



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

In this issue, link to information about

Developments: [Is Your OPIF Incomplete? The FCC Is Watching and Warning!](#)
[FCC Threatens License Revocation for Failure to Pay Regulatory Fees](#)
[FCC Denies “Good Faith” Retrans Negotiation Complaint Against MVPD](#)

Commission Sends Warnings to Stations Whose Online Public Inspection Files May Be Missing Documents

On December 6, FCC staff began sending emails to numerous radio stations that, according to the Commission’s records, have not yet uploaded all necessary documents to their OPIFs (Online Public Inspection Files). The emails that we have seen are targeted to specific stations, they identify the particular records/documents that appear to be missing from a station’s OPIF, and they warn of penalties if the stations fail to take quick action. Here’s an excerpt from one of the messages we’ve seen, in which the licensee purportedly has failed to upload all required Issues/Programs Lists:

“Dear FCC Licensee and Counsel –

Our records indicate that the above-referenced station(s) have not uploaded all required public inspection file material to the FCC’s online system. Your station(s) were required to complete the online public inspection file(s) by March 1, 2018. Our records indicate your station(s) have not uploaded the required Issues/Programs Lists and may be missing other information as well. You must act immediately to correct this

problem. Failure to comply with the online public inspection requirements may subject your station(s) to monetary penalties in the future and may have an impact on your next station license renewal. . . .

Please acknowledge receipt of this email by replying by email. Your response should include a date by which you will complete the upload of all required information. If you believe your online public inspection file is complete and up-to-date, please include that in your reply. If you have questions about the online public inspection file or if you require technical assistance, please reply with your request for help.”

The emails come on the heels of a Commission [Public Notice](#) released last month that reminded all stations that compliance with OPIF obligations is mandatory and made clear that any radio stations that had yet to transition to the OPIF needed to do so immediately. Between that Notice and the emails from FCC staff, it is clear that the Commission is looking closely at station OPIFs and is willing to take enforcement action. As a result, we strongly recommend that stations immediately take the time to review their OPIFs to ensure that their files are up-to-date and complete.

Station’s Failure to Pay Regulatory Fees Prompts FCC License Revocation Proceeding

Question: How important is the timely payment of annual FCC regulatory fees?

Answer: For a radio station, it is of life and death importance—the Commission recently initiated a *license revocation* proceeding against a station that has repeatedly failed to pay its annual regulatory fees.

In an [Order to Pay or Show Cause](#) (the “Order”), the Commission explains that the licensee of a radio station in Massachusetts has not paid its regulatory fees for each fiscal year from 2014 to the present, resulting in an outstanding balance of approximately **\$9,500**. Yes, an outstanding debt to the FCC of *less than ten thousand dollars* can result in a station being subjected to the “death penalty.”

The Order discusses the mandatory 25 percent late fee imposed on any reg fee that is “not paid in a timely manner,” as well statutory and regulatory interest, penalties, and administrative costs owed by the licensee. It also cites the FCC’s earlier attempts to collect on the debt, including multiple demand letters and notices sent to the broadcaster. But, given that those messages did not yield payment—or even a response from the broadcaster (which is likely part of the impetus here for the FCC using the “nuclear option”)—the FCC in its Order threatens to use its statutory and regulatory “authority to revoke authorizations for failure to pay regulatory fees (or related interest and penalties) in a timely fashion.”

The broadcaster now has sixty days from the date of the Order to either submit proof of payment or show cause why the payment is inapplicable or should be waived or deferred. One

would expect the Commission to proceed down the path of license revocation if the licensee continues to ignore the agency’s demands. The FCC’s action provides a salient reminder to broadcasters about the importance of timely regulatory compliance and responsiveness to Commission communications, inquiries, and demands—as well as the ultimate authority and power of the FCC to act when licensees fail to satisfy their obligations.

Commission’s Rejection of “Good Faith” Retrans Consent Complaint Offers Helpful Guidance for Broadcasters

Last month, the Commission released an [Opinion and Order](#) (“Order”) in which it rejected an Alaskan broadcaster’s “good faith” retransmission consent negotiation complaint brought against a multichannel video programming distributor (“MVPD”). The Order offers insight into the Commission’s interpretation of the good faith standard, which may be useful to broadcasters engaging in retrans negotiations.

Television broadcasters will recall that stations and MVPDs negotiating retransmission consent are required by statute to do so in “good faith.” The Commission utilizes a two-part test to determine whether the parties negotiate in “good faith”: the first part consists of an objective list of negotiation standards, the violation of any of which constitutes a *per se* breach of the duty to negotiate in good faith; the second part of the test considers the totality of the circumstances, and allows the Commission to find a violation of the duty to negotiate in good faith even if there is no allegation of a violation of the objective, *per se* standards.

In the case at issue, the broadcaster filed a complaint alleging that the MVPD violated two of the *per se* standards—(1) unreasonable delay in negotiations and (2) failing to respond to a retrans consent proposal from the other party—as well as the totality of the circumstances test. The parties’ retransmission consent agreement was slated to expire at the end of 2017, and the parties began negotiating for a renewal in November of that year. Prior to the agreement’s expiration, the broadcaster offered to extend the then-current agreement, and the MVPD declined, instead offering a new proposal with lower fees than what it had previously offered. The parties did not agree to new terms, the agreement expired, and the station’s signal was removed from the MVPD’s service. The parties continued email communications in January 2018, but then those communications ceased for several months. The parties resumed negotiating in the spring of 2018, but, in June, the MVPD stated that the parties were at an impasse and that it would not be making a counteroffer and was no longer interested in negotiating. That, in turn, led to the broadcaster’s filing of the complaint.

The Commission denied the broadcaster’s complaint. In its Order, the Commission reminded parties that, absent other factors, disagreement over rates, terms and conditions of retransmission consent—even “fundamental” disagreement—does not indicate a lack of good faith. The FCC also reminded parties that neither the Communications Act nor FCC rules require negotiating parties to actually reach an agreement.

In specifically addressing the facts before it, the Commission first found that the MVPD did not violate the *per se* rule prohibiting unreasonable delays in negotiations where (i) the

MVPD's alleged refusal to provide a counteroffer was preceded by emails from the MVPD containing and discussing prior counteroffers and requesting that the broadcaster clarify the parameters of the ongoing negotiations on issues like fees and other terms, and (ii) in response to the MVPD's emails, the broadcaster did not provide such clarification and instead insisted that the MVPD provide a further offer, arguing that FCC rules required one. The Commission found it was not unreasonable for the MVPD to withhold making another counteroffer in the absence of a reply from the broadcaster to the MVPD's reasonable inquiries. Additionally, the Order states that the MVPD did not unreasonably delay negotiations when it presented counteroffers that proposed lower fees than its previous offers, in light of evidence that the MVPD's member owners were opposed to programming rate increases. The Commission explained that "[n]othing in our good faith retransmission consent rules prohibits a party from adjusting its bargaining position during the course of the negotiation, as circumstances change."

Next, the Commission disagreed with the broadcaster's allegation that the MVPD violated the good faith rules by failing to respond to the broadcaster's proposals, including a failure to provide reasons for the rejection of one of the broadcaster's proposals. Here, in rejecting certain proposals, the MVPD had explained to the broadcaster that it believed its customers would be opposed to price increases. The broadcaster argued that the MVPD's rationale was self-serving and unconvincing, and that the MVPD should have known about such opposition at the outset of negotiations. The Commission rejected those arguments, reminding the broadcaster that while the rules require a party to provide an explanation for rejecting another party's offer, they do not require the rejecting party to justify its explanations with documentation or other evidence.

Finally, the Commission rejected the broadcaster's "totality of the circumstances" argument. The Order finds that the MVPD did not refuse to negotiate and, instead, engaged in multiple back-and-forth discussions in which it sought clarification of the broadcaster's proposal. According to the Commission, the dispute amounted to "nothing more than a commonplace disagreement over price like that encountered by numerous negotiating parties in the everyday business world." Significantly, though, the Commission urged the parties to return to the bargaining table and restart negotiations.

We think you'll agree that there are several nuggets of potentially helpful information in the Order. Still, each retransmission consent negotiation is distinct, and broadcasters would be well advised to consult with their communications counsel with any questions relating to the Commission's good faith rules.

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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