

## Executive Summary

Shifts in technology and changes to the economic landscape since 1992 suggest that statutory provisions that support must carry and retransmission consent are ripe for review. The major findings and recommendations of this paper are:

- **The Myth of an “Open” Marketplace for Negotiations**

A statutory environment exists which supports the maintenance of a skewed playing field where a single seller (broadcaster) controls all elements of price, terms and conditions of negotiations with multiple buyers (MVPD). Allowing the use non-disclosure agreements to hide the terms and price of agreements with other systems prevents the establishment of a marketplace price for content and, in turn, limits the opportunity for negotiations between parties in an open market.

- **Disproportionate Bargaining Power**

The regulatory imbalance created by antiquated statutory requirements for must carry and retransmission consent can be corrected through a consistent policy which mandates binding arbitration when no consensus is reached between parties during retransmission consent negotiations. This imbalance is especially critical for smaller, independent MVPD firms in rural areas who suffer disproportionate bargaining power because of size and the inability to collectively “pool bargain.”

- **Market Realities Have Changed Since 1992**

The statutory rules that regulate major network-cable system retransmission agreements were established in 1992. Over the last fifteen years both the technology and the economic landscape relevant to this bi-lateral market has changed. These transformations in the market have tilted bargaining power towards favoring owners of major broadcasting network rights. This shift in power is especially harmful to the interest of smaller independent and rural MVPD operators and their customers. Modifications of the rules governing retransmission agreements ought to be examined

- **Retransmission Consent**

Retransmission Consent and Must-Carry, two sides of the same coin, have developed into a somewhat contentious issue between broadcasters and MVPDs. Complaints come from the broadcasters that they should not be the only program suppliers not receiving compensation from cable, and from MVPDs who don’t understand why they should be required to pay for programming that is available without charge over the air waves.

## **ACTION ALTERNATIVES: Create a True Marketplace**

- **Out of DMA Negotiation for Small Market MVPDs**

In the negotiation between content providers (networks, stations and syndicators) and the delivery systems (cable systems), the best outcomes for consumers result when there is a balance of power between the two parties. This balance seems to currently exist in large markets but in small markets, content providers are in the position of power. They offer a monopoly product that the MVPDs can get from no other provider, yet they lack the subscriber base to have any clout. Content providers can easily make “take-it-or-leave it” offers. In order to level the playing field, small market delivery systems (cable and telco) ought to be able to negotiate with more than one provider of the same content.

- **Pooled Negotiation**

One approach to equalizing bargaining power in the retransmission consent negotiations is to allow small MVPDs to collectively bargain with owners of network transmission rights. Such pooled bargaining already occurs implicitly when large commercial cable systems negotiate with owners of network transmission rights. Authorizing and legally sanctioning such “pooled bargaining” would place small rural operators and their customers on par with owners and subscribers of larger cable systems. Although such a system would provide little incentive for cable operators who are in head-to-head negotiations with independent local network affiliates, it could provide leverage for those who negotiate with large media holding companies who hold local licenses in a number of markets.

- **A Coming Détente?**

As new multichannel video programming distributors; Telcos, satellite providers, and the Internet vie for customers and dollars, the MVPD industry faces increased financial challenges. Fortunately, there seems to be an awareness among the many players involved in traditional television delivery modes that they need to find ways to compete without alienating viewers. There is one option that has floated recently; Save Our Sets, which offers an alternative to the FCC’s Voucher plan for the looming digital transfer.