

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

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

COMMENTS

OF

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AND FOX TELEVISION STATIONS, INC.**

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Fox Entertainment Group, Inc. and Fox Television Stations, Inc. (collectively, “Fox”) hereby respectfully submit these comments in response to the Commission’s notice of proposed rulemaking seeking feedback about potential changes to the rules governing retransmission consent.¹

I. INTRODUCTION AND SUMMARY

The Commission expressed in the *Notice* that its “primary objective” is to ascertain whether its existing rules “are ensuring that the market-based mechanisms Congress designed to govern retransmission consent negotiations are working effectively and, to the extent possible, minimize video programming service disruptions to consumers.”² Fox submits that the answer to this question is an unequivocal “yes.”

The *Notice* does not arise in a vacuum but rather has evolved out of a deliberative and reflective process that already has generated an extensive record regarding the state of retransmission consent. More than one year ago, a coalition of multichannel video programming distributors (“MVPDs”) and advocacy organizations petitioned the Commission for a panoply of

¹ See *In re Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, FCC 11-31 (rel. Mar. 3, 2011) (the “*Notice*”).

² *Notice* at ¶ 1.

changes to the retransmission consent rules, arguing against all logic that the evolution of the marketplace warranted overhaul of a system that finally has begun to work as Congress intended. The coalition sought massive – and unjustified – changes to the rules primarily in order to give MVPDs a leg up in what otherwise is and should be a private business negotiation.³

Fortunately, the Commission refused to rush to judgment, and instead permitted the development of a substantial record that confirms two ineluctable truths: (1) retransmission consent works extraordinarily well to provide consumers with access to the most sought after content on television while enabling broadcasters to earn a reasonable return on their investments in popular content; and (2) Congress intentionally provided the Commission with only limited authority to interfere in negotiations that the Communications Act (the “Act”) mandates be left to the marketplace to the maximum extent possible. Thus, the *Notice* correctly starts from the premise that the existing retransmission consent regulatory regime should *not* be overhauled, but could be tweaked in ways that help protect consumers without giving either side an artificial advantage in negotiations.

Let there be no mistake – retransmission consent remains a vital, indispensable component of the future of over-the-air television in the United States. Unless owners of broadcast stations and networks are permitted to cultivate a second stream of revenue to supplement cyclical advertising, the most popular content on free, over-the-air television will migrate increasingly to pay-only models – a demonstrably bad outcome for consumers. At base, MVPDs recognize as much. Their desire for reform is borne not out of fundamental disagreement with the notion that broadcasters deserve to be compensated, but out of a self-

³ See *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, Public Notice, DA 10-474 (rel. Mar. 19, 2010).

interested craving to use the government as a shield to minimize as much as possible the marketplace-based rates that MVPDs expect will occur as the result of arms-length negotiations. The current imbalance –any given broadcast station typically draws an audience share that dwarfs the share of cable networks,⁴ yet the cable networks nonetheless receive disproportionately higher license fees – simply is not sustainable.

In light of this background, Fox applauds the Commission for its well-reasoned tentative conclusion that substantial changes to the retransmission consent rules are neither necessary nor legally permissible. Fox agrees not only that the Commission lacks authority under the Act to accede to the MVPDs’ demand for mandatory arbitration or standstills, but also that there is no justification for inserting the government into the marketplace negotiations envisioned by Congress. Fox also agrees that additional and more detailed notice requirements could benefit consumers in the rare instances in which a retransmission consent bargaining impasse threatens to deprive pay television subscribers of access to favored broadcast stations via a particular MVPD.

With respect to one area of the *Notice*, however, Fox is concerned that the Commission’s inquiry goes too far. To the extent that the *Notice* tees up changes to the good faith rules that would interfere with the network-affiliate relationship, Fox believes that the proposals would be unnecessary and unlawful. For one thing, Congress already has made clear that the retransmission consent rules are *not* intended “to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate’s

⁴ The highest-rated program on a broadcast station in 2010, the Super Bowl, was watched by 51.9 million households and 106.7 million viewers; the highest-rated program on a cable channel that year was a game on *Monday Night Football*, which was watched by only 13.0 million households and 18.0 million viewers. Similarly, the highest-rated recurring programs on a broadcast station 2010, *American Idol* and *Dancing With the Stars*, were watched by an average of 15.8 and 15.7 million households, respectively; the highest-rated recurring program on a cable channel that year was watched by an average of 6.5 million households.

right to redistribute affiliated programming.”⁵ In addition, the Commission’s proposed rule changes would harm rather than help consumers. Accordingly, Fox urges the Commission to abandon its proposals to restrict the manner in which networks work with affiliates when it comes to retransmission consent bargaining.

Ultimately, the Commission should hew closely to its tentative conclusion in the *Notice* that neither the legislative framework of the Act nor the real-world experience borne out by thousands of successful retransmission consent negotiations warrants any major changes to the existing regulatory regime.

II. THE NOTICE CORRECTLY CONCLUDES THAT THE COMMISSION LACKS AUTHORITY TO INTERFERE WITH FREE MARKET NEGOTIATIONS THROUGH TEMPORARY STANDSTILLS OR MANDATORY ARBITRATION

By its plain terms, with respect to stations that elect retransmission consent, Section 325 of the Act precludes any cable system or other MVPD from “retransmit[ing] the signal of a broadcasting station . . . except . . . with the express authority of the originating station.”⁶ Congress passed Section 325 of the Act “to establish a marketplace for the disposition of the rights to retransmit broadcast signals”⁷ In doing so, it expressed “the policy of the Congress in this Act to . . . rely on the marketplace, to the maximum extent feasible, to achieve” the “availability to the public of a diversity of views and information through cable television and other video distribution media.”⁸ Thus, the legislative history emphasized that “it is not the Committee’s intention in this bill to dictate the outcome of the ensuing marketplace

⁵ *In re Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339, 10354 (2005) (“*Reciprocal Bargaining Order*”).

⁶ 47 U.S.C. § 325(b)(1).

⁷ S. Rep. No. 102-92 (1992), at 36.

⁸ H. Rep. No. 102-862 (1992), at 4.

negotiations.”⁹ There is no ambiguity in this statute, and the Commission has no room to maneuver around its plain meaning to adopt rules that permit MVPD carriage of a broadcast station without the station’s consent.¹⁰

A. Federal Law Expressly Precludes Mandatory Interim Carriage or Binding Arbitration In Connection With Retransmission Consent

The Commission in the *Notice* observed that a variety of MVPDs and advocacy groups have urged the imposition of interim carriage or dispute resolution mandates as part of the retransmission consent process.¹¹ Ironically, some of those same MVPDs staunchly opposed the FCC’s authority to impose interim carriage mandates in resolving program carriage disputes when the MVPDs’ own channels were at issue. Time Warner Cable, for instance, told the Commission in no uncertain terms that the FCC “lacks authority to impose standstill requirements in circumstances involving . . . carriage disputes.”¹² Time Warner Cable further pointed out that “even if [the FCC] had authority” under the Act, a standstill “requirement would violate the First Amendment.”¹³ Yet the MVPDs apparently have no compunction in asserting the exact opposite position here.

The FCC, however, appropriately concluded that the Commission has no jurisdiction to impose these anti-competitive remedies: “We do not believe that the Commission

⁹ S. Rep. No. 102-92 (1992), at 36.

¹⁰ See *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (if a statute “has directly spoken to the precise question at issue,” the agency “must give effect to the unambiguously expressed intent of Congress”).

¹¹ *Notice* at ¶ 18.

¹² Comments of Time Warner, Inc., *In re Review of the Commission’s Program Access Rules*, MB Docket No. 07-198 (filed Jan. 4, 2008), at 4. (Time Warner Cable was a subsidiary of Time Warner, Inc. at the time.)

¹³ *Id.* at 12.

has authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations.”¹⁴

Citing Section 325 of the Act and accompanying legislative history, the Commission affirmed that “in the absence of a broadcaster’s consent,” Congress “expressly prohibits the retransmission of a broadcast signal”¹⁵ Moreover, “consistent with the statutory language, the legislative history of Section 325(b) states that the retransmission consent provisions were not intended ‘to dictate the outcome of . . . marketplace negotiations’ and that broadcasters would retain the ‘right to control retransmission and to be compensated for others’ use of their signals.”¹⁶ The FCC therefore:

interpret[ed] Section 325(b) to prevent the Commission from ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement. Consistent with this interpretation, the Commission previously found that it has ‘no latitude . . . to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission.’¹⁷

The Commission also flatly rejected assertions that the FCC’s limited ancillary authority somehow could be relied upon to support anti-competitive interference with free market retransmission consent negotiations. Ancillary authority “does not authorize the Commission to act in a manner that is inconsistent with other provisions of the Act, and thus

¹⁴ Notice at ¶ 18

¹⁵ *Id.*

¹⁶ *Id.* (citing S. Rep. 102-92).

¹⁷ *Id.* (citing *In re 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 5445, 5471 (2000) (“*Good Faith Order*”)).

does not support Commission-ordered carriage in this context.”¹⁸ In addition, the FCC found that “mandatory binding dispute resolution procedures would be inconsistent with both Section 325 of the Act, in which Congress opted for retransmission consent negotiations to be handled by private parties subject to certain requirements, and with the Administrative Dispute Resolution Act (“ADRA”), which authorizes an agency to use arbitration ‘whenever all parties consent.’”¹⁹

These findings, which are unusually conclusive and detailed for a notice of proposed rulemaking, leave little doubt that the Commission lacks authority to accede to MVPDs’ and advocacy groups’ demands for interim carriage or binding arbitration mandates.²⁰ The FCC should, in any final order emanating from this proceeding, take temporary standstills and binding arbitration off the table once and for all and confirm that Section 325 of the Act bars Commission interference in the outcome of retransmission consent negotiations.

B. Mandatory Carriage Obligations Would Violate Broadcasters’ First Amendment Rights

Putting aside the FCC’s lack of jurisdiction to implement a proposed overhaul of retransmission consent, the imposition of a temporary standstill or interim carriage obligation also would violate broadcasters’ First Amendment rights. As the Supreme Court has made clear, video programming networks “engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”²¹ All video

¹⁸ *Notice* at ¶ 18 (internal citation omitted).

¹⁹ *Id.* (citing 5 U.S.C. § 575(a)(1)).

²⁰ *See also Notice* at ¶ 3, note 6 (“[t]he Commission does not have the power to force broadcasters to consent to MVPD carriage of their signals nor can the Commission order binding arbitration (*citing* Letter from Chairman Julius Genachowski, FCC, to The Honorable John F. Kerry, Chairman, Subcommittee on Communications, Technology, and the Internet, Committee on Commerce, Science, and Transportation, U.S. Senate, at 1 (Oct. 29, 2010) (“[C]urrent law does not give the agency the tools necessary to prevent service disruptions.”)).

²¹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

programming channels, just like newspapers or magazines, have First Amendment rights to speak and to distribute their content as they see fit.²² Any FCC decision that interferes with broadcasters' right to control their speech would be subject to heightened constitutional scrutiny. Given the abundance of competition in the video programming marketplace, the Commission could not possibly justify a regulation of speech as narrowly tailored in furtherance of an important governmental objective.²³

A regulation that compels programmers to speak when they would choose otherwise poses a First Amendment issue because “[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to speak includes within it the choice of what not to say.”²⁴ Indeed, the right of a First Amendment-protected speaker not to speak “serves the same ultimate end as freedom of speech in its affirmative aspect.”²⁵ There is no basis for treating broadcasters in a disparate manner from any other video programming network in the context of the right to choose whether and how to speak.

III. ENHANCED NOTICE REQUIREMENTS WOULD BOLSTER PROTECTIONS FOR CONSUMERS IN THE RARE INSTANCES IN WHICH RETRANSMISSION CONSENT BARGAINING REACHES AN IMPASSE

As Fox previously has explained, while the FCC lacks authority to upend the retransmission consent regime, there are steps that it can take to protect consumers from harm

²² See *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988) (“The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.”).

²³ See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

²⁴ *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (internal citations omitted); see also *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010).

²⁵ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (internal citation omitted).

caused by MVPDs' bargaining tactics, which create contrived crises by suggesting that viewers have no choices and risk being cut off from their favorite programming in the event of a retransmission consent bargaining impasse.²⁶

The *Notice* indicates that “[a]dequate advance notice of retransmission consent disputes for consumers can enable them to prepare for disruptions in their video service.”²⁷ The Commission calls for comment on what steps might be taken to improve consumer protection. Fox believes that, in a world of abundant competition, consumers have myriad options (from cable over-builders to Direct Broadcast Satellite providers to telco competitors and, of course, over-the-air broadcasts themselves) for ensuring that they can continue to receive their favorite programming. Fox supports providing consumers with appropriate information to ensure that they are aware of these choices. Even in the rare case of a bargaining impasse that implicates one particular MVPD's ability to carry a broadcast signal, there is no reason for consumers to be left in the dark.

The Commission notes that its existing rules “apply to cable operators only” (rather than all MVPDs) and “are not violated by a failure to provide notice unless service is actually disrupted.”²⁸ Thus, the FCC asks whether it should expand notice requirements to all MVPDs and if it should require that consumers be alerted as to the “*potential* deletion of a broadcaster's signal . . . once a retransmission consent agreement is within 30 days of expiration, unless a renewal or extension has been executed,” without regard to whether “the station's signal

²⁶ See Comments of CBS Corp., Fox Entertainment Group, Inc. and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., The Walt Disney Co., and Univision Communications, Inc., MB Docket No. 10-71 (filed May 18, 2010), at 5.

²⁷ *Notice* at ¶ 34.

²⁸ *Id.* at ¶ 35.

is ultimately deleted.”²⁹ Fox believes that the answer to both questions should be “yes.” If the Commission’s essential concern – its *raison d’être* for this entire proceeding – is protecting and empowering consumers, then its focus should be on notice.

A requirement that MVPDs provide 30 days advance notice when negotiations have not resulted in a new carriage agreement could benefit consumers in a variety of ways. First, notice might help incentivize broadcasters and MVPDs to conclude their negotiations more than 30 days before a deal is set to expire, obviating the need for either party to have to advise consumers of any potential impasse. Indeed, both parties know long in advance when a contract is set to expire. Even though some MVPDs prefer to wait until the last minute to engage in serious negotiations, there is no reason why the parties could not have the parameters of a deal in place by the time they reach the 30-day mark. Second, even if the parties cannot reach agreement, 30 days notice would provide consumers with sufficient opportunity to explore alternative ways to receive the content that they desire – whether via an over-the-air antenna or another MVPD. Third and finally, since information is the hallmark of transparency, giving consumers additional notice should be sufficient to let them decide for themselves the best approach to dealing with a potential service interruption. This would enable the Commission to fulfill its responsibility to protect consumers without engaging in undue (and unlawful) interference in the actual negotiations between broadcasters and MVPDs.³⁰

²⁹ *Id.* at ¶ 37 (emphasis in original).

³⁰ Fox does not believe that the Commission should attempt to regulate the content of the messages that either broadcasters or MVPDs share with consumers. Rather, broadcasters and MVPDs should be permitted to choose how best to communicate with consumers, so long as the notices provide consumers with information sufficient to allow them to make informed decisions. *See Notice* at ¶ 37 (asking how to ensure that “required notifications provide useful information to consumers instead of merely serving as a further front in the retransmission consent war”).

Put simply, consumers have the right, and should have the opportunity, to take advantage of the many alternative choices available when one MVPD's behavior threatens the potential loss of popular content. Vigorous enforcement of notice requirements would advance the consumer-oriented goal of transparency and serve as a strong incentive to MVPDs to negotiate fairly and not to engage in the kinds of brinksmanship that put consumers in the middle of business disputes.

IV. FCC PRECEDENT CLEARLY RECOGNIZES THAT CONGRESS NEVER INTENDED TO RESTRICT NETWORK-AFFILIATE BARGAINING, OR INTERFERE WITH NETWORK-AFFILIATE CONTRACTS, AS PART OF THE RETRANSMISSION CONSENT PROCESS

While the Commission properly has teed up consumer notice as an area for potential modifications to the retransmission consent regime, it also has used the *Notice* to introduce a potentially troubling effort to intercede in the network-affiliation relationship. Specifically, the FCC has proposed to modify the reciprocal good faith bargaining rules to prohibit a broadcast station from providing its network partner with a retransmission consent approval right.³¹

As the Commission has recognized, Section 325 of the Act does not permit the FCC to play an “intrusive role” with respect to retransmission consent.³² Rather, Congress contemplated that the Commission would “develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent.”³³ The FCC thus has applied its good faith rules to ensure that “negotiations are conducted in an atmosphere of honesty,

³¹ *Id.* at ¶ 22.

³² *Id.* at ¶ 20 (citing *Good Faith Order*, 15 FCC Rcd at 5450).

³³ *Id.* (citing *Good Faith Order*, 15 FCC Rcd at 5455).

purpose and clarity of process.”³⁴ These criteria have served the Commission and consumers well for more than a quarter of a century. Broadcasters and MVPDs have developed an understanding of how to conduct retransmission consent negotiations under these strictures, as evidenced by both the dearth of good faith bargaining complaints adjudicated by the Commission and the exceptionally rare instances of bargaining impasse.

In the *Notice*, the Commission asks whether it should augment the good faith rules by, among other things, “includ[ing] additional objective good faith negotiation standards, the violation of which would be considered a *per se* breach” of FCC rules.³⁵ In particular, the *Notice* queries whether it should be considered a *per se* good faith violation “for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.”³⁶ Separately, the *Notice* asks whether it should add to the list of *per se* good faith violations any party’s refusal “to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement.”³⁷ Neither of these proposals is warranted by marketplace realities, and both would conflict with broadcast stations’ and networks’ statutory and constitutional rights.

A. Approval Provisions Represent A Reasonable Exercise of Rights Regarding Distribution of Valuable Network Programming

With respect to network-affiliate contracts, the *Notice* recounts an argument made by MVPDs that “in recent retransmission consent negotiations, a network’s exercise of its

³⁴ *Notice* at ¶ 22.

³⁵ *Id.* at ¶ 21.

³⁶ *Id.* at ¶ 22.

³⁷ *Id.* at ¶ 25.

contractual approval right has hindered the progress of the negotiations.”³⁸ Although no MVPD has ever demonstrated that a network-affiliate contract actually precluded a single retransmission consent deal,³⁹ the Commission nonetheless asks whether “provisions in network affiliation agreements giving the network approval rights over the grant of retransmission consent by its affiliate represent a reasonable exercise by a network of its distribution rights in network programming.”⁴⁰

Fox has negotiated approval rights with respect to stations that choose to affiliate with the FOX network; the right contemplates that the affiliate will obtain Fox’s approval before finalizing an agreement with an MVPD for retransmission consent that includes distribution of Fox’s network programming. Importantly, this consent clause – which has been included in Fox’s standard network-affiliation agreement for more than 15 years – does nothing to restrict an affiliated station’s ability to grant retransmission consent. Even if Fox were to refuse to approve a station’s deal, the refusal at most would affect the network-affiliate relationship, but as confirmed by Commission precedent, would not prevent the station licensee from granting retransmission consent for its entire signal to any MVPD that the licensee chooses.

Fox previously has explained to the Commission that, for the legal and important public policy reasons more fully described below, the FCC cannot and should not interfere with

³⁸ *Notice* at ¶ 22.

³⁹ The *Notice* references arguments made by Time Warner Cable concerning Fox’s network-affiliation agreement with Sinclair Broadcast Group, Inc. See *Notice* at ¶ 22, note 69 (*citing* Ex Parte Comments of Time Warner Cable Inc., CSR No. 8233-C and CSR No. 8234-M (Dec. 8, 2009), at 3). As Fox already has demonstrated, however, the Fox-Sinclair contract did *not* interfere with Sinclair’s ability to conclude a retransmission consent negotiation with Time Warner Cable. See Ex Parte Comments of Fox Broadcasting Co., CSR No. 8233-C and CSR No. 8234-M (Dec. 17, 2009), at 1-2. Rather, as even Time Warner Cable’s filing reflects, Sinclair and Time Warner Cable did in fact enter into a mutually acceptable retransmission consent agreement even though Sinclair’s network-affiliation agreement provided Fox a contractual approval right.

⁴⁰ *Notice* at ¶ 22.

the network-affiliate relationship as part of retransmission consent.⁴¹ First, FCC precedent makes abundantly clear that contractual arrangements between networks and affiliates have no bearing on broadcast stations' ability to negotiate in good faith with MVPDs. Networks and affiliates sometimes agree that networks should be compensated in exchange for acquiring and supplying the affiliate with popular (and expensive) national programming. Fox, as a network owner and programmer, has done nothing more than bargain for precisely the types of rights permitted under the Act and FCC precedent. Second, networks advance legitimate public interest goals when they seek to be compensated for the high quality programming that they distribute, not least of which is the preservation of sought-after content on over-the-air television. The Commission would put over-the-air viewers' access to compelling content at risk if it were to obstruct this process as proposed in the *Notice* because absent networks' ability to develop an alternative revenue stream, the inevitable result would be acceleration of the migration of expensive content to subscription platforms.

The Commission specifically has recognized that “neither the text nor the legislative history” of the Act “indicate[s] a congressional intent to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate’s right to redistribute affiliated programming.”⁴² The good faith bargaining rules were “not intend[ed] to affect the ability of a network affiliate agreement to limit redistribution of network programming.”⁴³ The FCC also said that it “perceive[d] no intent on the part of Congress that the reciprocal bargaining obligation interfere with the network-affiliate

⁴¹ See Reply Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., MB Docket No 10-71 (filed June 3, 2010), at 3-12.

⁴² *Reciprocal Bargaining Order*, 20 FCC Rcd at 10354.

⁴³ *Id.* at 10355.

relationship or . . . preclude specific terms contained in network-affiliate agreements”⁴⁴ The Commission also has emphasized consistently that the mere “existence of an underlying agreement” between a network and an affiliate “is [not] a violation of the good faith negotiation requirement,” since the obligation “applies to negotiations between MVPDs and broadcast stations, and not between a network and an affiliate.”⁴⁵

Furthermore, in resolving good faith bargaining disputes, the FCC explicitly has found that broadcast stations are permitted to enter into, and honor, network-affiliation agreements that contain provisions restricting a station’s right to grant retransmission consent to an MVPD.⁴⁶ Most recently, the Commission held that a station was well within its authority to break off bargaining with an MVPD when it discovered, after initially engaging in negotiations, that it was precluded by the terms of its network-affiliation agreement from granting consent to the MVPD in question.⁴⁷ The FCC “decline[d] to find that [the station’s] conduct” in ceasing negotiations “violated the Commission’s good faith standards.”⁴⁸ In particular, the FCC said that a “negotiation[] for which a broadcaster is contractually precluded from reaching consent may be truncated”⁴⁹

Likewise, Commission precedent makes clear that once a station grants retransmission consent to an MVPD, the MVPD has the right under the Act to carry that station’s

⁴⁴ *Id.* at 10354.

⁴⁵ *See In re Monroe, Georgia Water Light and Gas Commission D/B/A Monroe Utilities Network v. Morris Network, Inc.*, 19 FCC Rcd 13977, 13980, n. 24 (2004) (“*Monroe*”).

⁴⁶ *See, e.g., In re ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television, Inc.*, 24 FCC Rcd 1645, 1648-49 (2009) (“*ATC Broadband*”); *Monroe*, 19 FCC Rcd at 13980, n. 24.

⁴⁷ *See ATC Broadband*, 24 FCC Rcd at 1645.

⁴⁸ *Id.* at 1649.

⁴⁹ *Id.* (citing *Reciprocal Bargaining Order*, 20 FCC Rcd at 10345).

entire signal – even if the text of the station’s affiliation agreement purports to restrict it from granting consent.⁵⁰ Accordingly, a network approval provision necessarily is incapable of precluding an affiliate from granting retransmission consent to an MVPD should it desire to do so, and therefore cannot serve as an obstacle to the successful conclusion of retransmission consent negotiations, as the Commission posits in the *Notice*. At most, this type of provision only would affect whether the applicable station carried programming from the affiliated network at issue.

This precedent quite clearly indicates that the Commission itself has long believed that Congress barred it from using the good faith rules to interfere with the network-affiliate relationship. If, as the Commission acknowledges, Congress did not intend to restrict in any way the ability of a network affiliation agreement to limit the redistribution of network programming, then the FCC cannot possibly consider a network’s mere approval right to constitute a good faith violation.

The FCC posits in the *Notice* that “[i]f a station has granted a network a veto power over any retransmission consent agreement with an MVPD, then it has arguably impaired its own ability to designate a representative who can bind the station in negotiations, contrary to our rules.”⁵¹ Fox believes that this position is flawed for two reasons. First, the approval provision in Fox’s network affiliation agreement, as described above, does not give Fox “veto power” over an affiliate’s retransmission consent contracts with MVPDs. Second, regardless of the terms of its affiliation agreement, Fox submits that this reading of the existing good faith rules is unduly narrow and highly impractical. While the current rules demand that both parties

⁵⁰ See *Monroe*, 19 FCC Rcd at 13980.

⁵¹ *Notice* at ¶ 22.

“designate a representative with authority to make binding representations on retransmission consent,”⁵² the Commission appears to be taking the untenable position that this obligates each side’s representative to decide on-the-spot about any retransmission consent proposal.

That is not what the text of the rule says, however, nor would such a narrow construction make any sense. The rule requires only that representatives be authorized to make “binding representations” – not that they be authorized to conclude a negotiation without conducting any reasonable diligence or consulting with their business executives and partners.⁵³ As a practical matter, retransmission consent negotiations are complicated conversations between sophisticated parties covering a wide range of business issues. The Commission cannot possibly believe that either party, or consumers, would benefit if the rules barred bargaining representatives from taking time to consider an offer in more detail, or evaluate its economic impact. Indeed, the very text of the rule is limited to “representations” (and does not mandate a definitive response at a particular time) precisely in order to provide the parties with the flexibility they need to negotiate in a manner likely to lead to executing an agreement. While a party should be required to stand by the representations and offers it puts on the table, the good faith rules need not be so blunt an instrument that they ignore the distinction between negotiating and reaching a deal.⁵⁴

⁵² 47 C.F.R. § 76.65(b)(1).

⁵³ *See Good Faith Order*, 15 FCC Rcd at 5463 (the requirement to designate a representative “does not empower MVPDs to demand that specific officers or directors of a broadcaster attend negotiation sessions”; moreover, so long as “a negotiating representative is vested with the authority to make offers on behalf of the broadcaster and respond to counteroffers made by MVPDs to the broadcaster, this standard is satisfied”).

⁵⁴ *See Notice* at ¶ 18, n. 59 (*citing Good Faith Order*, 15 FCC Rcd at 5462 (“failure to reach agreement does not violate Section 325(b)(3)(C)”). Aside from the fact that it would be irrational to require parties to negotiate in a vacuum, the FCC’s unduly narrow interpretation of the existing rules cannot be squared with congressional intent and precedent. As noted above, if the Act was not intended to restrict the ability of a network affiliation agreement to limit the redistribution of network programming, then it cannot be a good faith violation for a

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In short, the retransmission consent statute and FCC’s precedent reflect a recognition that broadcast stations and networks have a right to freely negotiate between themselves about how to fairly divide their shared basket of rights and responsibilities. The Commission cannot, consistent with the Act or its administrative law obligations, simply abandon its conclusion in the *Reciprocal Bargaining Order* that the retransmission consent rules are not intended to “interfere with the network-affiliate relationship.”⁵⁵ Even if permitted by the Act, if the FCC were to change course, it would be obliged to provide a reasoned explanation for a change in policy.⁵⁶ Given the total absence of evidence that network-affiliate contracts have had any harmful impact on retransmission consent bargaining, the Commission could not possibly provide the necessary reasoned explanation for a change in course.

Perhaps for these reasons the Commission emphasized in the *Notice* that, in its “consideration of the role of the network in its affiliates’ retransmission consent negotiations, we do not intend to interfere with the flow of revenue between networks and their affiliates.”⁵⁷ Indeed, the FCC purported to “recognize the special value of broadcast network programming to local broadcast television stations and to MVPDs.”⁵⁸ Yet the FCC’s proposed changes to the

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station’s representative to decline temporarily to conclude a deal pending evaluation of whether an offer is consonant with partnership with a network.

⁵⁵ *Reciprocal Bargaining Order*, 20 FCC Rcd at 10354.

⁵⁶ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (holding that an agency “must . . . provide a more detailed justification than what would suffice for a new policy created on a blank slate” when the “new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account”) (internal citation omitted); see also *id.* (“a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy”).

⁵⁷ *Notice* at ¶ 22.

⁵⁸ *Id.*

good faith rules would limit a network's ability to utilize the retransmission consent process as a legitimate framework for working with its affiliates in connection with fair compensation.

This would be profoundly harmful to networks and, ultimately, consumers, given the central role that networks play in the creation of the most compelling and popular content available on television. Networks invest enormous sums of money in producing and acquiring content. From gripping dramas such as *House* to attractive family entertainment such as *American Idol* to highly-sought sports programming such as the Super Bowl and the World Series, Fox alone spends several billion dollars each year to distribute extraordinary television programming to its affiliate partners, who in turn make it available to American households across the country.

Unless broadcast networks such as Fox are permitted to try to recoup some of these expenditures from its affiliate partners, free, over-the-air television will see a continuing migration of expensive and popular content to cable networks. Already, *Monday Night Football* has moved from the over-the-air ABC network to ESPN; college football's Bowl Championship Series games similarly moved from the FOX network to ESPN; and a variety of Major League Baseball and National Basketball League playoff games, as well as NCAA basketball tournament games, now appear on cable networks each year instead of free broadcast television. Absent fair compensation for networks, this trend will accelerate, leaving viewers who rely on over-the-air television with fewer choices and less access to desirable content.

The FCC purports to appreciate these economic realities and professes not to have any desire to impede networks' ability to develop an additional revenue stream in partnership with affiliates. Nevertheless, the Commission needs to recognize that its proposed changes to the good faith bargaining rules would serve as an unnecessary obstacle to precisely the types of

arrangements that are vital to the future of broadcast television. That the FCC proposes such an important change without any demonstrable need is even more troubling. Given that Fox’s approval right has been a standard provision in its network-affiliation agreement for at least 15 years, and since Fox has never once prevented an affiliate from reaching a retransmission consent agreement with any MVPD, Fox submits that there is simply no public policy rationale to support the proposed rule changes.

The Notice also suggests that the FCC might bar a network from serving as a retransmission consent bargaining agent for an affiliate.⁵⁹ This too would constitute a stark departure from precedent and would be an equally unnecessary intrusion into the network-affiliate relationship. As the FCC has made clear, a broadcast station’s retransmission consent rights “may be freely bargained away in future programming contracts.”⁶⁰ Furthermore, in reviewing the retransmission consent-related implications of major transactions, the Commission repeatedly – including as part of the just-concluded Comcast/NBCU merger – has imposed conditions on broadcasters requiring binding arbitration in the event of a bargaining impasse.⁶¹ Tellingly, in the Comcast/NBCU Order, the FCC extended this requirement to apply with respect to “any local broadcast television station on whose behalf Comcast or NBCU negotiates retransmission consent.”⁶² Thus, the Commission approved a scenario in which a network

⁵⁹ Notice at ¶ 23.

⁶⁰ *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6746 (1994) (citing S. Rep. No. 102-92, at 36 (1992) (“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.”)).

⁶¹ See, e.g., *In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, MB Docket No. 10-56, FCC 11-4 (rel. Jan. 20, 2011) (the “Comcast/NBCU Order”).

⁶² See *id.* at Appendix A (emphasis supplied); see also *In re General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473, 572 (2004) (“extend[ing] our
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owner literally could assume the role of negotiator for non-owned stations. This precedent exists for good reason, as there may be any number of rationales for a network and its affiliates to cooperate in negotiating for retransmission consent against economically powerful MVPDs. If these arrangements do not raise antitrust issues, there is no reason for the Commission to be concerned, especially given Congress' admonition that the government do no more than establish a marketplace for the disposition of these rights.

For all of these reasons, Fox urges the Commission to reject its proposal to modify the good faith rules regarding networks and affiliates. Unless and until there is evidence that network-affiliation contracts actually pose a public interest concern, any effort to regulate in this area would be the very definition of arbitrary and capricious action.

B. Any Commission Action to Nullify or Invalidate Private Contracts Would be Laden With Risk

The Commission asks in the *Notice* whether, if it decides to prohibit stations from granting networks retransmission consent approval rights, it should “on a going-forward basis, abrogate any provisions restricting an affiliate’s power to grant retransmission consent without network approval that appear in existing agreements.”⁶³ An effort by the FCC to abrogate existing network-affiliation contracts would be fraught with peril, for the Commission’s power to interfere with private contractual rights is substantially limited both by statute and the Constitution.

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conditions to apply whenever News Corp. negotiates retransmission consent agreements on behalf of independently owned Fox network affiliates”).

⁶³ *Notice* at ¶ 22.

It has long been settled that an agency cannot modify or abrogate a private contract without a showing that the terms of the contract “adversely affect the public interest.”⁶⁴ The Commission itself has held that this standard imposes on those seeking to set aside private agreements a “heavy burden” of satisfying a “strict public interest standard.”⁶⁵ And the Supreme Court has long since made clear that a statute will *not* be deemed to authorize abrogation of existing common law rights “unless that result is imperatively required” by the statute, such that preserving the bargained-for rights would “render [the law’s] provisions nugatory.”⁶⁶

Nowhere in the Communications Act can the FCC point to any express jurisdiction to invalidate network affiliation contracts, and the Commission’s ancillary public interest authority is insufficient to interfere with rights privately negotiated between networks and affiliates. Indeed, the Act “contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the Act ‘imperatively require’ that [a court] imply such authorization.”⁶⁷

Even if the Commission were to direct its attention only to future network-affiliation agreements, rendering void or unenforceable a network’s approval provision would violate the network’s Fifth Amendment rights. The Supreme Court has confirmed that a constitutional “taking” can occur when government regulation strips a property owner of contract

⁶⁴ See *Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

⁶⁵ *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, 10 FCC Rcd 654, 657 (1995) (the Commission “can abrogate [a] contract only if it finds that the terms of the contract ‘adversely affect the public interest.’ Thus, any carrier challenging the terms of an intercarrier contract before the Commission faces a heavy burden”) (internal citation omitted); see also *California Water and Tel. Co., et al.*, 64 F.C.C.2d 753, ¶ 17 (1977) (power to interfere with private contracts “must be conferred by Congress. [It] cannot be merely assumed by administrative officers”) (internal citation omitted).

⁶⁶ *Texas & Pacific Railway Co. Abilene Cotton Oil Co.*, 204 U.S. 246, 437 (1907).

⁶⁷ *The Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250, 1280 (3d Cir. 1974).

rights (even in the absence of a physical invasion of property).⁶⁸ Courts have analyzed regulatory takings by evaluating (1) the “economic impact of the regulation”; (2) the “extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) the “character of the governmental action.”⁶⁹ There can be little debate that if the FCC restricts a network’s capacity to bargain freely with its affiliates, the regulation would hamper the network’s ability to be justly compensated for its investments in programming. This would result in an economic penalty to the network, depriving it of reasonable expectations of generating a fair return on its substantial investments in costly programming.

The Commission historically has exercised restraint when considering whether to invalidate or modify private contractual rights. As it has in the past, the Commission here should recognize the “significant effect on the investment interests” of regulated entities and refuse to saddle networks and affiliates with a constraint on their ability to bargain in a flexible manner.⁷⁰ Instead, consistent with its professed appreciation for the economic realities facing the over-the-air television industry, the Commission should reaffirm its historic, statutorily-mandated position that the good faith rules are “not intend[ed] to affect the ability of a network affiliate agreement to limit redistribution of network programming.”⁷¹

⁶⁸ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

⁶⁹ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 104).

⁷⁰ *In re :Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 23053 (2000).

⁷¹ *Reciprocal Bargaining Order*, 20 FCC Rcd at 10355.

C. Mandatory Mediation, Even If Non-Binding, Would Hinder Rather Than Help Advance Retransmission Consent Negotiations

The *Notice* also calls for comment on whether it should be a *per se* violation for either party to “refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement.”⁷² Fox does not believe that non-binding mediation would be appropriate or helpful to resolving complex retransmission consent disputes. Quite the opposite, Fox is concerned that non-binding mediation could be used as a back door opening to compulsory arbitration.

Most fundamentally, Fox believes that the two parties to a business negotiation are best situated to come to an agreement when they are not subject to outside influences.⁷³ As described above, retransmission consent negotiations are complex, and the intricacies of any given deal belie the notion that a disinterested third party can bridge complicated differences more effectively than direct, one-on-one bargaining. If anything, bringing a new party into the conversation, and giving that individual time to come up to speed on the potentially wide-ranging set of issues dividing the parties, likely would introduce more delays. And mediation itself would pit the parties as dueling adversaries racing to convince an outsider that they are “right,” rather than focusing their efforts on working toward reaching an accord. Parties almost certainly would defer action pending the mediator’s reaction or recommendation, wasting valuable time that they otherwise could spend negotiating.

⁷² *Notice* at ¶ 25.

⁷³ MVPDs’ allegations that routine, arms-length marketplace negotiations cause them disproportionate harm, because of the purported risks stemming from loss of access to broadcast signals, ring especially hollow. MVPDs often lock consumers into long-term contracts – contracts that prevent subscribers from switching providers when a dispute results in temporary loss of access to the programming at issue. Thus, even in the rare event of a bargaining impasse, these contracts serve as a bulwark against subscriber defections and reveal MVPDs’ concerns to be overblown.

Equally important, Fox believes that there are legitimate concerns that mandatory mediation – even if non-binding – will serve as a powerful disincentive to parties’ willingness to reach agreement. There is ample evidence from past retransmission consent disputes that parties will stall or refuse to reach a deal when they believe (or even hope) that outside pressure will enable them to achieve a better result than the marketplace would bear. For instance, when Fox was locked in a dispute with Cablevision Systems Corp. last October, Cablevision repeatedly called for Commission and congressional intervention. Once Chairman Genachowski publicly confirmed that the FCC lacked authority to accede to Cablevision’s ill-considered demands for government to resolve the dispute, Cablevision and Fox quickly reached an agreement between themselves.⁷⁴

Non-binding mediation likewise could be easily abused by intransigent parties seeking to exploit the process as a pressure tactic against the other side or, worse, to demand that the mediation discussions serve as the only acceptable template for an agreement. Mediation would risk the Commission, too, attempting to accomplish indirectly what it has acknowledged it cannot do directly – forcing the parties to adhere to a bargain imposed by an outsider. In other words, once foisted upon the parties, the Commission could have a difficult time preventing non-binding mediation from morphing into a back door for *de facto* binding arbitration.

Accordingly, Fox urges the Commission not to require that parties submit to non-binding mediation. While the option always should be available to those parties who believe that

⁷⁴ See Letter from Chairman Julius Genachowski, FCC, to The Honorable John F. Kerry, Chairman, Subcommittee on Communications, Technology, and the Internet, Committee on Commerce, Science, and Transportation, U.S. Senate, at 1 (Oct. 29, 2010); see also NAB Statement Regarding Retransmission Consent, rel. Oct. 19, 2010 (“As history has shown, 99.9 percent of these deals are reached without disruption. We don’t have a broken system; . . . Broadcasters and pay-TV operators share a mutual interest in reaching a fair, market-oriented carriage deal. *Only when one party shifts their focus, pleading to government instead of negotiating fairly, does that mutual desire dissolve*”) (emphasis supplied).

mediation would provide a benefit, neither side should be required to submit to a process that introduces far more risk of delay and doubt than likelihood of success.

V. CONCLUSION

Given that the Commission's "primary objective" in this proceeding is to ensure that "the market-based mechanisms Congress designed to govern retransmission consent negotiations are working effectively," Fox applauds the FCC's tentative conclusion that the retransmission consent regime not be overhauled.

While appropriate steps can and should be taken to empower consumers through transparency and additional notice, the Commission should not take more intrusive action to alter the bargaining balance between broadcasters and MVPDs in what Congress intended to be a marketplace-based retransmission consent negotiation. The FCC's motivation for constraining network-affiliate bargaining is not clear, but this should be: hampering networks' and affiliates' flexibility to work together is certain to impair consumers' enjoyment of free, over-the-air television as they currently know it.

In sum, the retransmission consent regime works as Congress intended, and flourishing competition has brought numerous benefits to consumers, broadcasters and MVPDs alike. The Commission should refrain from upsetting an environment that facilitates free market negotiations and ensures that broadcasters have an opportunity to bargain for the fair compensation needed to continue investing in creating and distributing what is indisputably some of the most compelling and popular programming on television.

Respectfully submitted,

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