THE BOMB KEEPS THE LIGHTS ON:  
THE USE OF FINAL-OFFER ARBITRATION  
IN FAILED RETRANSMISSION CONSENT NEGOTIATIONS

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1 The Note’s title is in reference to Elissa M. Meth’s Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes published in the American Review of International Arbitration. Meth poignantly describes the final-offer arbitration process as “the hydrogen bomb poised above the bargaining table whose very terror should assure its non-use.” Elissa M. Meth, Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes, 10 AM. REV. INT’L ARB. 383, 387 (1999).
I. INTRODUCTION

At the end of July 2013, retransmission consent negotiations between CBS and Time Warner Cable (“TWC”) went far off course. With the two parties unable to agree on a price to be paid for CBS’s programming, CBS channels in New York, Dallas, and Los Angeles went dark on August 1, 2013 for TWC subscribers. An agreement, eventually reached through private negotiations on September 1, 2013, restored CBS and its premium pay-TV offering, Showtime, to television sets in these major markets. It also avoided a highly undesirable situation for both parties: the blackout of the first week of the 2013 NFL football season. Both sides publically noted that CBS was seeking (1) an increase in fees per subscriber from TWC (from about $1 per subscriber to $2), and (2) the ability to retain digital distribution rights of its content to allow CBS to negotiate with online video distributors (“OVDs”) such as Netflix and Amazon for carriage on their platforms. Apparently, the ultimate agreement was a huge success for CBS. Following the negotiations, CBS president Leslie Moonves modestly noted that “[w]e [CBS]) are receiving fair compensation for CBS content,” while TWC executive Glen A. Britt confessed that TWC “certainly didn’t get everything we [TWC] wanted.”

This sobering reality of inferior bargaining power for TWC is a creature of the 1992 Cable Television Consumer Protection Act (“1992 Act”). In its simplest terms, the “retransmission consent” provision of the 1992 Act forbids any cable operator from retransmitting a broadcaster’s over-the-air television broadcast (what would be colloquially referred to as “network programming”) without negotiating for broadcasters’ “retransmission consent.”

7 Id.
Without an agreed-on compensation rate, cable operators cannot show broadcast programming on their distribution channels.\footnote{See 47 U.S.C. § 325(b) (2014).}

Since the inception of this retransmission consent regime, still in effect today, retransmission consent negotiations between broadcasters, such as CBS, and multichannel video programming distributors (“MVPDs”),\footnote{“The term ‘multichannel video programming distributor’ means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C. § 522 (2014).} such as TWC, have become increasingly volatile and public. Though the stalemates between these players do eventually end through private negotiations, instances of blacked-out broadcast content and higher prices for cable subscribers have become almost guaranteed. The parties even embarked on extensive public relations campaigns to persuade the public on the merits of their companies negotiating positions.\footnote{Ronald Grover & Liaba B. Baker, \textit{CBS ad enlists football stars in bid to end Time Warner blackout}, REUTERS (Aug. 29, 2013), http://www.reuters.com/article/2013/08/29/cbsblackout-nfl-idUSL2N0GU2AB20130829.}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Figure1.png}
\caption{Advertisements in the retransmission consent battle\footnote{Id.}}
\end{figure}
Due to the increased public profile of these negotiations and higher subscription prices, industry stakeholders and the general public have called for a reexamination of the relevant regulatory structure. Ideally, that reexamination would produce a structure with increased authority for the Federal Communications Commission (“FCC”) and an increased use of alternative dispute resolution (“ADR”) mechanisms in failed retransmission consent negotiations. In March 2010, fourteen MVPDs and public interest groups filed a rulemaking petition arguing that the Commission’s retransmission consent regulations are no longer responding to the realities of the media landscape. The petitioners argued that greater competition in the MVPD marketplace and soaring costs of retransmission consent justified a reexamination of the retransmission consent rules.

To a certain extent, the Commission agreed. The FCC invited comment on the MVPD petition and issued a Notice of Proposed Rulemaking (“NPRM”) in March 2011. Specifically, the NPRM requested comment on a number of amendments to the retransmission consent “good faith” negotiation requirements and what behavior would constitute *per se* violations of those requirements. The NPRM specifically addressed ADR in one significant instance. The Commission considered its authority to require binding arbitration between negotiating parties in light of its authority under the Communications Act of 1934 and the Administrative Dispute Resolution Act (“ADRA”). The Commission concluded, “[i]n light of the statutory mandate in Section 325 of the Communications Act and the restrictions imposed by the ADRA, we do not believe that we have authority to require . . . mandatory binding dispute resolution procedures.” This conclusion is significant because mandatory arbitration—specifically, final-offer arbitration—would affect retransmission consent disputes in two ways.

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13 *FCC Influence, suprajjote note 6.
15 *Id.* at 1–2.
17 *Id.* at 8–9.
18 *Id.* at 7.
21 *Id.*
First, arbitration would bring disputes to a quick and orderly end, enabling consumers to watch broadcast content they have already paid for through cable distribution systems. Second, the consequences of not reaching an agreement imposed by the arbitration system would encourage parties to move away from positional bargaining, and to engage in more collaborative negotiation practices.

This Note will consider the imposition of binding arbitration in instances of failed retransmission consent negotiations between broadcasters and cable companies. It will first consider the FCC’s authority to do so under the Communication Act of 1934 and the ADRA. Central to this discussion will be the debate and legislative history surrounding the 1992 Act and the way that mandatory binding arbitration has been used other contexts by the Commission. Further, this Note will explore the specific type of arbitration to be employed by the FCC in event the Commission finds they have the authority to mandate such a procedure. Specifically, this note will explore final-offer (or “baseball-style”) arbitration, how it differs from traditional arbitration, and how such a procedure would be implemented in failed retransmission consent negotiations to prevent retransmission consent blackouts. The disadvantages of using final-offer arbitration in retransmission consent and ways to mitigate those potential harms will also be explored. This Note will conclude by arguing that (1) the FCC has the statutory authority to mandate binding final-offer arbitration where negotiations fail, and (2) the imposition of such a mechanism would be an important step in protecting consumer from broadcast blackouts in the future.

II. HOW WE GOT HERE: THE 1992 ACT AND BROADCAST POLITICS

The 1992 Act was passed with the goal of adjusting what was seen to be an imbalanced dynamic between local broadcasters and cable companies.22 Cable companies, in the eyes of Congress, were a threat to the viability of local broadcast television.23 Members of both chambers proclaimed that the goal of the new retransmission

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23 Id.
690 CARDOZO J. OF CONFLICT RESOLUTION [Vol. 16:685

consent regime was to preserve “local programming and news about local interests.” The central aim of the legislation, in the words of bill sponsor Senator Daniel Inouye, was to “ensure that local stations remain viable well into the future to continue to provide local service to cable subscribers and non-subscribers alike.”

Though the stated goal was laudable, the use of the current retransmission consent as the means of preserving localism in television was highly contentious. In fact, the means to preserve localism chosen by the 1992 Act were so contentious that the bill triggered a veto from President H.W. Bush just one month before the 1992 presidential election. On the eve of that veto, Congressman Newt Gingrich described retransmission consent as a windfall for broadcast networks and a regulation that would ultimately raise consumer cable bills: “Retransmission means the cable companies will now pay the broadcasters to broadcast on cable something which the broadcasters have already sold advertising to pay for, and if you are a cable viewer you will both get to watch the advertising and pay a higher fee.” However, much to the dismay of President Bush and Congressman Gingrich, a Democratic Congress gathered the votes to override President Bush’s veto on the eve of October 6, 1992.

Retransmission consent negotiations did not immediately bolster advertising revenues for broadcast networks with a second stream of income (as they currently do). In the first years of retransmission negotiations, most broadcasters affiliated with major networks leveraged negotiations to require carriage of new broadcast owned cable stations. Major networks also began to restructure their relationships with their local affiliates to allow for greater network input in retransmission consent negotiations. The first of these negotiations was between Fox and MVPD TeleCommunications Inc. Fox proposed, in lieu of making cash pay-

24 Id.
25 Id.
26 Id.
27 Id.
28 Greenfield, supra note 22.
29 Id.
32 Id. at 143–44.
33 Id. at 144.
ments to the network, that the cable company give access to a new Fox-owned basic cable channel in exchange for the right to continue retransmission of their local broadcast stations. This model was soon echoed in other retransmission negotiations. While Fox leveraged the launch of FX on cable, ABC leveraged ESPN2 and NBC used its local affiliates to support continued support for CNBC.

After the first round of elections and negotiations concluded in 1995 (which happen every three years), retransmission consent was seen as being important to the development of new cable programming (such as the cable channels mentioned above). Cable operators claimed, however, that this bundling tactic was overcrowding cable systems with poor quality programming, and left “too few slots available to accommodate the burgeoning number of channels.” At this point, it was unclear how the negotiating structure enacted by the 1992 Act would affect programming deals between MVPDs and broadcasters, and, ultimately, how it would affect consumer access to programming.

III. THE DAMAGING EFFECTS OF THE CURRENT SCHEME AND THE INDUSTRY RESPONSE

Instances of retransmission consent blackouts have increased at a remarkable rate in the last decade. The American Television Alliance (“ATA”)—a trade organization consisting of MVPDs and public interest groups whose sole purpose is to advocate for retransmission consent reform—has compiled empirical evidence to support this assertion. The ATA has tallied forty-three “significant episodes of actual or threatened blackouts that achieved publicity” from 2000 to 2010. Since then, the ATA has published a list of over seventy “broadcaster retrans blackouts” affecting con-

34 Id.
35 Id.
36 Id. at 147.
37 Lubinsky, supra note 31, at 148.
41 Steven C. Salop et al., Economic Analysis of Broadcasters’ Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations, CHARLES RIVER ASSOCIATES 7 (2010).
sumers of both cable and satellite television services. In addition, the meteoric rise of retransmission consent fees has, arguably, had a direct effect on MVPD subscription prices.

SNL Kagan Financial media analysis projects that from 2006 to 2010, retransmission fees from cable systems “have increased from $44.3 million in 2006 to $572 million in 2010,” and from $214.6 million to $1.1 billion across all MVPDs. It is the conclusion of the MVPD industry—though beyond the scope of this note—that “[e]conomic analysis clearly predicates that higher industry-wide marginal costs (associated with retransmission consent) lead to higher (subscription) prices, ceteris paribus.”

In response to increased blackouts and higher cable subscription pricing, a group of MVPDs and public interest advocates filed a petition with the FCC requesting that the Commission reexamine its retransmission consent rules that are “outdated and causing consumer harm” in March 2010. The petitioners claim that the rules force MVPDs to choose between a “rock and a hard place: pay spiraling carriage fees and raise consumer rates, or be forced by broadcasters to drop local signals.” Along with laying out how increased carriage fees ultimately hurt consumers, the petitioners argue that compulsory arbitration in the event of failed negotiations would help bolster the Commission’s public interest obligations. The petition argues that compulsory arbitration would ensure that the retransmission consent rules do not undermine the Commission’s obligation to “ensure that rates for the basic service tier are reasonable.”

IV. THE FCC’S ARBITRATION AUTHORITY IN RETRANSMISSION CONSENT NEGOTIATIONS

Since the enactment of the retransmission consent regime, the FCC has refused to order binding arbitration in the disputes in accordance with its interpretation of Section 325 of the Communicat-
tions Act and the Congressional intent of the 1992 Act. The Commission’s interpretation leads the conclusion that the disputes are to be resolved through private negotiation and that additional alternative dispute resolution (“ADR”) mechanisms should not be imposed without the “consent” required by Section 575 of the ADRA.

Specifically with reference to the compulsory arbitration solution put forward in the petition, the FCC explained that they did not feel they had the authority to mandate binding arbitration in failed retransmission consent negotiations without the consent of the parties. The Commission explained that “mandatory binding dispute resolution procedures would be inconsistent with both Section 325 of the Act, in which Congress opted for retransmission consent negotiations to be handled by private parties subject to certain requirements, and with the ADRA, which authorizes an agency to use arbitration ‘whenever all parties consent.'” This short explanation of the Commission’s lack of dispute resolution authority was the last mention of the compulsory arbitration solution in the document.

Commenters on the 2011 NPRM disagree with this conclusion based on a textual analysis of the statute. The Public Knowledge and New America Foundation assert that Section 325(b) of the Communications Act only prohibits retransmission by MVPDs without the consent of broadcasters and “does not impose any prohibitions on Commission action.” Further, though the FCC states that the retransmission consent rules are not meant to dictate the outcome of retransmission consent negotiations, that piece of regulatory guidance extends only to the method of compensation that a broadcast channel may choose—the Commission should not dictate the means by which broadcasters are compensated. The Commission, however, still has ample authority to impose regulation on the structure of retransmission negotiations when they find the negotiations adversely affect the public interest.

Outside a textual analysis of the statute, the most obvious place to look to critique the Commission’s interpretation of its au-

49 NPRM, supra note 16, at 7.
50 Id.
51 Id.
52 Id. at 8.
54 Id. at 4.
55 Id.
authority is in the Congressional record. As previously noted, the passage of the 1992 Cable Act was a contentious process and produced a great deal of legislative history. The strongest piece of evidence contradicting the Commission’s interpretation of its arbitration authority comes from a Senate floor debate between 1992 Act sponsor Sen. Daniel Inouye (D-HI) and Sen. Carl Levin (D-MI). The debate directly addressed the Commission’s authority to mandate binding arbitration in failed retransmission negotiations. The relevant portion of that exchange is reproduced below:

Mr. Levin: I strongly suggest, and hope that the chairman of the subcommittee [Sen. Inouye] conurs that the FCC should be directed to exercise its existing authority to resolve disputes between cable operators and broadcasters, including the use of binding arbitration or alternative dispute resolution methods in circumstances where negotiations over retransmission consent rights break down and noncarriage occurs, depriving consumers of access to broadcast signals.

Mr. Inouye: The FCC does have the authority to require arbitration and I certainly encourage the FCC to consider using that authority if the situation the Senator from Michigan is concerned about arises and the FCC deems arbitration would be the most effective way to resolve the situation.

In a separate comment made by Sen. Inouye, the arbitration authority point is emphasized, and is positioned as a major safeguard against the very retransmission consent blackouts that are so frequent today.

Mr. Inouye: I am confident, as I believe the other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which [retransmission consent] carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers . . . If [the FCC] identifies such unforeseen instances in

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56 See Greenfield, supra note 22.
58 Id.
59 Id.
60 Id.
which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.\textsuperscript{61}

This Senate floor exchange came to light as a result of a January 2007 Emergency Petition filed with the FCC to address an impending retransmission blackout between Mediacom and Sinclair Broadcasting.\textsuperscript{62} In a letter, Senators Inouye and Stevens (R-AK) urged “immediate action to resolve this dispute, which could include binding arbitration.”\textsuperscript{63} The tussle continued with a letter from Sinclair’s CEO suggesting that the action recommended by the Senators would be in “in direct contravention of current retransmission-consent law.”\textsuperscript{64} Ultimately, the FCC found that they could only “strongly encourage” Mediacom and Sinclair to submit their dispute to binding arbitration.\textsuperscript{65} They further explained that they felt “the Commission does not have the authority to require the parties to submit to binding arbitration.”\textsuperscript{66}

The legislative history of the 1992 Cable Act indicates that the authority of the FCC to submit disputes to binding arbitration was an integral safeguard against the blackouts that are so common today. Bipartisan support for the imposition of binding dispute resolution mechanisms indicate a clear Congressional intent that these negotiations not affect consumer’s access to broadcast television signals over cable distribution channels. Again, the history of the 1992 Act indicates that the primary purpose of the retransmission consent regime was to preserve “local programming and news about local interests.”\textsuperscript{67} The continued threat of retransmission blackout and rapidly escalating retransmission fees do not work towards the goal of preserving localism. Absent a mandatory arbitration mechanism in retransmission consent negotiations, the current negotiation structure seems to be working against that laudable goal.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{61} Id. (emphasis added).
\item \textsuperscript{62} Id.
\item \textsuperscript{63} See Mediacom Legislative History, \textit{supra} note 57.
\item \textsuperscript{64} Id. It is also worth noting that presumably Senator Inouye would have been qualified to make the arbitration solution suggestion as the original sponsor of the 1992 Cable Act.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} See Greenfield, \textit{supra} note 22.
\end{itemize}
\end{footnotesize}
V. THE FCC AND ARBITRATION: YOU’VE BEEN TOGETHER BEFORE

While there are competing interpretations of the 1992 Cable Act’s legislative history, it is clear that the FCC has felt comfortable enough with its dispute resolution authority to order binding arbitration in other contexts. Specifically, the FCC has been willing to order compulsory arbitration in the retransmission consent context as part of its merger review process. In review of News Corp.’s vertical integration with DirecTV in 2009, the Commission imposed a condition that requires “News Corp. to participate in arbitration disputes over carriage of regional sports nets and participate in arbitration over retransmission consent negotiations with multichannel video providers.”68 The FCC imposed the arbitration condition to prevent a newly integrated News Corp. from engaging in anticompetitive behavior that would “harm the public interest.”69 Similarly, during the 2010 review of the Comcast-NBC Universal merger, FCC Commissioner Julius Genachowski proposed a merger condition that would allow other MVPDs to invoke mandatory arbitration with Comcast-NBC Universal in unresolved retransmission consent negotiations.70 The condition would allow parties “to settle any disputes and would potentially prohibit Comcast from withholding NBC Universal content during negotiations—a practice that broadcasters have been increasingly turning to in the push for higher fees.”71 Finally, the FCC also imposed a similar option for mandatory arbitration during Adelphia’s proposed spectrum license transfer to Comcast and Time Warner Cable.72

Though the FCC has expressly stated (at least in the News Corp.-DirecTV context) that “[a]bsent vertical integration . . . the arbitration conditions serve no transaction-related purpose,”73 in-

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69 Id.


71 Id.

72 CHARLES B. GOLDFARB, CONG. RESEARCH SERV. RL34078, RETRANSMISSION CONSENT AND OTHER FEDERAL RULES AFFECTING PROGRAMMER-DISTRIBUTOR NEGOTIATIONS: ISSUES FOR CONGRESS 51 (July 9, 2007).

73 See Eggerton, supra note 68.
Industry practitioners say the use of the arbitration in these contexts shows that the Commission has an “increased willingness to require arbitration of carriage disputes.” Further, though some commenters have argued that mandating such arbitration procedures would violate the requirement that all parties consent to the arbitration found in Section 575 of the ADRA, this is inconsistent with the Commission’s previous interpretation of the Act. The Commission has interpreted the ADRA “consent” requirement to only mean “administrative agencies may impose mandatory binding arbitration so long as arbitration is subject to de novo review.”

Considering the totality of the circumstances, it is likely that the FCC’s decision not to impose binding arbitration in failed retransmission negotiations outside the merger context is more a choice of policy than a strict interpretation of its statutory authority.

VI. CURRENT POSITIONAL TACTICS

Since the retransmission consent negotiation consent structure came about in 1992, the posturing of both broadcasters and cable companies has become increasingly public and firmly positional. These adversarial, lopsided negotiations—in favor of broadcasters—are reflected in the meteoric rise in retransmission fees since the year 2000, and how much these fees account for the total revenue of broadcasters.

75 Public Knowledge and New America Comments, supra note 53, at 5–6.
76 Id.
As noted in the above Pew Research Center data, the percentage of total revenues that broadcasters receive from retransmission consent negotiations is set to steadily increase in the foreseeable future. In response, cable companies have gone so far as to delineate line items on their subscriber bills to alert customers to the rising costs of retransmission fees. In April 2013, Mediacom added a “local broadcast surcharge” of $1.09 to their monthly cable subscription bill. In a statement, a Mediacom executive explained the company has “worked to find other places to close the gap. . . . We’re realizing more efficiencies in our operational expenses by using new technology, we’re streamlining where we can, but it’s becoming increasingly difficult to absorb the increases that the broadcast television stations demand each year.” Though this new charge may simply be a market reality, it is obvious that the “local broadcast surcharge” is a not-so-subtle dig at the increasing demands of broadcasters during retransmission consent negotia-

79 Id.
80 Id.
82 Id.
83 Id.
tions. It may even be characterized as an attempt to win the perpetual public relations battle surrounding these negotiations.

**Figure 3. Rising Retransmission Fees to Broadcast Television**

<table>
<thead>
<tr>
<th>Year</th>
<th>Spending in Millions</th>
<th>Percent of Growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018 (est.)</td>
<td>83,688</td>
<td>12.3%</td>
</tr>
<tr>
<td>2015 (est.)</td>
<td>84,282</td>
<td>15.3%</td>
</tr>
<tr>
<td>2014 (est.)</td>
<td>8,545</td>
<td>20.2%</td>
</tr>
<tr>
<td>2013 (est.)</td>
<td>2,366</td>
<td>24.1%</td>
</tr>
<tr>
<td>2012 (est.)</td>
<td>1,906</td>
<td>31.9%</td>
</tr>
<tr>
<td>2011</td>
<td>1,446</td>
<td>39.7%</td>
</tr>
<tr>
<td>2010</td>
<td>1,034</td>
<td>46.7%</td>
</tr>
<tr>
<td>2009</td>
<td>706</td>
<td>49.7%</td>
</tr>
<tr>
<td>2008</td>
<td>471</td>
<td>54.4%</td>
</tr>
<tr>
<td>2007</td>
<td>324</td>
<td>77.3%</td>
</tr>
<tr>
<td>2006</td>
<td>257</td>
<td>374.1%</td>
</tr>
<tr>
<td>2004</td>
<td>267</td>
<td>35.0%</td>
</tr>
<tr>
<td>2003</td>
<td>20</td>
<td>33.3%</td>
</tr>
<tr>
<td>2002</td>
<td>15</td>
<td>38.4%</td>
</tr>
</tbody>
</table>

Source: Veronis Suhler Stevenson Industry Forecast, 2012-2016

As the cited statistics suggest, the total amount to be paid to broadcasters is set to increase by double digit percentage points through 2016. The current regime is unquestionably producing unintended, undesirable consequences. Public interest advocates and financial analysts alike go further and stress that this trend is unsustainable and is a constant threat to consumers. Absent retransmission reform, “[b]roadcasters will continue to use their considerable leverage to extract unfair terms from MVPDs [and] . . . will continue to engage in brinksmanship exposing consumers to uncertainty about whether they will continue to have access to content they paid for.” It follows that the current retransmission regime creates a host of uncertainty for both consumers and the

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84 Matsa, supra note 78.
85 Id.
87 Public Knowledge and New America Comments, supra note 53, at 10.
700 CARDOZO J. OF CONFLICT RESOLUTION [Vol. 16:685

parties to the negotiations [along with their investors].\(^88\) Moody’s Investor Services has gone so far as to say “[i]f the current [retransmission consent] system is not fixed, it will cause further disruption for consumers and have negative financial ramifications for broadcasters and pay-TV operators that adhere to a stiffer negotiating posture over the longer term.”\(^89\)

VII. ARBITRATION PROPOSAL

Though some commenters advocate for a complete disposal of the current retransmission consent negotiations structure,\(^90\) a total rewrite is unrealistic in this political climate.\(^91\) A more feasible approach, advocated by other commenters, is a change to the dispute resolution process mandated when negotiations go awry. Specifically, the increased use of traditional ADR procedures will decrease the likelihood of disruptions and increase stability in the industry while still being politically realistic.\(^92\) The aforementioned Moody’s report goes on to say that third-party arbitration would likely decrease the frequency of broadcast blackouts and will presumably protect consumers from retransmission negotiations that go awry.\(^93\) Moody’s posits “mandatory binding arbitration would assure that subscribers continue to receive the local broadcast programming, consistent with the public policy objective of fostering localism.”\(^94\) Arbitration performed by an FCC or by a recognized arbitration association will encourage “the negotiating parties to avoid starting negotiations with extreme positions that they know

\(^88\) Id.


\(^92\) See Soloman & Begley, supra note 89.

\(^93\) Id.

\(^94\) Id.
would never survive arbitration . . . which in turn might expedite the negotiation process and discourage impasses.”

The proposal suggested here will present both the doctrinal justifications for use of compulsory arbitration and its practical application in the retransmission consent context. Specifically, the arbitration proposal will be presented in five parts. First, we will consider the merits of both traditional arbitration and final-offer arbitration. After concluding that final-offer arbitration is the most appropriate dispute resolution mechanism, the second portion of the proposal will consider how the final-offer process would be practically applied in the retransmission consent context. Third, the proposal will look at variations in the final-offer process and determine which of these variations would be most appropriate to the resolution of retransmission consent disputes. Fourth, it will consider what factors a neutral consider when making her decision. Finally, the proposal will highlight the disadvantages of the final-offer process and ways to mitigate those disadvantages in the interest of reaching a solution in the public interest.

A. Traditional Arbitration v. Final-Officer Arbitration

Though ADR mechanisms are undoubtedly desirable in the retransmission consent context, the Commission must be careful to choose a process that encourages good faith negotiations and swift resolutions to impasses that affect the television-viewing public. In the American Review of International Arbitration, securities arbitrator Elissa Meth describes traditional arbitration as a process where a “bargaining impasse is submitted to an arbitrator who selects either party’s position on one or all of the pending issues, compromises between the parties’ positions or awards a unique solution.” Though appropriate to swiftly resolve many kinds of disputes, use of compulsory traditional arbitration is criticized because of the “chilling effect” the potential arbitration hearing has on the parties’ willingness to engage in good faith negotiations. This “chilling effect” may very well produce firmer positional negotiations as the parties “may . . . conclude that any change in their initial bargaining position will reduce the likelihood.

95 Goldfarb, supra note 72, at 63.
96 Meth, supra note 1, at 387.
97 Id.
of obtaining a favorable award.”

Professor Harold Abramson explains that traditional arbitration, like a judicial trial, encourages a “familiar partisan strategy of presenting your strongest arguments and aggressively attacking the other side’s case.”

In addition, because the arbitrator has the authority to compromise between the parties’ claims, the parties may “undervalue the risks of the arbitration hearing” and further prevent the possibility of a mutually agreed upon settlement during the negotiation process. Traditional adjudicatory processes simply do not encourage the collaborative, problem-solving negotiation style ideal to protect the public interest in retransmission consent negotiations. Luckily, it seems as if the FCC is well aware of the disincentives that traditional arbitration produces and has used other, more appropriate procedures in the past.

It would be in the public interest for the FCC to choose a procedure that encourages the parties to move away from firmly positional negotiations toward more reasonable, measured approaches. Rather than traditional arbitration, the Commission has opted to order final-offer arbitration (“FOA”) when conditioning vertical mergers. For example, this condition was attached to the 2010 Comcast-NBC Universal merger.

Would the use of FOA in the retransmission consent context be appropriate? The American Arbitration Association provides this useful definition as a starting point:

“Baseball” arbitration is a methodology used in many different contexts in addition to baseball players’ salary disputes, and is particularly effective when parties have a long-term relationship. The procedure involves each party submitting a number to the arbitrator(s) and serving the number on his or her adversary on the understanding that, following a hearing, the arbitrator(s) will pick one of the submitted numbers, nothing else.

98 Id.
100 Meth, supra note 1, at 387.
101 Id.
103 See Rini, supra note 74.
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At first glance, FOA seems like a dramatic dispute resolution affair. FOA has even been called “the hydrogen bomb poised above the bargaining table whose very terror should assure its non-use.”\(^{105}\) Though it may sound frightful to the parties, we will see that the process offers many benefits that are especially appropriate to retransmission consent negotiations gone awry, and the process acts as a “psychological, economic, and political incentive for the parties to reach their own agreement.”\(^{106}\) Ideally, this process can be adapted to help fix the retransmission consent regime’s market-distorting effects and the harm it poses to the television-viewing public.

B. The Fit: Final-Offer Arbitration and Retransmission Consent

FOA has been traditionally employed in both baseball salary disputes and public sector collective bargaining negotiations.\(^{107}\) Carrell and Bales assert that FOA is a particularly attractive dispute resolution procedure when two conditions are present. First, FOA is appropriate when party “A” must bargain exclusively with party “B” because B maintains a monopoly or semi-monopoly over a product or service and that is valuable to A and the parties are thus locked into a continuing relationship.\(^{108}\) This dynamic makes it extremely difficult—if not impossible—to determine a true fair market value for the product or service in question.\(^{109}\) Party B has something party A wants and party A cannot get that product or service from any other source. This condition produces unchecked pricing trends and largely one-sided negotiating postures.\(^{110}\) Second, FOA is appropriate when the parties have incentive not to negotiate in good faith because the process being used incentivizes positional negotiating.\(^{111}\) As previously discussed, traditional arbitration produces a “fear [that] an arbitrator would simply split the difference of the last offers . . . and encourage the parties to take

\(^{105}\) Meth, supra note 1, at 388.

\(^{106}\) Id.


\(^{108}\) Id. at 17.

\(^{109}\) Id.

\(^{110}\) Id.

\(^{111}\) Id. at 20.
polar positions in negotiations to posture themselves for arbitration.\textsuperscript{112}

These conditions are found in baseball salary disputes, collective bargaining negotiations, and without a doubt, retransmission consent negotiations. First, broadcasters’ monopoly or semi-monopoly control over valuable (seen as \textit{essential}) programming makes it impossible to determine a true market value for the programming. As a result, broadcasters are able to extract continually increasing fees from MVPDs absent any kind of Commission oversight. Second, the current retransmission consent structure produces positional negotiations (at least on the part of broadcasters) and gives no incentive for the parties to negotiate in good faith or to come to an equitable solution. Broadcasters are able to demand increasingly higher fees and use the threat of blackouts of essential programming to force MVPDs to cave to broadcaster demands. As we have discussed, this incentive structure produces highly undesirable results for both consumers and the industry as a whole. The retransmission consent structure would greatly benefit from the use of FOA in instances where retransmission consent negotiations fail to produce a mutually agreed upon solution.

The use of FOA aims to address both of the mentioned market-distorting phenomena.\textsuperscript{113} First, it cuts through the lack of a true market value for the product in question by allowing the arbitrator to set the value for the programming based on a host of industry-specific factors (of which we will soon discuss).\textsuperscript{114} The ability to correct monopoly-driven market distortions is especially important when the public will ultimately bear the costs of unchecked negotiations.\textsuperscript{115} Second, FOA is a particularly attractive mechanism in the retransmission consent context because the “final offer” approach encourages the parties “to submit a highly reasonable number, since this increases the likelihood that the arbitrator(s) will select that number.”\textsuperscript{116} The threat that a party’s number will not be chosen changes the nature of the negotiation positions, and ideally, nudges the parties to engage in problemsolving,\textsuperscript{117} rather than positional negotiation tactics.\textsuperscript{118} This senti-

\textsuperscript{112} Id.
\textsuperscript{113} Carrell & Bales, \textit{supra} note 107, at 19.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} ABRAMSON, \textit{supra} note 99, at 447.
\textsuperscript{117} The “problem-solving” style, as opposed to the “positional”-negotiation style, encourages the parties to focus on their respective “interests” in the process rather than their legal or financial positions entering a negotiation. The hallmark of this approach is the use of solutions “that
ment is echoed in Professor Abramson’s discussion of FOA in mediation representation strategy in which FOA is used to steer parties away from litigation and towards a mutually agreed upon solution.\textsuperscript{119}

Specifically, Professor Abramson posits that “[i]nstead of participants posturing about who will win in court (or arbitration), they posture about who will present the more reasonable final offer. Instead of settlement offers consisting of painful compromises of positions . . . they consist of proposals that harmonize with the final offers that will be submitted to the arbitrator.”\textsuperscript{120} Even if the parties invoke the compulsory FOA provision by not settling, it is likely that the presence of FOA will induce the parties to submit a narrower range of numbers than in the instance of traditional arbitration.\textsuperscript{121} In addition to encouraging reasoned negotiating, FOA provides a quick, binding settlement to the dispute\textsuperscript{122} and allows parties, ideally, to maintain an amicable long-term commercial relationship.\textsuperscript{123} Though broadcasters and cable companies haven’t had the best relationship as of late, these parties, in reality, do need each other. Cable companies need the highly valued programming owned by broadcasters, and broadcasters need the extensive distribution systems that cable provides. It follows that there is a “powerful interest in reaching consensual agreement.”\textsuperscript{124}

C. Variations in the Final-Offer Arbitration Process

Before discussing the implementation of FOA in the retransmission consent context, it is worth noting the procedural varieties of the process. The variations of FOA highlight different confidentiality and evaluative preferences.\textsuperscript{125} Meth’s exploration of FOA in the American Review of International Arbitration offers two variations that may be applicable in the retransmission consent context. First, under the “concealed final-offer” method, “the
arbitrator reviews the evidence and then makes a decision, unseen by the parties, before the parties reveal their proposals. 126 The final offer that is closest to the arbitrator’s proposed figure is then implemented. 127 Under this approach, the parties are discouraged from making extreme offers, and are encouraged to come as close to the predicted arbitrator’s number in hopes of winning the arbitration. 128 Second, under the “dual final-offer” method, each party is allowed to submit two final offers rather than one. 129 This approach “increases the probability that one of the offers will be attractive enough to induce the other to settle . . . [because] the increase of information due to the multiple offers facilitates settlements.” 130

In making the decision about what procedure to choose to implement in retransmission consent negotiations—traditional, concealed, or dual FOA—the FCC would need to consider what kind of negotiation process they hope to see in retransmission consent. If they do decide to forego traditional FOA in lieu of one of the mentioned variants, it seems appropriate that the FCC would choose the process that maximizes the amount of information available to the arbitrator to make her decision. The dual-offer approach seems especially appropriate for the retransmission consent context because of the sheer number of considerations the neutral will have to take into account when making her decision. Though, before settling on a dispute resolution mechanism, we should consider the criteria for the neutral will use to make decision.

D. Implementation: Factors in the Arbitrator’s Process

This Note has discussed the political and theoretical justifications for implementing compulsory FOA in the instances of failed retransmission consent negotiations. Though once the dispute is actually submitted to a neutral third-party arbitrator, how would

126 Id. at 395.
127 Id. This procedural variation is also known as the “night” version of FOA. “In the “day” version of final offer arbitration the arbitrator chooses one of two proposals submitted by the parties. In the “night” version, the two proposals are submitted but held from the arbitrator until the arbitrator has independently decided an award-and then the offer closest to that value is the award.” Id. at 33.
128 Id.
129 Id. at 396.
130 Id.
that neutral go about making that decision? To discern what factors a neutral would have to take into account and whether the result would be in the public interest, it would again be helpful to look at other industries were FOA is a major dispute resolution mechanism.

In the baseball salary context, the neutral is permitted to consider a host of factors including contribution of the player during the previous season; special qualities of leadership and public image; length and consistency of the player’s contributions to the team; the previous year’s compensation; compensation of comparable players; recent performance of the team; and potential liabilities the player may pose to the viability of the team.\footnote{Carrell & Bales, supra note 107, at 21.} The neutral, however, is forbidden from considering the financial position of the player or team, press coverage of the proceeding, offers made during negotiation prior to arbitration, and legal costs.\footnote{Id.} Out of this list, two controversial categories emerge that we should be aware of in the retransmission consent context: first, what comparable criteria should be used when the neutral makes her decision; and second, should the neutral consider the parties’ ability to pay the settlement and for the costs associated with the process?\footnote{Id. at 22.}

Most likely, the neutral will have to consider comparable criteria to evaluate the parties’ submission. Though the list of permissible considerations will most likely come from the FCC, it is worth speculating what criteria would be important to the determination. Probable factors include program ratings for broadcast content; contribution of the network programming to the appeal of the cable system; predicted subscriber loss if the broadcast programming was to be removed; previous year’s retransmission consent fees; and comparable networks’ retransmission consent fees. It is likely that most of the same limitations would apply in the retransmission consent context as applied in the baseball salary context—no consideration of press coverage of the blackout (though this may be murky as it could affect potential subscriber loss) or legal costs to the respective parties.

Though it is unclear whether the neutral should be able to consider the parties’ ability to pay the settlement in the retransmission consent context, it is likely that the MVPDs in these negotiations could pay the neutral’s picked settlement. However, it is likely that retransmission costs, if disproportionately high, will be passed on
to consumers. In light of this serious public policy concern—though this consideration is barred in baseball salary negotiations—neutrals in retransmission consent arbitration should be able to consider the cost to be passed on to the consumer as a result of the settlement. Though these are indeed speculative concerns, these are certainly the types of factors that a neutral would have to consider in making her decision between the two numbers. Again, in FOA, a neutral cannot split the difference of the two offers; the neutral must pick one final offer (a potential disadvantage of selecting the FOA process).

E. Disadvantages of the Final-Offer Process

In their discussion of FOA in the public sector negotiation context, Carrell and Bales identify two main disadvantages of compulsory FOA.134 First, critics suggest that FOA could produce an instance where neither party to the proceeding submits a reasonable offer to the neutral. In that kind of situation, the neutral would still have to choose between the two unreasonable offers.135 Again, the process can only incentivize reasonable problem-solving negotiating and the submission of reasonable figures—there are simply no guarantees. Critics also suggest that the FOA process could actually incentivize extreme offers, compounding the fear that an inequitable solution will be reached.136 Carrell and Bales suggest that transparency in the negotiation process is critical to avoid these potential shortcomings.137 Specifically, they cite a University of Arkansas study that concluded “parties submitted more reasonable offers when they knew that their proposals would be disclosed to each other. When this was not the case, the parties’ proposals were more extreme or aggressive.”138 In addition, timing is a crucial consideration in soliciting reasonable offers from the parties.139 When imposing compulsory FOA, the neutral may encourage the parties to submit their first proposal well before the statutory deadline, and then allow for a “grace period” before the start of the formal arbitration process to allow for negotiations to continue.140

134 Carrell & Bales, supra note 107, at 30.
135 Id. at 31.
136 Id.
137 Id.
138 Id. at 32.
139 Id. at 33.
140 Carrell & Bales, supra note 107.
Ideally, early offers will incentivize the parties to turn back to the negotiation table and to reach last minute settlements before the beginning of the arbitration process.\textsuperscript{141}

These disadvantages are something that the FCC, the neutral and the parties to the negotiation should proactively address before offers are submitted for FOA. Though the public is privi-
lege to few details of these negotiations, it is safe to say that these negotiations do not exude radical transparency, and extreme positional negotiating that occurs behind closed doors, if not curbed, could produce inequitable results. The Commission and neutral should encourage the parties to negotiate with transparency and to submit offers to the neutral well before the statutory deadline. Again, FOA often serves as the “hydrogen bomb” of these negotiations—ideally, the process is not used at all, and the parties reach an inclusive, consensual agreement on retransmission fees to be paid by MVPDs to broadcasters.

Before concluding, it is worth recapping the details and the justifications for the specific arbitration proposal for use by the FCC in failed retransmission consent negotiations. First, the FCC should favor the use of FOA rather than traditional arbitration. The Commission should choose FOA because, as opposed to the positional negotiations encouraged by traditional arbitration, FOA incentivizes the submission of reasonable offers and collaborative, problem-solving negotiations. Ultimately, the Commission should encourage the parties to \textit{not} use the process and to resolve the conflict on their own if at all possible. Second, the Commission should favor dual FOA over standard or concealed FOA. Dual FOA is better suited to retransmission consent because it allows for the arbitrator to consider a wider range of offers and to incorporate that wider range into her final decision. In a complex dispute such as retransmission consent negotiations, it is preferable to give a neutral as many options as possible in order to reach an equitable settlement. Finally, the Commission should encourage the neutral to consider the way the settlement will affect the public interest. Though this will be a contentious point in the process, the FCC and the neutral need to be aware of how the cost of the eventual settlement will be passed on to the consumer and may drive up cable subscription prices.

\textsuperscript{141} \textit{Id.}
VIII. Conclusion

The above proposal presents a potential dispute resolution process that could have more effectively resolved the extraordinary public feud waged between CBS and TWC in summer 2013.142 Both sides to the 2013 summer’s negotiations engaged in extreme negotiation tactics and even resorted to widely distributed public relations campaigns to undercut the other side’s negotiation stance.143 These public tactics, along with what we know of the private negotiations are indicative of firmly positional negotiations, which Professor Abramson defined as “the conventional approach to claiming value at the expense of the other party.”144 These positional negotiations, unfortunately, are a result of a retransmission consent negotiation system that is not working in the public interest.

The 1992 Cable Act was passed with the laudable goal of preserving the viability of local broadcasting by compelling MVPDs to negotiate with broadcasters for the rights to retransmit their programming over their distribution channels.145 Ultimately, the retransmission consent regime did provide broadcasters with a boon to their revenues and bolstered the economic standing of both national and local networks. However, the retransmission consent structure has made the distribution of power in these negotiations inequitable at the expense of the MVPD industry. Further, the current scheme is forcing the broadcasters and MVPDs apart and leading to broadcaster blackouts at the expense of the television-viewing public. The implementation of a compulsory FOA mechanism in failed retransmission consent negotiations will go a long way to start to realign the bargaining positions of the broadcasters and cable companies and better protect the television-viewing public from broadcast blackouts and escalating MVPD subscription bills.146

To implement such a process, the Commission would need the statutory authority to pass the needed regulation. Though the cur-
rent FCC does not believe that they have the statutory authority to mandate a compulsory arbitration process, the legislative history surrounding the 1992 Act speaks to the contrary.\textsuperscript{147} Since the retransmission consent regime’s inception, the use of FCC mandated dispute resolution processes has been viewed as an integral safeguard against the very disruptions that are so prevalent today.\textsuperscript{148} Though it is recommended that the FCC act on its existing authority and write the compulsory FOA mechanism into their current rules, that solution may not be politically realistic. The solution will need to come from an act of Congress.

Absent FCC action, Congress should act swiftly to address the current retransmission blackouts with a comprehensive FOA solution. The imposition of compulsory FOA in failed retransmission consent negotiations would benefit both the television industry and the television-viewing public. Compulsory FOA would give the industry the stability and predictability needed to foster long-term investment while protecting consumers from the threat of constant blackouts and ever-increasing MVPD subscription pricing.\textsuperscript{149} The FOA solution should allow the parties to submit more than one proposal to the arbitrator (“dual-offer”)\textsuperscript{150} and should allow the arbitrator to consider how the settlement would affect the public interest. Such a process would allow the dynamics in these negotiations to equalize and would protect consumers from the threat of blackouts and the constant increase in consumer subscription prices.

\textsuperscript{147} Mediacom Legislative History, supra note 57.
\textsuperscript{148} Id.
\textsuperscript{149} See Soloman & Begley, supra note 89.
\textsuperscript{150} Meth, supra note 1.