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# Regulation of the Pay Television Market: Why A La Carte Cable is not the Solution but Giving the FCC More Power is

Jacob Moak<sup>1</sup>

## INTRODUCTION

Cable television subscribers in major television markets, including New York and Los Angeles, recently faced a blackout of “America’s most-watched network.”<sup>2</sup> Time Warner Cable, “the second largest cable [television] provider” in the United States,<sup>3</sup> and CBS fought over the retransmission consent fee that Time Warner must pay in order to broadcast CBS content.<sup>4</sup> The blackout meant that Time Warner Cable subscribers in these markets could not watch many of television’s highest rated programs including *NCIS* and *The Big Bang Theory*.<sup>5</sup> The blackout lasted a month causing damage to both sides.<sup>6</sup>

While this blackout might seem like a minor disruption to cable television subscribers, the blackout shows a greater problem within the pay television market. Pay television has roughly 100 million subscribers.<sup>7</sup> A pay television subscription is not cheap and represents a large portion of many American families’ discretionary

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<sup>2</sup> Michael Calabrese, *The CBS-Time Warner Cable Blackout Battle: Time for Congress to Rescue the Hostages*, SLATE FUTURE TENSE BLOG (Aug. 9, 2013, 4:58 PM), [http://www.slate.com/blogs/future\\_tense/2013/08/09/cbs\\_time\\_warner\\_cable\\_blackout\\_battle\\_congress\\_should\\_rescue\\_hostages.html](http://www.slate.com/blogs/future_tense/2013/08/09/cbs_time_warner_cable_blackout_battle_congress_should_rescue_hostages.html).

<sup>3</sup> *Our Company: Company Overview*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/about-us/company-overview.html> (last visited Nov. 12, 2014).

<sup>4</sup> See Bill Carter, *CBS Returns, Triumphant, to Cable Box*, N.Y. TIMES, Sept. 2, 2013, [http://www.nytimes.com/2013/09/03/business/media/cbs-and-time-warner-cable-end-contract-dispute.html?\\_r=0](http://www.nytimes.com/2013/09/03/business/media/cbs-and-time-warner-cable-end-contract-dispute.html?_r=0).

<sup>5</sup> *Big Bang Theory Extended to 2016-2017: Multi-Year Pick Up*, CBS (Mar. 12, 2014, 9:50 AM), [http://www.cbs.com/shows/big\\_bang\\_theory/news/1002098](http://www.cbs.com/shows/big_bang_theory/news/1002098); Neil Hughes, *CBS Spat with Time Warner Cable Extends Outage to Network’s Official iPad, iPhone Apps*, APPLEINSIDER (Aug. 5, 2013, 8:55 AM), <http://appleinsider.com/articles/13/08/05/cbs-spat-with-time-warner-cable-extends-outage-to-networks-official-ipad-iphone-apps>; Rick Kissell, *‘NCIS’ Has Become World’s Most-Watched TV Drama*, VARIETY (June 11, 2014, 1:45 PM), <http://variety.com/2014/tv/news/ncis-most-popular-drama-in-worldwatched-tv-drama-1201218492>.

<sup>6</sup> See Todd Spangler, *Time Warner Cable Lost Subscribers During CBS Blackout*, VARIETY (Sept. 12, 2013, 02:03 AM), <http://variety.com/2013/biz/news/time-warner-cable-lost-subscribers-during-cbs-blackout-1200608744>.

<sup>7</sup> See Matt Yoder, *ESPN President John Skipper Scoffs at A La Carte Prospects*, AWFUL ANNOUNCING (Sept. 26, 2013, 4:26 PM), <http://www.awfulannouncing.com/2013/september/espn-president-john-skipper-scoffs-at-a-la-carte-prospects.html>; see also *IPTV Defies Drop in US Pay-TV Market to Gain Subscribers in Q2*, IHS PRESSROOM (Aug. 14, 2013, 4:29 PM), <http://press.ihs.com/press-release/design-supply-chain-media/iptv-defies-drop-us-pay-tv-market-gain-subscribers-q2> [hereinafter IHS].

income. Blackouts, such as the one imposed by the Time Warner/CBS dispute, prevent American pay television subscribers from realizing the true value of their subscriptions. In addition, after blackouts, consumers lose again by being forced to pay more for their current subscriptions.<sup>8</sup> The current regulatory scheme is not sufficient to protect consumers from the disruption of a blackout or the rising prices associated with them.<sup>9</sup> As a result, new laws are needed to prevent similar blackouts.

This Note seeks to address the problems with the current regulatory scheme for the pay television market and to show potential solutions for service blackouts and rising pay television rate subscriptions. While there are many competing solutions regarding the best way to fix the problems, this Note will focus on three potential solutions: the potentially radical solution of *à la carte* cable, the less radical solution of providing injunctions for interim carriage and/or forced binding arbitration, and the germane solution of additional regulations to the existing marketplace. Part I of the Note will focus on the current regulatory framework and market conditions of the pay television market. Part II will discuss the potential solutions to the blackout. Finally, Part III will discuss why providing injunctions for interim carriage and/or forced binding arbitration is the best solution to the blackout problem.

## I. CURRENT LEGAL FRAMEWORK AND MARKET CONDITIONS OF THE PAY TELEVISION MARKET

### A. *Types of Pay Television*

Television began primarily as a broadcast model where television stations broadcasted their signal free over the air.<sup>10</sup> This model, which still exists today,<sup>11</sup> favored geographic areas close to major cities.<sup>12</sup> In the 1940s, cable television developed as a solution for communities unable to receive broadcast television signals because of terrain or distance from broadcast television stations.<sup>13</sup> To solve the problem of reception, cable television operators placed antennas in locations with suitable reception to receive broadcast signals.<sup>14</sup> From there, this signal could then reach subscribers by coaxial cable for a fee.<sup>15</sup> Cable television signified the first true instance of people paying a subscription to watch television. Since the

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<sup>8</sup> See Carter, *supra* note 4.

<sup>9</sup> See *id.*

<sup>10</sup> See *Evolution of Cable Television*, FCC, <http://www.fcc.gov/encyclopedia/evolution-cable-television> (last updated Mar. 14, 2012) [hereinafter FCC].

<sup>11</sup> Anyone with "rabbit ears" on the back of their television can attest to the fact that they can receive broadcast channels for free over the air; however, they still need to be located close to a broadcast station, usually in a larger city, in order to pick up a signal.

<sup>12</sup> See *id.* (noting cable television operators picked up broadcast station signals in areas with good reception and distributed them).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

introduction of cable, pay television has become a major source of entertainment for millions of families.

In addition to cable television, there are two other major technologies that provide pay television services: satellite and Internet Protocol Television (IPTV). Satellite television involves a receiver, such as a satellite dish, which receives signals from space that are then communicated to a television.<sup>16</sup> The concept of satellite television has existed since the 1960s;<sup>17</sup> however, satellite television really exploded onto the scene in the 1990s as a major player in the pay television landscape.<sup>18</sup> Satellite television helped solve some of the same problems as cable such as a lack of signal due to terrain and/or distance. Between the two largest providers, DirecTV and Dish Network, there are now roughly 34 million subscribers.<sup>19</sup>

The final major form of pay television is IPTV. IPTV is a service offered by some telecommunications companies, notably Verizon and AT&T, in which television service is provided over the Internet instead of by coaxial or fiber optic cable.<sup>20</sup> This type of pay television is the most recent addition to the marketplace.

These three major types of pay television services make up the pay television market. All pay television products are remarkably similar. While there are some differences with regard to market limitations, all three technologies share the problem of blackouts and the rising subscription costs associated with them.

### B. Cable Communications Policy Act of 1984

While the Federal Communications Commission (hereinafter FCC) asserted its ability to regulate the cable industry in the 1960s and 1970s,<sup>21</sup> Congress did not truly exercise that ability until 1984. At that time, unlike today, the pay television marketplace consisted almost entirely of cable television. Congress first regulated the cable industry with the Cable Communications Policy Act of 1984.<sup>22</sup> Congress passed the law to deregulate the pre-1984 market in order to “foster the growth of

<sup>16</sup> See Christopher Klein, *The Birth of Satellite TV, 50 Years Ago*, HISTORY (July 23, 2012), <http://www.history.com/news/the-birth-of-satellite-tv-50-years-ago>.

<sup>17</sup> See *id.*

<sup>18</sup> See Paul Richter, *New Satellite-to-Home TV Service Due in 1993: Broadcasting: Four Firms Back \$1-Billion Sky Cable Venture: The System Could Carry up to 108 Channels*, L.A. TIMES, Feb. 22, 1990, [http://articles.latimes.com/1990-02-22/news/mn-1704\\_1\\_cable-operator](http://articles.latimes.com/1990-02-22/news/mn-1704_1_cable-operator) (“Four top media and communications companies Wednesday disclosed plans for a television service that they say will be bouncing dozens of channels off satellites and into American homes by late 1993”).

<sup>19</sup> See Todd Spangler, *DirecTV Adds 93,000 U.S. Subscribers in Q4, But Growth Slows as Fees Keep Rising*, VARIETY (Feb. 20, 2014, 5:05 AM), <http://variety.com/2014/biz/news/directv-adds-93000-u-s-subscribers-in-q4-but-growth-slows-as-fees-keep-rising-1201113787> (noting that DirecTV “ended 2013 with 20.25 million subscribers”); *DISH Network Reports Third Quarter 2013 Financial Results*, DISH (Nov. 12, 2013, 4:01 AM), <http://about.dish.com/press-release/financial/dish-network-reports-third-quarter-2013-financial-results> (reporting a subscriber base of 14.049 million).

<sup>20</sup> See Bradley Mitchell, *IPTV*, ABOUT TECHNOLOGY, [http://compnetworking.about.com/od/homenetworkuses/g/bldef\\_iptv.htm](http://compnetworking.about.com/od/homenetworkuses/g/bldef_iptv.htm) (last visited Nov. 12, 2014); see also IHS, *supra* note 7.

<sup>21</sup> See FCC, *supra* note 10.

<sup>22</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

the cable industry.”<sup>23</sup> Another important goal of the law “prohibit[ed] telephone companies from entering the cable business.”<sup>24</sup> While much of this law was replaced by later legislation, the law developed the three-tiered jurisdictional regulatory system seen today in which federal, state, and local officials all play a role in the cable industry.<sup>25</sup>

The 1984 law accomplished some of its policy goals. For instance, “the number of households subscribing to cable television increased,”<sup>26</sup> unfortunately, “[h]owever, competition among distributors of cable services did not.”<sup>27</sup> In addition, for many places around the country, “the rates for a cable subscription far outpaced inflation.”<sup>28</sup> As a result, Congress responded to these issues with the Cable Television Consumer Protection and Competition Act of 1992.<sup>29</sup>

### C. Cable Television Consumer Protection and Competition Act of 1992

Congress passed the Cable Television Consumer Protection and Competition Act of 1992 to address the competitive imbalances and consumer abuses resulting from deregulation brought about by the 1984 law.<sup>30</sup> The law, passed over the veto of President George H. W. Bush, attempted to increase competition in the pay television marketplace by restructuring it.<sup>31</sup> The most important parts of the law were rate regulation, must-carry provisions, and retransmission consent.<sup>32</sup>

First, the law provided for rate regulation in areas without effective competition.<sup>33</sup> This represented a radical change from the 1984 law, which primarily focused on deregulation of the industry. The law allowed for federal regulation of both basic cable and higher programming tiers.<sup>34</sup> The FCC was placed in charge of ensuring that rates were not excessive.<sup>35</sup> By regulating the prices of cable subscriptions, Congress hoped to level the playing field by reducing consumer cost and increasing competition.<sup>36</sup> In this way, market players could theoretically be prevented from having “undue market power.”<sup>37</sup>

<sup>23</sup> MULTICHANNEL VIDEO COMPLIANCE GUIDE: BROADBAND LAW & REGULATION ¶¶ 100, 101 (2013) [hereinafter VIDEO COMPLIANCE GUIDE], available at 2004 WL 4110825.

<sup>24</sup> *Id.* ¶ 100.

<sup>25</sup> *See id.*

<sup>26</sup> 3 FREDERICK K. GRITTNER & MARK A. ROTHSTEIN, FEDERAL ADMINISTRATIVE PRACTICE § 3528 (3d ed. 2002).

<sup>27</sup> *Id.*

<sup>28</sup> FCC, *supra* note 10.

<sup>29</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

<sup>30</sup> VIDEO COMPLIANCE GUIDE, *supra* note 23, ¶ 100.

<sup>31</sup> *Id.* ¶ 101.

<sup>32</sup> *Id.* at ¶ 100.

<sup>33</sup> Cable Television Consumer Protection and Competition Act § 2-3.

<sup>34</sup> *Id.* at § 3.

<sup>35</sup> *Id.*

<sup>36</sup> *See* 3 GRITTNER & ROTHSTEIN, *supra* note 26.

<sup>37</sup> *Id.*

Second, Congress enacted must-carry provisions.<sup>38</sup> Must-carry provisions can force cable operators to carry local commercial and non-commercial broadcast signals.<sup>39</sup> The idea behind the must-carry provision is that local broadcasters can force cable operators to put the broadcaster's programming on a cable operator's channel lineup. Recall that television started out as a broadcast model where signals were distributed free over the airwaves to people.<sup>40</sup> With cable, the signals are gathered up and sent to paying subscribers. If there were no must-carry provisions, then cable operators could exclude broadcast programming from their lineup. Must-carry rules prevent this possibility by forcing cable companies to carry a particular channel or channels that the broadcast station elects. In doing so, the law preserves the original broadcast model of television. The technical details of the must-carry provision are somewhat complicated, but most local television stations (commercial, non-commercial, or educational) qualify for must-carry status.<sup>41</sup>

Finally, Congress amended the Communications Act of 1934 with regard to retransmission consent.<sup>42</sup> Retransmission consent is the process by which broadcasters give their written consent to allow cable operators to include their programming on the cable operator's lineup.<sup>43</sup> A pay television provider cannot show programming without retransmission consent.<sup>44</sup> Thus, retransmission consent works concurrently with must-carry provisions by setting up a choice for local broadcast television stations. Broadcast stations can either elect must-carry or can negotiate with a pay television provider for retransmission consent.<sup>45</sup> Thus, the law ensures that local broadcast television is available for cable subscribers by either requiring a cable to company to carry the broadcast station for free or, if the broadcast station has leverage, to require payment for retransmission consent.<sup>46</sup> Retransmission consent is the key provision of the law, still in existence today, that leads to blackouts of coverage of broadcast television stations such as the recent Time Warner/CBS blackout.

#### D. Telecommunications Act of 1996 and the Role of the FCC

The last major legislation affecting the cable industry is the Telecommunications Act of 1996.<sup>47</sup> In stark contrast to the 1992 law, this law was largely deregulatory in nature and as a result, cable rate regulation mostly came to

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<sup>38</sup> Cable Television Consumer Protection and Competition Act §§ 4-5.

<sup>39</sup> *Id.*

<sup>40</sup> See *supra* text accompanying note 10.

<sup>41</sup> See FCC, *supra* note 10. The FCC indicates that cable operators, if they have more than twelve stations in their lineup, must reserve up to a third of their line-up for must-carry status. *Id.* As a result, most local commercial broadcast stations and educational stations are included. *Id.*

<sup>42</sup> VIDEO COMPLIANCE GUIDE, *supra* note 23, ¶ 102.

<sup>43</sup> Cable Television Consumer Protection and Competition Act § 6.

<sup>44</sup> *Id.*

<sup>45</sup> See *id.*

<sup>46</sup> See Calabrese, *supra* note 2.

<sup>47</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

an end.<sup>48</sup> Federal oversight of rate regulation was greatly reduced by limiting regulation only to basic cable (not higher tiers) and only in locations in which adequate competition does not exist.<sup>49</sup> Congress however, did not remove the ability of local authorities to regulate basic cable rates.<sup>50</sup> Thus, local authorities play an increased role in ensuring that rates are not excessive. Another large change was the elimination of certain ownership restrictions such as prohibiting telephone companies from participating in the cable industry.<sup>51</sup>

This piece of legislation is the last major law for the cable industry. It is unlikely that Congress would have been able to foresee developments in the industry such as the recent rapid consolidation of pay television providers. While the 1996 law largely deregulated the industry, many of the major provisions from the 1992 law remained in place. For example, Congress did not modify must-carry rules or retransmission consent.<sup>52</sup> As a result, this structure, which allows blackouts, remains today.<sup>53</sup> Thus, some analysts posit that the current state of the law is outdated.<sup>54</sup>

### *E. Current Market Conditions and How They Lead to Blackouts*

As mentioned above, there are three primary types of pay television: cable, satellite, and IPTV. The 1984, 1992, and 1996 laws were primarily directed towards cable companies and not satellite or IPTV. While some of the provisions, such as retransmission consent, apply to all three types of services, the majority targeted cable companies. So, to understand the marketplace, the cable market must be looked at first.

Federal, state, and local officials all have influence over the cable policy of a particular geographic location.<sup>55</sup> Each jurisdictional level plays a role in setting the market for cable television.<sup>56</sup> Starting at the state level, there are various approaches states take for regulation. For instance, Massachusetts has a comprehensive system for regulating cable television through a state commission.<sup>57</sup> Another approach that some states maintain involves allowing public utility commissions to regulate cable

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<sup>48</sup> 3 GRITNER & ROTHSTEIN, *supra* note 26, § 3529.

<sup>49</sup> Telecommunications Act § 301.

<sup>50</sup> *See id.*

<sup>51</sup> *Id.* § 302. This part of the law set the stage for companies like Verizon and AT&T to offer video programming. Congress had been reluctant until this point to allow phone companies to make such offerings because of potential consolidation of the industry. This might have been a reasonable concern since the pay television marketplace is rapidly consolidating. *See* David Gelles, *Big Offer for Time Warner Cable Unsettles the Cable Industry*, N.Y. TIMES, Jan. 13, 2014, <http://dealbook.nytimes.com/2014/01/13/time-warner-cable-gets-61-3-billion-offer/>.

<sup>52</sup> *See* Calabrese, *supra* note 2.

<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See* FCC, *supra* note 10.

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

and cable rates.<sup>58</sup> Nonetheless, the most common approach is for cable to be regulated by local governments.<sup>59</sup> Usually, states have laws dealing with franchising and related issues,<sup>60</sup> but the rest is left to local governments.

Because this system is the most prevalent, local governments have a tremendous amount of influence on the cable market. Local governments, called “local franchising authorities,”<sup>61</sup> are responsible for granting franchises to cable operators to operate in a local area.<sup>62</sup> Federal law dictates that local franchising authorities may grant one or more franchises within their jurisdiction.<sup>63</sup> A local “franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.”<sup>64</sup> Since 1996, the local franchising authority has been responsible for the regulation of basic cable rates.<sup>65</sup> Thus, any issues with high prices must be taken up with the local franchising authority.<sup>66</sup> The federal government, through the FCC, can only regulate basic cable rates in areas without effective competition or in areas with small cable operators.<sup>67</sup> As a result, local authorities—not state or federal—determine both regulation of pricing and franchising.

At the federal level, the FCC is in charge of implementing federal communications policy relating to cable television.<sup>68</sup> Nonetheless, the FCC mainly plays an oversight role. While the FCC helps to enforce must-carry provisions and basic cable price regulation in places without competition,<sup>69</sup> the FCC has a limited ability to intervene in retransmission consent battles.<sup>70</sup> Retransmission consent is obtained through private negotiations.<sup>71</sup> The FCC lacks real teeth to do much of anything during a blackout and can essentially only make sure that companies negotiate in good faith.<sup>72</sup> The FCC does not have the ability to provide for an injunction of blackouts or force binding arbitration and, as a result, must largely stand on the sidelines when battles over retransmission consent occur.<sup>73</sup>

<sup>58</sup> *Id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 7(a), 106 Stat. 1460, 1483 (codified as amended at 47 U.S.C. § 541(a)(1) (2012)).

<sup>63</sup> *See id.*

<sup>64</sup> *Id.*

<sup>65</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 301, 110 Stat. 56, 115–116 (codified as amended at 47 U.S.C. § 543 (2012)).

<sup>66</sup> FCC, *supra* note 10.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; VIDEO COMPLIANCE GUIDE, *supra* note 23, ¶ 100.

<sup>69</sup> *See* Cable Television Consumer Protection and Competition Act §§ 3–5.

<sup>70</sup> *See* Press Release, FCC, FCC Takes a Fresh Look at Its Retransmission Consent Rules in Light of Recent Consumer Television Disruptions (Mar. 3, 2011) [hereinafter Press Release], available at 2011 WL 765091, at \*2.

<sup>71</sup> *See* Carter, *supra* note 4; *see also* Press Release, *supra* note 70, at \*6.

<sup>72</sup> *See* 47 C.F.R. § 76.65(a) (2013); Press Release, *supra* note 70, at \*1–2, 4, 6.

<sup>73</sup> Press Release, *supra* note 70, at \*1–2, 4.



The current framework for cable television means that each of the three jurisdictional levels plays a role in creating the current marketplace.<sup>74</sup> Around much of the country, cable franchises are granted on a location-by-location basis.<sup>75</sup> Various communities, even neighboring communities, may have different providers. The cable market, as a result, is fragmented on a national level.<sup>76</sup> The primary reason for this is the huge infrastructure cost associated with building, maintaining, and operating a cable system.<sup>77</sup> Cable systems are expensive because they require significant amounts of equipment and physical capital for services to be distributed to customers.<sup>78</sup> While local authorities may grant more than one franchise in any location, the costs associated with building a network prevent competition in most markets. Thus, in most places around the country, there is only one cable provider. Nonetheless, even with the fragmented nature of the cable industry, the cable market has consolidated rapidly in the last few years.<sup>79</sup> The primary reasons for this consolidation are retransmission consent battles and increasing competition with satellite and IPTV providers.<sup>80</sup> Consolidation allows for increased bargaining power with content providers and less competition in the market.<sup>81</sup>

Cable's competition primarily comes from satellite and IPTV services.<sup>82</sup> Satellite providers operate nationwide and are not subject to local franchising authorities like cable companies.<sup>83</sup> Satellite television is currently the only form of pay television that can essentially be purchased from any location in the country. While putting satellites in space is extremely expensive, little terrestrial physical infrastructure is required. A satellite subscriber only needs a power source, a satellite dish with a clear sky, and a television in order to receive this form of pay television. This is unlike cable, which requires a substantial terrestrial physical

<sup>74</sup> See FCC, *supra* note 10.

<sup>75</sup> See *id.*

<sup>76</sup> See *Cable and Other Pay Television Services*, HIGHBEAM BUSINESS, <http://business.highbeam.com/industry-reports/transportation/cable-other-pay-television-services> (last visited Nov. 12, 2014).

<sup>77</sup> See Kate Cox, *Why Starting a Competitor to Comcast is Basically Impossible*, CONSUMERIST (May 10, 2014), <http://consumerist.com/2014/05/10/why-starting-a-competitor-to-comcast-is-basically-impossible>; Jay Yarrow, *How Much It Would Cost Google to Become a National Cable Company like Comcast*, BUSINESS INSIDER (Dec. 7, 2012, 12:44 PM), <http://www.businessinsider.com/how-much-it-would-cost-google-to-build-a-cable-network-2012-12>.

<sup>78</sup> See Yarrow, *supra* note 77.

<sup>79</sup> See Scott Sloan, *Time Warner Cable to Buy Insight for \$3 Billion*, KENTUCKY.COM (Aug. 16, 2011), <http://www.kentucky.com/2011/08/16/1846261/time-warner-cable-to-acquire-major.html>; Brian Stelter, *Comcast Buys Time Warner Cable for \$45 billion*, CNN MONEY (Feb. 13, 2014, 3:09 PM), <http://money.cnn.com/2014/02/13/technology/comcast-time-warner-cable-deal/>.

<sup>80</sup> See Sharon Waxman & Brent Lang, *What the Comcast Purchase of Time Warner Cable Means for Cord-Cutting - and Consolidation*, THE WRAP (Feb. 13, 2014, 10:18 AM), <http://www.thewrap.com/comcast-time-warner-cable-consolidation-analysts-cord-cutting-purchase>.

<sup>81</sup> See *id.* (discussing the consolidation of Time Warner with Comcast and noting that it "annihilated the bidders").

<sup>82</sup> See *Cable and Other Pay Television Services*, *supra* note 76.

<sup>83</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1460, 1471-1481 (codified as amended at 47 U.S.C. §§ 534-535 (2012)) (stating that satellite providers are not included in franchise sections).

infrastructure. As a result, satellite television is an excellent substitute product for cable in virtually every market in the country.

The final competitor to cable is IPTV. While cable is subject to the three-tiered regulatory system, including the requirement of obtaining a franchise, there is an open question regarding whether IPTV providers must have an additional cable franchise or whether they can operate within an existing telephone franchise.<sup>84</sup> Regardless of the results of these battles in various jurisdictions around the country, IPTV is still a physical network. IPTV, like cable, requires a substantial terrestrial physical infrastructure. As a result, IPTV is limited in this regard. The huge costs associated with a physical network mean that only a few providers are economically efficient in a given area. Accordingly, while IPTV is likely to keep growing, it is currently relatively small on the national stage.<sup>85</sup>

As indicated above, most of the provisions in the laws were intended primarily for cable television. For instance, must-carry agreements only apply to cable operators, not to other forms of pay television.<sup>86</sup> Retransmission consent, however, affects each type of pay television because all three types of service qualify as multichannel video programming distributors (MVPD).<sup>87</sup> As a result, all three types of services are subject to blackouts of coverage. Blackouts of coverage occur when content providers do not give their written consent to retransmit their signal because the content provider and the pay television distributor have not come to terms on a price for consent.<sup>88</sup>

There are two distinct kinds of blackouts. The first type of blackout is that of local broadcast television stations. These stations provide their signal for free over the air. As indicated in the 1992 Act, all MVPDs must have permission to retransmit local broadcast signals for subscribers.<sup>89</sup> In this type of blackout, a distinction is made between cable operators and the two other forms of pay television. Recall that only cable television is subject to must-carry provisions.<sup>90</sup> This means that if a particular broadcaster does not have negotiating power, then it can still elect to have its channel placed on a cable line-up. However, if the broadcaster has superior negotiating power, then it can charge a fee for its retransmission consent. The Time Warner/CBS fight is an example of this latter type of blackout.<sup>91</sup> Satellite and IPTV are not subject to the must-carry provisions

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<sup>84</sup> See *Mediacom Se. L.L.C. v. BellSouth Telecomms., Inc.*, 672 F.3d 396, 396–98, 401 (6th Cir. 2012).

<sup>85</sup> See Jeffrey Hill, *Satellite, IPTV Eating Away at Cable Market Share*, VIA SATELLITE (Oct. 23, 2012), <http://www.satellitetoday.com/broadcasting/2012/10/23/satellite-iptv-eating-away-at-cable-market-share> (noting that “IPTV services have less penetration than cable or satellite in the U.S. market”).

<sup>86</sup> See Cable Television Consumer Protection and Competition Act §§ 4–5.

<sup>87</sup> *Id.* § 6.

<sup>88</sup> See Calabrese, *supra* note 2. This is opposed to a sports blackout, like in the National Football League, in which a team fails to sell out its home stadium and is blacked out in its local market. *Sports Blackouts*, FCC, <http://www.fcc.gov/guides/sports-blackouts> (last updated Oct. 1, 2014).

<sup>89</sup> Cable Television Consumer Protection and Competition Act § 6.

<sup>90</sup> *Id.* §§ 4–5.

<sup>91</sup> See Calabrese, *supra* note 2. This disagreement ends up in this category because CBS owned the blacked-out local broadcast stations. *Id.* In other locations, such as Lexington, Kentucky, CBS was not

because they are not cable operators.<sup>92</sup> Thus, while both types are allowed to show local broadcast stations, they are not required to do so. For these providers, the question is how much the fee will be, if any, to retransmit a local broadcast signal.

The retransmission consent type of blackout deals generally with non-terrestrial broadcasters. These are content providers that do not broadcast their signal free over the air. An example of such a provider is ESPN. While ESPN does not provide its signal over the air, federal communications law still requires pay television providers to have written permission to broadcast ESPN content to subscribers, usually for a fee.<sup>93</sup> This fee is often referred to as a carriage fee.<sup>94</sup> Because the must-carry rules do not apply here, the battle is over the fee to be paid to the content provider for retransmission. An example of this is the recent battle between The Weather Channel and DirecTV over its carriage fee.<sup>95</sup>

While there are two distinct categories of blackouts, each operates in roughly the same way and has essentially the same effect. Blackouts of service and/or the threat of blackouts are the most important tools that cable companies and broadcasters use in determining market price. Without retransmission consent, pay television providers cannot show content.<sup>96</sup> The result is that blackouts cause disruption of service and inevitably lead to price increases.<sup>97</sup> Blackout battles often get nasty with companies trying to win in the court of public opinion. Companies on both sides will often run advertisements in an attempt to get the public to force the other side to act to stop a blackout.<sup>98</sup> During blackouts, as stated above, the FCC has little power to step in.<sup>99</sup>

Most blackouts occur because pay television providers balk at the higher prices that content providers want to charge for their programming. For instance, in the Time Warner/CBS dispute, Time Warner originally hesitated to pay an increased retransmission fee from \$1 to \$2 per subscriber per month.<sup>100</sup> The blackout lasted a

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blackout for Time Warner customers because the local CBS affiliate is owned by a third party. In locations like this, Time Warner negotiates directly with the local affiliate for subscriber fees. This is not to say that local customers were not affected. The author notes that he could not watch programming on CBS.com or the CBS owned networks of Showtime or The Movie Channel during the blackout because CBS barred Time Warner Internet customers from using the website.

<sup>92</sup> See Cable Television Consumer Protection and Competition Act §§ 4–6.

<sup>93</sup> See *id.*

<sup>94</sup> *Id.* § 4.

<sup>95</sup> Mark Memmott, *20 Million DirecTV Customers Just Lost The Weather Channel*, NPR: THE TWO-WAY (Jan. 14, 2014, 10:05 AM), <http://www.npr.org/blogs/the-two-way/2014/01/14/262382556/20-million-directv-customers-just-lost-the-weather-channel>.

<sup>96</sup> Tom Wheeler, *Protecting Television Consumers by Protecting Competition*, OFFICIAL FCC BLOG (Mar. 6, 2014, 3:25 PM), <http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition>.

<sup>97</sup> *Id.*

<sup>98</sup> See Todd Spangler, *CBS Comes Out Swinging Against Time Warner Cable in Contract Fight*, VARIETY (July 18, 2013, 3:04 PM), <http://variety.com/2013/biz/news/cbs-comes-out-swinging-against-time-warner-cable-in-contract-fight-1200565129>.

<sup>99</sup> Press Release, *supra* note 70, at \*1.

<sup>100</sup> See Calabrese, *supra* note 2.

month with Time Warner finally caving in and agreeing to pay the increased fee.<sup>101</sup> Another example is the DirecTV/ Weather Channel dispute. There, DirecTV refused to pay The Weather Channel an increased fee, which was reportedly around an additional penny per subscriber per month.<sup>102</sup> After three months, the blackout of The Weather Channel ended but only after The Weather Channel conceded to DirecTV.<sup>103</sup>

The reason that cable operators balk at increased fees is that the prices are eventually passed on to customers. For example, the extra dollar that Time Warner has to pay to CBS per subscriber is passed on to Time Warner customers in their monthly subscriptions.<sup>104</sup> Carriage and retransmission fees have exploded in recent years, and, in turn, so have monthly subscription prices. For instance, ESPN receives roughly \$5.54 per subscriber per month for each of its roughly 100 million subscribers.<sup>105</sup> All of these fees translate to an average cost of \$86 for a pay television subscription.<sup>106</sup> As a result, cable television subscriptions have decreased primarily because of these high subscription rates.<sup>107</sup>

As shown above, the price of a pay television subscription is rising because carriage and retransmission fees are increasing. The primary reason that content providers are asking for a higher price for retransmission consent is the increased cost of producing and/or paying for content. This can be most starkly seen through the increasing rights fees associated with sports programming. A sports rights fee is the price paid by networks to a sport's governing body for the right to broadcast that sport. For example, ESPN recently agreed to pay the National Football League \$15.2 billion through 2021 to broadcast NFL games.<sup>108</sup> This means that ESPN is spending well over \$1 billion per year just to broadcast the NFL. ESPN spends hundreds of millions of dollars on its other programming as well.<sup>109</sup> The high cost of programming is both how and why ESPN charges roughly \$5.54 to each of its 100 million subscribers per month.<sup>110</sup> Better content allows ESPN to ask for higher subscription fees. In turn, the higher fees allow ESPN to bid on additional content. And ESPN is not the only one. Content providers such as

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<sup>101</sup> See *id.*

<sup>102</sup> See Memmott, *supra* note 95.

<sup>103</sup> Brian Stelter, *Weather Channel Coming Back to DirecTV*, CNN MONEY (Apr. 8, 2014, 4:44 PM), <http://money.cnn.com/2014/04/08/news/companies/directv-weather-channel> (noting that The Weather Channel "agreed to reduce reality programming by half on weekdays").

<sup>104</sup> See Calabrese, *supra* note 2.

<sup>105</sup> See Richard Sandomir et al., *To Protect Its Empire, ESPN Stays on Offense*, N.Y. TIMES, Aug. 26, 2013, <http://www.nytimes.com/2013/08/27/sports/ncaafotball/to-defend-its-empire-espn-stays-on-offensive.html>.

<sup>106</sup> Amadou Diallo, *Cable TV Model Not Just Unpopular but Unsustainable*, FORBES (Oct. 14, 2013, 9:05 AM), <http://www.forbes.com/sites/amadouidiallo/2013/10/14/cable-tv-price-hikes-unsustainable/>.

<sup>107</sup> See IHS, *supra* note 7.

<sup>108</sup> Richard Sandomir, *ESPN Extends Deal With N.F.L. for \$15.2 Billion*, N.Y. TIMES, Sept. 8, 2011, <http://www.nytimes.com/2011/09/09/sports/football/espn-extends-deal-with-nfl-for-15-billion.html>.

<sup>109</sup> See *id.*

<sup>110</sup> See Sandomir et al., *supra* note 105.

FOX, CBS, and NBC also pay large sums of money for the right to broadcast various sporting events.<sup>111</sup> The large sums paid for rights fees inevitably eventually end up in the bottom line of a pay television subscriber's bill.

How can content providers afford to pay for increased rights fees? The simple answer is bundling. Bundling is the process by which pay television distributors group certain channels together in a package.<sup>112</sup> Sports, business, and movie packages are examples of bundling similar channels together. Another example is offering a higher tier of programming beyond basic cable. In each of these examples, different channels are placed together and sold as a group.<sup>113</sup> Bundling is an important part of how subscribers receive programming; thus, the presence of bundling will be important to consider for any proposed solution to blackouts.

Bundling is an essential component of the pay television marketplace because even if consumers do not watch all the channels they subscribe to, they still pay for all channels in their package.<sup>114</sup> Economists generally believe bundling is economically efficient in markets such as pay television when there are high costs of production and consumers have different preferences for content.<sup>115</sup> The following example explains how bundling can be efficient:

Suppose there are two cable TV channels, "sports" and "business," each of which costs \$10 to produce. Suppose further that there are two consumers, one of whom is willing to pay \$7 for the sports channel and \$4 for the business channel, while the other is willing to pay only \$4 for sports, but will pay \$7 for business. If the two channels are offered separately, there is no price at which demand will be sufficient to cover cost: if each is offered for \$10 (its cost), no one buys either channel; if each is offered at \$7 and is purchased by one consumer, revenue is \$7 and each channel loses \$3; and, if each is offered at \$4 and purchased by both consumers, revenue is \$8, and each channel loses \$2. In short, in an a la carte world, neither channel is produced.

If bundling is permitted, on the other hand, the two channels can be offered together for \$10, and both consumers (each of whom values the two channels at a total of \$11) will purchase. Revenues are now \$20, covering the costs of both channels, and each consumer receives \$1 in consumer surplus.<sup>116</sup>

Commentators believe that bundling also helps to reduce cost by allowing content providers expanded distribution.<sup>117</sup> More people would subscribe to the channel if it were sold in a bundle than if the channel were sold individually. Additional distribution means increased revenues from additional subscribers fees. Moreover, bundling allows for other revenue streams, such as advertising, to be greater as well. Because more people subscribe to the channel, the potential reach for advertisers is

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<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Jeffrey Eisenach & Adam Thierer, *A La Carte Regulation of Pay TV: Good Intentions vs. Good Economics*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, June 2008, at 150.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

greater. The more people an advertisement can reach, the more broadcasters can charge. Thus, in a bundle, advertising revenues can be increased, which helps defray additional costs that would otherwise be passed on as higher subscription fees.<sup>118</sup> Furthermore, bundling allows for reduced transaction costs because providers do not have to constantly add and subtract channels from individual consumers' subscriptions, as they might if channels were purchased individually in an à la carte model.<sup>119</sup>

While bundling may reduce cost in some ways, in others it may not. For instance, ESPN bundles the multiple channels it provides together such as ESPN and ESPN2. For example, ESPN is available in almost 100 million homes at a cost of \$5.54 per subscriber per month.<sup>120</sup> However, customers must pay an additional fee for access to ESPN2.<sup>121</sup> ESPN usually requires pay television providers to accept its channels as a group.<sup>122</sup> What all of this means is that ESPN takes in over \$500 million in subscriber fees per month. This revenue figure does not include advertising or other forms of revenue. ESPN uses this cash, available by bundling, to bid on additional rights fees for sporting events; but, the prices for the rights fees keep going up. To pay for this, ESPN demands more money for its retransmission consent from pay television providers. Thus, the concepts of bundling and retransmission consent work together because both lead to a cycle of escalating fees. The increased fees lead to blackouts of programming because pay television providers are often not willing to pay content providers the additional money being requested.

While the debate on whether bundling is economically efficient or not rages on, many commentators do not like bundling because it does not help to increase customer choice. Many people, including politicians, see the extra, unwatched channels in a subscription as waste.<sup>123</sup> This may be why many potential customers are leaving their cable subscriptions behind.

The last important factor that is having a great impact on the market is the effect of alternative sources of programming and the presence of "cord-cutters" and "cord-nevers." Cord-cutting is when a customer quits his or her pay television subscription.<sup>124</sup> Cord-nevers are those who object to having or who have never had a pay television subscription.<sup>125</sup> Alternative sources of programming such as Netflix and Hulu are facilitating the presence of "cord-cutters"<sup>126</sup> by providing content via

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See Sandomir et al., *supra* note 105.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Tim Molloy, *John McCain Makes the Case for A La Carte Cable (Q&A)*, THE WRAP (Sept. 12, 2013, 11:42 PM), <http://www.thewrap.com/qa-john-mccain-makes-the-case-for-a-la-carte-cable>.

<sup>124</sup> Adam Levine-Weinberg, *Cutting the Cord? I'm Plugging Mine Back In!*, DAILY FINANCE (Sept. 17, 2013, 5:16 PM) <http://www.dailyfinance.com/2013/09/17/cutting-the-cord-im-plugging-mine-back-in/>.

<sup>125</sup> IHS, *supra* note 7.

<sup>126</sup> See Levine-Weinberg, *supra* note 124.

online streaming. These services are considerably cheaper than pay television, with subscriptions around \$10 a month.<sup>127</sup> This appears to be greatly impacting the pay television marketplace because many consumers view this as an adequate substitute product. In past years, pay television subscriptions have declined.<sup>128</sup> In addition to rising prices associated with blackouts, the surge of online streaming services has certainly led to decreases in pay television subscriptions.<sup>129</sup>

The results of decreasing subscriptions present a huge threat to the industry because pay television distributors and content providers get most of their revenue through subscriptions. Decreasing subscriptions means less money to pay for new programming and less profit for existing programming. As margins shrink, pay television providers will be even less willing to pay increased carriage and retransmission fees. Thus, blackouts are likely to be more common in the future.

## II. POTENTIAL SOLUTIONS

This Note addresses three potential solutions to help solve the issue of blackouts of service: offering à la carte cable, providing injunctions for interim carriage and/or forcing binding arbitration, and implementing additional regulations.

### A. The Radical À La Carte Solution

What is the à la carte solution? The à la carte model would force pay television to offer channels individually as opposed to in a bundle.<sup>130</sup> The alluring idea behind à la carte cable is that consumers could choose to purchase only the channels that they want and, in turn, potentially save money. In addition, proponents argue that there is more choice and less waste in an à la carte model.<sup>131</sup>

À la carte has important political backers that would like to see the proposal become a reality.<sup>132</sup> Senator John McCain recently proposed a bill that would regulate the industry by forcing à la carte as an offering.<sup>133</sup> Additionally, there is a Kentucky proposal to force à la carte programming as an option as well.<sup>134</sup> Under the Kentucky bill, the proposal would force cable operators to provide à la carte service as an option, but cable companies would still be allowed to offer bundled

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<sup>127</sup> See HULU, <http://www.hulu.com/plus> (last visited Nov. 12, 2014); NETFLIX, <http://movies.netflix.com/WiHome> (last visited Nov. 12, 2014).

<sup>128</sup> IHS, *supra* note 7.

<sup>129</sup> *See id.*

<sup>130</sup> See Ted Johnson, *John McCain's A La Carte Cable Bill Gains a Co-Sponsor*, VARIETY (July 23, 2013, 12:26 PM), <http://variety.com/2013/biz/news/john-mccains-cable-bill-1200566913>.

<sup>131</sup> See Timothy F. Winter, *Cable Television Is Just a Cartel*, U.S. NEWS (Sept. 16, 2013, 5:30 PM), <http://www.usnews.com/debate-club/should-consumers-be-allowed-to-unbundle-their-cable-packages/the-cable-industry-should-join-the-free-marketplace>.

<sup>132</sup> See Johnson, *supra* note 130.

<sup>133</sup> *See id.*

<sup>134</sup> H.R. 39, 2014 Leg., Reg. Sess. (Ky. 2014).

packages.<sup>135</sup> At this point, while unlikely to pass, the bills provide a starting point for future legislation.

One important aspect of the à la carte solution is there currently are no laws preventing pay television distributors from selling channels à la carte. Yet, no major providers of pay television offer à la carte television. Either this highlights the market power that pay television providers possess, or it shows that the industry has elected not to offer à la carte on its own.<sup>136</sup> Many analysts believe the latter. In most geographic markets, consumers now have a choice between a cable provider and satellite service.<sup>137</sup> IPTV providers are also available options in some markets.<sup>138</sup> A strong argument can be made that if à la carte is economically viable, then somebody, somewhere, would offer it.<sup>139</sup> But, at this point, no company has done so.<sup>140</sup>

The current regulatory structure of the pay television market means that most of the laws apply only to cable.<sup>141</sup> While some of the laws apply to other pay television distributors, any new laws in this area would need to be written to cover all three major types of pay television services. This would not be hard because Congress did this before with the 1992 law. Under that law, retransmission consent must be obtained by any MVPD, which includes all three major types of pay television.<sup>142</sup> Thus, for an à la carte solution to be in effect nationwide for all pay television customers, Congress would need to ensure that the language covers all MVPDs.

À la carte would radically change the current marketplace because bundling is now an important part of the pay television market. While proponents of the à la carte model cite the potential cost savings and greater choice,<sup>143</sup> significant potential problems also exist. First, as indicated above, most economists believe bundling is an economically efficient model and do not believe that an à la carte system would make pay television cheaper.<sup>144</sup> In an à la carte model, channels like

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<sup>135</sup> *Id.*

<sup>136</sup> Eisenach & Thierer, *supra* note 115.

<sup>137</sup> *Id.*

<sup>138</sup> See IHS, *supra* note 7 (noting IPTV sector's growth in second quarter of 2013 especially in urban areas where IPTV lured subscribers from satellite providers).

<sup>139</sup> Eisenach & Thierer, *supra* note 115.

<sup>140</sup> Chloe Albanesius, *Verizon Tips A La Carte Internet TV Service in 2015*, PCMAG.COM (Sept. 12, 2014, 12:30 PM), <http://www.pcmag.com/article2/0,2817,2468402,00.asp> (reporting that cable television companies have vocally resisted the "à la carte approach" for about a decade).

<sup>141</sup> See *supra* text accompanying note 86.

<sup>142</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 6, 106 Stat. 1460, 1482 (codified as amended at 47 U.S.C. § 325 (2012)).

<sup>143</sup> See Winter, *supra* note 131.

<sup>144</sup> Eisenach & Thierer, *supra* note 115; Matthew Yglesias, *A La Carte ESPN Would Cost \$30 a Month*, SLATE MONEYBOX BLOG (July 17, 2013, 1:41 PM), [http://www.slate.com/blogs/moneybox/2013/07/17/a\\_la\\_carte\\_espn\\_would\\_cost\\_30\\_a\\_month.html](http://www.slate.com/blogs/moneybox/2013/07/17/a_la_carte_espn_would_cost_30_a_month.html); *If You're Paying for Cable, You're Paying for the Channels You Watch*, SLATE MONEYBOX BLOG (Jan. 26, 2013, 12:57 PM), [http://www.slate.com/blogs/moneybox/2013/01/26/cable\\_unbundling\\_a\\_la\\_carte\\_is\\_not\\_the\\_miracle\\_it\\_seems.html](http://www.slate.com/blogs/moneybox/2013/01/26/cable_unbundling_a_la_carte_is_not_the_miracle_it_seems.html) [hereinafter *Paying for Cable*].



ESPN could cost up to \$30 per subscriber per month.<sup>145</sup> While this could save money for customers who do not watch sports, the vast majority of people would not actually save money. An FCC study in 2004 indicated that the average person watches only seventeen channels in their subscriptions.<sup>146</sup> Certainly, each individual customer does not watch the same seventeen channels as every other customer. Nonetheless, bundling allows for greater distribution of all channels, thus decreasing the average channel cost per subscriber. Bundling means that, in general, channels are cheaper in a bundle than they would be à la carte. Additionally, studies cast doubt on the potential cost saving of the à la carte model. One such study suggests the average customer would save only thirty-five cents with unbundled channels.<sup>147</sup> Moreover, commentators speculate à la carte packages might hurt or even destroy a good portion of quality programming.<sup>148</sup> The importance of choice may be an important policy factor, yet if prices are unlikely to fall in an à la carte model, then blackouts would likely still be a possibility in an à la carte world.

### *B. Injunctions and Forced Arbitration as a Solution*

A second approach is to give the FCC the ability to sue for an injunction and/or force mandatory binding arbitration. The battles over retransmission consent are the result of private negotiation.<sup>149</sup> The FCC maintains that it does not have the ability to impose an injunction in response to a blackout or to force negotiating companies into binding arbitration.<sup>150</sup> The FCC will only seek to make sure parties negotiating retransmission consent fees do so in good faith.<sup>151</sup> This is a significant limitation on the ability of the FCC to prevent and control blackouts. Under existing regulatory framework, there is little more the FCC can accomplish without a statutory change. For the FCC to be able to sue for an injunction or force mandatory arbitration of parties negotiating retransmission consent, the change would have to come by statute.

Giving the FCC the ability to sue for an injunction to force interim carriage and/or force mandatory binding arbitration has a variety of pros and cons. Two large pros include the FCC would have the ability to keep blackouts from occurring and to help to bring blackouts to a speedy end. As stated above, blackouts are a powerful negotiation tool in the pay television industry.<sup>152</sup> Blackouts can be

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<sup>145</sup> Yglesias, *supra* note 144.

<sup>146</sup> Amy Schatz & Joe Flint, *FCC May Endorse Cable À la Carte, In a Policy Shift*, WALL ST. J. (Nov. 29, 2005, 12:01 AM), <http://online.wsj.com/news/articles/SB113323293561108783>.

<sup>147</sup> Dmitri Byzalov, *Unbundling Cable Television: An Empirical Investigation 7* (July 2010) (working paper), available at <http://astro.temple.edu/~dbyzalov/cable.pdf>.

<sup>148</sup> See Brent Lang & Tony Maglio, *Why A La Carte Cable Could Kill TV's Golden Age*, THE WRAP (Sept. 12, 2013, 11:34 PM), <http://www.thewrap.com/why-a-la-carte-cable-could-kill-tvs-golden-age>; see also *Paying for Cable*, *supra* note 144.

<sup>149</sup> See Press Release, *supra* note 70, at \*1.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See *supra* text accompanying notes 89–95.

protracted. For instance, the Time Warner/CBS blackout lasted over a month.<sup>153</sup> Giving the FCC the ability to order mandatory carriage through an injunction would help keep programming on the air and protect consumers. When broadcasters and pay television distributors cannot come to an agreement, channels would stay on the air because the FCC could force them to stay on the air. Thus, blackouts could be avoided in the first place. Additionally, giving the FCC the ability to force mandatory binding arbitration would mean that the FCC could help reduce the length of time that blackouts last. Arbitration could help the FCC bring blackouts to a speedy end and/or prevent them entirely by either forcing parties into an ultimate solution or having the threat of a binding solution.

The major disadvantage to this proposal is that there is virtually no guarantee that prices would not continue to rise. While blackouts could be reduced, the market would still set the price of retransmission consent. While this may not inherently be a bad thing, prices may still rise based on increased carriage/retransmission consent fees. Thus, between the two problems of blackouts and the increased costs associated with them, this solution likely only solves one of them.

### *C. Additional Regulation as a Solution*

The third solution is to provide additional regulation within the existing framework. Currently, the biggest tool the FCC has within the existing framework is the ability to make sure that companies negotiate in good faith.<sup>154</sup> The FCC has proposed additional regulations along these lines in the past.<sup>155</sup> The idea of the proposed regulations was to have a greater definition of what constitutes good faith negotiation. This is certainly a good place to start when looking to reduce blackouts and the rising costs associated with them. While the FCC maintains it does not have the ability to order interim carriage or force binding arbitration,<sup>156</sup> a clarification of what constitutes “good faith” could help greatly reduce blackouts of service.

The FCC’s previous proposed rules sought to demonstrate what does or does not constitute a good faith negotiation. For example, the proposed rules aspired to illuminate what constitutes a per se violation of good faith negotiations.<sup>157</sup> Additionally, the proposed rules suggested that a refusal to enter into non-binding

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<sup>153</sup> Kyle Stock, *The CBS Blackout Was a Horror Show for Time Warner Cable*, BLOOMBERG BUSINESSWEEK (Oct. 31, 2013), <http://www.businessweek.com/articles/2013-10-31/the-cbs-blackout-was-a-horror-show-for-time-warner-cable> (“Time Warner Cable . . . lost almost 3 percent of its TV subscribers in the recent quarter, a period that included a month when it didn’t broadcast CBS . . .”).

<sup>154</sup> 47 C.F.R. § 76.65(a) (2013).

<sup>155</sup> Amendment of the Commission’s Rules Related to Retransmission Consent, 76 Fed. Reg. 17,071, 17,076 (proposed Mar. 28, 2011) (to be codified at 47 C.F.R. pt. 76).

<sup>156</sup> See Press Release, *supra* note 70, at \*1.

<sup>157</sup> Amendment of the Commission’s Rules Related to Retransmission Consent, 76 Fed. Reg. at 17,076–78 (suggesting, among other things, that it could be a per se violation “for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned”).

mediation could be considered a violation of the good faith provision.<sup>158</sup> Finally, the proposed rules clarified what constitutes an unreasonable delay in negotiations.<sup>159</sup> These rules, which did not become law, help clarify what constitutes good faith negotiation and could potentially reduce the number of blackouts.

This proposal is advantageous because industry players would be on notice of what tactics they could and could not use when negotiating for retransmission consent. The threat of not negotiating in good faith could be a significant deterrent to future blackouts.

Unfortunately for consumers, these proposed rules would not eliminate the threat of blackouts of service completely. Current market players would still be in control of the process. Thus, blackouts would remain a powerful tool for retransmission consent battles. Skeptics of these proposed regulations will say that the rules would only seek to serve as a caution for players in the industry and not as an active deterrent, thus blackouts would remain a pressing problem.

### III. GIVING THE FCC MORE POWER IS THE BEST SOLUTION

Looking at the potential solutions to solve the blackout problem, the best solution is to give the FCC more power by allowing for an injunction to provide interim carriage and/or forced binding arbitration. This proposal is the best solution because it helps to prevent blackouts in the first place.<sup>160</sup> Forced arbitration and/or an injunction to force interim carriage would mean blackouts could be prevented while negotiations take place.<sup>161</sup>

Opponents and skeptics of this proposal will note that giving the FCC more power would not necessarily stem the tide of rising prices of a pay television subscription. While this is true, the proposal does help to eliminate one of the most annoying and aggravating parts of a pay television subscription: a blackout.<sup>162</sup> Additionally, the other proposals do not help to reduce cost either.<sup>163</sup> Evidence suggests that the costs of individual channels would rise in an à la carte model.<sup>164</sup> For example, ESPN would likely cost \$30 per month in an à la carte model instead of its current price of more than \$5 per month.<sup>165</sup> Additional evidence suggests customers would only save thirty-five cents per month in an unbundled model.<sup>166</sup>

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<sup>158</sup> *Id.* at 17,077.

<sup>159</sup> *Id.* (noting that the "Commission's rules currently provides that '[r]efusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations,' constitutes a violation of the Negotiating Entity's duty to negotiate retransmission consent in good faith" (alteration in original) (citation omitted)).

<sup>160</sup> *See supra* Part II.B.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *See supra* Parts II.A, II.C.

<sup>164</sup> *See supra* Part II.A.

<sup>165</sup> Yglesias, *supra* note 144.

<sup>166</sup> Byzalov, *supra* note 147.

Thus, à la carte is not actually solving the problem of high consumer cost. Furthermore, additional regulation is also highly unlikely to help stem prices because blackouts and the threat of blackouts would still be present under that framework.

While the forced interim carriage and/or forced arbitration has no guarantee of reducing prices, it would represent a new arena for market players because they could avoid a blackout of service, at least in the short term.<sup>167</sup> The ability to prevent blackouts, or at least lessen their length, symbolizes a significant potential improvement over the status quo in the current marketplace. While blackouts hurt pay television distributors and content providers in the short term, both end up making more money in the end by increased rates. Customers will then end up footing the bill and not getting to enjoy the programming they pay for while negotiations continue. While forced arbitration and/or interim carriage would not fully solve the problem of rising prices, it would mean that customers could at least enjoy the programming they pay for without the interruption of a blackout of service.

#### CONCLUSION

Blackouts are a part of the pay television marketplace. Currently, they are annoying yet seemingly unavoidable. Though there are several potential solutions to the problem of blackouts, giving the FCC the ability to order interim carriage and/or force binding arbitration would certainly help. While this proposal does not solve all of the ills of the pay television marketplace, it would help to significantly reduce potential blackouts of service for customers. As a result, this proposal represents a realistic additional law to the existing marketplace Congress should consider in order to protect customers from blackouts.

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<sup>167</sup> Presumably, if parties could not come to an agreement eventually, then the FCC would not force the parties to work with each other in perpetuity.

