

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Commission's Rules to Promote) RM - 11752
Expanded Free Access to Local Broadcast)
Television Stations via Over-the-Air Reception,)
Internet Streaming, or Other Means)

COMMENTS OF PUBLIC KNOWLEDGE

John Bergmayer
Senior Staff Attorney
Foster Dobry
Law Clerk
PUBLIC KNOWLEDGE
1818 N Street NW, Ste. 410
Washington, D.C. 20036

August 6, 2015

TABLE OF CONTENTS

I. THE COMMISSION SHOULD INCORPORATE THE PUBLIC INTEREST OBLIGATIONS OF BROADCASTERS INTO ITS “GOOD FAITH” STANDARD FOR RETRANSMISSION CONSENT NEGOTIATIONS	4
II. THE COMMISSION SHOULD ADOPT MANDATORY ARBITRATION WHEN RETRANSMISSION CONSENT NEGOTIATIONS REACH AN IMPASSE, AND ALLOW FOR INTERIM CARRIAGE	9
a. The Commission Has the Authority to Compel Mandatory Final-Offer or “Baseball” Arbitration	10
b. Policy Underlying Final-Offer Arbitration Makes it the Ideal Choice for Retransmission Consent Negotiation Disputes	11
c. Commission Should Require Interim Carriage During Arbitration	12
III. COMMISSION SHOULD ADOPT ADDITIONAL <i>PER SE</i> BAD FAITH ACTS INTO THE GOOD FAITH STANDARD, AND SEEK TO FIX PERVASIVE PROBLEM OF ‘ORPHAN COUNTIES’ IN THE CURRENT VIDEO MARKETPLACE.....	13
a. Adopting Additional Per Se Bad Faith Acts into the Good Faith Standard Will Lead to Fairer Retransmission Consent Negotiations	13
b. The Commission Should Seek Reforms Regarding Fixing the Pervasive Issue of ‘Orphan Counties’	14
IV. CONCLUSION	14

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Commission’s Rules to Promote)	RM – 11752
Expanded Free Access to Local Broadcast)	
Television Stations via Over-the-Air Reception,)	
Internet Streaming, or Other Means)	

COMMENTS OF PUBLIC KNOWLEDGE

Public Knowledge (“PK”) believes that Mediacom has raised important issues that deserve careful consideration by the Commission. PK suggests that many of the outcomes Mediacom seeks to achieve could be achieved by incorporating over-the-air availability into the good faith standard, and through the Commission more comprehensively revisiting the recurring issue where viewers cannot access programming due to a lack of over-the-air availability or rules that prohibit an MVPD from carrying the signal its customers want to see.

Additionally, PK submits policy proposals relating to retransmission consent that would bring about a fairer result for MVPD customers: (1) The FCC should require parties to a retransmission consent dispute submit to mandatory final-offer arbitration should they reach an impasse, (2) require interim carriage during arbitration, and (3) treat the timing of a blackout during heavily televised events as *per se* bad faith.

I. THE COMMISSION SHOULD INCORPORATE THE PUBLIC INTEREST OBLIGATIONS OF BROADCASTERS INTO ITS “GOOD FAITH” STANDARD FOR RETRANSMISSION CONSENT NEGOTIATIONS

Mediacom’s petition for rulemaking proposes changing retransmission consent negotiation rules such that a broadcaster will not be permitted to terminate the agreement “if the station is not accessible via over-the-air reception or Internet streaming to at least 90 percent of the homes in its local market served by the broadcaster.”¹

Mediacom cites in support of its proposal the fact that the broadcasters have had an “infusion of billions of dollars in retransmission consent revenues” yet have “not sought in any material way to expand the free availability of local television stations.”² Furthermore, the broadcaster “has a strong incentive to decrease the number of viewers who can . . . [obtain] off-air reception” because the broadcasters neither receive retransmission monies nor gain leverage during negotiations when numerous options are available to off-air users.³ This perverse incentive goes against “broadcasters['] . . . obligation to provide free over-the-air television service that meets the needs and interests of the local communities.”⁴ Thus, according to Mediacom, to counteract this undesirable incentive the broadcaster should be prevented from implementing a blackout unless the broadcaster provides alternative means for 90 percent of the market to access the signal over-the-air.

Mediacom performs a valuable service by focusing the Commission’s attention on the public interest obligations of broadcasters. Broadcasters have heightened public interest obligations, among other reasons, because broadcasting is a publicly-subsidized

¹ *Petition for Rulemaking to Amend Commission’s Rules to Promote Expanded Free Access to Local Broadcast Television Stations via Over-the-Air Reception, Internet Streaming, or Other Means*, Mediacom Commc’n Corp., RM – 11752 at 1 (filed July 7, 2015).

² *Id.* at 3.

³ *Id.* at 3-4.

⁴ *Id.* at 2.

industry. As scholar J.H. Snider puts it, “The explanation for the continued prosperity of broadcasting has at least partly to do with government policy. Over the years, the government has enacted a number of policies to enhance the profitability and market value of local broadcast TV stations.”⁵ He classifies the various subsidies broadcasters are given into “those given directly via taxpayers,” such as spectrum access, and “those given indirectly via regulations imposed upon buyers, suppliers, and competitors,”⁶ such as the regulatory privileges like syndicated exclusivity, mentioned above, as well as copyright-specific special protections such as an exemption from paying public performance royalties to songwriters.

In terms of monetary value, broadcasters’ largest subsidies are spectrum rights. Broadcasters were first allocated prime spectrum “real estate”—frequencies that can cover wide areas with a minimum of broadcast towers, and that can pass easily through trees, buildings, and other obstructions—at a time when broadcasting was the height of communications technology, and before spectrum auctions became the typical way to allocate licenses to the exclusive use of public airwaves. Even though technology and public policy have since moved on, broadcasters have not. As economist Thomas Hazlett has explained, “Today, the social opportunity cost of using the TV Band for television broadcasting – 294 MHz of spectrum with excellent propagation characteristics for mobile voice and data networks, including 4G technologies – is conservatively estimated to exceed \$1 trillion (in present value).”^{7,8} But this trillion-dollar giveaway to the broadcast industry

⁵ J.H. Snider, *Speak Softly and Carry a Big Stick: How Broadcasters Exert Political Power* 37 (iUniverse 2005).

⁶ *Id.*

⁷ Comment of Thomas Hazlett, *A National Broadband Plan for Our Future*, GN Docket. No. 09-51, Federal Communications Commission (filed Dec. 18, 2009).

⁸ More conservatively, CTIA – The Wireless Association and the Consumer Electronics Association have concluded that the FCC’s broadcast incentive auctions, where only a few broadcasters would give up their

is no mere accident of history: In recent years, broadcasters have lobbied for, and won, yet more free spectrum. In the late 1990s, when new “digital” spectrum was set to be allocated to the broadcasting industry and proposals were floated to allocate it on an auction basis, the broadcasting industry responded with fury, demanding that it continue to be granted use of the public’s airwaves, free of charge.⁹ The president of NBC even called the idea that broadcasters (like other commercial spectrum users) would pay for the right to use the airwaves like “taxing the right to build churches.”¹⁰ The broadcasters got their way.

Gretchen Craft-Rubin offers a compelling narrative of this lobbying triumph:

No auction took place, even though some estimates of the spectrum’s value have ranged between \$ 20 and \$ 132 billion. No lottery took place, even though that process might permit those without broadcast licenses to gain access to the airwaves. No distribution to any new entrant took place, even though licensed competitive newcomers might rush in with bold new plans for digital services. Instead, after years of intense lobbying by the broadcast industry, Congress directed the FCC to limit eligibility for digital licenses to those who already held analog licenses or construction permits.

Congress and broadcasters justified this massive benefit, in substantial part, on the grounds that existing broadcasters deserved it because of their unique service to the American people, through the programming they provide. According to one of the rationalizations offered for the spectrum give-away, incumbent broadcasters are steeped in the tradition of public service. . .¹¹

As Anthony E. Varona has likewise observed:

[B]roadcasters . . . are quick to don the mantle of public trustees when it is politically expedient. For example, when then-Senator Robert Dole (R-Kan.) and Senator John McCain (R-Ariz.) demanded in 1996 that television broadcasters pay fair market value for new digital television (DTV) channels by means of competitive bidding (i.e., auctions), broadcasters launched a

licenses to more productive uses, could produce more than \$33 billion in revenue for the U.S. Treasury. See CTIA and CEA Study Finds Broadcast Incentive Auction Will Net U.S. Treasury More Than \$33 Billion, Feb. 15, 2011, <http://www.ctia.org/media/press/body.cfm/prid/2051>.

⁹ See Snider, *supra* note 5, at 346-47.

¹⁰ *Id.* at 347 (citing Ralph Kinney Bennett, *The Great Airwaves Giveaway*, Reader’s Digest, June 1996, page 150).

¹¹ Gretchen Craft Rubin, *Quid Pro Quo: What Broadcasters Really Want*, 66 Geo. Wash. L. Rev. 686, 694 (1997).

massive lobbying campaign claiming that their status as public trustees exempted them from paying for spectrum, unlike many other FCC digital licensees who have paid in excess of \$ 20 billion in spectrum fees since 1994.¹²

Donning the “public trustee” mantle, Edward Fritts, 19th President of the National Association of Broadcasters, once wrote that “[s]erving the public interest is more than a mandate handed down by Congress. It is a self-imposed credo by which successful broadcasters operate their stations. It is the touchstone of American broadcasting.”¹³ In embracing their public interest obligations, broadcasters echo the consistent refrain of policymakers, who have demanded that broadcasters serve the public interest from the outset.¹⁴ “A licensed broadcaster is ‘granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.’”¹⁵ This is why, “[i]n the Communications Act of 1934, Congress created a system of *free broadcast service . . .*”¹⁶ Congress has found that there is a “substantial government interest in promoting the continued availability of . . . free television programming, especially for viewers who are unable to afford other means of receiving programming.”¹⁷ The Supreme Court has likewise found that “preserving the benefits of *free, over-the-air local broadcast television*” is an important government

¹² Anthony E. Varona, *Changing Channels and Bridging Divides*, 6 Minn. J.L. Sci. & Tech 1, 7 (citing Hearings Before the Comm. on Commerce, Sci. and Transp., 103d Cong., 304-15 (1994) (statement of Edward Fritts)).

¹³ *Broadcasters and the Public Interest, in Public Interest and the Business of Broadcasting* 53 (Jon T. Powell & Wally Gair, eds.) (Quorum Books 1988).

¹⁴ “Under the present scheme, broadcast television and radio stations operate under licenses granted by the federal government through the Federal Communications Commission (the “Commission”). In return for the exclusive right to use the public property of the airwaves, broadcasters are required to serve the ‘public interest, convenience, and necessity’ in their operations and programming.” Rubin, *supra* note 11, 686

¹⁵ *CBS, Inc. v. F.C.C.*, 453 US 367, 396 (1981) (citing *United Church of Christ v. F.C.C.*, 123 U.S. App. D.C. 328, 337, 359 F. 2d 994, 1003 (1966)).

¹⁶ *Turner Broadcasting System, Inc. v. F.C.C.*, 512 US 622, 633 (1994) (citing Communications Act of 1934, § 307(b), 48 Stat. 1083, 47 U. S. C. § 307(b)) (emphasis added).

¹⁷ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 2(a)(12), 106 Stat. 1460, 1461 (codified as amended at 47 U.S.C. § 521 (2000)).

interest.¹⁸ Historically, broadcasters have agreed that the “free service” they provide is one of their defining characteristics. As Snider explains,

Broadcasters came to claim that they provided a ‘free’ service while their competitors provided a ‘pay’ service. As a consequence, broadcasters argued that they deserved an array of government subsidies (e.g., free spectrum) and regulatory privileges (e.g., free cable and satellite carriage of broadcast programming) because of this free service to the public. Looking back at 15 years of NAB’s legislative issue papers (talking points to use with legislators), I couldn’t find a single one that didn’t mention ‘free TV’ as a worthy goal for Congress to pursue. In broadcasters’ Congressional testimony and FCC comments, the term ‘free TV’ is endlessly repeated.¹⁹

NBC Universal, as a condition of its merger with Comcast, even agreed to maintain free access to over-the-air broadcast programming.²⁰

The “free TV” argument even has traction with critics of the “public interest” concept generally. Robert Corn-Revere is one such critic. In his essay *Regulation and the Social Compact*, Corn-Revere “rejects [the] proposition that the government is entitled to expect certain programming in the public interest as a condition of granting a license to the public airwaves.”²¹ But even he recognizes that broadcasters can be expected to provide “advertiser-supported, free TV.”²² He writes, “This seems like a pretty fair deal.

Broadcasters obtain a license to use the spectrum without charge in exchange for providing free universal service.”²³

¹⁸ *Turner Broadcasting System*, 520 U.S. at 189 (emphasis added).

¹⁹ Snider, *supra* note 5, at 308.

²⁰ Applications and Public Interest Statement of Comcast Corporation, General Electric Company, and NBC Universal, Inc., *In the Matter of Applications for Consent to the Transfer of Control of Licenses*, 26 FCC Rcd. 4238, ¶¶ 109, 134, 156-62 (2010).

²¹ Rubin, *supra* note 11, at 688 (citing Robert Corn-Revere, *Regulation and the Social Compact*, Rationales & Rationalization: Regulating the Electronic Media (Robert Corn-Revere ed., 1997)).

²² *Id.*

²³ Corn-Revere, *supra* note 21.

The Supreme Court has “acknowledged the public interest in making television broadcasting more available,”²⁴ and has given weight to “the public interest in increasing access to television programming.”²⁵ It would be perverse for the Commission to not include these considerations as part of its retransmission consent standard. PK suggests that one path for doing this may be, instead of adopting a blanket rule triggered by an availability threshold, as Mediacom suggests, to incorporate free, over-the-air, availability into the good faith standard that an arbitrator considers. A broadcast who would pull its signal from so many viewers, who have not other means of accessing it, is likely acting in bad faith.

II. THE COMMISSION SHOULD ADOPT MANDATORY ARBITRATION WHEN RETRANSMISSION CONSENT NEGOTIATIONS REACH AN IMPASSE, AND ALLOW FOR INTERIM CARRIAGE

A number of retransmission consent rules surrounding negotiations no longer serve the public interest— they serve the interest of networks and affiliate broadcasters. They should be reformed to promote blackout-free negotiation and prevent broadcasters from demanding high fees from MVPDs that viewers ultimately pay. The Commission has an obligation to “provide protection for consumers against monopoly rates”²⁶ The following suggestions further the Commission’s stated purpose and should be adopted.

Mandatory final-offer arbitration should be imposed in order to effectively resolve consent disputes, as final-offer arbitration compels parties to either (1) settle prior to the arbitration process or (2) make legitimate, *bona fide* offers. These two outcomes lead to quick, blackout-free resolution of consent disputes. Additionally, the Commission should

²⁴ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 US 417, 454 (1984).

²⁵ *Id.* at 425.

²⁶ S. REP. 102-92, 1, 1992 U.S.C.C.A.N. 1133, 1133.

require interim carriage in the event a consent dispute reaches arbitration to prevent consumers from being used as leverage during negotiation.

Final-offer or “baseball” arbitration requires that the arbitrator pick between two competing offers; the arbitrator may not split the difference.²⁷ The arbitrators’ limited discretion tends to diminish the “chilling effect” that plagues traditional arbitration,²⁸ and leads to parties making reasonable offers due to high risk associated with extreme offers.²⁹ This will prevent parties from employing brinksmanship tactics, as the more extreme party is likely to lose final-offer arbitration. Finally, PK notes that under 47 U.S.C. §325 – and other authority – the Commission has the power to enact such a requirement, and requests that the Commission undertake implementation of a final-offer arbitration scheme.

a. The Commission Has the Authority to Compel Mandatory Final-Offer or “Baseball” Arbitration

As PK has previously noted,³⁰ the Commission has strong authority on which to base implementation of a final-offer scheme. Section 325(b)(3)(A) expressly directs the Commission “to govern the exercise by television broadcast stations of the right to grant retransmission consent.”³¹ Furthermore, this general mandate is bolstered by the Commission’s obligation to adopt and enforce rules which “prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith.”³² Finally, both sections 303(r) and 4(i) of title 47 provide a supplemental source of legal

²⁷ Benjamin A. Tulis, *Final-Offer “Baseball” Arbitration: Contexts, Mechanics & Applications*, 20 Seton Hall J. Sports & Ent. L. 85, 88 (2010).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Letter of Public Knowledge, DISH Network, New America Foundation, DIRECTV, Charter Commc’ns, American Cable Ass’n, and Time Warner Cable to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (filed Dec. 11, 2013).

³¹ 47 U.S.C. §325 (b)(3)(A).

³² 47 U.S.C. §325 (b)(3)(C)(ii).

authority on which the Commission may rely.³³ Therefore, there is ample legal authority on which the Commission may depend upon in implementing a final-offer scheme.

b. Policy Underlying Final-Offer Arbitration Makes it the Ideal Choice for Retransmission Consent Negotiation Disputes

Final-offer arbitration is the ideal solution to consent disputes, as it produces *bona fide* offers and does not possess the same problems as traditional arbitration. Traditional arbitration is problematic because the arbitrator has discretion to split the difference and find a compromise,³⁴ and this “idea of a compromise can be seen as an obstacle to good-faith bargaining.”³⁵ Parties are “less willing to make concessions and more likely to take extreme positions so that the arbitral ‘compromise’ will be skewed in their favor.”³⁶ This has a “chilling effect” on the arbitration process.³⁷

Final-offer arbitration remedies this problem by removing the element of discretion from the equation, and thus the incentive to skew offers to the extremes. Taking an extreme position is risky because if the “final offer is too extreme, an arbitrator will [likely] choose” the less extreme offer.³⁸ This tends to “promote[] good faith bargaining and pre-hearing settlement,” as “winning means being more reasonable.”^{39,40} Thus, final-offer arbitration is “the key that unlocks the door to settlement” and quicker resolution of a dispute.⁴¹

³³ 47 U.S.C. §§4, 303.

³⁴ Tulis, *supra* note 27.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ For example, in 2015, 175 MLB players were eligible for arbitration, and 55 went to the arbitration deadline without a deal in place. Of these 55, 41 settled and 14 went to hearing. Of these 14 players won 6 and teams won 8 (57% win rate for teams). <http://www.sbnation.com/mlb/2015/1/16/7562075/salary-arbitration-tracker-mlb-2015>.

⁴¹ Tulis, *supra* note 27.

Final-offer arbitration benefits television consumers as it would decrease the length of a consent dispute and reduce the chance of a blackout. Neither party is likely to choose an extreme position as there is greater risk of losing. This will drive offers towards a reasonable midpoint and prevent either side from employing brinksmanship tactics. Thus consumers are not deprived of content for which the pay, and parties still get fair, but not exorbitant, compensation for their consent.

c. Commission Should Require Interim Carriage During Arbitration

Finally, during arbitration the Commission should require the parties to continue carriage under the terms of the previous agreement, in order to prevent viewers from being used as pawns during negotiations. The authority stated previously⁴² clearly permits the Commission to adopt interim carriage. Interim carriage would prevent broadcasters and MVPDs from using a blackout as leverage to better their position. Thus, interim carriage would increase fairness and ameliorate the retransmission consent process by preventing blackouts before the dispute is resolved via arbitration. Only if the arbitration process fails to resolve impasse would a blackout be permitted.

In summation, the Commission should require parties to a retransmission consent dispute enter into final-offer arbitration, and provide for interim carriage while the process works itself out. Final-offer arbitration offers the best balance to parties and consumers alike, and lacks the problems of other means of arbitration. The Commission has the authority to implement these changes and public policy is squarely on their side, therefore these changes should be implemented.

⁴² *Commission Has the Power to Compel Mandatory Final-Offer or "Baseball" Arbitration, supra* ¶ (a).

III. COMMISSION SHOULD ADOPT ADDITIONAL *PER SE* BAD FAITH ACTS INTO THE GOOD FAITH STANDARD, AND SEEK TO FIX PERVASIVE PROBLEM OF 'ORPHAN COUNTIES' IN THE CURRENT VIDEO MARKETPLACE

a. Adopting Additional Per Se Bad Faith Acts into the Good Faith Standard Will Lead to Fairer Retransmission Consent Negotiations

During retransmission negotiations, both sides are required to negotiate in good faith. As discussed above, it should be deemed *per se* bad faith if broadcaster terminates its signal in a market in which the broadcaster does not have a substantial over-the-air presence. Additionally, it should be deemed bad faith *per se* when either party threatens a blackout during certain high-profile events.

Timing the dispute to large events – such as the Super Bowl – only serves to ratchet up pressure on one party, leading to unfair negotiating power that does not reflect true value. Acts that lead to unfair negotiating power negatively impact consumers, as lower negotiating power begets higher fees which are passed on to the consumer. Also, a broadcaster who terminates signal in a market in which it has an insubstantial over-the-air presence should be deemed bad faith, as this also leads to unfair negotiating position. As Mediacom mentioned in its proposal for rulemaking,⁴³ broadcasters have little incentive to increase over-the-air capability as a greater percentage of over-the-air customers in the broadcaster's market *lowers* the broadcaster's leverage.⁴⁴ Therefore, if the broadcaster has not worked to increase its over-the-air capacity in a meaningful way, it should be deemed bad faith during negotiations, as this action only leads to unfair negotiating power.

In short, both these behaviors should be treated as acting in bad faith, as they lead to unfair negotiating position, and the Commission should enforce rules aimed at preventing

⁴³ Mediacom Petition for Rulemaking, *supra* note 1, at 3-4.

⁴⁴ *Id.*

them. The Commission should not shirk its duty to ensure parties act in good faith, which helps to prevent exorbitant fees. Enforcing the good faith standard matches the Cable Television Consumer Protection and Competition Act of 1992 purpose of “providing protection for consumers against monopoly rates.”⁴⁵ Thus, adverse timing of a blackout and failure to increase over-the-air capacity should be added as examples of *per se* bad faith.

b. The Commission Should Seek Reforms Regarding Fixing the Pervasive Issue of ‘Orphan Counties’

Mediacom’s petition highlights a pervasive problem with the current video marketplace: some customers are left without access to the broadcast content they want to see, and there is no lawful way for an MVPD to provide it to them. For example, in addition to viewers being left without access to a broadcast signal during a blackout, millions of users may live in areas where they cannot access the broadcast signals they want.⁴⁶ The Commission is already considering some reforms that could help address this problem.⁴⁷ PK suggests that these disparate issues suggest that the issue of broadcast carriage and availability deserves a hard look.

IV. CONCLUSION

Current retransmission consent rules serve the interest of networks and affiliate broadcasters and should be reformed to promote blackout-free negotiation and prevent broadcasters from demanding high fees from MVPDs that viewers ultimately pay. PK has submitted proposals which aim to resolve retransmission consent issues, and bring about fairer results in negotiations. Also, PK believes issues raised by Mediacom deserve close examination,

⁴⁵ S. REP. 102-92, 1, 1992 U.S.C.C.A.N. 1133, 1133.

⁴⁶ Keena Lipsitz and Jeremy M. Teigen, *Orphan Counties and the Effect of Irrelevant Information on Turnout in Statewide Races*, 27 Political Commc’n 178, 178 (2010).

⁴⁷ FCC Strengthens Retransmission Consent Rules, *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 3351 (2014).

and the outcomes they seek can be achieved via incorporation of over-the-air availability into the good faith standard. If these changes are implemented, consumers will benefit from a lack of infuriating blackouts, and MVPDs and broadcasters will benefit from quicker, cleaner, and fairer negotiations. Moreover, these changes would satisfy the Commission's duty to protect consumers and regulate retransmission consent in the public interest.

Respectfully submitted,

John Bergmayer
Senior Staff Attorney
PUBLIC KNOWLEDGE
1818 N Street NW, Ste. 410
Washington, D.C. 20036

August 6, 2015