

BEFORE THE
Federal Communications Commission

In the Matter of

Implementation of the Cable Television)	MB Docket No. 07-29
Consumer Protection and Competition)	
Act of 1992)	
)	
Development of Competition and Diversity)	
in Video Programming Distribution:)	
Section 628(c)(5) of the Communications)	
Act)	
)	
Sunset of Exclusive Contract Prohibition)	
)	
Review of the Commission's Program)	MB Docket No. 07-198
Access Rules and Examination of)	
Programming Tying Arrangements)	

To: Office of the Secretary
Attention: The Commission

**COMMENTS OF MCKINNON GROUP
AND VIRGINIA BROADCASTING CORP.**

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SUMMARY

The McKinnon Group and Virginia Broadcasting Corp., both small, family-owned television broadcasters, urge the Commission not to adopt any rule which would preclude broadcasters from requesting the carriage of other signals in retransmission consent negotiations.

Requests for the carriage of additional signals in retransmission consent negotiations cannot harm the public interest, because the “good faith bargaining” requirements that apply to retransmission consent negotiations preclude a broadcaster from insisting on any particular form of consideration in exchange for retransmission consent, including access to additional channel capacity. Indeed, permitting requests for carriage of additional signals in the retransmission consent context affirmatively *further*s the public interest, because it allows the parties to negotiate for and agree to what in many instances will be *the most economically efficient and desirable* form of consideration. To prohibit such requests would therefore have the effect of *increasing* the ultimate prices consumers pay for television service, not decreasing them.

In addition, requests for the carriage of additional *local broadcast signals* are particularly to be favored, because the public interest is affirmatively advanced by MVPD retransmission of local public interest broadcast services such as digital multicast, Class A and LPTV signals. Retransmission of such local broadcast public interest services clearly furthers the public interest by promoting both the digital transition and the wider dissemination and availability of important local public interest broadcast programming services. A rule precluding requests for the carriage of such local public interest broadcast services would be antithetical to the entire relevant framework of Title III of the Communications Act. It would also be contrary to the retransmission consent scheme adopted by Congress.

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These comments are submitted in response to the *Notice of Proposed Rulemaking* in this proceeding¹ (principally paragraphs 119-28 of the *NPRM*) by two small, family-owned television broadcasters, the McKinnon group and Virginia Broadcasting Corp. ("VBC")² to express their opposition to any rule which would preclude them from

¹ *Report and Order and Notice of Proposed Rulemaking* in MB Docket Nos. 07-29 & 07-198, FCC 07-169 (rel. Oct. 1, 2007) (¶¶114-37) ("*NPRM*").

² The McKinnon group owns and operates stations KIII(TV), Corpus Christie, Texas; KBMT(TV), Beaumont, Texas; and KUSI-TV, San Diego, California. VBC is the licensee of WVIR-TV, Charlottesville, Virginia.

seeking, in return for a grant of retransmission consent, the carriage of one or more additional television signals on cable, satellite and other MVPD systems.

I. STATEMENT OF INTEREST

The McKinnon group and VBC are among an increasingly “rare breed” in broadcasting – television broadcasters that are 100% family-owned. They believe it is of singular importance to their continued survival as small, family-owned television broadcasters that they be able to seek, in retransmission consent negotiations, the carriage of additional broadcast services which they provide – such as multicast DTV channel signals – that are not currently entitled to mandatory carriage on MVPD systems. Seeking carriage of such additional local broadcast signals in exchange for a grant of retransmission consent is important because it enables small broadcast television owners to achieve at least a few of the efficiencies of scale that are already enjoyed by their much larger corporate media competitors – and thus to continue to survive as small, family-owned broadcast companies in an increasingly consolidated media marketplace.

The McKinnon group and VBC are convinced that requests for additional broadcast signal carriage in retransmission consent negotiations pose no threat whatever to any public interest value and indeed help to further several important public interest ends. In addition, there is at minimum a serious question as to whether the Commission has legal authority to adopt a rule precluding broadcasters from making such requests for additional signal carriage in the context of retransmission consent negotiations. We therefore urge the Commission not to adopt any such rule.

II. RETRANSMISSION CONSENT REQUESTS FOR ADDITIONAL BROADCAST SIGNAL CARRIAGE DO NOT HARM THE PUBLIC INTEREST; THEY FURTHER IT

A. The “Good Faith Bargaining” Requirements that Apply to Retransmission Consent Negotiations Preclude Broadcasters from Harming the Public Interest by Requesting Carriage of Additional Signals in Return for Retransmission Consent

Permitting a television broadcaster to ask for the carriage of one or more additional signals during retransmission consent negotiations poses no risk of any harm to the public interest. The Commission itself has recognized the reason why this is so in the *NPRM* at paragraphs 121-23. Broadcasters engaged in retransmission consent negotiations are subject to legal constraints imposed by the “good faith bargaining” requirement of Section 325(b)(3)(C) of the Communications Act and implementing Commission regulations. Among these is the requirement that no broadcaster “put forth a single, unilateral proposal,” engage in “take it or leave it” bargaining or be “unyielding in its insistence upon carriage of a secondary programming service” in lieu of other possible forms of consideration offered in exchange for retransmission consent.³ Broadcasters are thus in a very different position in retransmission consent negotiations than are ordinary, unregulated commercial entities in ordinary, unregulated forms of commercial negotiations (such as those which occur between nonbroadcast program networks and MVPDs regarding carriage of nonbroadcast programming). Broadcasters are directly prohibited by law from insisting on the carriage of an additional program service. If an MVPD refuses a request for such carriage, broadcasters are required by law to consider in good faith other alternate forms of consideration.

³ See *NPRM* at ¶¶122-23, citing *inter alia*, 47 C.F.R. § 76.65, the *Reciprocal Bargaining Order*, 20 F.C.C. Rcd. 10339 (2005), and the *Good Faith Order*, 15 F.C.C. Rcd. 5445 (2000).

Given the existing legal constraints on retransmission consent bargaining, it is essentially impossible for broadcasters to harm the public interest by requesting carriage of additional signals in return for retransmission consent. If such a request were to exceed the reasonable value of the retransmission consent being offered, the MVPD (behaving rationally) would simply refuse the request and offer instead alternate consideration – be it carriage of a different type, cash or something else – that is more commensurate with the retransmission consent value offered by the broadcaster. The broadcaster is *legally prohibited* from rejecting such counter offers out of hand. Under the good faith bargaining rules, broadcasters cannot demand in return for retransmission consent either *clearly disproportionate value* or *value of a particular kind* – such as carriage and not cash.

As someone famously said, “nothing is instead of money.” MVPD channel capacity is no exception to this. Neither is retransmission consent. The right to occupy a particular channel on a particular MVPD system has a value that can always be expressed in dollars. So does the right to carry a particular broadcast signal on a particular MVPD system. Under the good faith bargaining rules, *it is not possible* for a broadcaster to force an MVPD to grant it disproportionate value in the form of channel capacity, because the broadcaster is not legally permitted to insist on that particular form of consideration. It must at the end of the day accept a reasonable offer of cash, if nothing else, in lieu of carriage – and if it should insist on an amount of cash consideration clearly disproportionate to the retransmission consent value it offers, it would thereby breach its good faith bargaining obligations.

In short, a broadcaster cannot in retransmission consent negotiations extract excess value from an MVPD in the form of carriage commitments – or any other type of consideration for that matter – due to the unique legal constraints that govern retransmission consent negotiations. The concern with “tying” arrangements in the anti-trust context simply has no application here, because the retransmission consent negotiations in question are already subject by law to what amounts to a “rule of reason,” and because the very concept of an undesirable “tying” arrangement – making an essential product or service available only if an undesired product or service is purchased as well – is already *legally prohibited* under a good faith bargaining regime in which a broadcaster *cannot insist* on the purchase of the “undesired” product. Ultimately, he can only insist on *a price*, and even then only if that price is not clearly unreasonable.

It follows that requests for additional carriage in the retransmission consent context do not present the threat of public interest harm posed by anti-competitive “tying” arrangements and *cannot* as a practical matter, under the good faith bargaining rules, cause any market dislocation or consequent public interest harm.

B. Requests for Additional Carriage in Retransmission Consent Negotiations Affirmatively Further Both Market Efficiencies and Other Important Public Interest Ends

1. Economic Efficiency Is Furthered

It follows also from the foregoing discussion that a prohibition of requests for additional carriage in retransmission consent negotiations would *materially harm* marketplace efficiencies and, thus, the public interest. This is so because such a prohibition would arbitrarily remove from retransmission consent negotiations one of the key potential forms of consideration that the parties to the negotiations may wish to

bargain for and agree to. Any such prohibition would place an utterly arbitrary and irrational government-imposed restraint on the parties' ability to reach the most economically and commercially efficient and desirable marketplace bargain.

If the broadcaster seeks carriage of another service in lieu of cash, it does so (acting rationally) because it expects the value of the carriage and access to channel capacity it requests to *exceed*, to *it*, the cash value it might anticipate obtaining in return for the retransmission consent it offers. And if the MVPD *accepts* a proposal for carriage in lieu of cash consideration, it does so (acting rationally) because the value of the carriage and channel capacity it is agreeing to provide is, to *it*, *less than* (or at least not greater than) the value of the retransmission consent it is obtaining in exchange. In other words, a retransmission consent bargain for carriage instead of cash will generally be *the most economically efficient bargain the parties could reach*. It will reward the broadcaster with a value it expects will exceed the cash value of the retransmission consent it is providing, and it will reward the MVPD with retransmission consent at a "price" it expects will be less (or at minimum not more) than the fair market value in cash of the retransmission consent it obtains (for were it otherwise, the rational MVPD would not agree to "overpay" (with carriage) for what it could have purchased in cash for less). Normally, both parties to such an agreement will correctly perceive that they are getting a "better deal" by such an "in lieu of cash" exchange. That is particularly true because "additional carriage for retransmission consent" agreements are often coupled with cross-promotional arrangements calculated to enhance synergistically the ultimate expected value of the non-monetary consideration both parties to the bargain are receiving.

Put simply, where additional carriage in return for retransmission consent is agreed to, such a bargain can generally be expected to be the most economically efficient and desirable bargain the parties are able to reach. To preclude such economic efficiency would be irrational and contrary to the public interest. Such a prohibition would have no economic benefits and would ultimately simply *increase* the prices consumers pay for television service, not reduce them.

2. Requests for Carriage of Other Local Broadcast Signals Also Further Localism and Related Important Public Interest Goals

Of particular concern to the McKinnon group and VBC is the idea that the Commission might adopt a rule which would preclude them from seeking the carriage of additional local broadcast signals – such as digital multicast broadcast signals, Class A or LPTV signals – in retransmission consent negotiations. Such carriage agreements benefit not only the parties concerned – the broadcaster and the MVPD provider – but also the viewing public as a whole, because access to local broadcast signals on MVPD systems is, *ipso facto*, in the public interest.

As the Commission is aware, local digital and digital multicast signals (and also, except in extremely limited circumstances, local Class A and local low power television station signals) currently enjoy no right to mandatory carriage on MVPD systems. Such local broadcast signals therefore cannot “require” MVPD carriage – they must obtain it by MVPD consent. The public interest value in obtaining MVPD carriage of these local broadcast signals is something we assume the Commission would not question.

As observed in the *NPRM*, the Commission has previously noted that broadcasters’ use of retransmission consent negotiations to obtain carriage of digital broadcast signals helps to “further[] the digital transition by increasing the number of

households with access to digital signals. If broadcasters are limited in their ability to accept in-kind compensation, they should be granted full carriage rights for digital signals, including all free over-the-air digital multicast streams.”⁴ Although the Commission has determined to date not to mandate “dual” carriage or MVPD carriage of multicast digital signals, the very fact that the Commission has carefully considered *requiring by law* the carriage of such digital signals is a clear indication that *voluntary agreements* to carry digital broadcast signals do serve the public interest in important ways. One way, as the Commission has noted, is by furthering the digital transition. Another is by creating wider public access to important local broadcast services not otherwise available to many MVPD subscribers.

In all but the largest television markets, newer network services – such as CW or MyTV – may be available *only* on a digital multicast channel (or via a Class A or LPTV station).⁵ The same is true for many foreign language, religious and other “niche” broadcast programming networks. Indeed, even in some markets of moderate size, and frequently in smaller television markets, one or more *major* network services may be available only via digital multicasts or a Class A or LPTV station. In addition, broadcasters are increasingly using their digital multicast capacity to offer new and innovative public interest programming services, such as (to cite a common example) an all-day local weather channel. MVPD carriage of these local broadcast services clearly serves the public interest for the simple reason that local broadcast services such as these

⁴ *NPRM* at ¶124 n.17, quoting *Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (September 8, 2005).

⁵ In the Charlottesville, Virginia market, for example, VBC provides the only local broadcast access to the CW network via one of its digital multicast signals.

are legally required under the Communications Act to serve – and do serve – the public interest.

Public access to local public interest broadcast services is, *ipso facto*, in the public interest. To provide such public access to local public interest broadcast service by private agreement *without government mandate or intervention* is, if anything, an additional blessing. Were the Commission to adopt a rule *prohibiting* broadcasters from seeking private agreements for voluntary MVPD carriage of local broadcast signals *that serve the public interest*, the action would contradict every relevant element of the Commission's charter under the Communications Act.⁶

MVPD carriage of local broadcast signals serves the public interest in a host of ways, including promoting the digital transition, furthering localism and increasing public access to local public service programming. To seek local broadcast signal carriage in retransmission consent negotiations is merely to try to advance these public interest ends. To prohibit a request to advance these public interest ends would not advance the public interest. The Commission therefore should not adopt a rule that would preclude broadcasters from seeking the carriage of other local broadcast signals in retransmission consent negotiations.

⁶ The same is true of retransmission consent bargains for MVPD carriage of Class A and LPTV station signals. The Commission has often recognized the important contributions to localism and local programming diversity which Class A and LPTV stations provide. That such stations operate in and serve the public interest is clear. Indeed, Class A stations are required by law to meet all full power television public service requirements in order to maintain their Class A status. LPTV broadcast stations are also subject to public interest obligations imposed by law.

III. A RULE PROHIBITING BROADCASTERS FROM SEEKING CARRIAGE OF ADDITIONAL SIGNALS IN RETRANSMISSION CONSENT NEGOTIATIONS WOULD BE OF DUBIOUS LEGALITY

In the *NPRM* (at ¶126), the Commission properly questioned whether it has jurisdiction to adopt a rule that would “preclude tying arrangements by broadcasters, without modification of the retransmission consent regime by Congress.” As the Commission noted, Congress appears expressly to have *approved* broadcaster requests for carriage of additional signals in adopting the retransmission consent regime. And as the Commission further noted, the Commission itself has also repeatedly *approved* such requests in its own past statements and decisions. *NPRM* at ¶127. This is no wonder. Such requests are in the public interest.

The Commission quite probably *is* precluded by statute from adopting a prohibition of so-called “tying arrangements” in retransmission consent agreements. But beyond this, such a prohibition would be absolutely wrong from a public interests standpoint – and thus of dubious legality for that reason also. A very unusual record would have to be compiled to support the counter-intuitive proposition that a mere request (for by law it could not be a demand) to carry a local broadcast public interest service is somehow contrary to the public interest. Such an unlikely record is, we think, unlikely to result from this proceeding.

IV. CONCLUSION

The issues raised in the *NPRM* apparently result primarily from concerns expressed by small cable operators. As small, family-owned broadcasters ourselves, we can sympathize with the difficulties other small media companies in a different but related field may experience. It is not easy to be small when most of the world is large.

But like (we suspect) most broadcasters, the retransmission consent dealings we have had have been largely with the major cable MSOs and the two national DBS satellite services. We can assure the Commission that those large MVPD companies are in no way nonplussed by retransmission consent requests for the carriage of additional signals. Nor could such mere requests for carriage of local broadcast signals possibly constitute “unfair leverage” over such cable and DBS giants – who most certainly know how to say “no” to a carriage request they think contrary to their own interests.

Retransmission consent agreements for the carriage of additional local broadcast signals are reached by mutual consent within the parameters and restrictions of the “good faith bargaining” retransmission consent scheme. As a result, they can be presumed to serve the interests of the parties to the agreements better than any other agreement which might have been reached. They also clearly serve the public interest by bringing local public interest broadcast signals to more MVPD viewers. A rule prohibiting such agreements would in all likelihood be illegal – and it would certainly be wrong.

For the foregoing reasons, we urge the Commission not to adopt any rule which would prevent television broadcasters from seeking the carriage of additional program services in retransmission consent negotiations.

Respectfully submitted

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