to deal with a single cable operator who has consolidated previously independent systems into a cluster and thereby controls the lion's share of the market's subscribers.[19] As a result, local stations generally are even more beholden to incumbent cable operators now than they were in 1992. It therefore is no surprise that incumbent cable operators repeatedly demand and receive exclusivity from broadcasters where the Commission's rules allow them to do so. For instance, it is well known that NBC, which jointly owns the MSNBC cable network with Microsoft, surrendered exclusivity for MSNBC to incumbent cable operators

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[18] *See id.* § 543(c)(4).

[19] By way of example, Comcast has recently initiated or completed transactions that will give it control - - or the option to control - - all but one of the cable systems in the Washington, D.C. metropolitan area, plus the cable system serving nearby Baltimore, Maryland. Leibovich, "Comcast to Control Area Cable," *The Washington Post*, pp. E1, E10 (May 6, 1999) ("Cable firms have for many years moved to consolidate their holdings into regional pockets, or 'clusters' of systems . . . Unlike the highly balkanized cable industry of the past, operators in recent years have swapped or sold their holdings to assemble these large groups . . . ."). *See also* Comments of Ameritech New Media, Inc., CS Docket No. 99-230, at 9 (filed Aug. 9, 1999) ("As of July 1, 1999, Chicago, Illinois was served by seven cable incumbents . . . . However, after the completion of several systems swaps and purchases, it is expected that AT&T/TCI will own virtually all of the cable fiber plant in the Chicago area.").

in exchange for cable carriage of NBC broadcast stations.[20] Similarly, in giving retransmission consent for carriage of its owned and operated stations, CBS provided incumbent cable operators exclusivity with respect to CBS's news-oriented cable channel, Eye on People.[21] In other words, all that stops cable from demanding and the networks from giving exclusivity with respect to *broadcast* programming is the Commission's ban on exclusive retransmission consent agreements. Against this backdrop, the need for the Commission to retain jurisdiction over such agreements becomes even more pronounced.[22]

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[20] *See, e.g.*, "Continental, Comcast to Pick Up Fox News," *Media Daily* (Sept. 25, 1996); "NBC's Wright Says Fox-Time Warner News Deal Imminent," *Media Daily* (July 15, 1996); Kennard Letter, Responses to Questions at 1. At least one major fixed wireless broadband provider has already advised the Commission of the anticompetitive effects of NBC's refusal to sell MSNBC to cable's competitors:

> Channels such as MSNBC . . . were created as a way for broadcasters to get something other than money for carriage of their free TV channels on cable. The cable industry demanded these channels be exclusive. Thus, today, companies like [wireless cable operator People's Choice TV Corp.], Ameritech, Wireless One and others are faced with NBC using its *free* television franchise to undermine cable competition. Celebrities like Tom Brokaw, Katie Couric, and Jane Pauley exhort viewers to tune to MSNBC as soon as they're done watching NBC, even though cable's competitors on the ground can't get MSNBC.

Testimony of Matthew Oristano, Chairman, People's Choice TV Corp., before the Federal Communications Commission re: Status of Competition in the Multichannel Video Industry, at 7 (Dec. 18, 1997).

[21] *See* "TCI Defends Exclusive Carriage Deals to Senate," *Media Daily* (October 13, 1997); Leibowitz, "The New Cable Economics," *Cable TV Media Law & Finance*, at 6 (March 1997); Kennard Letter, Response To Questions at 1.

[22] Also, fixed wireless broadband providers operating in the MDS/ITFS bands often retransmit local broadcast signals over microwave frequencies to assure that the subscriber can enjoy the same high quality picture he or she sees on nonbroadcast channels. This enables those providers to install a single compact and unobtrusive microwave receive antenna at each subscriber's residence, thereby enhancing the marketability of wireless cable service. However, were the Commission to allow incumbent cable operators to extract exclusive retransmission consent agreements from local

Finally, taken to its logical extreme, the Commission's reading of the exclusivity language in Section 1009(a) stands Congress's original concept of retransmission consent entirely on its head. The legislative history of the 1992 Cable Act reflects that Congress adopted the retransmission consent law to eliminate the competitive imbalance arising from the cable industry's subsidization of cable programming services with revenues generated from carriage of local broadcast signals, for which incumbent cable operators paid nothing.[23] By contrast, the Commission's proposed abandonment of its ban on exclusive retransmission consent agreements would eventually permit incumbent cable operators to use retransmission consent for the very different purpose of eliminating competition by denying alternative MVPDs full and fair access to local broadcast programming. Again, given the procompetitive focus of the 1992 Cable Act and its successors, this is not a plausible reading of Congressional intent.

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broadcasters, a fixed wireless broadband provider that is denied consent could be forced to install obtrusive dual receive antennas at each subscriber home to ensure delivery of local broadcast signals (*i.e.*, a traditional off-air "rooftop" antenna for receipt of off-air broadcast stations and a smaller microwave antenna for receipt of nonbroadcast services). See 47 C.F.R. § 76.64(e) (retransmission consent not required where the wireless cable operator makes off-air reception of local broadcast signals available at no charge to the subscriber, provided that the off-air antenna is either (1) owned by the subscriber or, in the case of multiple dwelling units, the building owner; or (2) under the control and available for purchase by the subscriber or the building owner upon termination of service). Since consumers generally are reluctant to allow such cumbersome antenna installations on their property, and since off-air antennas cannot facilitate delivery of local broadcast signals in areas with poor reception, the elimination of the Commission's ban on exclusive retransmission consent agreements could greatly diminish the marketability of fixed wireless broadband service in many areas.

[23] *See* S. Rep. 102-92, at 35 (1991) ("Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.").

WCA therefore submits that all of the above militates strongly against the Commission's preliminary interpretation of the exclusivity language in Section 1009(a), and that the Commission should instead read the statute as having no effect on the Commission's authority to regulate exclusive retransmission consent agreements after January 1, 2006.

B. Discrimination Must Be The Cornerstone Of Any Commission Definition of "Good Faith" Negotiations During the Retransmission Consent Process.

As noted above, Section 1009(a) also requires the Commission to adopt rules that, until January 1, 2006, require a broadcaster to negotiate retransmission consent in "good faith," a term which is undefined in the statute. However, Section 1009(a) further 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 market considerations."

The Commission correctly observes that Congress, through the language quoted immediately above, "has signaled its intention to impose some heightened duty of negotiation on broadcasters in the retransmission consent process."[24] However, many of the Commission's proposed "good faith" criteria focus primarily on whether a broadcaster observes proper protocol during the negotiating process.[25] By contrast, the legislative history of the SHVIA reflects that

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[24] *NPRM* at ¶ 15.

[25] By way of example, the Commission suggests that it might use the "good faith" criteria set forth in Section 51.301(c) for interconnection negotiations between incumbent local exchange carriers and their competitors. *Id.* at ¶ 17 & n.38. Among other things, those criteria require that an ILEC refrain from (1) intentionally misleading or coercing another party into reaching an agreement it

discrimination, and not merely a broadcaster's behavior during negotiations, should be the linchpin of the "good faith" analysis:

> The bill goes beyond prohibiting exclusive contracts in only one respect. In order to prevent refusals by a station to deal with any particular distributor, the FCC is directed to bar not only exclusive deals *but also any other discriminatory practices, understandings, arrangements and activities by the station which have the same effect of preventing any particular distributor from the opportunity to obtain a retransmission consent agreement.*[26]

Accordingly, given the injury discriminatory retransmission consent agreements inflict on alternative MVPDs and their customers, it is imperative that the Commission declare that discrimination will be the centerpiece of its definition of "good faith" where retransmission consent is concerned. Further, in view of the often insurmountable difficulty of proving discrimination in the absence of a precise definition of "good faith," it is equally imperative that the Commission develop specific, clearly defined "good faith" criteria that are "subject to swift and effective enforcement."[27]

At paragraph 19 of the *NPRM*, the Commission suggests that it might rely on the nondiscrimination criteria set forth in the federal program access statute (Section 628 of the 1992 Cable Act) and the associated Commission rule (47 C.F.R. § 76.1002) when determining

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would not otherwise have made; (2) intentionally obstructing or delaying negotiations or resolution of disputes; (3) refusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues; and (4) refusing to provide information necessary to reach agreement.

[26] Remarks of Rep.W.J."Billy" Tauzin, 145 Cong. Rec. H2320 (daily ed. April 27, 1999) (emphasis added).

[27] *NPRM* at ¶ 15; *see also id.* at ¶ 19 ("While we will resolve each case on its own merits, adding specification to our rules should add certainty to the negotiation process and reduce the number of cases presented to the Commission for adjudication.").

whether a broadcaster's offering of different terms and conditions to an alternative MVPD is based on "competitive market considerations" and thus qualifies as "good faith." Generally, the program access nondiscrimination criteria prohibit a "satellite broadcast programming vendor" (*i.e.*, a superstation) from discriminating in the prices, terms and conditions of sale or delivery of its programming among or between cable operators and other MVPDs.[28] However, the criteria include a number of loopholes that have proven to be very problematic for fixed wireless broadband providers, particularly with respect to price discrimination.[29] This is because the statute permits price differentials based on "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the [MVPD]," and thus has been interpreted as giving programmers *carte blanche* to offer steep volume discounts exclusively to the cable MSOs, even where those discounts bear no reasonable relationship to any cost savings or other economic benefits realized by the programmer.[30]

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[28] 47 U.S.C. § 548 (c)(2).

[29] *See id.* § 548(c)(2)(B)(i)-(iii).

[30] For instance, according to a recent study submitted to the Commission by Ameritech New Media, Inc., a small MVPD carrying the 19 basic cable networks included in the study would pay approximately $27.13 more per subscriber per year than would an MVPD receiving the average industry discount — and even more over and above the amount paid by large MSOs receiving the maximum off-rate card discounts. For an MVPD with 100,000 subscribers, which would pay at or near the top rate for most networks, this amounts to a more than $2.7 million cost disadvantage. *See* Dertouzos and Wildman, "Programming Access and Effective Competition in Cable Television," at 5 (Aug. 14, 1998) (submitted as Appendix A to Comments of Ameritech New Media, Inc., MM Docket No. 92-260 (filed Aug. 14, 1998)).

Moreover, the price discrimination criteria for program access have proven to be difficult to apply in case-by-case adjudications of price discrimination complaints.[31]

Nonetheless, WCA is aware that Congress has instructed the Commission to conclude this proceeding within a very short time frame, and that the Commission therefore may not have sufficient opportunity in this proceeding to develop a separate and distinct set of nondiscrimination criteria that would apply exclusively to retransmission consent. Accordingly, WCA tentatively supports incorporation of the program access nondiscrimination criteria into the Commission's definition of "good faith" retransmission consent negotiations, subject to the following caveats. First, as in the case of Section 628, the retransmission consent nondiscrimination criteria should be viewed as the *minimum* criteria which a broadcaster must satisfy in order to obtain a finding of "good faith."[32] Given the importance of local broadcast programming to alternative MVPDs and their customers, it is essential that the Commission retain the flexibility to impose more stringent nondiscrimination criteria on a case-by-case basis where necessary to eliminate any and all types of anticompetitive behavior by incumbent cable operators and/or local broadcasters. Moreover, there is no statutory impediment to this approach, since Congress has imposed no boundaries on the Commission's discretion to define what "competitive market considerations" fall within the ambit of "good faith."

Second, the Commission should adopt a "bright line" rule stating that any attempt by a broadcaster to condition retransmission consent on an alternative MVPD's carriage of that

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[31] *See, e.g., Turner Vision, Inc. et al. v. Cable News Network, Inc.*, 13 FCC Rcd 12610, 12611-12 (1998).

[32] *Compare* 47 U.S.C. § 548(c)(2) (titled "Minimum Contents of Regulations").

broadcaster's cable programming services via a non-optional tying arrangement is a *per se* violation of the "good faith" requirement and shall be actionable as such. As those Commission personnel residing in Fairfax County well know, any doubts as to a broadcaster's willingness to hold consumers hostage to such tying arrangements have been laid to rest by Fox's recent refusal to grant Cox Communications retransmission consent unless it also agreed to carry (for an additional fee to Fox) the FXM and Fox Sports World cable networks.[33] If Fox is willing to do whatever is necessary to force this sort of tying arrangement on a cable MSO with hundreds of thousands of subscribers nationwide, than it is hardly a leap of faith to assume that Fox would be equally willing (if not more so) to impose a similar burden on an alternative MVPD who enters the market with no or few subscribers. Moreover, whatever the Commission's public interest standard for broadcasters may be at the present time, it should not be read to give Fox or any other television network an unequivocal right to leverage a federally-granted broadcast license into favorable carriage arrangements for its cable programming services, particularly where the MVPD in question lacks market power or otherwise cannot subsidize its own cable programming services with carriage of local broadcast signals.[34]

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[33] *See, e.g.*, "Prospects Dim For Cox-Fox Retransmission Agreement," *Communications Daily*, at 4 (Jan. 4, 2000). Fox is uniquely positioned to dictate the terms of retransmission consent for its owned and operated stations, since (1) through the Fox Broadcasting Network and the Fox/Liberty regional cable networks, Fox controls the lion's share of all major sports programming in the United States, and (2) Fox's parent company, News Corp., holds a substantial ownership interest in DBS provider EchoStar Communications Corporation, to whom many of Cox's subscribers may turn if the current stalemate continues indefinitely.

[34] *Cf.* Separate Statement of Commissioner Gloria Tristani re: *Public Interest Obligations of TV Broadcast Licensees (Notice of Inquiry)*, MM Docket No. 99-230, at 3 (Dec. 20, 1999) ("The public interest must be considered in the context of our other proceedings considering the relationship of broadcasting to the public. For instance, some will assert that the explosion in media outlets over

C. *The Commission Should Adopt Expedited Special Relief Procedures and Other Additional Requirements To Minimize The Harm To Competitive MVPDs Caused By Unlawful Retransmission Consent Agreements.*

Though WCA supports the Commission's proposal to use its Section 76.7 special relief procedures when reviewing alleged violations of the exclusivity or good faith provisions of the SHVIA,[35] those procedures must be fine-tuned to ensure that the Commission's complaint process does not aggravate the already substantial injury suffered by alternative MVPDs who have been denied full and fair access to local broadcast programming. Thus, at a minimum, those procedures should provide for expedited processing of Section 76.7 retransmission consent complaints, such that all complaints must be resolved by the Commission within 120 days of filing.[36]

In addition, since it is virtually impossible for an aggrieved MVPD to prove unlawful discrimination without access to the retransmission consent agreements of its competitors, the Commission should permit limited mandatory discovery of such agreements to ensure the development of a complete record as to the aggrieved MVPD's complaint. Specifically, where

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the past thirty years (*e.g.*, cable, satellite, the Internet) means that we should impose minimal, if any, public interest requirements on broadcasters. The argument is that consumers are so awash in substitutable media that it no longer makes sense to single out broadcasters for special treatment. But in other proceedings, like digital must-carry, we hear a completely different story. In digital must-carry, the argument is that broadcasting still provides a unique service, especially to the 30% of Americans who do not subscribe to cable, and that because of this special role, broadcasting is entitled to special treatment by the government. Both of these cannot be true. Either broadcasting is special and worthy of special concern or it is not.").

[35] *NPRM* at ¶ 26.

[36] This is the resolution period afforded to must-carry complaints under Section 614(d)(3) of the 1992 Cable Act. *See* 47 U.S.C. § 543(d)(3).

an aggrieved MVPD's complaint includes allegations of discrimination which, if proven to be true, would constitute a violation of the "good faith" provisions of the SHVIA, the Commission should require the defendant broadcaster to include with his or her answer a copy of any retransmission consent agreement(s) with any competing MVPD(s) which the complainant alleges to include unlawfully different terms and conditions. Finally, the Commission should require a defendant broadcaster to extend any existing retransmission consent it already has with an MVPD complainant, such that the *status quo* as to carriage of the broadcaster's signal is maintained until the MVPD's complaint is denied by the Cable Services Bureau or, if reconsideration is requested, by the full Commission. Local television stations already enjoy similar protection where a cable operator seeks to drop a broadcaster via the Commission's market modification process (*i.e.*, where the cable operator files a request to delete its communities from the broadcaster's DMA, the cable operator cannot drop the broadcaster until the Commission issues a final ruling granting the cable operator's request).[37] Basic considerations of fairness dictate that alternative MVPDs be accorded the same benefit during the course of a retransmission consent dispute, so as to ensure that their customers do not suddenly lose access to local broadcast signals while the legality of a broadcaster's conduct during the retransmission consent process is under Commission review.

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[37] *See Dynamic Cablevision of Florida, Ltd.*, 12 FCC Rcd 9952, 9960 (1997) (cable operator may not drop local broadcaster while market modification petition remains pending before the Cable Services Bureau or the full Commission).

III. CONCLUSION.

WCA wishes to emphasize that fixed wireless broadband providers are more than willing to negotiate with local broadcasters for retransmission consent rights on nondiscriminatory terms and conditions. The issue here, however, is whether fixed wireless broadband providers and other alternative MVPDs will continue to have the opportunity to do so. Simply put, Congress did not intend to sacrifice the competitive viability of alternative, non-DBS MVPDs on the altar of "local into local," and thus the Commission should not interpret the SHVIA as a mandate to expose those competitors to a heightened risk that they will lose nondiscriminatory access to local broadcast programming that is essential to their survival. Therefore, for the reasons set forth above, WCA asks that the Commission implement the exclusivity/good faith provisions of the SHVIA in the pro-competitive manner set forth above.

Respectfully submitted,

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