



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

THE FCC'S RETRANSMISSION CONSENT RULEMAKING

In response to a congressional directive contained in last year's reauthorization of the satellite home viewer act ("STELAR"), the FCC has initiated a rulemaking proceeding to review the "totality of the circumstances" test for determining whether broadcast stations and MVPDs are negotiating retransmission consent in "good faith." Clearly, this is one of the most important television rulemaking proceedings undertaken by the Commission in recent years. The proceeding, therefore, warrants careful review by every television broadcaster.

The Commission has previously held that retransmission consent agreements with different terms and conditions and different retrans rates for different MVPDs in the same market do not violate the "good faith" negotiating requirement if based on "competitive marketplace considerations," and the Commission has, in that context, listed various negotiating practices it considers to be presumptively "consistent" with competitive marketplace considerations. By the same token, the Commission has also listed various negotiating practices it considers to be presumptively "inconsistent" with "competitive marketplace" considerations. (Both lists appear in the discussion below.)

In addition, the Commission has identified the following nine specific negotiating practices it considers *per se* violations of the "good faith" negotiating requirement:

- Refusal to negotiate;
- Refusal to designate a representative with authority to negotiate an agreement;
- Refusal to meet and negotiate at reasonable times and locations or acting in a manner that unreasonably delays the negotiation;

- Refusal to put forth more than a single, unilateral proposal;
- Failure to respond to the other party’s proposal, including failure to provide reasons for any rejection of a proposal;
- Execution of a retrans agreement that prohibits a party from entering into a retrans agreement with any other station or MVPD;
- Refusal to reduce the agreement to writing setting forth the terms and conditions of the agreement;
- Joint negotiation of retrans by stations in the same market that are not under common ownership; and
- Prohibition by a station against importation by an MVPD of another television station that is “significantly viewed” in the local market (unless the stations are under common ownership).

Cable, satellite, and telephone companies have engaged in an unprecedented lobbying effort at the FCC over the last six months to persuade the Commission to weaken the bargaining position of television stations in retransmission consent negotiations. Countless filings have been made by large and small cable companies, telephone companies, satellite carriers, and their multiple trade associations.

In issuing the *Notice of Proposed Rulemaking*, the Commission is asking for comment on the following issues:

1. Should the current “totality of the circumstances” test be changed or updated? If so, in what respect? Should the test be made more specific? Should it be eliminated?
2. How effective has the “totality of the circumstances” test been in facilitating retrans negotiations?
3. Is the retrans consent market working—or is there a market failure that should be addressed?
4. Do the FCC’s current retrans negotiating requirements and procedures promote “good faith” negotiations? Do these procedures protect viewers?
5. Have changes been made in the “good faith” negotiating requirement applicable to regulated labor law negotiations, and, if so, should those changes be considered for adoption by the FCC in retrans negotiations? [*Note:* The Commission’s original “good faith” negotiation requirements were patterned after the “good faith” negotiating requirements that at the time applied to regulated labor negotiations.]

6. Should the bargaining proposals listed below that the Commission currently considers to be presumptively “consistent” with competitive marketplace considerations be modified? If so, how?
- Proposals by stations for rates or compensation in excess of rates or compensation the station has agreed to with other MVPDs in the same market;
 - Proposals by MVPDs for compensation that is different from the compensation offered by the MVPD to other broadcasters in the same market;
 - Proposals by a station for retransmission that are conditioned on carriage of other programming, such as the station’s multicast channels, an affiliated cable programming service, or another broadcast station either in the same or a different market;
 - Proposals by a station for carriage conditioned on obtaining specific channel positioning or tier placement;
 - Proposals by a station for compensation in the form of commitments to purchase advertising on the station or on affiliated media; and
 - Proposals that allow termination of a retransmission consent agreement based on the occurrence of a specific event.
7. Should the bargaining proposals listed below that the FCC currently considers to be presumptively “inconsistent” with competitive marketplace considerations be changed? If so, how?
- Proposals by a station that specifically foreclose carriage of other programming services by an MVPD that do not substantially duplicate the station’s programming;
 - Proposals involving compensation or carriage terms that result from an exercise of “market power” by a station or that result from an exercise of market power by other participants in the market (*e.g.*, other MVPDs) the effect of which is to hinder significantly or to foreclose MVPD competition;
 - Proposals that result from agreements not to compete or to fix prices; and
 - Proposals for contract terms that foreclose the filing of complaints with the Commission.

8. Should the FCC identify specific practices as evidencing bad faith negotiation under the “totality of the circumstances” test?
9. Should a station be required to publicly disclose (*e.g.*, place in its public file) its “retrans rates”?
10. Should stations be permitted to block “online” access by viewers to a station’s signal in a retrans negotiation *impasse*, including blocking an MVPD’s online subscribers who do not subscribe to the MVPD’s cable or satellite video service? Would a ruling that such blocking constitutes “bad faith” under the “totality of the circumstances” test create statutory or constitutional issues?
11. What are the appropriate parameters, if any, for network involvement in an affiliate’s retrans agreements or its negotiations? Should a network be permitted to negotiate retransmission consent with MVPDs on behalf of its affiliates?
12. Should a broadcaster be allowed to negotiate retrans for another broadcast station it does not own, but which is located in another market?
13. Should a station be permitted to insist on “bundling” its broadcast signal with (a) other cable or satellite programming services, (b) the signals of other co-owned stations, or (c) the station’s multicast channels?
14. Should a station be allowed to insist that a retrans agreement expire just prior to a “marquee” sports or entertainment event?
15. Should a local station be permitted to block importation by an MVPD of a duplicating distant station if the local station is not retransmitted by the MVPD? [*Note:* Under the Commission’s current network non-dupe and syndex rules, an MVPD may not import duplicating programming from a distant station.]
16. Should a station be allowed to prohibit the use of lawful devices and functionalities (“ad hopper,” for example) by an MVPD or the MVPD’s subscribers?
17. May a station insist on being paid for signals viewed by an MVPD’s subscribers over the air or through the MVPD’s internet offering, but not viewed by means of the MVPD’s traditional video service?
18. May a station or MVPD refuse to provide “information substantiating reasons for positions taken” when requested by the other?
19. May a station or MVPD be permitted to engage in conduct designed to delay retrans negotiations?
20. May an MVPD-affiliated station discriminate among other MVPDs in rates, terms, and conditions of retransmission of the station?

21. Should *all* MFNs be prohibited in retrans agreements? If not, should some, but not all MFNs be prohibited? If so, what kind of MFNs should be prohibited?
22. May a broadcaster insist on channel position or tier placement as a condition of carriage?
23. Should a broadcaster be required to submit a written retrans proposal to MVPDs at least 90 days before the existing retrans agreement expires?
24. May a broadcaster prohibit disclosure of the rates, terms, or conditions of a retrans agreement to a court of competent jurisdiction or to a state or federal government entity in connection with a formal retrans complaint or administrative proceeding?
25. May a broadcaster discriminate in rates among MVPDs in the same market absent a showing of a direct and legitimate economic benefit of the rate difference?
26. Should parties be prohibited from attempting to manufacture a retransmission consent dispute in the hope of encouraging government intervention?
27. Should networks be prohibited from having affiliation contracts that prohibit an affiliate from granting retrans consent outside its market where the station is “significantly viewed”?
28. Should a station that bundles its retrans negotiation with a co-owned cable/satellite network or program service be allowed to require an MVPD to guarantee that the station’s affiliated cable/satellite network or program service will reach a certain minimum percentage of the MVPD’s customers?
29. Should stations and MVPDs be required to negotiate retrans terms and conditions based on “actual local market conditions”?
30. Should the FCC’s good faith retransmission consent rules, and any modifications made to those rules, apply equally to both broadcasters and MVPDs?
31. How should an MVPD’s demand for online distribution rights, or a broadcaster’s refusal to grant those rights, be treated under the “totality of the circumstances” test?

The above questions appear to constitute a retrans “wish list” for cable, satellite, and telephone companies. Adverse rulings on these issues would have serious consequences for local television stations and, in turn, for the viewers they serve.

The deadline for filing comments is **December 1, 2015** and for filing reply comments is **December 31, 2015**.

NAB and the major network affiliate associations and others will be submitting comments. NAB is encouraging each individual station (or station group) to also file comments

with the Commission in view of the critical importance of this proceeding. Comments may address some or all of the issues listed above and, in addition, suggest specific negotiating practices used by MVPDs that should be defined by the FCC as a violation of the “good faith” negotiating requirement.

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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