

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)	
)	
Amendment of the Commission's Rules Related)	MB Docket No. 10-71
to Retransmission Consent)	
)	

COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.

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Introduction

Writers Guild of America, West, Inc. (WGAW) is pleased to submit the following comments in response to the Federal Communications Commission's (FCC) March 3, 2011 Notice of Proposed Rulemaking (NPRM), MB Docket No. 10-71.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and new media. Our members, and the members of our sister organization, Writers Guild of America, East, are the creators of television series that are watched by millions of Americans on broadcast networks. Primetime broadcast programs such as *Glee*, *C.S.I.*, *Grey's Anatomy*, and *Criminal Minds* are written by WGAW members. These television series attract large audiences to the broadcast networks and provide strong lead-ins to local news. Our members' work supports the local content produced by station affiliates to serve the needs and interests of the community to which the station is licensed. MVPDs (multichannel video programming distributors) derive significant value from the ability to charge consumers for access to the broadcast networks to view our members' creative works. Additionally, the WGAW represents more than 100 news writers working at local broadcast stations KCBS and KCAL in Los Angeles. By writing the local news stories that air daily on both KCBS and KCAL, our members are responsible for the creation of programming that directly serves the public in the Los Angeles metropolitan area.

The WGAW does not believe the retransmission consent rules are in need of repair. The few instances of contentious negotiations between MVPDs and broadcast network affiliates do not warrant FCC action. Rather, it appears that MVPDs are using these instances to convince the FCC to weaken retransmission consent rules in a way that increases their market power in retransmission negotiations. To reach the public, broadcast networks and their affiliate stations

must rely on an increasingly concentrated MVPD market, making a strong, protective retransmission consent regime more necessary than ever. The few contests highlighted in the press demonstrate that the retransmission negotiation system is working as envisioned, and that broadcast stations have the protection needed to negotiate against powerful MVPDs.

Empowering broadcast stations to negotiate for retransmission revenue to fund local and national programming helps the FCC realize its mandate to foster diversity, localism and competition in media. To weaken the rules would undermine these important objectives.

The WGAW is concerned with the detrimental impact weakening retransmission consent rules would have on both the local and national content created by our members and enjoyed by consumers. The changes proposed by MVPDs and considered by the FCC in the NPRM would undoubtedly enhance the market power possessed by MVPDs. The proposed action would hurt the ability of broadcast stations to seek appropriate compensation for network programming. This would in turn reduce the revenue available for investment in new original programming nationally and locally, harming both content creators and consumers. The WGAW has a strong record of supporting consumer protections and believes the interests of content creators and consumers are very closely aligned on this issue. Writers have an interest in seeing their content reach as wide an audience as possible; consumers want reliable delivery of the programming they pay to access and the local news on which they rely. Any FCC action must be designed to serve these complementary interests, rather than further enhancing MVPD market power.

Retransmission Consent Remains a Necessary Protection

In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act (“Act”), which created the retransmission consent process. The Act prohibited MVPDs from retransmitting a broadcast station’s signal without the station’s consent. In passing this law,

Congress correctly recognized the government's interest in protecting broadcast television and local content from the growing market power of cable operators in the distribution of television programming. At the time, cable operators often faced no competition in the delivery of television programming. Retransmission consent attempted to mitigate some of cable's power over broadcast networks. While the rise of satellite and telephone providers that offer video programming has somewhat diversified distribution options, the market remains concentrated and broadcast stations must continue to rely on MVPD distribution to access consumers. With 87 percent of homes subscribing to cable through one of these services, broadcast networks must submit to MVPD distribution to access consumers.¹ Additionally, retransmission consent recognizes the value MVPDs derive from the ability to sell broadcast network programming to consumers. This fact remains relevant today as broadcast networks continue to be the most watched channels on television.

The Act noted "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is substantial government interest in ensuring its continuation."² The FCC must ensure continued protection of broadcast stations to meet this objective. Careful consideration of these facts supports the continued need for strong retransmission consent rules.

Retransmission Negotiations

The recent occurrences of a few high profile disputes and network blackouts are the main evidence the MVPDs have offered in support of their request that the FCC re-examine retransmission consent rules. MVPDs use these disputes to paint a picture of a broken system in which broadcast stations are aggressively exerting their power over MVPDs. However, a few

¹ SNL Kagan, "U.S. Multichannel Industry Benchmarks," Available from SNL Kagan, <http://www.snl.com>, accessed May 23, 2011.

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

high profile disputes and network blackouts do not amount to a “broken” system in dire need of change. MVPDs and broadcast networks enter into retransmission negotiations every three years, with scores of negotiations taking place in any given year. Signal cutoff is a rare occurrence. One study found that American MVPD subscribers are “about 10 times as likely to experience a complete cable system outage, and about 24 times as likely to experience an electricity outage, [as they are] to be deprived of [their] first-choice television channel because of a retransmission consent dispute.”³

This context is valuable when considering the success of broadcast network CBS in negotiating long term distribution agreements that include retransmission consent. One such agreement was a ten-year, comprehensive content carriage agreement with Comcast in 2010.⁴ As news of the deal became public, Comcast CEO Brian Roberts made clear the value broadcast programming has for an MVPD like Comcast:

We are very pleased to have reached a long-term agreement with CBS to distribute its valuable programming across our multiple platforms... In this time of rapidly changing technology and viewership interest, we were able to structure a deal that gives customers the content they want without any threat of disrupting their service.⁵

The Comcast deal followed long-term retransmission consent and program carriage agreements CBS reached with both Verizon and Time Warner Cable in 2009.⁶ Collectively, these three

³ Jeffery Eisenach, “The Economics of Retransmission Consent,” National Association of Broadcasters, March 2009, p.2, Available from National Association of Broadcasters, <http://www.nab.org/documents/resources/050809EconofRetransConsentEmpiris.pdf>, accessed May 17, 2011.

⁴ “CBS and Comcast sign ten-year content carriage agreement,” CBS Corporation press release, August 2, 2010, on the CBS Corporate website, <http://www.cbcorporation.com/news-article.php?id=666>, accessed May 19, 2011.

⁵ *Ibid.*

⁶ “Verizon and CBS Reach Long-Term Comprehensive Retransmission Consent and Program Carriage Agreement,” CBS Corporation. press release, January 1, 2009, on the CBS Corporate website, <http://www.cbcorporation.com/news-article.php?id=522>, accessed May 20, 2011. “Time Warner Cable and CBS Corporation Reach Comprehensive Retransmission Consent and Program Carriage Agreement,” CBS Corporation press release, January 7, 2009, <http://www.cbcorporation.com/news-article.php?id=527>, accessed May 20, 2011.

agreements cover approximately 37 million cable subscribers and represent 36 percent of the MVPD market.

MVPD Market Remains Concentrated

When retransmission consent was enacted in 1992, cable operators faced little competition in the delivery of television services to consumers. The recognition of the market power possessed by these operators was a critical factor in Congress' decision to require negotiations over carriage of broadcast stations. In the ensuing years, the introduction of satellite and telephone provider delivery of cable services has increased the choices offered to some consumers. Yet the emergence of these alternative distributors has not significantly altered the power dynamics between MVPDs and the broadcast stations. Cable providers remain dominant in the MVPD market. In 2010, SNL Kagan reported that 63 percent of consumers receive multichannel services through a cable provider.

Moreover, the MVPD market is concentrated in the hands of ever fewer, and bigger, providers. The four largest MVPDs in the U.S. provided service to 68 percent of all MVPD subscribers nationally in 2010, up from 50 percent in 2002.⁷ To reach a majority of consumers, broadcast networks must reach agreement with these four companies. Many local markets are more concentrated still. In the Comcast proceeding, Consumer Federation of America and other public interest groups noted, "While Comcast's national market share is 25 percent, its share of

⁷ Jeffery Eisenach, "The Economics of Retransmission Consent," National Association of Broadcasters, March 2009, p.1, Available from National Association of Broadcasters, <http://www.nab.org/documents/resources/050809EconofRetransConsentEmpiris.pdf>, accessed May 17, 2011. SNL Kagan, "U.S. Multichannel Industry Benchmarks," and "U.S. Cable Subscriber Highlights," Available from SNL Kagan, <http://www.snl.com>, accessed May 23, 2011.

individual markets is well over 50 percent in every market in which it provides service, and an upwards of 60 percent in other markets, including Boston, Philadelphia, and Chicago.”⁸

Concentration in the MVPD market helps explain why cable prices continue to rise faster than the consumer price index (CPI). The FCC’s most recent Cable Industry Price Report found that average monthly price for expanded basic cable in 2008 increased 5.9 percent over the previous year, to an average of \$52.37. The increase in the CPI in the same period was just 0.1 percent.⁹ The rising cost of basic cable services is a symptom of the decline of competition among cable providers.

Broadcast networks have strong incentives to reach agreement

Broadcast stations cannot afford a strategy in which they lose viewers, even temporarily. The business model of network television and the competition for television viewers necessitate uninterrupted distribution of broadcast programming through MVPDs. Broadcast network programming is funded by advertising revenue with retransmission revenue playing a small but important supplementary role. In 2010, the broadcast networks received approximately \$19 billion in advertising revenue.¹⁰ In the same year, the networks and their local station affiliates received approximately \$1.1 billion in retransmission revenue.¹¹ While retransmission revenue provides an important second source of funding, broadcast networks remain primarily dependent on advertising revenue. There is a strong incentive to avoid losing viewers and advertising revenue through hard bargaining over retransmission fees.

⁸ Consumer Federation of America *et al.* “Joint Position to Deny of Consumer Federation of America, Consumers Union, Free Press and Media Access Project,” In the Matter of Applications for Consent to the Transfer and Control of Licenses from General Electric Company to Comcast Corporation, MB Docket No 10-56, June 21, 2010, p. 15.

⁹ Federal Communications Commission, “Annual Report on Cable Industry Prices,” February 14, 2011, p. 2, Available from FCC website, MM Docket No. 92-266, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-284A1.pdf.

¹⁰ SNL Kagan, “TV Network Summary,” Available from SNL Kagan, <http://www.snl.com>, accessed May 23, 2011.

¹¹ Robin Flynn, “Updated retrans projections: Despite fewer projected multichannel subs, higher fees boost total,” May 17, 2011, Available from SNL Kagan, <http://www.snl.com>, accessed May 17, 2011.

The competitive landscape of television provides further evidence of the incentives broadcaster have to avoid disruptions by reaching agreement for MVPD distribution. Broadcast networks compete for viewers not only with each other but with hundreds of cable channels. The broadcast networks' share of the total television audience has been declining for years. Cable networks have increased their original programming offerings and compete directly with the broadcast networks for viewers. For the 2010-2011 television season, the Cable Advertising Bureau estimated that the broadcast networks share of primetime viewers was 38.6 percent, while ad-supported cable networks attracted more than 60 percent of the total audience.¹² By itself, a broadcast station cannot easily engage in a strategy of withholding its signal as it risks furthering viewer migration to cable.

Proposed Changes Would Enhance Market Power of MVPDs While Hurting Content Creators and Consumers

MVPDs have suggested that the FCC institute dramatic changes to the retransmission consent regime. The WGAW opposes suggestions by Time Warner Cable and others to require mandatory interim carriage of a broadcast station and mandatory binding arbitration of retransmission disputes. Both changes would greatly increase the power of MVPDs in retransmission negotiations and ultimately limit the revenue broadcasters can invest in original local and national programming, hurting content creators and depriving consumers of content.

Mandatory Interim Carriage

The WGAW opposes a requirement of mandatory interim carriage in the event of a dispute because such a rule would undermine the ability of broadcast stations to negotiate for adequate compensation. By removing the threat of signal loss, mandatory interim carriage would reduce the incentives for MVPDs to engage in good faith negotiations. While such a

¹² "Cable's Rating Dominance," Cable Advertising Bureaus, 2011, p. 3, available from Cable Advertising Bureau <http://www.thecab.tv/main/bm~doc/std-thru-4-11-publica.pdf>, accessed May 23, 2011.

requirement would prevent any disruption to consumers, this change would significantly enhance the market power of MVPDs. In order for consumers to access the programming they expect, broadcast stations must retain the ability to negotiate for retransmission revenue to reinvest in that programming. Mandatory interim carriage is then best understood as a means by which the balance of power in retransmission consent negotiations can be further tilted towards MVPDs at broadcasters' expense.

Second, as noted by other parties to this proceeding and confirmed by the FCC in the NPRM, the Commission does not have the statutory authority to enact mandatory interim carriage. The Act expressly prohibits retransmission of a broadcast signal without the broadcaster's consent.¹³ Therefore, if the FCC were to impose mandatory interim carriage it would represent a substantial, questionable expansion of the FCC's authority while disadvantaging broadcasters both large and small. While Time Warner Cable points to the FCC's Comcast Order as proof that the Commission is capable of making such a determination, the MVPD ignores the fact that such a protection was put in place because of the power of Comcast as an MVPD, not the power of the broadcast stations or network.

Mandatory Binding Arbitration

Mandatory binding arbitration would also greatly enhance the power of MVPDs in retransmission negotiations. Requiring a broadcast station to submit to arbitration in advance of a contract's expiration would eliminate the incentive for the MVPD to negotiate in good faith. Such a requirement would also eliminate a broadcaster's ability to approach retransmission consent negotiations in a way best suited to their business outlook and strategy. Additionally, the FCC notes in the NPRM that "Congress opted for retransmission consent negotiations to be

¹³ Federal Communications Commission, "Notice of Proposed Rulemaking," In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71. March 3, 2011, p. 11.

handled by private parties” and for arbitration to be used only when both parties consent.¹⁴ As such, the FCC does not have the authority to require the parties to submit to binding arbitration.

Changes to Retransmission Consent are Harmful and Unnecessary

As broadcast networks must continue to rely on a limited number of MVPDs to reach consumers, a strong retransmission consent regime that protects broadcast stations remains necessary. As such, the WGAW believes that additional *per se* violations or other changes suggested by the FCC would be harmful to broadcast stations. These changes would harm content creators and consumers by enhancing the power of MVPDs and depriving broadcast stations of the power necessary to negotiate for compensation that can be reinvested in content.

Per Se Violations

The FCC should not limit broadcast station flexibility in negotiations by increasing the number of *per se* violations of the obligation to negotiate in good faith. For instance, the ability of a broadcast station to grant a network with which it is affiliated the right to approve a retransmission consent agreement should not be considered a *per se* violation. Broadcast networks are interested parties and should not be prohibited from participation in the negotiation. Similarly, the FCC should not prohibit joint retransmission negotiations by broadcast stations that are not commonly owned. Such action should not be deemed a *per se* violation of the obligation to negotiate in good faith as the arrangement may help small local broadcasters. As this filing makes clear, MVPDs continue to have significant market power and the FCC should not limit how broadcast stations approach negotiations with them.

¹⁴ Federal Communications Commission, “Notice of Proposed Rulemaking,” In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent, MB Docket No. 10-71. March 3, 2011, pp. 11-12.

The FCC Should Not Require Broadcast Stations to Submit to Non-binding Mediation

If no agreement has been reached within 30 days of a contract's expiration, refusal to submit to non-binding mediation should not be seen by the FCC as a *per se* violation of the duty to engage in good faith negotiations. To find a *per se* violation would amount to the institution of a new requirement that broadcast stations to submit to mediation. Such a new requirement would alter the incentives of MVPDs in negotiations and render impasse an attractive option as a means of compelling mediation.

Network Non-Duplication and Syndicated Exclusivity Rules

The WGAW does not believe the Commission should eliminate its rules concerning network non-duplication and syndicated programming exclusivity. By eliminating these rules, the FCC would weaken its own policies favoring localism. The ability of an MVPD to carry duplicative programming would significantly undermine the ability of a broadcast station to negotiate for compensation and weaken the MVPD's incentive to reach agreement. Further, as the FCC notes, network programming and syndicated exclusivity are based in private contractual rights that would persist even if the FCC eliminated its rule. The FCC should remain committed to localism by continuing to support this rule.

FCC Should Narrowly Tailor Improvements to Benefit Consumers

Rather than placing its finger on the MVPD's side of the scale in negotiations, the FCC should adopt reforms that are narrowly focused on consumers. The WGAW strongly believes that the impact of retransmission consent negotiations on consumers should be minimized. One effective approach would be to increase educational programs for consumers about accessing broadcast network signals over the air. Broadcast network programming is never really "lost" during transmission disputes, since most consumers can view local stations using an inexpensive

antenna and receiver device, which are now often built into television sets. The FCC should consider rules that require notification of customers by MVPDs detailing how to access broadcast network signals in the event of a dispute.

Conclusion

Retransmission consent remains a necessary protection and as such, the WGAW does not support changing the rules to weaken this protection. We believe the proposed changes would only increase the bargaining power of MVPDs, to the detriment of content creators and consumers. Such an effect would be damaging to the FCC's goal of promoting diversity of programming, local content and a competitive media marketplace. Compounding this harm, weakening retransmission consent will hinder the ability of broadcast networks and stations to negotiate for compensation from powerful MVPDs. This will limit the amount of revenue received by broadcast networks and stations, which could reduce investment in increased national and local original programming.