

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Telepak Networks, Inc. d/b/a C Spire Fiber)	MB Docket No. 19-159
)	CSR-8978-C
v.)	
)	
Gray Television Group, Inc.)	

**COMMENTS OF ACA CONNECTS —
AMERICA’S COMMUNICATIONS ASSOCIATION**



ACA Connects — America’s Communications Association (“ACA Connects”) hereby submits these Comments in response to the Retransmission Consent Complaint and Petition for Declaratory Ruling (“Complaint”) filed by Telepak Networks, Inc. (“C Spire”) against Gray Television Group, Inc. (“Gray”).¹ We offer these Comments

¹ Telepak Networks, Inc. d/b/a C Spire Fiber, Retransmission Consent Complaint and Petition for Declaratory Ruling, CSR-8978-C, MB Docket No. 19-159 (filed June 3, 2019). ACA Connects recognizes that the Retransmission Consent Complaint is a restricted proceeding in which *ex parte* presentations are prohibited. However, this communication is not an *ex parte* presentation because it is being served on all other parties to the proceeding. See 47 C.F.R. § 1.1202(b). Because Gray has yet to file its Answer, we will serve these Comments on Robert Folliard, Gray’s Vice President of Government Relations, who has appeared for Gray in other recent proceedings regarding market modifications. Upon reviewing Gray’s Answer, we will then provide courtesy copies to any other counsel appearing for Gray in this proceeding.

because C Spire's Complaint raises issues of broader significance to ACA Connects Members.

According to the Complaint, Gray has entered into a network-affiliation agreement with CBS that prohibits Gray from granting retransmission consent of a station to an in-state MVPD in an area where the station has long been significantly viewed and (thanks to a market modification) *is now located in the station's own local market*. Moreover, CBS will not waive that provision unless the MVPD also carries a duplicative, out-of-state station from further away. Gray, in other words, has essentially contracted away the station's ability to negotiate (or have another negotiate on its behalf) in good faith as required by the Commission's rules. This makes a mockery of the market-modification process that Congress promulgated to promote the availability of local, in-state news. And it violates the good-faith negotiation rules, which do not permit networks to preclude the negotiation of retransmission consent in their affiliates' own markets—regardless of what other role networks may legitimately play in retransmission consent negotiations.

C Spire is not the only cable operator to encounter these sorts of problems. Other ACA Connects Members have reported difficulties in obtaining retransmission consent to deliver local or significantly viewed stations to subscribers who would prefer them to more distant, out-of-state options. We believe the existing rules are clear on this point and that the Commission should simply grant C Spire's complaint. But if the

Commission sees ambiguity here that we do not, it should grant C Spire's petition for declaratory ruling.²

I. BY CONTRACTING AWAY ITS ABILITY TO NEGOTIATE WITH AN IN-MARKET MVPD, GRAY HAS UNDERMINED THE MARKET MODIFICATION PROCESS.

The facts in this case are particularly egregious: Diamondhead is a city in a Southeastern county of Mississippi which does not receive adequate in-state local programming because the county is included in a Designated Market Area ("DMA") with stations that are primarily located in Louisiana. Thus, viewers in this area receive New Orleans news, weather, and sports rather than in-state programming from Biloxi, which is closer to Diamondhead than the in-DMA New Orleans stations.

Diamondhead, in other words, lies in an "orphan county." Congress, of course, has long been concerned with orphan counties.³ In 2009, Congress directed the

² Although the issues raised in this case are already addressed by the current rules, ACA Connects has previously pointed its broader concerns with networks interfering in retransmission consent negotiations. See Comments of American Cable Association at 26-66, MB Docket No. 10-71 (filed May 27, 2011); Reply Comments of American Cable Association at 42-73, MB Docket No. 10-71 (filed June 27, 2011); Comments of American Cable Association at 60-71, MB Docket No. 15-216 (filed Dec. 1, 2015); Reply Comments of American Cable Association at 70-80, MB Docket No. 15-216 (filed Jan. 14, 2016).

³ See, e.g., Orphan County Telecommunications Rights Act, H.R. 4635, 113th Cong. (2014); Colorado News, Emergency, Weather, and Sports Act, S. 2375, 113th Cong. (2014); Four Corners Television Access Act, H.R. 4469, 112th Cong. (2012); Letting Our Communities Access Local Television Act, S. 3894, 111th Cong. (2010); Local Television Freedom Act, H.R. 3216, 111th Cong. (2009). See also, e.g., Letter from Doug Collins, Rep. Ga., & Bob Goodlatte, Rep. Va., to Tom Wheeler, Chairman, FCC, in Docket No. 14-8 (dated Aug. 18, 2014) (available via ECFS); Letter from Rand Paul, Sen. Ky., to Julius Genachowski, Chairman FCC in Docket No. 12-2 (dated Nov. 3, 2011) (available via ECFS); Letter from Ben Cardin, Sen. Md., & Barbara Mikulski, Sen. Md., to Julius Genachowski, Chairman, FCC, in Docket No. 11-9 (dated Mar. 4, 2011) (available via ECFS); Letter from Mark Udall, Sen. Colo., et al., to Julius Genachowski, Chairman, FCC, in Docket No. 11-9 (dated Feb. 16, 2011) (available via ECFS); Letter from Scott Tipton, Rep. Colo., to Julius Genachowski, Chairman, FCC, in Docket No. 10-238 (dated Feb. 16, 2011) (available via ECFS); Letter from Mike Ross, Rep. Ark., to Julius Genachowski, Chairman, FCC, in Docket No. 11-9 (dated Jan. 25, 2011) (available via ECFS); Letter from Michael B. Enzi, Sen. Wyo., et al., to

Commission to examine the issue,⁴ which it did.⁵ And in 2014, Congress directed the Commission to address this problem through the market-modification process, which permits the Commission to modify the market of a station to reflect the realities of which communities it serves.⁶

In the case of Diamondhead, the Commission has done so. In April, it found that “Hancock County, within which Diamondhead is located, is an orphan county with insufficient access to in-state programming.”⁷ It explained that “Diamondhead residents have been deprived of the ability to receive their preferred in-state Mississippi television broadcast stations and instead are relegated to local broadcast content that is oriented to Louisiana.”⁸ And it determined that WLOX—a station owned by Gray and which had long been “significantly viewed” in Hancock County—offered local programming that

Julius Genachowski, Chairman, FCC, in Docket No. 11-9 (dated Dec. 1, 2010) (available via ECFS); Letter from Russell Feingold, Sen. Wis., to Julius Genachowski, Chairman, FCC, in Docket No. 10-20 (dated July 28, 2010) (available via ECFS).

⁴ The Satellite Television Extension and Localism Act of 2010 (STELA), § 307 Pub. L. No. 111-175, 124 Stat. 1218 (2010). STELA was signed by President Barack Obama on May 27, 2010 (S. 3333, 111th Cong.).

⁵ *In-State Broad. Programming: Report to Cong. Pursuant to Section 304 of the Satellite Television Extension & Localism Act of 2010*, Report, 26 FCC Rcd. 11919 (2011).

⁶ The STELA Reauthorization Act of 2014 (STELAR), § 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (codified at 47 U.S.C. § 338(l)). The STELAR was enacted on December 4, 2014 (H. R. 5728, 113th Cong.). See *Telepak Networks, Inc.*, Memorandum Opinion and Order, DA No. 19-320, MB Docket No. 18-381, ¶ 6 (rel. Apr. 18, 2019) (“Market-Modification Order”) (“With the STELAR’s revisions to the market-modification process, Congress expressly intended to address orphan county situations like that of Hancock County, of which the community of Diamondhead is a part.”).

⁷ Market-Modification Order ¶ 7.

⁸ *Id.*

was most relevant to Diamondhead residents.⁹ As a result, the Commission declared that it was expanding the local market of WLOX to include Diamondhead.

The Commission predicted that its Market-Modification Order “would bring much desired in-state programming to residents of Diamondhead.”¹⁰ Unfortunately, the conduct of Gray and CBS has now threatened to undermine the clear intent of that order. Although C Spire—a cable operator in Diamondhead, Mississippi—has sought retransmission consent rights for WLOX’s broadcast stream that airs CBS programming, Gray is either unable or unwilling to engage in good-faith negotiations. According to Gray, its network-affiliation agreement with CBS prohibits it from granting new retransmission consent rights outside its DMA (Biloxi). Gray also says that regardless of the Market-Modification Order, Diamondhead is not part of WLOX’s DMA because a DMA is defined by The Nielson Company rather than the Commission. Although Gray asked CBS to waive this restriction, CBS will do so only if C Spire also agrees to carry the CBS affiliate in New Orleans. As a result, Gray has made C Spire a take-it-or-leave-it offer and claims that it cannot engage in negotiations.

Gray’s refusal to negotiate retransmission consent with a station within its local market plainly undermines the market-modification process. That process is supposed to “promote consumer access to in-state and other relevant television programming, particularly in ‘orphan counties’ whose residents have insufficient access to in-state

⁹ *Id.* ¶ 9, ¶ 12 n.40.

¹⁰ *Id.* ¶ 7.

programming.”¹¹ But if Gray’s actions are allowed to stand, the market-modification process would become toothless.

Unless the Commission intervenes, C Spire will be left with two choices—neither of which comports with the goals enumerated by Congress in establishing the market modification process. If it chooses to carry WLOX’s CBS stream, it will have to purchase and carry additional broadcast stations that its viewers do not need or even want. Because MVPDs typically pass on the costs of retransmission consent fees, this will result in higher prices for consumers, which is not in the public interest. On the other hand, if C Spire chooses not to pay for and carry the New Orleans affiliate, it will not be able to carry WLOX’s programming stream affiliated with CBS, including local news, sports, and weather. That will prevent Diamondhead residents from receiving the in-state, local programming that is most relevant to them.

That is plainly not the result the Commission intended when it issued its Market-Modification Order. To the extent networks impose similar restrictions on other broadcasters, moreover, Congress’s broader efforts to address orphan counties will prove in vain.

II. GRAY’S CONDUCT VIOLATES THE GOOD-FAITH RULES.

For years, both Congress and the Commission have required broadcasters and MVPDs to negotiate retransmission consent rights in good faith. The first and most basic command of these rules is that a broadcaster may not refuse to negotiate.¹² The

¹¹ Market-Modification Order ¶ 3.

¹² 47 C.F.R. § 76.65(b)(1)(i).

rules also prohibit a broadcaster from refusing “to put forth more than a single, unilateral proposal.”¹³ Yet Gray has done both things here.¹⁴ By contracting *not* to grant retransmission consent (or permit others from granting such consent on its behalf) in its local market, Gray has tied its own hands and made it impossible to comply with its obligations. If Gray’s conduct is allowed to stand, broadcasters could escape their obligation to negotiate in good faith by simply contracting the obligation away.

Moreover, Gray cannot defend its conduct by pointing to its affiliation agreement with CBS. First, the Commission has never suggested that a network-affiliation agreement can contain such broad restrictions. In its 2005 *Reciprocal Bargaining Order*, the Commission found that Section 76.65(b)(1)(iv) does not prevent a network from limiting an affiliate’s right to redistribute network programming *out of market*.¹⁵ But whatever the merits of that ruling, the conduct at issue here goes far beyond what the Commission considered there. In fact, in that proceeding, NBC conceded that “a station cannot refuse to negotiate with an MVPD located in the same DMA regarding retransmission consent.”¹⁶ But NBC argued that this rule did not prevent a station “from refusing to grant *out-of-market* retransmission consent with respect to programming for which it does not hold extra-territorial rights.”¹⁷ The Commission thus had no reason to

¹³ *Id.* § 76.65(b)(1)(iv).

¹⁴ As C Spire points out, this conduct also violates the “totality of the circumstances” test for determining good faith. 47 C.F.R. § 76.65(b)(2).

¹⁵ *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd. 10339, ¶ 33 (2005).

¹⁶ *Id.* ¶ 20.

¹⁷ *Id.* (emphasis added).

consider whether a broadcaster could contract away its obligation to grant retransmission consent *in its own local market*.

Second, the Commission’s conclusion with respect to *out of market* negotiations may no longer be valid in light of subsequent Congressional action. In the most recent satellite-legislation reauthorization, Congress prohibited stations from limiting the ability of MVPDs to import significantly viewed stations such as WLOX, which is significantly viewed in Hancock County.¹⁸ Thus, even if WLOX were “merely” significantly viewed in Diamondhead—and had not been determined to be local there—CBS very likely could not restrict its retransmission into that community.

Third, as NBC conceded, a station cannot refuse to negotiate (or designate someone else to negotiate) retransmission consent with an MVPD *within a station’s own market*—regardless of the terms of its network-affiliation agreement. The plain letter of Congress’s requirement to negotiate in good faith allows no such exception. And we can identify no public policy reason for the Commission to create one. The law is replete with provisions limiting the retransmission of network content in distant locations *in order to promote localism*.¹⁹ Indeed, broadcasters cite preserving localism as a

¹⁸ 47 U.S.C. § 325(b)(3)(C)(v) (requiring the Commission to “prohibit a television broadcast station from limiting the ability of a multichannel video programming distributor to carry into the local market (as defined in section 122(j) of title 17 [United States Code]) of such station a television signal that has been deemed significantly viewed, within the meaning of section 76.54 of title 47, Code of Federal Regulations, or any successor regulation, or any other television broadcast signal such distributor is authorized to carry under section 338, 339, 340, or 534 of this title, unless such stations are directly or indirectly under common de jure control permitted by the Commission”).

¹⁹ The law is riddled with provisions protecting *local* stations from duplicating *out-of-market* stations. See, e.g., 17 U.S.C. § 119 (permitting satellite distant signals only to households not receiving a same-market local signal over-the-air or by satellite); 47 C.F.R. § 76.92 *et seq.* (network nonduplication and syndicated exclusivity rules).

justification for everything from loosening the national ownership cap to classifying online providers as MVPDs.²⁰ Yet allowing Gray to prevent C Spire from carrying *the most local content* does just the opposite: it undermines localism. In negotiations between a station and an in-market MVPD, a network has little or no legitimate interest in restricting the retransmission of its content. In that context, the public's interest in receiving local programming plainly outweighs whatever interest the network may have in imposing geographical restrictions.

III. THE COMMISSION SHOULD, IF NECESSARY, CLARIFY THAT A BROADCASTER MAY NOT CONTRACTUALLY LIMIT ITS ABILITY TO NEGOTIATE WITH AN MVPD IN THE SAME LOCAL MARKET.

We believe the arrangement between Gray and CBS violates the Commission's good-faith negotiating rules. If, however, the Commission determines that ambiguity exists over the meaning of the rules, it should resolve that ambiguity as soon as possible. In that case, the Commission should issue a declaratory ruling clearly affirming that a broadcaster must negotiate retransmission consent with an in-market MVPD regardless of any restrictions in its network-affiliation agreement. ACA Connects understand that networks are imposing similar restrictions on other stations. This risks creating broader, industry-wide problems. The Commission should prevent such an outcome by resolving the issues raised by C Spire as quickly as possible.

²⁰ See, e.g., Comments of The ABC Television Affiliates Association *et al.* at iv, MB Docket No. 17-318. (filed Mar. 19, 2018) ("Such a tiered cap is necessary to ensure that the Commission's ownership rules continue to serve their intended purpose: to protect and promote localism by maintaining an appropriate balance of power between national networks and local, non-network-owned stations."); See Comments of The ABC Television Affiliates Association *et al.* at v, MB Docket No. 14-261 (filed Mar. 3, 2015) ("Indeed, core principles of localism should guide the Commission's application of the retransmission consent regime to broadcast-streaming OVDs, along with the Commission's program exclusivity enforcement scheme and the good faith negotiation requirement.").

Respectfully submitted,

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Certificate of Service

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