

Proposed Questions for Retransmission Consent Reform Notice of Proposed Rulemaking

1. The 1992 Cable Act adopted or left in place a series of regulatory measures that were intended to protect broadcasters against the perceived threat posed by cable operators to the public interest benefits associated with widespread distribution of over-the-air broadcasting. In light of the industry changes that have taken place since 1992, including the significant growth in competition among MVPDs and consolidation among broadcast and cable programmers, are the regulatory provisions favoring broadcast stations still necessary? Or do they undermine the interests that Congress sought to advance? How have increased competition among MVPDs and the concurrent concentration among programmers affected the behavior of broadcasters in carriage negotiations? How have these developments affected consumers? What steps should the Commission take to effectuate Congress's goals in the 1992 Cable Act in light of today's dramatically different MVPD landscape?
2. What steps should the Commission take to prevent or eliminate consumer harms associated with retransmission consent disputes? Given Congress's broad grant of authority to the Commission to "govern" the exercise of retransmission consent under Section 325(b)(3)(C), to ensure that broadcasters act in the public interest under Section 309, and/or to take whatever actions are necessary to carry out these provisions using the Commission's ancillary authority, does the Commission have legal authority to develop remedies that address the problems arising from the current retransmission consent regime? In particular, do these or other statutory provisions authorize the Commission to: (a) establish an alternative dispute resolution mechanism to resolve retransmission consent disputes, such as binding arbitration, mediation, or another procedure; (b) adopt interim carriage rules to avert programming blackouts; (c) establish rates for retransmission consent; and/or (d) revise its rules to better achieve Congress's overarching purpose of ensuring public access to broadcast programming? Would consumers benefit from the adoption of such reforms?
3. How should the Commission's approach to interim carriage in related contexts inform our decisionmaking regarding the imposition of such requirements in this proceeding? For example, does the Commission's requirement that NBC owned-and-operated stations permit interim carriage of their signals pending resolution of retransmission consent disputes as a condition in the *Comcast-NBCU Order* (as in previous merger orders) reflect the Commission's view that such requirements are consistent with the Communications Act? Similarly, the Commission adopted interim carriage rules in the program access context that allow complainants to seek "a temporary standstill of the price, terms, and other conditions of an existing programming contract"—despite the networks' general right to withhold their programming pursuant to copyright law. [*2010 Program Access Order*, ¶ 71]. Does the Commission's adoption of such rules confirm our ability to establish a similar interim carriage regime here? We note that the Copyright Act gives pay-television networks "exclusive rights" in their copyrighted material and requires the holder's "consent" for certain secondary transmissions, 17 U.S.C. §§ 106, 111(c)(3), just as Section 325(b)(1)(A) of the Act generally requires MVPDs to obtain a broadcast station's express consent to carriage. Do these consent provisions generally speak to the relationship between MVPDs and programming providers, rather than to the Commission's authority to order interim relief? Does the Commission's willingness to overcome general copyright-based consent

requirements by authorizing standstills under the program access rules justify a similar analysis in the retransmission consent context?

4. Assuming the Commission can override consent requirements on a temporary basis, how can the Commission best ensure consistency with consent rights in facilitating long-term retransmission consent agreements? Should the Commission consider adopting a dispute-resolution mechanism that does not require overriding any party's consent? For example, an arbitrator or the Commission might establish a retransmission consent rate that would determine what stations may charge, but not obligate carriage. We seek comment on such an approach.
5. We also note that several members of Congress have made clear their view that the Commission has authority to require interim relief in the context of retransmission consent disputes. For instance, Senator Inouye stated that that the "universal availability of local broadcast signals" was a major goal of Section 325, and that "the FCC has authority under the Communications Act" to "ensure that local signals are available to all the cable customers." 138 Cong. Rec. S643 (Jan. 30, 1992). Senator Lautenberg likewise noted that "if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights," explaining that, "[i]nstead, cable operators will have an opportunity to seek relief at the FCC." 138 Cong. Rec. S14615-16 (Sep. 22, 1992). More recently, in a 2007 letter to the Commission, Senators Inouye and Stevens, as Chair and Vice Chair of the Senate Commerce Committee, wrote that Section 325's directives meant, "[a]t a minimum," that "Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution]." Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30, 2007). How should these statements inform the Commission's analysis of its authority?
6. With regard to arbitration, is the Commission's authority strengthened by the fact that members of Congress have repeatedly stated that the Commission has authority to order arbitration to prevent consumer harm in retransmission consent disputes? *See, e.g.*, Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30, 2007) (responding to expressions of doubt regarding the Commission's ability to order arbitration and quoting Senate floor statements indicating that the "FCC *does* have the authority to require arbitration" to "resolve disputes between cable operators and broadcasters"). Would arbitration with *de novo* review by the Commission be consistent with the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-584? Although the ADR Act provides for "binding arbitration" only "whenever all parties consent," *id.* §§ 575(a)(1), 575(a)(3), the ADR Act uses the term "binding arbitration" only to mean arbitration in which the award is directly enforceable in court without *de novo* review by the agency, *id.* §§ 576, 580(c), 581(a). Indeed, consistent with the statutory guidelines, the Commission has ordered mandatory arbitration with *de novo* Commission review a number of times—beginning with the *News Corp. Order* in 2004 and most recently in the *Comcast-NBCU Order*. Has mandatory arbitration been a successful dispute-resolution tool in those contexts?

7. Should the Commission clarify that the 1992 Cable Act's tier placement and buy-through requirements do not apply in areas where a cable system faces effective competition? To what extent does the Commission have the authority to allow cable systems to carry broadcast stations (whether they elect must-carry or retransmission consent) on an optional tier or on an à la carte basis? Would consumers benefit if they were not forced to purchase broadcast stations as a condition of subscribing to other cable programming? Would changes to basic-tier buy-through obligations affect the rates broadcasters demand for the grant of retransmission consent?
8. A recent development described in the record is the direct involvement of the major broadcast networks in retransmission consent negotiations between their independently owned station affiliates and MVPDs. Section 325(b)(6) of the Act states that the retransmission consent provisions shall not "be construed as modifying the compulsory copyright license established in section 111 of title 17". If a broadcast network already has been compensated for its programming under the statutory compulsory copyright regime, does it have a legitimate claim to an affiliate's retransmission consent revenues? Is broadcast network involvement in affiliate negotiations with MVPDs consistent with congressional intent and the Commission's broadcast ownership rules?
9. Should the Commission reform the current retransmission consent framework by updating Section 76.65(b) of its rules to expand the list of *per se* violations of the obligation to negotiate in good faith? For example, should the Commission determine that any of the following constitute bad faith *per se*: (1) refusal to agree to arbitration as a means of resolving a retransmission consent dispute; (2) refusal to allow interim carriage pending resolution of a retransmission consent dispute; and/or (3) demands for compensation when insisting on placement on the basic tier?
10. To what extent, if any, do the notice requirements in Sections 76.1601 and 76.1603 of our rules apply in the retransmission consent context? Does it make sense to require a cable operator to provide its customers with advance notice of a potential blackout when the loss of a station is within the station's control? Should the station, and not the cable operator, bear the responsibility of providing notice in such circumstances? Do notices from cable operators about the *potential* loss of a signal do more harm than good by serving only to confuse consumers? Should the temporary importation of a distant signal to protect consumers facing a blackout of a local station trigger any notice requirements?