CABLEVISION

JAMES L. DOLAN
President and Chief Executive Officer

October 25, 2010

Mr. William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Lake:

Attached please find Cablevision's response to your letter of October 22, 2010 regarding the pending retransmission consent dispute between Cablevision and News Corporation regarding carriage of WNYW, WWOR, and WTXF (the "Fox stations"). As detailed in the attached submission, Cablevision's conduct throughout the negotiations with News Corp. has been in complete compliance with the Commission's good faith rules. Regrettably, the same cannot be said about News Corp.

Cablevision is committed to trying to resolve these negotiations in good faith. To end the current impasse, we have proposed that both parties submit the dispute to binding arbitration and that News Corp. restore carriage of the Fox stations during the pendency of arbitration. More than 50 elected officials and other policymakers have joined our call for this common-sense approach.

In light of News Corp.'s intransigence and bad faith, the only solution is for the Commission to act. We therefore respectfully request that the Commission redress News Corp.'s violation of the good faith rules by ordering News Corp. to arbitrate and to restore the Fox stations immediately.

We are prepared to engage immediately under FCC auspices in Washington to resolve this dispute with News and to restore programming, starting Tuesday morning.

Thank you for your attention to this serious matter.

Sincerely,

James L. Dolan

Attachment

CABLEVISION SYSTEMS CORPORATION
1111 Stewart Avenue, Bethpage, NY 11714-3581
516 803-1002

CABLEVISION SYSTEMS CORP.
RESPONSE TO MEDIA BUREAU

October 25, 2010

Cablevision System Corp. ("Cablevision") hereby responds to William T. Lake's letter of October 22, 2010, regarding the pending retransmission consent dispute between Cablevision and News Corporation ("News Corp.") regarding carriage of WNYW, WWOR, and WTXF (the "Fox stations"). The letter asks Cablevision to describe how it is satisfying the good faith requirement of the Commission's retransmission consent rules, and in particular what has transpired since we initially began our negotiations with News Corp. and the efforts we are making to end the current impasse. The letter also asks Cablevision to describe and provide supporting evidence of any conduct by News Corp. that we believe violates the good faith requirement.

Throughout all of its negotiations with News Corp., Cablevision has consistently acted in good faith and in compliance with the Commission's rules. News Corp., on the other hand, has refused to negotiate in good faith, leading to the current situation where millions of Cablevision subscribers are unfairly deprived of News Corp. programming and clearly will continue to be unable to access that programming without Commission intervention. Specifically:

- News Corp. has refused to negotiate in good faith by demanding a "take it or leave it" rate for WNYW, based on a rate it claims Time Warner Cable agreed to pay in a much broader, national agreement. Further, News Corp. has claimed it cannot show any flexibility in its demands for WNYW because it is bound by the "Most Favored Nation" (MFN) clause in that agreement, a self-imposed limitation that is a clear violation of the FCC's good faith rules.

- News Corp. deliberately timed the deadline to black out WNYW and WWOR to ensure that Cablevision customers would be denied access to "must see" sporting events including Major League Baseball playoffs and the World Series to force Cablevision to accept its "take it or leave it" demands. This strategy, designed to inflict maximum inconvenience on customers for private gain, presents Cablevision with the untenable choice of losing access to a marquee National sports events, or accepting unconscionably high subscription rates for Fox broadcast stations – a model of bad faith tactics that if permitted would result in a spiral of ever higher consumer prices for broadcast cable.

- News Corp. has abused the power in the New York market it has achieved through government broadcast licenses and special "one of its kind" FCC waivers that allow it to own multiple broadcast stations and newspapers in the market. News Corp. is attempting to leverage its unprecedented government-enabled media consolidation to force Cablevision to accept unreasonable fee demands.

The Commission has the authority to order News Corp. to allow carriage of that programming pending resolution of the contract dispute – resolution that might, as Cablevision has suggested, be appropriately achieved through binding arbitration.

Given the impasse resulting from News Corp.'s intransigence, it appears that Commission intervention is the only practical solution to restoring programming and addressing consumer needs. The Commission should exercise that authority in this case.

I. Cablevision's Conduct Has Adhered to the Good Faith Requirements

As detailed in the attached summary of the negotiations, Cablevision has consistently acted in good faith and in compliance with the Commission's rules. Throughout the negotiations, Cablevision has been flexible in trying to find a mutually acceptable arrangement that would permit the continued availability of the Fox stations for Cablevision's 3 million customers. Significantly, all of our proposals included retransmission consent fees that represented substantial increases over what Cablevision had previously paid for the Fox stations and have been in line with (and in some instances, have been more than) the fees we pay other stations affiliated with major networks, including networks that have higher ratings than Fox. Moreover, as the negotiations progressed, we submitted numerous proposals in which we increased the overall amount of compensation we were prepared to pay News Corp.

In July, we responded to News Corp.'s initial offer with a reasonable and creative proposal that would provide fair compensation for the Fox stations and other News Corp. programming at a substantially higher level than we paid under the one-year agreement that expired on October 15. Our proposal included a number of options for News Corp. – such as providing additional programming on demand and multi-platform rights – that would have enabled News Corp. to substantially increase its compensation.

When News Corp. dismissed that proposal in August, we responded in September with a proposal for carriage fees that would have nearly tripled the compensation to News Corp. for the Fox stations that we paid in the prior one-year agreement. When News Corp. refused to make any material concessions to the demanded compensation model for the Fox stations, particularly WNYW, Cablevision made another, materially richer, proposal that would have permitted News Corp.'s WNYW to earn as much as, if not more than, any other broadcaster carried by Cablevision. News Corp. rejected that proposal, too. As expiration approached and News Corp. resorted to advertisements and threats, Cablevision repeatedly urged News Corp. to agree either to a reasonable contract or to a process that would ensure a timely resolution fair to both parties (such as arbitration), but in either case to suspend its threatened harm to customers by agreeing that the Fox stations would remain available until a contract was achieved.

News Corp. rejected all of these proposals. Meanwhile, senior Cablevision executives with authority to make binding representations on behalf of the company have responded in a timely fashion to every News Corp. proposal and have made themselves available for discussions on an ongoing basis with the singular aim of finalizing a fair contract.

Cablevision is committed to trying to resolve these negotiations in good faith, both by proposing reasonable financial proposals and by proposing reasonable processes that would permit resolution. When it was clear that negotiations were at an impasse and News Corp. reiterated that it had no flexibility on the rate for WNYW because of a most favored nation clause in a contract with another multichannel video programming distributor (MVPD), Cablevision urged that the parties submit the dispute to binding arbitration and that News Corp. restore carriage of the Fox stations during the pendency of arbitration. More than 50 elected officials and other policymakers have joined our call for this common-sense solution. In other contexts, the Commission has recognized that binding arbitration with interim carriage is an appropriate means for resolving carriage disputes, including retransmission consent disputes.[1/] News Corp. has refused to agree to our proposal, or any proposed process, to reach a resolution that restores programming timely and on reasonable terms. The result has been that millions of Cablevision subscribers have been harmed needlessly, held hostage to News Corp.'s unreasonable demands.

II. News Corp. Has Refused to Negotiate in Good Faith

In contrast to Cablevision's flexibility and its willingness to propose increased compensation for the Fox stations as the negotiations progressed, News Corp. effectively refused to move from its offer, including a steadfast refusal to reduce the price for its FOX network affiliate, WNYW. The Commission has explained that "'[t]ake it or leave it' bargaining is not consistent with an affirmative obligation to negotiate in good faith."[2/] The Commission's regulations also provide that a broadcaster may be found to have violated good faith bargaining rules "based on the totality of the circumstances of a particular retransmission consent negotiation."[3/] On both of these scores, Fox's current negotiating position violates the good faith requirement.

As discussed in more detail below, in the course of the current negotiations News Corp. has violated its duty to negotiate in good faith by (1) proposing unreasonable compensation, including unreasonable bundling, on a take it or leave it basis[4/] that is "inconsistent with competitive marketplace considerations";[5/] (2) deliberately structuring the timing of its agreements and negotiations so it could withhold its signal immediately prior to a "must see" marquee event;[6/] (3) hiding behind most favored nation clauses in other agreements as the basis

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1/ *See, e.g., General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee,* Memorandum Opinion and Order, 19 FCC Rcd 473, App. F (2004) ("*News Corp./DirecTV Order*"); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses of Adelphia Communications Corporation,* Memorandum Opinion and Order, 21 FCC Rcd 8203, App. B (2006) ("*Adelphia Order*").

2/ *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 43 ("*Good Faith Order*").

3/ 47 C.F.R. § 76.65(b)(2).

4/ 47 C.F.R. § 76.65(b)(1)(iv) (barring a "single, unilateral proposal").

5/ 47 C.F.R. § 76.65(b)(1); *see Good Faith Order* ¶ 8.

6/ *See* 47 C.F.R. § 76.65(b)(2) (totality of the circumstances test for good faith negotiations).

for refusing to negotiate a reasonable rate for WNYW;[7/] and (4) refusing to enter into arbitration in which the reasonable value of its programming could be determined.[8/] News Corp.'s conduct also represents an abuse of its duopoly in the New York market and its two extraordinary waivers of the newspaper-broadcast cross-ownership rules. Finally, its disregard of the interests of its viewers raises serious questions about its fitness as a broadcast licensee operating as a trustee of an important public asset.

The sum of these unfair negotiating tactics – the totality of the circumstances – is that Fox has not engaged in negotiations with a "sincere intent of trying to reach an agreement that is acceptable to both parties"[9/]

1. News Corp. has proposed unreasonable compensation, including unreasonable bundling, on a take it or leave it basis. Within the past year, Cablevision – which is the largest MVPD in the New York market – has reached new retransmission consent agreements with the flagship stations of each of the other broadcast networks. We therefore have a solid understanding of the prevailing market rate for broadcast carriage in the New York market. We have offered to pay News Corp. *more* for carriage of the FOX network affiliates than we pay *every other broadcaster* despite the fact that it is *not* the highest rated network in our market.

News Corp., however, has not moved from its "take it or leave it" price demand for the Fox stations that is **significantly higher than what we pay for every other broadcaster in this market *combined***. Its insistence on this "single, unilateral" price at multiples of the prevailing market rate is not justified by ratings, popularity, or content, and therefore is not based on "reasonable market considerations" as required by the Commission's rules.

News Corp.'s "'[t]ake it or leave it' bargaining is not consistent with an affirmative obligation to negotiate in good faith."[10/] In violation of this obligation, News Corp. has been unwilling to consider any significant changes to the first proposal it made to us in May. As the attached summary of negotiations indicates, while News Corp. has made some incremental changes on the prices and terms of carriage of the other News Corp. programming services it is bundling with the broadcast stations, it has been wholly unwilling to move off its demands for WNYW. Thus, News Corp. has effectively put forth a "single, unilateral proposal" on a take it or leave it basis, in direct contravention of the good faith rules and the Commission's orders.[11/]

[7/] 47 C.F.R. § 76.65(b)(1)(iv).

[8/] *Id.*

[9/] *Good Faith Order* ¶ 39.

[10/] *Good Faith Order* ¶ 43.

[11/] *Good Faith Order* ¶ 43. News Corp. attempts to justify its unreasonable demands by comparing its proposal to the price for Madison Square Garden's two regional sport networks, but that is an apples-to-oranges comparison. Broadcast channels have a number of advantages that more than offset the difference in pricing for these small, regional cable channels. In particular, the Communications Act guarantees broadcasters like the Fox stations carriage on the most widely distributed tier of cable programming and requires that all subscribers purchase this tier. *See* 47 U.S.C. § 543(b)(7)(A). There are a number of other distinguishing factors that make News Corp.'s equivalence claim unpersuasive, but the Commission need not address these here. The parties' submission of this pricing dispute to an arbitrator

News Corp. also insisted on tying retransmission consent to increased payments for its other cable programming services. While a broadcaster is not barred *per se* from seeking retransmission consent compensation through the carriage of cable programming, such compensation must be reasonable and based on "market considerations." This was clearly not the case here. Much of the compensation that News Corp. receives for its cable channels from Cablevision is, in fact, indirect compensation for its broadcast channels. News Corp.'s demand for direct compensation for its broadcast stations in addition to increases in the fees for its cable channels is an attempt to obtain double compensation through tying. News Corp. made this obvious when Cablevision asked for a standalone broadcast proposal, untied to unrelated cable networks. When, after Cablevision's repeated requests, News Corp. finally made such a proposal, the price for the Fox stations was more than *four times the price* for the stations as part of the bundle, and multiple times more than what Cablevision pays other broadcasters like CBS and ABC. Such bargaining tactics cannot reasonably be characterized as good faith.

News Corp.'s demand for a substantial premium over and above what other broadcasters receive – including broadcasters with whom Cablevision contracted in 2010 – is unjustified and not based on "reasonable market considerations," such as relative ratings, content, or popularity.

2. News Corp. deliberately structured the timing of its agreements and negotiations so its existing consent agreement would expire immediately before the baseball playoffs and the World Series. The Commission's regulations also provide that a broadcaster may be found to have violated good faith bargaining rules "based on the totality of the circumstances of a particular retransmission consent negotiation."[12/] On this ground as well, News Corp.'s conduct violates the good faith requirement. As the attached summary notes, News Corp. deliberately structured the timing of its agreements and negotiations with Cablevision so that its 2009 extension of retransmission consent would expire immediately before the National League playoffs and the World Series. Those marquee events are "must see" programming for Cablevision subscribers.[13/] Fox obviously realized that scheduling expiration of its agreement to occur immediately prior to an event that is likely to be extremely popular with Cablevision subscribers gives it maximum – and unfair – leverage in negotiations because withholding

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would allow each to make its case for whether its proposed price model is reasonable in light of market circumstances.

12/ 47 C.F.R. § 76.65(b)(2).

13/ *See, e.g.*, Press Release, Major League Baseball, Excitement building as the teams fight for the World Series berth (Oct. 21, 2010) ("2010 LCS coverage on FOX and TBS continues to generate the highest combined television ratings and viewership levels since 2006."); Johnathan Berr, *World Series ratings: Fox Knocks It Out of the Park*, DAILY FINANCE (Oct. 29, 2009) ("Game 1 of the World Series posted stunning ratings, underscoring the bonanza News Corp.'s Fox television network is reaping."), *at* http://www.dailyfinance.com/story/media/world-series-tv-ratings-fox-knocks-it-out-of-the-park/19215695/. *See also, e.g.*, Wayne Friedman, *TV Brands Can Be Hurt Long-Term In the Retrans Wars*, TV WATCH, Oct. 18, 2010 ("Higher-gloss TV brands, like Fox, will win out in these situations, especially this time of year with the World Series and NFL programming in full swing. . . . [Cablevision] will lose subscribers at a far faster pace than its prior battles given the timing of key sporting events.") *at* http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=137879.

retransmission of the marquee event causes Cablevision the maximum possible damage with its subscribers.[14/] Exploiting exclusive broadcast rights to marquee events to extract leverage for long-term contracts at an above-market price violates the requirement that retransmission consent be based on "market considerations."

The Commission has long recognized the unfair leverage a party to carriage negotiations can exert by threatening to withhold – or actually withholding – carriage during a programming event valuable to the other party. It is for just this reason that Commission rules prohibit cable operators from deleting any local commercial television station from their channel line-ups during any television ratings "sweeps."[15/] The same unfair leverage exists when a broadcaster threatens to – or does – withhold consent to rebroadcast the signal during a popular national television event such as the Super Bowl, the World Series, or the Academy Awards. Just as cable operators are prohibited from using their leverage at critical times for broadcasters, broadcasters should be similarly prohibited from abusing their leverage during times of marquee events.

The Commission has acknowledged that it "must always take into account the relative bargaining position of the parties when examining the totality of the circumstances for a failure to negotiate in good faith."[16/] News Corp.'s exploitation of its rights to the American and National League playoffs and the World Series can only be viewed as an abuse of its bargaining position.

3. News Corp.'s self-imposed limitation on negotiating because of a most favored nation clause in its agreement with Time Warner Cable violates the good faith requirement. In discussions with Cablevision, News Corp. representatives acknowledged that one reason they were unwilling to consider Cablevision's offer for carriage of WNYW was the existence of a most favored nation ("MFN") clause in its retransmission consent agreements with other MVPDs.[17/] They told us that because of MFN they could not agree to *any* rate for WNYW that is less than what Time Warner Cable pays. In fact, they said that because the MFN would

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14/ *See* Congressional Research Service, *A Condensed Review of Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations*, Summary, at 17 (July 9, 2007) ("There often is a timing element to must-have programming that programmers can use strategically in their negotiations with distributors. Television households are far more likely to switch MVPD providers if they fear the loss of particular time sensitive programming, such as the Super Bowl, the Olympic Games, the National Football League season, or the finale of American Idol or some other extremely popular series. Some programmers have effectively timed their negotiations with distributors to take advantage of such program schedules.").

15/ 47 C.F.R. § 76.1601.

16/ *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligations*, Report and Order, 20 FCC Rcd. 10339, ¶ 15 (2005).

17/ The existence of an MFN in News Corp.'s contract with Time Warner Cable has been reported in the press and effectively acknowledged publicly by Fox. *See* Joe Flint, *One reason Fox is reluctant to arbitrate its contract dispute with Cablevision*, LOS ANGELES TIMES (Company Town Blog), Oct. 21, 2010, *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/10/fox-arbitrate-contract-cablevision.html.

require them to reduce Time Warner Cable's rate if they agreed to a lower rate for Cablevision, not doing a deal with Cablevision would be an "easy decision."

This self-imposed limitation violates the good faith rules because it effectively presented Cablevision with just the kind of take it or leave it offer for WNYW that is barred by the rules.[18/] As the courts and the Department of Justice have recognized, MFNs under certain circumstances are antithetical to competition because they inhibit a party to an MFN from negotiating competitive deals with third parties.[19/] Clearly, News Corp.'s insistence on avoiding triggering the MFN has had that effect here.

News Corp.'s insistence on the MFN would also force Cablevision to accept a rate for WNYW that is not reflective of the prevailing market rate. Time Warner Cable's rate reflects bargaining by Time Warner Cable and News Corp. across multiple markets rather than a rate that is based on "market conditions" in New York.[20/] Retransmission consent was designed to protect and support local broadcasting and the origination of local programming,[21/] but a national carriage rate by definition reflects the parties' judgment of an appropriate rate across a range of markets. An MFN that effectively ties the rate for carriage of WNYW in New York to a national composite rate effectively decouples the rate from the "competitive market conditions" in the New York market. Further, the rate represented in a national MFN may also reflect other offsets between the contracting parties that are not present in the New York market. For instance, Time Warner Cable's rate may be higher because News Corp. gave Time Warner Cable rate discounts or ad availabilities on the News Corp. regional sports networks ("RSNs") that Time Warner Cable carries in other markets. The absence of any News Corp. RSNs in the New York market make such offsets unavailable to Cablevision, rendering the national MFN a poor substitute for market-based negotiation.

As discussed above, the best determination of the prevailing rate in the New York market are the deals Cablevision has struck with the other major broadcasters in that market. Because News Corp. insists on a cash payment that is greater than what Cablevision pays for all the other retransmission consent stations in the New York market *combined*, its offer clearly deviates significantly from the prevailing market rate. As a consequence, News Corp.'s adherence to its MFN rate has produced an unreasonable proposal and made News Corp. inflexible in

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18/ 47 C.F.R. § 76.65(b)(iv) (barring a "single, unilateral proposal").

19/ *See, e.g.*, *United States v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14155 (E.D. Mich. filed Oct. 18, 2010) (complaint filed by the United States Department of Justice alleging "Blue Cross' use of MFNs has reduced competition in the sale of health insurance in markets throughout Michigan . . ."). *Cf. United States v. Delta Dental of Rhode Island*, 943 F. Supp. 172, 182, (1996) (accepting the "proposition that courts should not adopt a per se rule regarding MFN clauses, but should carefully examine the alleged anticompetitive effects of each challenged clause.").

20/ *Cf.* 47 C.F.R. § 76.65(a); *see Good Faith Order* ¶ 8 (an offer violates the good faith rules if it is "inconsistent with competitive marketplace considerations").

21/ *See* S. Rep. No. 102-92, 102d Cong.,1st Sess., at 35 (June 28, 1991) (Congress sought to protect and preserve local broadcast programming so that broadcasters no longer had to "subsidize the establishment of their chief competitors").

negotiations regarding that proposal. News Corp.'s insistence on this rate violates its duty to negotiate in good faith.

4. News Corp.'s refusal to submit to arbitration is evidence of bad faith. The prohibition on "take it or leave it"[22/] bargaining is not limited to the terms of a retransmission consent offer, but goes to a party's willingness to engage in a process that can yield a fair, market-based result. With respect to the process for resolving disputes that arise in a negotiation, a party may not "refus[e] . . . to put forth more than a single, unilateral proposal."[23/] News Corp.'s refusal to submit to binding arbitration in the face of a persistent impasse in negotiations is the kind of take it or leave it behavior that is inconsistent with the requirement to negotiate in good faith. The Commission has long recognized the value of arbitration where parties cannot reach agreement on the terms of carriage.[24/] Under the circumstances presented here, News Corp.'s refusal to agree to a mechanism to break the impasse is unreasonable. The Commission should break this impasse by ordering News Corp. to agree to arbitration, just as it has imposed that requirement on News Corp. in the past.[25/]

5. News Corp.'s special duopoly in the New York market confers additional unfair leverage. The Commission is currently seeking comment on whether its current "duopoly" rules serve the goals of diversity, competition, and localism.[26/] It is clear that permitting News Corp.'s duopoly in this instance does not advance any of those objectives. As a general matter, enabling a broadcaster to control multiple local stations in a market gives a broadcaster the ability to increase leverage in retransmission consent negotiations by tying low-rated stations and stations that have discontinued offering valued programming with network affiliates that have "must-have" national sports programming. The result is that broadcasters are able to extract higher retransmission consent fees than a less concentrated market would produce, driving up consumer costs with no added value.

The additional negotiating leverage that comes from owning two stations in the same market is in this case solely the result of the extraordinary grant to News Corp.'s of *two* waivers of the newspaper-broadcast cross-ownership rule, one of which is a temporary waiver that expired in 2008, with Fox's requested extension hotly opposed.[27/] That exceptional treatment should

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22/ *Good Faith Order* ¶ 43.

23/ 47 C.F.R. § 76.65(b)(iv).

24/ *News Corp./DirecTV Order* ¶¶ 177, 222; *Adelphia Order*, App. B.

25/ *News Corp./DirecTV Order* ¶¶ 220-224.

26/ *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 25 FCC Rcd 6086, ¶¶ 83-85 (2010).

27/ *See K. Rupert Murdoch, (Transferor) and Fox Entertainment Group (Transferee)*, 21 FCC Rcd 11499, ¶ 8 (2006) (extending for 24 months the temporary waiver for WWOR first granted in 2001, *see Applications of UTV of San Francisco Inc., et al. (Assignor) and Fox Television Stations, Inc. (Assignee)*, 16 FCC Rcd 14975 (2001)). Fox's requested permanent waiver for WWOR, *see Fox Television Stations, Inc., Applications for Renewal of License of WWOR-TV and WNYW,* Supplement to Petition for Modification of Permanent Waiver (filed Jun. 23, 2008), has been opposed, *see Fox Television Stations,* impose a special responsibility on News Corp. to meet the spirit and the letter of the Commission's good faith negotiation rules. As we have demonstrated, News Corp.'s conduct has been exactly to the contrary.

6. News Corp. has engaged in bad faith by abusing its government-granted assets and using them as leverage to the detriment of the public. News Corp. built Fox by using government-granted free broadcast licenses such as that used by the Fox stations. In exchange, it is obligated by law to operate in a manner that serves the "public interest, convenience, and necessity." [28/] WNYW and WWOR are both currently operating with expired broadcast licenses, and as noted above News Corp. enjoys two special waivers of the newspaper-broadcast cross-ownership prohibition. Moreover, there has been significant opposition to renewal of the WWOR license specifically based on the station's failure to serve the local community as required.[29/] Under these circumstances, News Corp. has a special obligation to protect the public and to ensure that WWOR and WNYW operate in a manner that serves the public interest while the FCC determines whether the licenses should be renewed.

Inc. Applications for Renewal of License of WWOR-TV-TV and WNYW Request for Waiver of the Newspaper-Broadcast Cross-Ownership Rule Relating to WWOR-TV and the New York Post, Opposition of Office of Communication, United Church Of Christ, Inc., Rainbow/PUSH Coalition and Free Press (filed July 15, 2009).

[28/] 47 U.S.C. §§ 307, 309. *See Office of Communication of the United Church of Christ v. Federal Communications Commission*, *707 F.2d 1413, 1427 (D.C. Cir. 1983)* ("In return for 'the free and exclusive use of a limited and valuable part of the public domain,' broadcasters were to be burdened by enforceable public obligations") *(quoting Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994, 1003 (D.C. Cir. 1966)); *Black Citizens for a Fair Media, et al. v. Federal Communications Commission,* 719 F.2d 407, 419 (D.C. Cir. 1983) (Wright, J., dissenting) ("It is a fundamental premise of the Act that the public, and not the broadcaster, owns the airwaves. Under the regulatory scheme, a broadcaster receives free and exclusive use of a slice of this public resource, the remunerative potential of which has proven to be vast. In return, the broadcaster must use this public resource so as to serve the 'public interest, convenience, and necessity.' This public interest standard mandates programming that meets the needs of a broadcaster's viewing or listening community.") (internal citations omitted).

[29/] *See, e.g.*, *Application for Renewal of Station License of WWOR(TV) Secaucus, NJ*, Petition to Deny Renewal Filed by Voice for New Jersey, MB Docket No. 07-260, at 6-7 (filed April 28, 2007) ("The quantity of news coverage provided by WWOR is not adequate to properly serve the community of license [and] WWOR's coverage of New Jersey issues is completely inadequate."); *Fox Television Stations, Inc. Applications for Renewal of WWOR-TV-TV and WNYW, Request for Waiver of the Newspaper-Broadcast Cross-Ownership Rule Relating to WWOR-TV and the New York Post*, Opposition of Office of Communication, United Church of Christ, Inc., Rainbow/PUSH Coalition and Free Press to Fox Television, Inc. and News Corporation Limited's Supplement to Petition for Modification of Permanent Waiver, MB Docket No. 07-260, at 17 (filed July 15, 2009) ("WWOR-TV has failed to provide adequate local news coverage to its community of license."); Letter from Charles Lovey, Member, Voice for New Jersey, to Julius Genachowski, Chairman, FCC, MB Docket No. 07-260, at 5 (filed Feb. 15, 2010) ("It is [] difficult to fathom that WWOR-TV could maintain even the minimal service levels that Fox boasts of, having just reduced its news and public affairs programming by more than half and its staffing by over 2/3.").

News Corp.'s decision to withdraw carriage of these stations to increase its leverage in retransmission consent negotiations with Cablevision violates this public trust by holding consumers hostage to Fox's unreasonable retransmission consent demands. The FCC and the courts have long recognized that a station is not serving the public interest if it is not meeting the needs and interests of its viewers.[30/] Withholding programming is certainly not meeting those needs and interests. The Commission has held that "[c]onduct that is violative of national policies favoring competition" violates rules requiring good faith bargaining.[31/] Retransmission consent – required by a statute that was designed to preserve local broadcasting for the public – should not be allowed to become simply a tool in an anticompetitive strategy to withhold broadcast programming from competitors as a bargaining tool or to leverage a substantial increase in the costs of receiving the programming. Indeed, allowing a national network to pursue through its owned and operated stations a national economic strategy driven by the increased cost of sports and that is divorced from local market realities perverts the spirit and purpose of the retransmission consent statute. News Corp.'s abuse of its public trust violates the good faith negotiation requirements.[32/]

III. The Commission Has The Authority To Order Carriage Pending Arbitration

The FCC has recognized that interruption of local broadcast signals is "highly undesirable,"[33/] and has expressed "concern regarding the service disruptions and consumer outrage that will inevitably result should MVPDs that are entitled to retransmit local signals lose such authorization."[34/] The Commission's broad and unique authority over broadcasters under Title III of the Communications Act, as well as other provisions of the Act, allow it to redress News Corp.'s violations of the good faith requirement by ordering News Corp. to submit to arbitration and by requiring News Corp. to immediately allow Cablevision to carry the Fox stations during the pendency of the arbitration.

First, the Commission has the authority to enforce the requirement that parties negotiate retransmission consent in good faith. In addition to its obligation to adopt rules "governing the exercise by television broadcast stations of the right to grant retransmission consent," including the requirement to negotiate in good faith,[35/] the Commission has the power to enforce those rules and the underlying statutory good faith requirement. That power is found in section 4(i) of the Communications Act, which authorizes the FCC to "perform any and all acts . . . not inconsistent with this Act, as may be necessary in the execution of its functions."[36/]

30/ *Office of Communication of the United Church Of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

31/ *Good Faith Order* ¶ 58.

32/ News Corp.'s conduct in its negotiations with Cablevision also goes to its fitness to remain a broadcast licensee, let alone the beneficiary of two waivers of the newspaper-cable cross-ownership rules.

33/ *Good Faith Order* ¶ 12.

34/ *Good Faith Order* ¶ 61.

35/ *Id.*

36/ 47 U.S.C. § 154(i); *see also id.* § 303(r) (in exercising its plenary authority over radio communications, "the Commission from time to time, as public convenience, interest, or necessity requires shall … make such rules and regulations and prescribe such restrictions and conditions, not

Enforcement of the Communications Act's duties is clearly an act that is "necessary to the execution of [the FCC's] functions."

Second, it is well established that the FCC has the authority to impose interim relief in order to preserve the status quo while the dispute is finally resolved. In the broadcast carriage context, that authority has been upheld by the Supreme Court.[37/] Earlier this year, invoking sections 4(i) and 303(r) of the Communications Act, the Commission held that it had the authority to order continued carriage of cable programming services in order to "minimiz[e] the impact on subscribers who may otherwise lose valued programming" pending resolution of a dispute.[38/] After the adoption of the *2010 Program Access Order*, but before it became effective, the Media Bureau held that it has authority to impose a standstill order during the pendency of a program access complaint under section 4(i) of the Act, independently of that order.[39/] In the News Corp-DirecTV and Adelphia proceedings described above, the Commission likewise required the parties to permit continued carriage of their television stations and regional sports programming during the pendency of a retransmission consent or program access dispute.[40/]

Third, specifically in the context of a retransmission consent dispute, the Commission has exercised this authority to ensure continued carriage of broadcast signals even where the retransmission consent agreement has expired.[41/] In that instance, Time Warner was required to restore carriage of ABC broadcast stations because, the Commission held, section 614 of the Communications Act applies to all local commercial broadcast stations "[u]pon expiration of an

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inconsistent with law, as may be necessary to carry out the provisions of this Act"); § 201(b) (authorizing the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act"). While the latter provision is contained in Title II of the Communications Act, the FCC has invoked it in support of its regulation of cable service. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 22 FCC Rcd 5101, ¶ 54 (2007), *aff'd sub nom Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

37/ *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 180 (1968) (recognizing the Commission's authority under sections 4(i) and 303(r) of the Communications Act to issue an order maintaining the *status quo* in cable carriage disputes whenever "the public interest demands interim relief") (internal quotation marks and citations omitted).

38/ *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, ¶ 71 (2010). The Commission cited numerous prior instances where it imposed interim relief, including orders for temporary carriage. *See id.* at ¶ 72 n. 265.

39/ *Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill*, 25 FCC Rcd 3879 (MB 2010) (FCC has authority to impose interim carriage requirement under its general grant of authority in section 4(i)).

40/ *News Corp.-DIRECTV Order* ¶¶ 177, 222; *Adelphia Order*, App. B.

41/ *Time Warner Cable; Emergency Petition of ABC, Inc. for Declaratory Ruling And Enforcement Order For Violation of Section 76.58 of the Commission's Rules, or in the Alternative For Immediate Injunctive Relief*, 15 FCC Rcd 7882 (MB 2000).

existing retransmission consent."[42/] While the Time Warner-ABC dispute involved the specific question of whether a station could be dropped during "sweeps week," the logic of that decision applies to this dispute. In particular, the same important government interest in promoting free, over-the-air local broadcast television, the widespread dissemination of information, and fair competition that the Commission noted there[43/] support an order for Fox to restore carriage of its stations to Cablevision pending arbitration of this dispute.

Finally, requiring News Corp. to restore carriage will further the purposes of the 1992 Cable Act.[44/] In the 1992 Cable Act, Congress found that "[t]he Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems" and in "having cable systems carry the signals of local commercial television stations."[45/] Congress also recognized the popularity of broadcast programming and that consumers who subscribe to cable television often do so to obtain local broadcast signals.[46/] Continuing to allow Fox's unilateral decision to deny broadcast programming to Cablevision subscribers undermines these substantial Federal interests.

Conclusion

Under the Commission's rules, a broadcaster may be found to have violated good faith bargaining rules "based on the totality of the circumstances of a particular retransmission consent negotiation."[47/] News Corp. has engaged in multiple unfair tactics in the course of the current negotiations – deliberately structuring the timing of its agreements and negotiations so it could withhold its signal immediately prior to a "must see" marquee event; making a "take it or leave it" proposal in which it demanded a cash payment that far exceeds the retransmission consent demands of other broadcasters; hiding behind most favored nation clauses in other agreements as the basis for refusing to negotiate a reasonable rate for WNYW; and refusing to enter into arbitration in which the reasonable value of its programming could be determined. Viewed as a whole – in the totality of the circumstances – the sum of these unfair negotiating tactics reveals that News Corp. has not engaged in negotiations with a "sincere intent of trying to reach an agreement that is acceptable to both parties."[48/] We respectfully request that the Commission take immediate steps to redress this violation of Commission rules by ordering News Corp. to arbitrate and to restore the Fox stations immediately. The Commission has ample authority to do so.

[42/] *Id.* ¶ 7.

[43/] *Id.* ¶ 9.

[44/] *Cf. Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order, 22 FCC Rcd 20235, ¶ 47 (2007) (invoking the purposes of the 1992 Cable Act in support of its action).

[45/] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, § 2(a)(8), (9).

[46/] *Id.* § 2(a)(17), (19).

[47/] 47 C.F.R. § 76.65(b)(2).

[48/] *Good Faith Order* ¶ 39.

ATTACHMENT A
CABLEVISION-NEWS CORP. RETRANSMISSION CONSENT NEGOTIATIONS

This document sets forth a summary of the retransmission consent negotiations between Cablevision and News Corp. for carriage of WNYW, WWOR, and WTXF (the "Fox stations").

Summary of Negotiations

- **October 2009**. After 15 years of month-to-month retransmission consent, News Corp. sent Cablevision a 30-day termination notice deliberately timed to coincide with the start of the American League Championship Series featuring the New York Yankees. The timing was intended as leverage to force Cablevision to agree to a substantial increase in retransmission consent fees. Cablevision agreed to a one-year extension of the retransmission consent agreement and further agreed to launch and pay for two new cable channels (Fox Business Network and National Geographic Wild) that Cablevision had otherwise not intended to launch. Cablevision asked for an extension until mid-November 2010, but News Corp. insisted that the agreement expire on October 15, just before the National League playoffs and the World Series.

- **May 2010.** News Corp. proposes terms for a three-year retransmission consent deal that would increase the price for the Fox stations by more than 10 times the effective rate under the existing agreement, and only if Cablevision also agreed to an increase of tens of millions of dollars in fees for other News Corp. cable programming, including programming subject to in-place contracts that otherwise lock in a rate for another year or longer. Annual increases during the second and third years of the proposal would dramatically exceed the rate of inflation. When News Corp.'s later proposal for an increase in the rate for Fox News is taken into account, the total amount of News Corp.'s proposal reached $150 million, compared to the $70 million that Cablevision was then paying for the same broadcast and cable programming.

- **July 2010.** Cablevision responded with its own proposal, which, contained base rates for retransmission consent that it believe reflected market conditions in the New York market. Significantly, this proposal, for the first time, would have obligated Cablevision to pay cash directly for the retransmission of broadcast signals at a rate that would increase each January 1 beginning in 2011. Cablevision also proposed to extend its existing agreements for various News Corp. cable channels. Cablevision further proposed a unique structure for the retransmission consent component of its offer that provided News Corp. with a menu of options to increase the retransmission consent fee in exchange for providing expanded rights, such as enhanced VOD, to Cablevision and its subscribers. In addition, as added value to News Corp., Cablevision proposed an innovative interactive, on-demand video channel dedicated to News Corp. programming that would provide the opportunity to drive deeper viewer engagement and an additional vehicle to monetize advertising revenue for them.

- **July 2010.** In a call between Cablevision and News Corp. representatives later in July, the News Corp. representatives noted that accepting Cablevision's proposal would cost them more money in givebacks to other distributors because of most favored nation clauses in their retransmission consent agreements with those distributors. They suggested that agreeing to Cablevision's proposal would require them to reduce rates to these other distributors and said that therefore not doing a deal with Cablevision would be an "easy decision."

- **August 2010.** Significantly, News Corp. responded to Cablevision's proposal by raising its proposed fees. Although the "base" retransmission consent rates were somewhat lower than its May proposal, News Corp. restructured components of its offer such that the total cost to Cablevision under this new proposal was actually higher than News Corp.'s May proposal. Once again, News Corp. included increases for cable services subject to in-place contracts. News Corp. refused Cablevision's request for a proposal for Fox News, despite the December 2010 expiration of the contract for that service.

- **September 2010.** Cablevision made a substantially more generous offer to News Corp., raising the proposed fee for the Fox stations while attempting to greatly simplify the negotiation by limiting it to only those broadcast and cable services that were set to expire on October 15. Based on News Corp's selective demand to include some, but not all of the cable services with near-term expirations, Cablevision suggested this fair and simpler approach in the hopes that the parties could quickly come to agreement. Cablevision's new proposal represented an almost tripling of News Corp.'s combined compensation under the existing one-year agreement for this group of services.

- **October 5.** News Corp. responded with what its lead negotiator characterized as a non-negotiable ("this is it") proposal to Cablevision for Fox retransmission consent and indicated that it would not show any flexibility in this regard. News Corp. representatives suggested that the rate contained in this proposal was their "MFN" rate and thus any reduction below it would trigger give-backs to other distributors. While the proposal represented a slight reduction from News Corp.'s August offer, the broadcast component was still many times the market rate for broadcast channels in the New York market. Moreover, like past proposals, the broadcast fee was conditioned on Cablevision agreeing to tens of millions of dollars of new fees on cable programming, but once again, addressed some, but not all of the imminently expiring cable services. In some instances, this would have required Cablevision to reopen contracts in mid-term and increase payments for the programming. Because the price for the package of broadcast and cable programming proposed by News Corp. was simply too costly and incomplete, Cablevision asked News Corp for a standalone price for the Fox stations.

- **October 6.** News Corp. responded with a proposal for the Fox stations that would have increased the price more than four-fold for those stations in its prior proposals.

- **October 12.** News Corp. and Cablevision exchanged letters. News Corp. asked for a response to its October 6 proposal. Cablevision responded that it was prepared to negotiate and pay a fair market rate, but that News Corp's demand – that Cablevision pay more for News Corp.'s broadcast than it pays all other New York area broadcasters combined – was not a useful starting point. Cablevision urged News Corp. not to pull the stations while negotiations continued beyond October 15.

- **October 13.** News Corp. and Cablevision again exchanged letters. Cablevision reiterated its willingness to negotiate a fair price for News Corp.'s programming and indicated its availability for around-the-clock talks if necessary. News Corp. again asked for a response to its October 6 proposal, ignoring Cablevision's October 12 response. Cablevision made a new proposal to News Corp. that further increased the price for the Fox stations above Cablevision's September proposal, along with separate payments for News Corp.'s cable programming. Cablevision also proposed that the parties agree to submit the dispute to binding arbitration. News Corp. refused.

- **October 14.** News Corp. made another proposal that included the exact same rates for the Fox stations as its prior offer. This time they finally included a proposal for Fox News, but with a 44% year-one rate increase that further widened, rather than narrowed, the gap between our respective positions.

- **October 15-17.** Cablevision representatives attended numerous face-to-face meetings in News Corp's New York headquarters, during which Cablevision extended a total of four new proposals, each with increased rates for WNYW and WTXF. News Corp. refused to negotiate the rate for those stations and persisted in their October 5 "this is it" rate. News Corp. representatives told Cablevision that the WNYW rate was the rate in agreements subject to the most favored nation clause in their agreements with other MVPDs and that therefore they would not agree to a lower rate. They strongly suggested that any future proposal we make should begin with agreeing to the rates they proposed for WNYW.

At the conclusion of these meetings Cablevision representatives made it clear that they had sufficient flexibility to negotiate and make a deal, but that it was essential that News Corp. demonstrate willingness to creatively approach bridging the price difference between Cablevision's position and News Corp's position on WNYW. News Corp. has declined to do so.

DECLARATION OF E. McRAE BUDILL

I, E. McRae Budill, declare as follows:

My title is Executive Vice President – Programming. I have been employed by Cablevision Systems Corporation since June 10, 1991. In this capacity, my duties include negotiating retransmission consent and program carriage agreements. I have primary responsibility for negotiating with News Corp. for retransmission consent for the carriage of WNYW, WWOR, and WTXF (the "Fox stations").

I have reviewed the foregoing summary of the retransmission consent negotiations between Cablevision and News Corp. for carriage of the Fox stations. I solemnly affirm under penalty of perjury that the summary is true and correct to the best of my knowledge, information and belief.

Date: 10/25/10

CSK E. McRae Budill