

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

In the Matter of)
)
Implementation of Section 103 of the) MB Docket No. 15-216
STELA Reauthorization Act of 2014)
)
Totality of the Circumstances Test)

To: The Commission

Comments of Morgan Murphy Media

Morgan Murphy Media (“Morgan Murphy”)¹ submits these comments regarding the Federal Communications Commission’s (“Commission”) review of the “totality of the circumstances” test for evaluating whether parties are conducting negotiations for retransmission consent in good faith.² In its Notice of Proposed Rulemaking (“NPRM”), the Commission seeks comment on “potential updates to the totality of the circumstances test” pursuant to Section 103(c) of the STELA Reauthorization Act of 2014.³ Morgan Murphy provides its perspective as a small broadcasting company that serves communities in small-to-mid-sized markets and urges the Commission to avoid any changes to the retransmission consent rules that would undermine the availability of diverse sources of local broadcast programming or that would unduly interfere in private contractual negotiations.

¹ Evening Telegram Company d/b/a Morgan Murphy Media files these comments on behalf of the following direct or indirect subsidiaries: Television Wisconsin, Inc. (WISC-TV, Madison, WI), QueenB Radio Wisconsin, Inc. (WPVL[AM] & WPVL-FM, Platteville, WI; WGLR[AM] & WGLR-FM, Lancaster, WI; KIYX-FM, Sageville, IA), Spokane Television, Inc. (KXLY-TV, Spokane, WA); QueenB Radio, Inc. (KZZU-FM, Spokane, WA; KEZE-FM, Spokane, WA, KXLY[AM] & KXLY-FM, Spokane WA; KHTQ [FM], Hayden, ID; KVNI [AM], Coeur d’Alene, ID; KXLX[AM], Airway Heights, WA), Apple Valley Broadcasting, Inc. (KAPP[TV], Yakima, WA, and satellite station KVEW[TV], Kennewick, WA), and QueenB Television, LLC (WKBT[TV], La Crosse, WI).

² Notice of Proposed Rulemaking, *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, MB Docket No. 15-216 (rel. Sept. 2, 2015)(“NPRM”).

³ See Pub. L. No. 113-200, §103(c), 128 Stat. 2059 (2014).

Background

Free, over-the-air broadcasting remains a critical source of news, information and public service programming. For more than 70 years, Morgan Murphy has provided award-winning local news, programming and information to communities in small- and medium-sized markets in Washington, Wisconsin, Idaho and Iowa. The company's five television stations are affiliated with two of the largest national broadcast networks, but their focus is local. In 2015, these stations (one of which is a satellite station) have produced in the aggregate an average of more than 88 hours per week of local news and other local programming. Morgan Murphy takes great pride in its award-winning news operations, its programming and in its commitment to public service.⁴ Like other broadcasters, Morgan Murphy provides a critical voice and thorough, real-time coverage of weather emergencies and dissemination of emergency information.⁵

As Morgan Murphy has previously observed,⁶ true local broadcast programming responds to local viewers' needs and interests, but such programming does not pay for itself. Without fair compensation for the cost of producing such programming, the quality and quantity of such programming inevitably diminishes. As described below, broader market pressures in advertising markets and in network economics have eroded revenue for some broadcasters, and retransmission consent offers a marketplace-focused mechanism to enable such fair compensation for the costs of producing local programming.⁷ Here, as in 2011, Morgan Murphy

⁴ In 2015, such public service efforts included "Time for Kids" and "Coats for Kids" (WISC-TV); participation in food drives, the Hunger Task Force, the Compassion Alliance and Toys for Tots campaigns (WKBT); broadcasts for the Children's Miracle Network and Hoopfest (KXLY-TV); and a fundraiser for a military family and the "Season of Giving" food drive (KAPP/KVEW).

⁵ In 2015, Morgan Murphy stations reported on emergency events such as the La Crosse explosion (WKBT); historic windstorms, wildfires and record-breaking heat (KXLY-TV); local fires (KAPP/KVEW) and severe winter weather and Spring tornadoes (WISC-TV).

⁶ Comments of Morgan Murphy Media, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed May 27, 2011) ("Morgan Murphy 2011 Comments").

⁷ Fair compensation is possible through the combination of retransmission consent, network nonduplication and syndicated exclusivity. *See* Morgan Murphy 2011 Comments at 8-9.

wishes to bring its perspective as a broadcaster in small-to-medium-sized markets and, in this instance, to assist the Commission’s “robust examination” of practices that broadcasters and MVPDs use in negotiating for retransmission consent.

Discussion

I. THE CHANGING RETRANSMISSION CONSENT MARKETPLACE CONTINUES TO REFLECT THE IMPORTANCE OF FAIR COMPENSATION FOR THE RIGHTS TO RETRANSMIT LOCAL PROGRAMMING

In the NPRM, the Commission asks “[h]ow is the retransmission consent market currently functioning?”⁸ Morgan Murphy’s view is largely the same as it was in 2011, when Morgan Murphy observed that the regulatory structure of retransmission consent “promotes freedom of contract, and negotiations should be expected to involve significant give and take, even within the bounds of good faith negotiations.”⁹ Nevertheless, the Commission should be aware of changes in the marketplace that affect smaller broadcasters like Morgan Murphy.

a) Programming costs have increased

Programming costs have increased dramatically for Morgan Murphy in recent years. Viewers demand and expect high-quality, locally produced programming, and such programming is expensive to bring to the marketplace. Accordingly, fair compensation for retransmission consent remains a critical financial component for broadcasters.

For example, Morgan Murphy, like many broadcasters in small-to-mid-sized markets, face pressures on their advertising revenues. As the Commission recently stated, “[o]n-air advertising is by far the most significant source of revenue for television stations, although its

⁸ NPRM at ¶ 7.

⁹ Morgan Murphy 2011 Comments at 5.

share of overall broadcast television station industry revenues is declining.”¹⁰ Contributing factors include the proliferation of online advertising sources as well as the large amounts of low-priced spot inventory that certain Multichannel Video Programming Distributors (“MVPDs”) have in markets where Morgan Murphy operates. In fact, many of the same MVPDs with whom Morgan Murphy negotiates for retransmission consent fees also compete against Morgan Murphy for national and local advertising revenues.

Another point of economic pressure for broadcasters is the cost to provide valuable programming via multicast channels. Some Morgan Murphy stations transmit programming via multicast streams, and these streams often have higher ratings than other programming channels in an MVPD’s lineup. Nevertheless, despite the costs of creating this highly demanded programming, smaller broadcasters like Morgan Murphy often can only negotiate any payment for carriage of this valuable programming or carriage for the channel except as part of a retransmission agreement for a primary station. Even so, in Morgan Murphy’s experience, MVPDs often refuse to carry these channels and provide no specific information to support to Morgan Murphy to support this refusal.

Morgan Murphy’s financial relationships with national broadcast networks place additional pressures on station overhead.¹¹ Morgan Murphy stations carry valuable network news, entertainment and sports programming such as National Football League games and NCAA basketball. The combination of programming fees and sports fees for content rights can run into millions of dollars, and some types of content, standing alone, lose money for Morgan Murphy. Despite these financial pressures, Morgan Murphy recognizes the importance to our

¹⁰ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, MB Docket no. 14-16 at ¶197 (rel. Apr. 2, 2015) (“Sixteenth Report”). The Commission projected a 2% loss in broadcast television advertising revenue in 2013.

¹¹ See Sixteenth Report at ¶202 (“Network compensation to television broadcast stations has all but disappeared, and today, television stations instead commonly pay compensation to networks in order to air their programming.”)

viewers of network, sports and multicast network programming. In short, as programming costs for broadcasters have increased, these broadcasters should be fairly compensated by parties who seek to rebroadcast this valuable broadcast content.

b) *Consolidation among large incumbent MVPDs is increasing these companies' negotiating leverage*

MVPDs with more scale are better able to exploit their bargaining leverage to drive down prices to obtain programming.¹² While competition among MVPDs increased in the wake of the 1992 Cable Act, recent consolidation among larger incumbent MVPDs has reduced competition and has increased these incumbents' negotiating leverage. As the Commission has noted, the total number of cable systems has been declining.¹³ The Commission reports that as of year-end 2013, the three largest cable MVPDs at that time (Comcast, Time Warner Cable and Cox) had a total of 37.4 million video subscribers, while the two DBS MVPDs (DirecTV and DISH) had a total of 34.4 million subscribers.¹⁴ In other words, as of the end of 2013, five MVPDs served approximately 71% of all MVPD subscribers, even before considering the additional video subscribers in the recent AT&T/DirecTV transaction. Pending transactions involving large providers such as Cablevision, Charter Communications, Time Warner Cable and Bright House Networks,¹⁵ if approved, could further reduce competition for access to rights to retransmit local broadcast programming.

¹² Sixteenth Report at ¶61. (“SNL Kagan maintains that greater scale gives MVPDs more negotiating clout to control programming costs. According to SNL Kagan, the largest MVPDs have achieved lower programming costs.”)(footnotes omitted)

¹³ *Id.* at ¶70.

¹⁴ *Id.* at ¶133, Table 7.

¹⁵ Altice N.V. and Cablevision Systems Corporation have sought Commission approval of the transfer of control of Cablevision and certain subsidiaries to Altice, and Altice has an application pending before the Commission for the transfer of control of Cequel Corporation (d/b/a Suddenlink Communications). *Applications filed for the Transfer of Control of Cablevision Systems Corporation to Altice N.V., Pleading Cycle Established*, Public Notice, WC Docket No. 15-257 (rel. Nov. 5, 2015). In addition, Charter Communications, Time Warner Cable, and Advance/Newhouse Partnership, parent of Bright House Networks, are seeking approval of a merger of three of the 10 largest MVPDs. *Commission Opens Docket for Proposed Transfer of Control of Time Warner Cable, Inc. and Charter*

Such leverage extends beyond traditional retransmission of local broadcast programming on traditional MVPD facilities. In Morgan Murphy’s experience, some MVPDs have sought to tie additional rights to the grant of retransmission consent. For example, some MVPDs have demanded online distribution rights over the MVPD’s last-mile broadband facilities and have placed contractual pressure for Morgan Murphy to secure these rights and grant them to the MVPDs. These may not be rights that Morgan Murphy would necessarily need or want.

Issues of buying power, bargaining leverage and information asymmetries are inherent in each negotiation, and smaller station groups face unique challenges in negotiating with large incumbent MVPDs. Moreover, smaller station groups have more limited negotiating power than large station groups. Morgan Murphy expects that larger broadcasters often are able to obtain economic benefits in negotiating retransmission consent that are unavailable to small-to-mid-sized broadcasters. Consolidation among large incumbent MVPDs means that Morgan Murphy negotiates at a disadvantage when trying to obtain fair compensation for programming via retransmission consent. Despite these obstacles, Morgan Murphy has worked diligently to negotiate favorable deals to obtain fair compensation for these valuable programming rights.

II. IN INTERPRETING “GOOD FAITH” AND “TOTALITY OF THE CIRCUMSTANCES,” THE COMMISSION MUST AVOID UNDUE INTERFERENCE INTO PRIVATE CONTRACTUAL MATTERS

The NPRM asks whether certain negotiating practices “should factor into our assessment of whether a negotiating entity has breached its duty to negotiate in good faith under the totality of the circumstances test.”¹⁶ For example, the Commission seeks comment about network involvement in retransmission consent negotiations,¹⁷ about bundling of broadcast signals with

Communications, Inc. and Proposed Transfer of Control of Bright House Networks from Advance/Newhouse Partnership to Charter Communications, Inc., Public Notice, MB Docket 15-149 (rel. June 23, 2015).

¹⁶ NPRM at ¶16.

¹⁷ *Id.* at ¶14.

other broadcast stations or cable networks,¹⁸ and about whether “a number of other negotiating practices ... are inconsistent with the statutory duty to bargain in good faith.”¹⁹

In Morgan Murphy’s view, the “good faith” and “totality of the circumstances” legal standards²⁰ provide ample, flexible guidance to negotiating parties and that particularized disputes generally should be resolved on a case-by-case basis. In Morgan Murphy’s view, each negotiation is unique, and the Commission should only in very limited circumstances substitute its judgment for that of the parties involved in private negotiations for retransmission consent. This view comports with Congressional intent,²¹ and with the Commission’s understandable reluctance to intervene in private contractual arrangements.²² The good-faith requirements, coupled with the strong incentives that Broadcasters and MVPDs have to avoid service disruptions to their viewers, mean that the Commission rarely must become involved in individual disputes.

Nevertheless, the NPRM could be read to invite a dramatic reboot of the “totality of the circumstances” test based on marginal, difficult cases (like extended network outages) or on a

¹⁸ *Id.* at ¶15

¹⁹ NPRM at ¶16 (footnotes and citations omitted).

²⁰ The rules establish several standards that are deemed to violate the duty to negotiate retransmission consent agreements in good faith: 1) Refusal to negotiate; 2) Refusal to designate a representative with authority to make binding representations on retransmission consent; 3) Refusal to meet and negotiate at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations; 4) Refusal to put forth more than a single, unilateral proposal; 5) Failure to respond to the other party’s retransmission consent proposal; 6) Execution of an agreement with any party that prohibits entry into a retransmission agreement with any other broadcast station or MVPD; and 7) Refusal to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the MVPD and 8) joint negotiation by two or more local broadcast stations in the same local market. *See* 47 C.F.R. §76.65(b)(1).

²¹ *See, e.g., Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445, 5448-50 (2000) (“Good Faith Order”) (noting that Congress did not intend to subject retransmission consent to detailed substantive Commission oversight but rather intended that the Commission follow established precedent, such as in labor law, in implementing the good faith retransmission consent requirement) at ¶13, *recon. granted in part*, 16 FCC Rcd 15599 (2001).

²² *See, e.g., Northwest Broadcasting, L.P., Broadcasting Licenses, Limited Partnership, Mountain Licenses, L.P., Stainless Broadcasting, L.P., Eagle Creek Broadcasting of Laredo, LLC, Bristlecone Broadcasting LLC, and Blackhawk Broadcasting LLC v. DIRECTV, LLC*, Memorandum Opinion and Order (Med. Bur.), rel. Nov. 6, 2015 (finding that a disagreement between a broadcaster and an MVPD over the market price for retransmission consent does not amount to bad faith or require parties to disclose confidential information).

presumed degree of leverage supposedly held by the negotiating broadcaster. To Morgan Murphy, any corresponding changes to the retransmission consent rules risk overbreadth for smaller companies like Morgan Murphy. To the contrary, changes in the “totality of the circumstances” test or the “good faith” bargaining regulations, if any, should acknowledge the marketplace advantages enjoyed by larger incumbent MVPDs in negotiations.

The Commission should resist calls to overstretch the legal concepts of “good faith” and “totality of the circumstances” to unduly distort private negotiations. In Morgan Murphy’s view, there is little basis for adopting sweeping new interpretations of these standards. Unlike other competitors in the marketplace for video programming, Morgan Murphy seeks no special regulatory advantages to aid in its negotiations, despite demonstrated evidence that the market structure and scale advantages of large MVPDs give those entities disproportionate bargaining leverage over smaller companies like Morgan Murphy.

The Commission has acknowledged that it adjudicates relatively few complaints of good faith violations.²³ In Morgan Murphy’s experience, some MVPDs have significantly delayed commencing negotiations, often leaving insufficient time to complete negotiations and to denials of requests for extension. That said, there have been relatively few reported instances of extended outages – outages which cost broadcasters and MVPDs in terms of viewership, customer goodwill and advertising revenue. Based on Morgan Murphy’s experiences, broadcasters and MVPDs already have strong incentives to avoid contractual breakdowns that disrupt service to customers. While such disruptions may occasionally be necessary to resolve a contractual impasse, the broadcaster, the MVPD and the viewer all suffer in the case of prolonged disruptions. In Morgan Murphy’s case, the only MVPD with which it has ever failed

²³ *Amendment of the Commission’s Rules Related to Retransmission Consent*, 26 FCC Rcd 2718, 2724 (rel. Mar. 3, 2011).

to reach an agreement is DISH Network, but even during a retransmission consent dispute last summer, Morgan Murphy stations KXLY-TV (Spokane, WA) and KVEW-TV (Yakima, WA) agreed to allow temporary access to the stations on DISH Network to ensure that viewers would have access to emergency information regarding local wildfires.

There have been public allegations of parties flouting the good faith rules by manufacturing contractual impasses to support an advocacy position, and indeed, narrowly tailored rule changes may be justified to prohibit such blatant disregard for good-faith negotiations. That said, the Commission would be ill advised to use hard cases at the margins to justify undue intrusions into private contractual matters. The rules – either the current rules or rules that have only narrowly focused modifications or clarifications – can give the Commission the tools necessary to deter or remedy bad behavior and thereby protect the interests of consumers.

Simply put, Morgan Murphy has had a long history of negotiating in good faith for carriage and for fair compensation. Not only does the company have every incentive to conduct business in this manner, but doing so is ingrained in the corporate culture, irrespective of what the rules may require. To the extent that the NPRM suggests that the current rules give the company the incentive or the ability to engage in bad-faith negotiation tactics, Morgan Murphy soundly rejects that position.

Conclusion

For the above-stated reasons, Morgan Murphy urges the Commission to apply its existing standards regarding good faith negotiations and the totality of the circumstances test on a case-by-case basis. Each negotiation and each market is unique, and freedom of contract should be the governing principle, not stacking the deck in favor of parties who do not need government

intervention to negotiate private contractual matters. Parties already have strong incentives to avoid prolonged outages stemming from disputes over retransmission consent – outages that, as a practical matter, are uncommon. The Commission should reject calls to devote scarce Commission resources toward dramatically increasing its role in refereeing private contractual disputes. Instead, the Commission should recognize the role that small-to-mid-sized broadcasters play in delivering valuable local programming and should ensure that any policies with respect to the “good faith” and “totality of the circumstances” legal standards are applied narrowly but fairly.

Respectfully submitted,

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