

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF INSIGHT COMMUNICATIONS COMPANY, INC.

Insight Communications Company, Inc. (“Insight”), by its attorneys, hereby submits the following reply comments in the above-referenced proceeding.¹ This proceeding, which arises out of a Petition for Rulemaking (“Petition”) to which Insight was a signatory, has drawn comments from a diverse array of multichannel video programming distributors (“MVPDs”), consumer advocates, and government officials. Those comments, together with the Petition itself, demonstrate that the Commission’s current rules governing the exercise by broadcasters of the retransmission consent right granted them in Section 325(b) were adopted under much different market conditions than exist today and no longer are sufficient to protect consumers from being used as pawns by broadcasters in order to force MVPDs to capitulate to their escalating demands for retransmission consent fees. Because the record clearly establishes both the need for changes to the Commission’s rules and the Commission’s authority to make such changes, the Commission should promptly initiate the requested rulemaking.

¹ Insight operates cable television systems serving over 700,000 customers, located in Kentucky, Indiana and Ohio.

DISCUSSION

I. **The Record Establishes That the Commission's Rules Governing Retransmission Consent are Outdated and in Dire Need of Reform.**

The current retransmission consent regime dates back to 1992, when Congress amended the Communications Act to give local broadcaster the choice of electing between mandatory carriage and carriage pursuant to negotiated “retransmission consent” agreements.² The goal of Congress in establishing this comprehensive regulatory structure was to ensure the continued availability of free, over-the-air television in the face of growing competition from non-broadcaster affiliated cable programming networks.³

The issue of whether retransmission consent might turn out not to be a good thing for consumers was plainly on the minds of legislators as they debated the 1992 Act. In particular, concern was expressed over and over that retransmission consent agreements might drive up the cost that consumers had to pay for cable service or might face interruptions in their continued access to local stations if the parties could not strike an agreement.⁴ Those concerns, however, were assuaged by the sponsors of the legislation (particularly the author of the retransmission consent provision, Senator Inouye) who made clear that they expected the balance of power that then existed between cable operators and local broadcasters to keep negotiations on track and to prevent retransmission consent from having an adverse impact on consumer rates.⁵ Moreover, the legislative history makes clear that Congress intended for the Commission to exercise

² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 6, 106 Stat. 1460 (1992).

³ 138 Cong. Rec. S667 (Jan. 30, 1992) (Statement of Sen. Inouye).

⁴ *See, e.g., id.*

⁵ *Id.*

authority, both under existing law and under Section 325(b), to ensure that consumer interests were put first in the event the parties to a retransmission consent negotiation reached an impasse.⁶

As Congress had anticipated, for most of the first decade following the enactment and implementation of the must carry/retransmission consent regime, the balance of power between broadcasters and cable operators kept both sides in check. While there were occasional problems, retransmission consent negotiations generally were tough but fair, with the parties able to reach agreements based on a mutually beneficial exchange of value. Thus, when the Commission reported to Congress on the state of the retransmission consent rules in 2005, it found no cause to recommend changes in the Act or its rules. As that report noted, the vast majority of retransmission agreements entered into through 2005 involved in-kind rather than cash consideration, including agreements to carry new services or for advertising and marketing support.⁷

During this period, retransmission consent was essentially invisible to consumers. Public spats over retransmission consent were unusual and actual service disruptions rarer still. However, as the record establishes, the situation has changed dramatically in the past few years. Retransmission consent negotiations have become increasingly contentious, to the direct detriment of consumers.

The reason that the retransmission consent process is breaking down is attributable to changes in the marketplace that have upset the balance that formerly kept the process in check. Assisted by Congress and the Commission, competition in the

⁶ *Id.*

⁷ Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (Sept. 8, 2005).

MVPD space has become fierce. DBS, once constrained by its inability to provide local signals, has had a “local-into-local” compulsory license since 1999. Telephone companies have had the way smoothed for them in terms of obtaining competing franchises. At the same time, the broadcast industry has become more concentrated. In 1992, the maximum number of stations that a broadcaster could own was 12. Today, the largest broadcast group has more than four dozen stations. In addition, there is more local concentration due to the establishment of LMAs and other relationships that essentially give one entity duopoly control over multiple stations in a single market. Another relevant development: the digital transition, which has made it more costly and difficult for consumers to access signals via over-the-air reception in the event they are unable to receive local stations from their preferred MVPD. Finally, the big four networks have emerged as major players in retransmission consent negotiations notwithstanding the fact that retransmission consent is supposed to operate for the benefit of the local affiliate and that it is the local station, not the network, that has an interest in the broadcast signal that is the subject of the retransmission consent right (as distinct from the programming transmitted over that signal, which is the subject of the compulsory copyright license).

Not surprisingly, the broadcast industry has come together almost as one to oppose any changes in the retransmission consent regime.⁸ They defend the rising prices and use of bullying tactics as simply the “free market” at work. And they claim that the fact that actual shut downs of service are still rare is evidence that the marketplace is not broken. But a retransmission consent negotiation does not have to reach the point of an

⁸ Notably, Cox Enterprises, which has a foot in both the broadcasting camp and the MVPD camp, has come out in support of the commencement of a rulemaking proceeding in its opening comments. *See* Comments of Cox Enterprises, Inc., MB Docket No. 10-71 (filed May 18, 2010).

actual service interruption for consumers to be harmed. Moreover, the breakdown in the retransmission consent process is not limited to places like New York or Los Angeles. All across the country, and particularly in smaller and mid-sized markets, cable operators and their customers are being squeezed by broadcasters who use consumers as pawns by threatening to “go dark,” knowing that for the cable operator, the choice is to fight, and risk having customers lose access to local signals they have received for decades without interruption, or give in and pay prices that are too much for the operator to absorb without passing them on to consumers. Either way, it is the consumer that loses.

This is not how retransmission consent was supposed to work and it is not how it should work. Broadcasting occupies a unique position in American life. The entire business of broadcasting exists by virtue of its use of a scarce public resource, the airwaves. The public has granted broadcasters the right to use this resource, but only on condition that such use be consistent with the public interest. To this end, over the years, Congress and the Commission have established an exhaustive set of rules to govern how broadcasters relate to MVPDs. These include must carry rules, program exclusivity rules, rules governing the tier placement of broadcast signals and the manner of carriage. In addition, Congress has created a compulsory copyright mechanism that allows for the efficient clearance of the rights to retransmit to subscribers all of the content that a broadcaster delivers via its over-the-air signal.

In short, contrary to the broadcasters’ claims, there is no “free market” when it comes to retransmission consent. In a free market, buyers and sellers would have multiple options. In a free market, decades of government regulation would not distort options available to the parties to a negotiation. Under the circumstances, it is both necessary and appropriate for the Commission to take action to prevent broadcasters, who

are licensed to serve viewers in their service area in the public interest, from holding those viewers' access to that service hostage.

II. The Commission Plainly Has the Requisite Authority to Make Changes in Its Rules In Order to Ensure Consumers are Not Harmed By the Retransmission Consent Process.

The broadcasters argue with all their might that the Commission lacks the authority to adopt measures that would reform the retransmission consent process to provide meaningful protection to consumers. However, the broadcasters' arguments simply will not stand up to close scrutiny. The statutory language, the legislative history, and the Commission's own decisions all support the conclusion that the Commission has the requisite authority to adopt dispute resolution mechanisms, interim carriage requirements, and other provisions designed to ensure retransmission consent serves the purposes it was created to serve in the manner in which Congress expected.

In particular, the broadcasters rely on the plain language of Section 325(b)(1)(A), which declares that an MVPD shall not retransmit the signal of a broadcasting station without the station's "express authority."⁹ But nothing in that language limits the Commission's authority to order a broadcaster to grant its consent or to otherwise intervene to ensure that the retransmission consent process serves the public interest, not merely the interest of the broadcasters. As noted above, the legislative history of Section 325(b) is rife with statements indicating that Congress understood the Commission to have the necessary authority to deal with retransmission consent disputes that threatened the public's access to local stations or that were having an adverse impact on consumer prices.

⁹ 47 U.S.C. § 325(b)(1)(A).

Insight will not here repeat the detailed discussion of the varied sources of authority under which the Commission can and should act. Suffice it to cite Section 325(b)(3)(A), Section 309(a), and Sections 4(i) and 303(r).¹⁰ The first two of these sections are, respectively, direct grants of authority to the Commission to adopt regulations governing the exercise of retransmission consent (and, specifically, to address any adverse impact such exercise is having on consumer rates) and to regulate broadcasters to ensure that they operate in the public interest. The latter two sections provide the Commission with broad “ancillary” authority to carry out its responsibilities under the Act.

These provisions give the Commission the authority it needs to adopt any of the proposals made in the Petition. The legislative history, as noted, confirms that Congress expected the Commission to use this authority if and when it became necessary. Finally, the Commission’s own decisions, both in interpreting Section 325(b) – i.e., the adoption of a rule barring exclusive retransmission consent agreements notwithstanding the absence of any specific statutory authority to do so – and in interpreting other sections of the law – e.g., the Commission’s adoption of an interim carriage rule in its *Terrestrial Loophole Order* or mandating interim franchise agreements in its *Competing Franchises Order* – are compelling precedent for the type of actions being proposed here.¹¹

¹⁰ 47 U.S.C. §§ 325(b)(3)(A), 309(a), 154(i), 303(r).

¹¹ See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order, 25 FCC Rcd 746 (2010); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007).

III. The Commission Should Seek Comment on Wide Range of Options.

As noted, Insight is a signatory to the Petition and it endorses the specific proposals contained therein. In addition, Insight notes that the opening round of comments contains a number of additional suggestions for changes to the Commission's rules governing the exercise of retransmission consent. For example, several commenters have proposed that the Commission consider making changes in its network non-duplication rules and to restrict networks from interfering in the right of their affiliates to grant retransmission consent, even for out-of-market carriage. We urge the Commission to seek comment on such proposals, not as substitutes for, but as complements to the proposals outlined in the Petition.

Finally, we urge the Commission to reject "notice" proposals that have been put forward by some broadcasters. Consumers are not being harmed by retransmission consent because they lack information about what is going on. Cable operators already have notice obligations under the Commission's rules that require them to inform subscribers in advance of changes in their channel line-ups. Moreover, as the recent retransmission consent disputes between Time Warner Cable and Fox and between Cablevision and ABC demonstrate, broadcasters are not shy about mounting extensive advertising and public relations campaigns to scare consumers as part of their strategy for coercing MVPDs into giving into their demands, no matter what the ultimate cost to the consumer. A notice provision would simply formalize and legitimize this tactic and would not provide meaningful relief.

CONCLUSION

The Commission could sit by and wait for the next game of chicken, hoping that an absolute disaster will be averted. But doing so would be an abdication of the Commission's responsibility to ensure that the nation's system of broadcasting is operating in the public interest. Rather, the Commission should promptly initiate a wide-ranging proceeding to explore meaningful reforms.

Respectfully submitted,

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