

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

In the Matter of)
)
Petition for Rulemaking to Amend the) MB Docket No. 10-71
Commission's Rules Governing)
Retransmission Consent)

To: The Commission
Attn: Secretary

COMMENTS OF NEXSTAR BROADCASTING, INC.

Elizabeth A. Hammond
Nexstar Broadcasting, Inc.
Vice President & General Counsel
5215 North O'Connor Blvd.
Suite 1400
Irving, TX 75039

TABLE OF CONTENTS

SUMMARY iii

I. General Background.....2

II. The Commission Has No Authority to Grant the Relief Requested4

III. Consumers Are Not Harmed By the Retransmission Consent Process.....8

IV. Conclusion11

SUMMARY

Fourteen entities (“Petitioners”) submitted a Petition for Rulemaking seeking to modify the retransmission consent negotiating process such that, in the event of a dispute, local broadcasters would be required to grant interim carriage of their signals and submit to binding arbitration to resolve any disputes. However, the Commission does not have the authority to implement either proposed “fix.”

Section 325(b)(1) of the Communications Act of 1934, as amended, states that “[n]o cable system or other multichannel video programming distributor [“MVPD”] shall retransmit the signal of the broadcasting station, or any part thereof, except with the express authority of the originating station.” As the Commission has previously acknowledged, this language clearly prohibits an MVPD from retransmitting a broadcaster’s signal without the express consent of the broadcaster, and the Commission has no latitude to adopt regulations to the contrary. Nor does the Commission have authority to impose binding arbitration on broadcasters and MVPDs. Section 325(b) does not permit the Commission to interfere in the retransmission consent marketplace; rather Commission participation is limited only to ensuring the parties are negotiating in good faith.

Petitioners claim their proposed reforms are necessary in order to prevent consumers from being deprived of programming and from skyrocketing MVPD fees. Notwithstanding Petitioners’ claims to the contrary, no consumer ever is deprived of local station programming because local broadcast stations are always available to the consumer 100 percent free, over the air. Further, broadcast retransmission consent fees are a *de minimis* part of MVPD programming expenses. Indeed, MVPDs are paying most broadcasters less than \$10 per year per subscriber in retransmission consent fees.

While MVPDs may be seeking a return to the days when they were able to dictate carriage terms to broadcasters, the retransmission consent regulations are working as Congress intended, providing broadcasters with the opportunity to achieve fair compensation for MVPDs' use of local television stations' signals. Therefore, Nexstar urges the Commission to ignore Petitioners' request to fix a process that is not broken, and dismiss the Petition.

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

In the Matter of)
)
Petition for Rulemaking to Amend the) MB Docket No. 10-71
Commission’s Rules Governing)
Retransmission Consent)

To: The Commission
Attn: Secretary

COMMENTS OF NEXSTAR BROADCASTING, INC.

On March 9, 2010, fourteen entities (“Petitioners”) submitted a joint Petition for Rulemaking seeking modification of the Commission’s retransmission consent rules to provide multichannel video programming distributors (“MVPDs”) with the ability to return to a bygone era that permitted cable operators to carry broadcast signals without broadcaster consent.¹ Petitioners premise their request on the misguided argument that the Commission’s retransmission consent regulations are outdated and cause consumer harm. However, their real complaint appears to be that broadcasters are seeking fair and reasonable cash compensation in exchange for consent to the carriage of local broadcast television stations’ signals. Petitioners do not want to pay such fees.

¹ See *Petition for Rulemaking* filed by Public Knowledge, Time Warner Cable Inc., DIRECTV, Inc., Verizon, DISH Network LLC, Cablevision Systems Corp., Charter Communications, Inc., Mediacom Communications Corp., American Cable Association, Bright House Networks, LLC, New America Foundation, Insight Communications Company, Inc., OPASTCO and Suddenlink Communications (“Petition”).

On March 19, the Commission issued a Public Notice seeking comment on the Petition.² Nexstar Broadcasting, Inc. (“Nexstar”), the licensee of 33 full-power television stations, has negotiated hundreds of retransmission consent agreements with MVPDs over the past four years and respectfully disagrees with the Petitioners. The retransmission consent regulations are working as Congress intended, providing broadcasters with the opportunity to achieve fair compensation for MVPDs’ use of local television stations’ signals. Nexstar submits that the Petition is simply another attempt by MVPDs to alter or repeal a process that is not broken, solely for their own business purposes. Accordingly, Nexstar urges the Commission to dismiss the Petition without initiating a proceeding to modify the current retransmission consent rules.

I. General Background.

Local television stations spend millions of dollars annually to provide current and up-to-date news and other local programming information with respect to their local communities, including breaking news, severe weather alerts, school closing notices, and AMBER alerts. Stations also participate in and sponsor numerous local community activities. Retransmission consent revenues defray a small percentage of all these expenses.

Prior to 1992, no regulations governed cable operators’ use of broadcasters’ signals, and cable operators were appropriating the signals for their own use without consent of, or compensation to, broadcasters, causing Congressional concern about broadcasters’ abilities to serve their communities. Therefore, Congress enacted Section 325 of the Communications Act, which removed a cable operator’s unfettered right to appropriate a broadcaster’s signal without

² DA 10-474. By subsequent Order (DA 10-594), released April 2, 2010, the Commission extended the comment date to May 18, 2010.

consent and gave broadcasters the right to negotiate fair compensation for a cable operator's carriage of a station's programming ("retransmission consent").³

As the cable and broadcast industries moved into this new era, cable owners announced that under no circumstances would they pay broadcasters for the rights to carry broadcast signals.⁴ Accordingly, most local broadcasters, including Nexstar, made must carry elections to ensure carriage of their stations by the cable operators. Those that made retransmission consent elections generally ended up granting carriage rights without associated compensation in order to ensure that their stations were carried by the local monopoly cable companies.⁵

In 1999, direct broadcast satellite ("DBS") providers were granted the right to carry local broadcast stations on their systems, and stations were granted the same option to assert either must carry or retransmission consent carriage rights for such DBS carriage.⁶ In addition, the Telecommunications Act of 1996 authorized the Commission to permit new companies to overbuild local cable providers and provide additional competition in the MVPD market.⁷ As overbuilders entered the MVPD market, local stations were able to obtain modest fees for carriage of their stations on such systems. Accordingly, local stations finally were able to

³ See *The Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "Cable Act"). Through companion legislation, broadcasters were given the alternative to require cable systems to carry their stations on an uncompensated basis ("must carry").

⁴ *The Media Business; Cable Showdown Looms Over Network Payments*, Elizabeth Kolbert, *The New York Times*, <http://www.nytimes.com/1993/06/21/business/the-media-business-cable-showdown-looms-over-network-payments.html?pagewanted=all>, June 21, 1993 (last visited May 13, 2010).

⁵ During this period the networks extracted value for their owned-and-operated stations primarily by securing carriage of, or increased carriage fees for, their co-owned cable networks. Because the history with respect to carriage issues between MVPDs and networks is different than the history between MVPDs and companies such as Nexstar, Nexstar's comments herein do not address any issues raised in the Petition with respect to network retransmission consent practices.

⁶ *Satellite Home Viewer Improvement Act*, Pub. L. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-54 (1999) ("SHVIA").

⁷ Pub. L. No. 104-104, 110 Stat. 56. See also 47 U.S.C. §§651-653.

effectively utilize their retransmission consent option and obtain some compensation for carriage of their signals.

With the changing MVPD landscape, Nexstar made retransmission consent elections with respect to carriage of its stations on cable systems for the 2006-2008 election cycle and, for the first time, sought cash compensation fees from cable operators. Nexstar has been able to negotiate carriage agreements with MVPDs that provided for modest fees for the 2006-2008 and 2009-2011 cycles. Thus, as a result of MVPD competition from DBS providers and overbuilt terrestrial MVPDs, the rules the Commission adopted pursuant to the Cable Act finally are operating as intended to permit broadcasters to obtain a reasonable and fair marketplace value from MVPDs for the carriage of broadcast stations' signals.

II. The Commission Has No Authority to Grant the Relief Requested.

The Petition is the just the latest salvo in MVPDs', and particularly cable operators', continuing objection to paying cash (any cash) compensation for the right to retransmit broadcast signals. Petitioners now claim that MVPDs are being placed in the position of paying spiraling carriage fees or dropping local signals and, therefore, that they need Commission assistance to restore their prior unilateral ability to carry the signals of local stations without paying marketplace-determined compensation and without broadcaster consent.

Petitioners can not avoid the fact that both Congress and the Commission have determined that disputes over the parties' valuations of broadcast signals do not give rise to a violation of the regulations requiring broadcasters to negotiate for the carriage of their signals in good faith.⁸ Petitioners point to just three (out of many hundreds of) recent retransmission

⁸ 47 U.S.C. §325(b) states that "it shall not be a failure to negotiate in good faith . . . [to] enter into retransmission consent agreements containing different terms and conditions, including price terms..." See also *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.: Emergency Retransmission*

consent negotiations in which MVPDs may have or briefly did lose their carriage rights as evidence that the retransmission consent marketplace is in need of Commission intervention in the negotiating process itself. But the fact that some broadcasters exercised their Congressionally-granted rights to withhold carriage of their signals for a period is not evidence of a fundamental failure of the retransmission consent regime or harm to consumers.⁹ Petitioners further claim that only by Commission evisceration of the current regulations through the imposition of requirements for interim carriage and binding arbitration will consumers be protected from broadcasters' alleged "unreasonable price demands and hold-up threats" in seeking to obtain a fair, marketplace fee for their signals.¹⁰ Unfortunately for Petitioners, the Commission has no authority to require broadcasters to permit carriage of their signals on an interim basis, nor does it have authority to impose binding arbitration as a means of dispute resolution.

MVPDs argued for the imposition of interim carriage requirements on broadcasters at the time the Commission adopted the SHVIA regulations on good faith negotiating standards.¹¹ However, the Commission recognized that the Communications Act unambiguously forecloses the Commission's authority to mandate interim carriage. Section 325(b)(1) states that "[n]o cable system or other multichannel video programming distributor shall retransmit the signal of the broadcasting station, or any part thereof, *except . . . with the express authority of the*

Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith, Memorandum Opinion and Order, 22 FCC Rcd 284 (Media Bur. 2007), at ¶24.

⁹ Nexstar addresses Petitioners' purported claim of consumer harm in the next section.

¹⁰ Petition at p. 16.

¹¹ *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5475, *recon, granted in part*, 16 FCC Rcd 15599 (2001) ("SVHIA Order"), at ¶59.

originating station . . .”¹² As the Commission acknowledged, this language clearly prohibits an MVPD from retransmitting a broadcaster’s signal without the express consent of the broadcaster, and the Commission has no latitude to adopt regulations permitting retransmission where the broadcaster has not consented.¹³ Because there have been no Congressional changes to Section 325 that would permit the Commission to grant interim carriage, Petitioners request must be denied.¹⁴

With respect to Petitioners’ demand that the Commission require broadcasters to engage in binding arbitration to set pricing for carriage of a station’s signal, here too the Commission has no authority to impose the requested relief. In enacting the Cable Act and SHVIA, Congress granted the Commission only limited oversight over the retransmission consent marketplace. The Commission recognized this fact in the *SHVIA Order*, stating that “when Congress first applied retransmission consent to MVPDs in 1992, it stated that ‘it is the Committee’s intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee’s intention in this bill to dictate the outcome of the ensuing marketplace negotiations’ [and, therefore,] the Commission concluded . . . that Congress did not intend that the Commission should intrude in the negotiation of retransmission consent.”¹⁵ The Commission further noted that Congress had considered and explicitly rejected a more comprehensive regulatory scheme and that “where Congress expressly considers and rejects [an] approach, the rules of statutory construction do not favor interpreting a subsequent statutory provision to

¹² 47 U.S.C. §325(b)(1) (emphasis added by the Commission in the *SHVIA Order*).

¹³ *SHVIA Order* at ¶60.

¹⁴ On May 13, 2010, Congress passed the Satellite Television Extension and Localism Act without any change to the broadcasters’ rights granted under Section 325.

¹⁵ *SHVIA Order* at ¶¶ 13-14 (internal citations omitted).

require the rejected alternative.”¹⁶ Accordingly, the Commission determined that nothing in SHVIA granted it authority “to impose a complex and intrusive regulatory regime” on retransmission consent negotiations.¹⁷ And consistent with that determination, the Commission stated that, “[p]rovided that the parties negotiate in good faith in accordance with the Commission’s standards, failure to reach agreement does not violate Section 325(b)(3)(C).”¹⁸ Accordingly, it is not the government’s place to determine marketplace values and there is no basis for the Commission to order binding arbitration when the parties have reached a good faith dispute over the value of a station’s signal.

In addition, it is not necessary for the Commission to adopt regulations implementing interim carriage or mandatory arbitration because, notwithstanding Petitioners’ assertions to the contrary, consumers are never deprived of a local broadcast station’s signal during those rare retransmission disputes where the broadcaster temporarily denies a MVPD the right to carry its signal. Rather, consumers can still receive the signal over-the-air, through another provider or via the Internet.¹⁹ Furthermore, even if the Commission did have such authority, adopting an interim carriage right for MVPDs or mandating binding arbitration, or both, would raise multiple issues that the Commission would need to address. For example, MVPDs would have no reason ever to negotiate in good faith knowing that their stonewalling would lead to arbitration; MVPDs

¹⁶ *Id.*

¹⁷ *Id.* at ¶23.

¹⁸ *Id.* at ¶40.

¹⁹ With respect to Petitioners’ comments that consumers are surprised by service interruptions, Nexstar does not object to a regulation that would require it to begin notifying consumers of the negotiations and possibility of a service interruption at an earlier time. However, it has been Nexstar’s experience that MVPDs object to providing such advance notice because it may cause consumers to consider alternatives to the MVPD in question.

would be incented to drag negotiations out as long as possible in order to benefit from extension of the prior negotiated carriage fees for as long as possible; the Commission would be involved in nearly every carriage negotiation; and consumers would be subject to more, not fewer, disruptions as broadcasters declare official ends to negotiation in order to terminate interim carriage rights.

Petitioners point to the very few recent carriage disputes between broadcasters and MVPDs where station carriage rights were removed or threatened as evidence that the retransmission consent process is outdated and causing consumer harm. However, over the course of nearly twenty years there have been only a handful of disputes that have resulted in an MVPD losing its right to retransmit local signals. The retransmission consent system is working as Congress intended and, as the Commission hoped, with impasses occurring infrequently. Therefore, it is unnecessary for the Commission to expend its limited resources in attempting to adopt regulations for which it has no authority.

III. Consumers Are Not Harmed By the Retransmission Consent Process.

Retransmission consent negotiations are the market through which the relative benefits to the broadcaster and MVPD are established. MVPDs cannot argue harm to themselves (and their own profits). Therefore, Petitioners cast their objections to paying retransmission consent fees as a concern for consumers. Throughout their Petition, Petitioners claim to be looking out for consumer welfare by objecting to the “skyrocketing” consumer costs, “excessive” retransmission consent fees and “unreasonable” price demands which broadcasters are imposing on MVPDs (and MVPDs are passing on to consumers).

However, retransmission consent negotiations between broadcasters and MVPDs are essentially the same contractual process MVPDs engage in with content providers for non-

broadcast networks. The basic difference is that if a broadcaster and MVPD are not able to reach agreement on carriage rates, the consumer continues to have access to the station's local programming 100 percent free on an over-the-air basis, and, more recently, via Internet access. And for most consumers, there are other MVPDs available, such as DBS or a terrestrial cable overbuilder. Thus, despite Petitioners' contentions otherwise, consumers never truly lose access to a broadcast station's signal and programming and therefore are not harmed.

Furthermore, despite Petitioners' rhetoric, local broadcasters are not seeking exorbitant or even significant fees from MVPDs. For example, if a broadcaster receives a per subscriber fee of a penny a day (or \$0.30 per month), the MVPD is paying only \$3.60 per year (per subscriber) for that station. At two cents per month, the MVPD would be paying only \$7.20 per year per subscriber. Even at an unheard of nickel per day (\$1.50 per month) an MVPD is paying only \$18 per subscriber to a station for carriage of its broadcast signal for an entire year. It is these relatively *de minimis* sums that broadcasters are seeking from MVPDs in order to continue providing their communities with quality network programming as well as local news and other vital life saving information that neither MVPDs nor any other source is capable of providing with the timeliness and depth that local broadcasters do.

Nor do these modest fees create windfall profits for local broadcasters. With the fragmentation of viewing audiences, increasing competition from hundreds of MVPD-delivered programming channels, the Internet and other entertainment choices, and increasing news production and operating costs and decreasing advertising revenues, the relatively modest retransmission consent fees charged by local broadcasters are helping preserve localism and diversity in communities.

Further, although retransmission consent fees are contributing a modest amount to stations' revenues, the bulk of stations' revenues continue to be generated from advertising.²⁰ Advertising rates are set based on the advertiser's value with respect to the audience it is seeking to reach. If a broadcaster is demanding an "excessive" fee, the MVPD will negotiate for a lesser amount or drop the signal. And broadcasters know this. Therefore, there is incentive for broadcasters to reach carriage agreements with as many MVPDs as possible in order to ensure that their programming is as widely distributed as possible to support their advertising rates.

In addition, Petitioners' effort to shift blame to local broadcasters for the rising costs consumers are paying for MVPD services is merely a self-serving attempt to deflect to another party complaints about rising costs. Between 2001 and 2006, when cable operators were largely providing in-kind compensation (if any) to stations, cable operators' programming expenses as a percentage of revenues and as a percentage of total costs were declining.²¹ Yet, during this same period, total gross profits per subscriber increased by more than 29 percent.²² Therefore, cable rates were increasing exponentially even before broadcasters began requesting modest cash compensation fees.

Further, broadcast retransmission consent fees are only a small fraction of MVPDs' costs for programming. In 2008, the average MVPD programming expense per subscriber per month was approximately \$26.²³ Assuming that the MVPD was paying all four local major network stations fifty cents each per subscriber per month (*i.e.*, paying \$2.00 to the four stations

²⁰ On average, between 80-85% of Nexstar's stations' revenues are generated from advertising.

²¹ *The Economics of Retransmission Consent*, Jeffrey A. Eisenach, Ph.D., Empiris LLC, March 2009, at p. 26.

²² *Id.* at p. 30.

²³ *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon*, Jeffrey A. Eisenach, Ph.D. and Kevin W. Caves, Ph.D. Navigant Economics, April 2010, p. 22.

collectively), the total programming fees attributable to the local stations was only 7.7 percent of total programming costs. Thus, it is inaccurate and misleading for MVPDs to blame retransmission consent payments for consumers' escalating monthly MVPD fees.

Nonetheless, if MVPDs truly are concerned about consumer programming costs, perhaps it is time for the Commission to revisit the issue of requiring MVPDs to offer programming channels on an a la carte basis. Nexstar is certain that most consumers who subscribe to MVPDs would choose its stations on an a la carte basis, even at \$1.00 or more per month, based on the quality and local content of the programming Nexstar provides on its stations. But, for example, cable subscribers in the Dallas-Fort Worth area with no interest in sports could eliminate the nearly \$8.00 per month in wholesale programming costs associated with ESPN, ESPN2, Fox Sports, Golf and the Speed Channel on Time Warner's Expanded Basic Tier or subscribers in Arlington, Virginia could eliminate the more than \$10.00 per month in wholesale programming costs associated with Comcast's Digital Starter Tier (which includes ESPN, ESPN2, Comcast Sportsnet, MASN, MASN2, Versus, Speed and the Golf Channels).²⁴

IV. Conclusion.

Congress enacted the Cable Act because of its concern that broadcasters might lose their ability to provide a voice for the community. While MVPDs may be pining for the days when they were able to dictate carriage terms to broadcasters, Congress' grant of retransmission consent rights to broadcasters did not (and does not) provide an unfair advantage to broadcasters. It merely levels the playing field. Nor is it harmful to consumers to require MVPDs to pay

²⁴ Nexstar is estimating the total sports wholesale cost for the referenced channels based on 2009 subscriber fees available from *All Things Digital, Hate Paying for Cable? Here's Why.*, Peter Kafka, posted March 8, 2010 at <http://mediamemo.allthingsd.com/20100308/hate-paying-for-cable-heres-the-reason-why/> (last visited on May 14, 2010).

reasonable, fair market compensation for carriage of local broadcast television signals. Indeed, consumers benefit from this payment. In today's hypercompetitive media marketplace, with broadcasters facing enormous challenges, retransmission consent fees allow broadcasters to maintain their local programming and other valuable local services.

Because of changes in the MVPD marketplace over the past few years, retransmission consent finally is achieving the results envisioned by Congress with the enactment of the Cable Act. Broadcasters now are able to negotiate a fair value for carriage of their stations' signals. On the whole, the retransmission consent regulations are working as intended, with the vast majority of local broadcasters reaching carriage agreements with MVPDs without brinksmanship negotiating tactics. Therefore, the Commission should dismiss the Petition.

Respectfully submitted,

Nexstar Broadcasting, Inc.

By: /s/ Elizabeth A. Hammond
Elizabeth A. Hammond
Vice President & General Counsel
5215 North O'Connor Blvd.
Suite 1400
Irving, TX 75039

May 18, 2010