

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

**COMMENTS OF DIGITAL LIBERTY
AMERICANS FOR TAX REFORM**

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Summary of Comments

In recent years, fundamental changes have occurred in the programming distribution market. Consumers today enjoy a growing number of options to receive programming from broadcasters, cable, satellite, and broadband operators, as well as online subscription services. Yet, the retransmission consent, must-carry, and compulsory licensing regulations that currently oversee content distribution are antiquated and prevent broadcasters and multichannel video programming distributors (MVPDs) from negotiating in a free market.

The Commission seeks comment on how, considering its current statutory authority, it may revise retransmission consent rules to better reflect modern-day negotiations between broadcasters and MVPDs.¹ Here, we comment on a selection of the Commission's proposals. However, Digital Liberty ultimately urges the Commission to proactively work with Congress and the U.S. Copyright Office to undertake a fundamental re-write of the broader retransmission and compulsory licensing regime to permit negotiations between broadcasters and MVPDs to operate in a free-market.

I. The Commission Should Not Expand Oversight of Good Faith Negotiations

The Commission has proposed a series of additions to its good faith negotiation standards.² We urge the Commission to forgo enacting more rules of the road in negotiations. The Commission is seeking comment on what it means to “unreasonably delay retransmission consent negotiations” and whether it should revise the “totality of the circumstances” standard to give the Commission more oversight into the negotiation process. We urge the Commission to avoid injecting itself further into retransmission negotiations, particularly if it sets nebulous standards to expand its current oversight.

Instead of building on current authority, the goal of the Commission should be to foster a free market for negotiations to take place or make clearer any limited rules of the road.

II. Commission Should Avoid Revising Notice Requirements

The Commission asks whether consumers should be notified of the mere *potential* that a broadcaster's signal may not be available with their current MVPD 30 days prior to the outage and regardless of whether the programming ultimately remains or is deleted.³ We strongly urge the Commission not to expand upon its current notification authority, particularly in ways that may rile consumers.

Good faith negotiations can and do continue within the current 30-day window, and inserting likely consumer backlash has the potential to derail legitimate, private negotiations. Alerting consumers to program outages should come only after negotiations have failed or a contract is not renewed.

Prematurely alerting consumers of a station's deletion will toss good faith negotiations to the whim of public outrage. It will give broadcasters and MVPDs an incentive to capitalize on public sympathies as an upper hand in negotiations, rather than engage in legitimate discussion of contract priorities and demands. Thus, alerting consumers of potential outages may have the reverse effect of what the Commission seeks by slowing or stalling negotiations in the 30-day window and increasing the chances of an outage.

III. The Commission Should Eliminate Network Non-Duplication and Syndicated Exclusivity Rules

Non-duplication and syndicated exclusivity rules should be eliminated, allowing private contracts between broadcast networks and local network affiliates to dictate the terms by which affiliates may supply MVPDs with programming. Yet, in no way should the Commission seek to interfere with broadcaster-affiliate contracts in the name of ensuring programming remains on should retransmission negotiations break down.

Together, these exclusivity rules *unilaterally* prevent MVPDs in negotiations with one affiliate from carrying identical programming from an affiliate in another geographic zone. There is some truth that these rules can “hold programming hostage” by preventing MVPDs from entering into agreements with outside affiliates to continue non-local network programming.

Instead of relying on the Commission, networks and local affiliates should determine whether and how to distribute programming within their own individual contracts. There is merit to the claim that eliminating the rules may have no effect due to broadcaster-affiliate contracts, but that begs the question as to their necessity in the first place.

Concerns that exclusivity rules will harm “localism” are also unfounded. By and large, network programming is identical between markets. Where programming, such as local news, is not similar between affiliates in different geographic zones, consumers will direct complaints of “foreign” affiliate programming toward MVPDs. Thus, any demand from consumers for local programming will once again likely put greater pressure on MVPDs – not broadcast networks – to continue retransmission negotiations. This is, of course, if such provisions preventing affiliates from transmitting their signals to MVPDs outside their geographic zone are not already inserted into broadcaster-affiliate contracts.

IV. Compulsory Licensing: The Other Side of the Retransmission Coin

While the Commission has no jurisdiction over the compulsory licensing regime for broadcaster programming, the system is inextricably linked to the Commission’s proceeding on retransmission consent. Currently, MVPDs pay government-set royalties for copyright licenses to retransmit programming without having to negotiate with each copyright holder. Neither the compulsory copyright licensing system nor the retransmission consent regulatory regime operates in a free market. Both regimes distort negotiations between MVPDs, broadcasters, and copyright owners.

As the Commission’s Notice of Proposed Rulemaking progresses, the U.S. Copyright Office is currently undergoing a statutorily mandated Notice of Inquiry to study whether the current licensing system should be scrapped or replaced with an alternative system.⁴ This study will provide better insight into the future of compulsory licensing and its roll in the discussion of retransmission reform.

V. Commission Should Look Less to Current Authority and More to Comprehensive Reform

We urge the Commission to work with Congress and the U.S. Copyright Office to set a clearer path for moving all retransmission consent, must-carry, and compulsory licensing rules in a free-market direction. Ultimately, the current system inhibits balanced, free-market negotiations between MVPDs and broadcasters from taking place. While clear the Commission must also work within its statutory authority, which largely does not permit it to dismantle the current regulatory regime, we believe the proposed changes are a band-aid solution that does not attack the root of problems arising in retransmission disputes.

Respectfully Submitted,



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¹ 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.

² Ibid, ¶ 20-30.

³ Ibid, ¶ 34-37.

⁴ Library of Congress Copyright Office, “Notice of Inquiry on Section 302 Report,” Docket No. RM 2010-10, March 3, 2011.