Remarks of William T. Lake
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to
The Media Institute
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Thank you. I'm very happy to be here, in this group. One of the pleasures of joining the Commission has been intersecting more regularly with those of you who are old friends, and getting to know those who are new friends. The Washington media community really is a wonderful fraternity – or, predominantly these days, sorority!

I knew that my Media Bureau perch would give me a vantage point to watch the electronic media go through great changes. The Internet, among other things, has forced everyone to go back and reconsider their business models. Times of change like this are the interesting times mentioned in the old Chinese curse.

But I didn't predict which of the changes would fill up my days, or my nights. I certainly never guessed that one of those would be retransmission consent. Ever since CBS first tried -- and failed -- to get cash for its signals, broadcasters and distributors

had settled into a comfortable pattern of paying for retransmission through carriage of additional programming – a pattern that seemed to serve both sides well. Since 1992, thousands of retrans deals have been made quietly without viewers even knowing they were happening. It says something that, among all the briefing papers I received when I took my current job, there wasn't one on retransmission consent.

Those halcyon days are over. When a retrans deal expires today, there can be high drama. I know now that, when my family takes our year-end ski trip, I should buy my lift tickets only one day at a time, and, when I do get to the slopes, I'm likely to be one of those obnoxious people standing at the top of the lift talking into a cell phone.

We all know the nub of what has happened. The broadcasters see their ad revenues down and see the allure of a dual revenue stream. And the distributors feel stress on the amounts they have planned to pay for programming. The cash demands of broadcasters are rising faster than the distributors' willingness to

pay, and the result has been a growing number of cliffhanger negotiations – and some that have fallen off the cliff. Some observers say that the retransmission landscape changed forever when Cablevision subscribers missed two games of the World Series. But just think how much *more* it would have changed if the Yankees had been in the Series!

All of this ferment puts stress on a statutory regime that relies on private business negotiations to set the terms for carriage but then tells the Commission to make sure the parties are negotiating in good faith and to watch that retrans fees don't produce unreasonable basic cable rates. So what we have is a form of regulated negotiation. You can be forgiven if you see an oxymoron in that – something like managed competition, or friendly argument. But the Commission takes seriously its job of enforcing the duty to negotiate in good faith. Unfortunately, the good faith obligation does little to prevent impasses for negotiators and service disruptions for consumers.

As you know, we've had calls for further Commission action. The petition for rulemaking filed in March seems to focus most on the view that broadcasters' new demands are excessive and reflect changes in the marketplace never imagined when the law was enacted almost 20 years ago. The petition also suggests that the Commission's rules put a government thumb on the scales in favor of the broadcasters, preventing true market outcomes.

The calls for action from other quarters, such as the Hill, focus more on the harm to consumers that results when private parties fail to reach a deal and viewers find their programming suddenly cut off. As the African saying goes, when the elephants fight, it is the grass that suffers. The remedies that have been proposed range from ordering binding arbitration to making sure that viewers get advance notice of a coming blackout, so they can make other arrangements if they like.

We've looked carefully at all the input we've received. The impasse in October between Fox and Cablevision focused attention on one aspect of the issue: what power do we have to prevent

service interruptions for consumers, when parties fail to agree? Cablevision and others urged the Commission to order binding arbitration and to require continued carriage in the meantime. A careful review of our authority led Chairman Genachowski to write to Senator Kerry on October 29. The Chairman agreed with Senator Kerry on the importance of protecting viewers from being pawns in retrans battles. He expressed the view that existing law does not give us the tools to prevent service disruptions, such as by ordering binding arbitration. And he agreed with Senator Kerry that Congress may want to revisit the law in this respect.

But the question remains whether we have done all we can or should do with our current authority. We have decided we should move forward with a Notice of Proposed Rulemaking to explore a number of available actions. The Media Bureau will prepare a Notice that will take a broad look at what more we might do to advance the statutory objectives of allowing retrans fees to be set by market forces while protecting the interests of consumers.

One thing we've heard is that uncertainty exists about what good faith means. Our rules provide some limited guidance on this; but, if we can provide greater certainty to the marketplace, that could help to guide the negotiating parties and reduce the number of failed deals and dropped signals. We may try to identify additional practices that will be treated as *per se* violations of the duty to bargain in good faith. We may be able to provide more specifics about the meaning and scope of the "totality of the circumstances" test. Because a principal concern is to protect consumers when talks break down, we may propose to strengthen our notice requirement and extend it to non-cable distributors and broadcasters. If some of our broadcast rules are thought to interfere with market negotiations, we may want to look at those rules.

We will pay close attention to the comments we receive and also to future developments in the marketplace. Are the disruptions of the last year an anomaly – perhaps just a sign of friction as prices move to a new level? Or will we see a continuing

pattern of disputes that threaten viewers' access to programming? We hope that a rulemaking will help us to find the most constructive role we can play to protect consumers under the retransmission law as it now exists.

To shift gears, I'd like to share a few thoughts about the Commission's proposal to repurpose some of the spectrum now devoted to TV broadcasting. We've just taken the first modest regulatory step to implement that proposal, in the NPRM we issued last week. We would love to receive the constructive input of people in this room on the ideas in that Notice, and on each of the future steps that will be necessary to implement the proposal.

If that input is to be constructive, it has to be grounded in a clear-eyed appreciation of today's spectrum environment and of exactly what we are proposing to do.

In today's environment, some facts can't be blinked. One is the stratospheric growth of wireless broadband use, which will

outstrip the supply of spectrum unless the country looks to spectrum that can be repurposed from other uses.

Another fact is that the digital transition makes it possible to transmit broadcast TV programming more efficiently. Some broadcasters are making good use of this spectrum dividend; others are not. This means it is inevitable that, as we look for sources of spectrum, one place we need to look is broadcast spectrum that is not being efficiently used.

Though it may be tempting to be wistful about the way things were, the communications universe is changing, and this is your chance to be part of the solution by working creatively with us. We are in this thing together, and we need to cooperate to make this the true win-win-win we believe it can be.

If Congress gives us the authority, we will move from this first NPRM to the business of structuring incentive auctions. As we do, it is important to give us your thoughts on what we *are* proposing, and not to perpetuate any misunderstandings about things we're not. We want to implement incentive auctions that will give

broadcasters an option they do not have today – one they can choose voluntarily if they find it attractive. We'll need your help in structuring that option to make it achieve its purposes for wireless consumers, for broadcasters, for the Treasury, and for job creation. If you can work with us constructively on what we *are in fact* proposing, you can be our partners in achieving one of the most innovative advances in spectrum policy of the century.

We look forward to working with you.