



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

FCC Chairman Wheeler: No New “Good Faith” Retransmission Consent Negotiation Rules

In an important victory for television broadcasters, FCC Chairman Wheeler announced Thursday, July 14—[by blog post](#)—that he will not, at this time, propose any new rules relating to the “totality of the circumstances” test by which to evaluate good faith retransmission consent negotiations. Although we cannot be certain, the expectation is that the Commission will be asked by the Chairman before the end of the year to terminate the current retrans rulemaking proceeding.

Broadcasters may recall that, in early September 2015, the FCC issued a [Notice of Proposed Rulemaking](#) (the “Notice”) and launched a proceeding (as required by Congress in the STELA Reauthorization legislation) to address the retransmission consent “totality of circumstances” test. The “totality of circumstances” test is used by the FCC to determine whether one party to a retransmission consent negotiation has failed to negotiate in good faith. The Commission must judge whether the offending party negotiated in good faith; employed bad faith practices *per se*; or, if a *per se* violation cannot be established, engaged in negotiating practices that would—considering the totality of circumstances—constitute bad faith.

The Notice identified several broadcaster practices that warranted consideration in the proceeding. Those practices included the following:

- A threat to black out a station signal just prior to the airing of a “marquee” sports or entertainment event if demands are not met
- Preventing an MVPD from temporarily importing an out-of-market signal in cases where the broadcaster has blacked out its local signal after negotiations failed by the expiration date of the consent agreement

- A demand that an MVPD place limits on its subscribers' use of lawful devices and functionalities
- A demand that an MVPD pay per-subscriber fees for all subscribers including those who subscribe to internet and voice service but not to video service
- Refusal to provide information substantiating reasons for positions taken when requested in the course of bargaining
- Price discrimination not shown to relate to a legitimate economic benefit associated with the price difference
- Preventing online access by subscribers to broadcast programming

To be sure, the Commission's inquiry in the Notice was extensive, and the questions were aimed at determining whether any specific practices should be identified as evidencing bad faith negotiations under the "totality of circumstances" test. Numerous broadcaster parties filed comments, including the NAB, network affiliates associations, station groups, and state broadcaster associations. Generally, broadcasters advocated that no changes be made to the "totality of the circumstances" test and pointed out that the vast majority of retrans negotiations conclude without so much as a hiccup, let alone a blackout. Of course, MVPDs also filed comments in the proceeding, and some argued vehemently that the system is broken and that numerous broadcaster negotiation tactics evidence bad faith.

Thursday's announcement by Chairman Wheeler reinforces the broadcaster view of retrans negotiations, and the Chairman acknowledged that "[m]any broadcasters and MVPDs take [the good faith negotiation] responsibility seriously and conclude hundreds of retransmission consent deals without interruption." At the same time, Chairman Wheeler promised that the Commission would become involved in retrans impasses when necessary, and he observed that the Commission may get involved even if a bad faith complaint has not been filed, stating "we do not need one of the parties to a negotiation to cry foul before acting in the public interest. The Commission can investigate a potential good faith violation on its own and take enforcement action when a party fails to fulfill its statutory obligations." Indeed, the Chairman pointed out that the Commission is currently reviewing the facts in a high-profile ongoing dispute between an MVPD and television broadcast group. Whether that type of involvement from the Commission will become more common remains to be seen. For today, however, television broadcasters can celebrate the fact that their efforts in educating the Commission about retrans practices have resulted in a favorable outcome in this proceeding at this time.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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