

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

In the Matter of

**AMENDMENT OF THE COMMISSION'S
RULES RELATED TO RETRANSMISSION
CONSENT**

MB Docket No. 10-71

REPLY COMMENTS OF DIRECTV, INC.

The comments filed in this proceeding evidence a clear divide in perspective. Broadcasters feel that the existing retransmission consent regime is working well, and reject any suggestion for updating the rules. This should come as no surprise, given the regulatory advantages the current regime bestows upon broadcasters. By contrast, virtually everyone else – from multichannel video programming distributors (“MVPDs”) to programmers to think tanks to public interest groups – agrees that the regime has become dysfunctional over the last twenty years and that the broadcasters’ exercise of market power will increasingly result in video service disruptions to and higher prices for consumers.¹ In order to prevent viewers from being used as pawns, DIRECTV, Inc. (“DIRECTV”) and others have urged the Commission to modify its rules

¹ See, e.g., Comments of American Cable Association, American Consumer Institute, American Public Power Association, AT&T, Bright House Networks, LLC, Charter Communications, Inc., DISH Network L.L.C., Free State Foundation, Mediacom Communications Corporation, SureWest Communications, Starz Entertainment, LLC, Time Warner Cable, and Verizon. All of these comments were filed in MB Docket No. 10-71 on May 27, 2011.

by, for example, enhancing its good faith negotiation requirements and eliminating exclusivity rules that give broadcasters a virtual monopoly in their assigned territories.²

Broadcasters refuse to recognize the shortcomings of the current retransmission consent regime, even when their own rhetoric serves to highlight them. For example, Sinclair Broadcasting Group, Inc. (“Sinclair”) asserts that Congress intended to create a market for broadcast signals that is comparable to the market for cable channels, citing the following language from the legislative history of the 1992 Cable Act:

Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel *should not be treated differently*.³

Yet broadcasters are treated *very* differently, as they enjoy a number of regulatory advantages that cable channel owners do not, including syndicated exclusivity, network non-duplication, must carry rights, and protection against deletion during “sweeps” periods. Ironically, Sinclair’s own economist confirms the danger of such outmoded regulatory intervention, asserting that “[p]olicies designed to ‘protect’ the bargaining power of one party at the expense of another can create and preserve inefficiencies that weigh heavily on consumers.”⁴

Broadcasters enjoy just such protectionist policies under the Commission’s current rules, which enhance their market power. Just a week after comments were filed in this proceeding, the head of one national network candidly stated that denying viewers a station’s signal provides the “ultimate leverage” in retransmission negotiations and stated that the “sky’s the limit” for

² See Comments of DIRECTV, Inc., MB Docket No. 10-71 (filed May 27, 2011) (“DIRECTV Comments”).

³ Comments of Sinclair Broadcasting Group, Inc., at 4 (citing S. Rep. No. 102-92 at 35) (emphasis supplied by Sinclair) (“Sinclair Comments”).

⁴ Michael G. Baumann, *Proposals for Reform of the Retransmission Consent Good Faith Bargaining Rules: An Economic Analysis*, at 18 (May 27, 2011) (attached as Exhibit 1 to Sinclair Comments).

extracting ever higher fees from MVPDs and their subscribers.⁵ The Commission cannot allow broadcasters to continue to engage in gamesmanship that ultimately victimizes the very viewers that the broadcasters are charged to serve.

Rather than rehash the myriad problems with the current retransmission consent regime, DIRECTV focuses in these reply comments on a single issue: rebutting arguments raised by Fox Entertainment Group, Inc. (“Fox”) in defense of network involvement in affiliate retransmission consent determinations. As demonstrated below, Fox’s arguments are contradictory and contrary to Commission precedent. Granting a network the right to approve its affiliates’ retransmission consent agreements or the right to negotiate such agreements on its affiliates’ behalf is inconsistent with the good faith negotiating requirement and implicates core Commission policies on licensee control. Because the Commission has specific authority from Congress to establish good faith criteria and to prevent unauthorized transfers of control,⁶ it can and should act in this proceeding to prevent network overreaching on retransmission consent.

In its initial comments, DIRECTV argued that the Commission should find that giving a network the right to negotiate or approve a station’s retransmission consent agreements is a *per se* violation of the good faith negotiation requirement.⁷ As Fox admits, its network affiliation agreement includes a provision calling for the affiliate to “obtain Fox’s approval before finalizing an agreement with an MVPD for retransmission consent that includes distribution of

⁵ See Press Release, American Television Alliance, *CBS Chief Says Retrans Blackouts Are “Ultimate Leverage” Making Consumers the Broadcasters’ Ultimate Victims* (June 6, 2011) (available at <http://www.americantelevisionalliance.org/press-releases/cbs-chief-says-retrans-blackout-are-%E2%80%9Cultimate-leverage%E2%80%9D/>) (discussing comments by CBS CEO Les Moonves at the Nomura Securities Media Summit).

⁶ See 47 U.S.C. §§ 310(d), 325(b)(3)(C).

⁷ See DIRECTV Comments at 13-18.

Fox’s network programming.”⁸ Because the Commission requires a commercial station to grant consent for carriage of its entire signal within the station’s market,⁹ this provision applies to virtually all negotiations between MVPDs and Fox affiliates. Nonetheless, Fox argues that an affiliated station is free to “grant[] retransmission consent for its entire signal to any MVPD that the licensee chooses”¹⁰ – *i.e.*, breach its contractual obligation to seek approval from the network – and therefore a network approval right “cannot serve as an obstacle to the successful conclusion of retransmission consent negotiations.”¹¹

This argument is disingenuous. According to Fox, the “only” effect of a station’s refusal to comply with the right-of-approval provision would be on “whether the applicable station carried programming from the affiliated network at issue.”¹² A station is free, in other words, to grant retransmission consent without seeking network approval, so long as it is willing to risk losing its network affiliation by doing so. As Fox surely knows, the monetary value of an independent station pales in comparison to the value of a network-affiliated station.¹³ Indeed, non-affiliated stations almost always opt for must-carry status and thus forego any retransmission

⁸ Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., MB Docket No. 10-71, at 13 (filed May 27, 2011) (“Fox Comments”).

⁹ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd. 6723, ¶ 102 (1994) (“*Broadcast Signal Carriage Order*”).

¹⁰ Fox Comments at 13.

¹¹ *Id.* at 16.

¹² *Id.*

¹³ See, e.g., Elizabeth A. Rathbun, *KRON-TV’s price of freedom*, BROADCASTING AND CABLE, Apr. 9, 2000 (discussing valuation of station at up to \$915 million with NBC affiliation or as little as \$680 million without it) (available at http://www.broadcastingcable.com/article/136203-KRON_TV_s_price_of_freedom.php).

consent revenue.¹⁴ And as Fox has recently demonstrated, it is more than willing to strip a station's affiliation over disagreements related to retransmission consent.¹⁵ Given this level of economic pressure, Fox's claim that its affiliates remain free to grant retransmission consent without seeking network approval rings hollow.¹⁶

In further defense of its contractual approval rights, Fox cites several Commission decisions for the proposition that a station may freely bargain away its retransmission consent rights, and that doing so is not inconsistent with the obligation to negotiate in good faith.¹⁷ However, Fox's selective quotations do not accurately reflect the limited holdings in those cases. For instance, one of them specifically did not reach the issue of good faith negotiation.¹⁸ Each of the others arose in the context of an MVPD's attempt to negotiate rights to carry part or all of a

¹⁴ See, e.g., *Comcast Corp., General Electric Co., and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 172 n.446 (2011) ("most independent stations assert must-carry rights, rather than opt for retransmission consent") ("*Comcast/NBCU Order*").

¹⁵ See, e.g., Michael Malone, *Fox, Nexstar Cut Ties in Springfield, Mo. And Ft. Wayne*, BROADCASTING AND CABLE, June 20, 2011 ("Fox continues to push its affiliates to share retrans money as part of their affiliation agreements, and has shown it will find a new local partner if stations balk at the terms.") (*available at* http://www.broadcastingcable.com/article/470015-Fox_Nexstar_Cut_Ties_in_Springfield_Mo_and_Ft_Wayne.php).

¹⁶ Fox's argument in this proceeding is similar to one made by networks, and rejected by the Commission, in a prior proceeding. A group of network-affiliated stations petitioned the Commission to enforce the rule preserving the stations' "right to reject" network programming, which had "been reduced to almost an empty letter by the affiliation terms that the networks have forced their affiliates to accept." See *Network Affiliated Stations Alliance, Petition for Inquiry Into Network Practices*, at 8 (filed Mar. 8, 2001). Those agreements contained significant limitations on the stations' right to preempt network programming, to the point that "[u]nder virtually every current affiliation agreement, an affiliate risks the ultimate penalty – loss of affiliation altogether – if it preempts any or more than a few hours of network programming without the network's approval." *Id.* The ability to seek approval for preemption was not deemed sufficient to protect station control with respect to programming. The Commission clarified that networks may not unduly limit a station's right to reject and that "[a]ffiliation agreements should not include provisions that impose monetary or non-monetary penalties on affiliates based on preemptions protected by the right-to-reject rule." *Network Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, 23 FCC Rcd. 13610, ¶ 8 (2008).

¹⁷ Fox Comments at 14-15, 20.

¹⁸ See *Monroe, Georgia Water Light and Gas Commission d/b/a Monroe Utilities Network v. Morris Network, Inc.*, 19 FCC Rcd. 13977, ¶ 9 (2004) ("[W]e need not reach the question of Morris's alleged violation of the good faith negotiation requirement.").

station's signal *outside* of its home market. In that specific context, the Commission has held that (1) a station may bargain for carriage of less than its entire signal,¹⁹ and (2) an affiliation agreement limiting the station's retransmission rights to in-market carriage only does not improperly usurp the station's authority or conflict with good faith negotiation obligations.²⁰ It was in this context that the Commission stated that "the right involved is one which may be freely bargained away in future programming contracts."²¹ But Fox would universalize these narrow holdings to support its broad assertion that a network could "*completely ban* a station from granting retransmission consent to an MVPD."²² This line of cases cannot support such a sweeping power grab by networks at the expense of local stations.

Fox also contends that permitting network approval rights does not impair an affiliated station's ability to designate a representative with authority to make binding representations on retransmission consent, as required under the Commission's rules.²³ Specifically, Fox asserts that, although "a party should be required to stand by the representations and offers it puts on the table," it should nonetheless be able to subject its offer to approval by a third party before

¹⁹ See *Broadcast Signal Carriage Order*, ¶ 105 ("any station which is not eligible for must-carry status under Section 614, because it is not a local commercial broadcast station, or does not qualify under the definitions of Section 614, may negotiate for partial carriage").

²⁰ See *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, 20 FCC Rcd. 10339, ¶¶ 20, 31-35 (2005) (discussing good faith obligation as it relates to requests for "retransmission of the broadcaster's signal by a distant MVPD") ("*Reciprocal Bargaining Order*"); *ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, 24 FCC Rcd. 1645, ¶ 9 (2009) ("Either party in such retransmission consent negotiations for out-of-market carriage has the right, 'after evaluating the prospect of distant signal carriage, to reject the proposal and terminate further negotiation.'" (quoting *Reciprocal Bargaining Order*, ¶ 31)).

²¹ *Broadcast Signal Carriage Order*, ¶ 107 (cited by Fox Comments at 20).

²² See *Ex Parte* Comments of FOX Broadcasting Company in Response to Time Warner Cable's Comments, CSR Nos. 8233-C and 8234-M, at 7 (filed Dec. 17, 2009) (emphasis in original). By contrast, NBC has previously conceded that "under the good faith requirements, a station cannot refuse to negotiate with an MVPD located in the same DMA regarding retransmission consent." *Reciprocal Bargaining Order*, ¶ 20.

²³ Fox Comments at 16-17.

actually “reaching a deal.”²⁴ This is an untenable reading of the rule. If a station makes an offer and an MVPD accepts it, there is a deal – which even Fox acknowledges the station should be required to stand by. Subjecting that deal to *post hoc* ratification or rejection by a third party would be wholly inconsistent with the concept of binding representations as required under the Commission’s rules.²⁵ This is borne out in the record of the rulemaking proceeding establishing the good faith negotiation rules, in which “[b]roadcast commenters propose[d] several standards based on experience gathered in the NLRB field,” including: “a party’s negotiator must have authority to conclude a deal.”²⁶ In that same proceeding, The Walt Disney Company, owner of the ABC Network, asserted that parties “are under a duty to vest negotiators with the authority to enter into a contract.”²⁷ By making all offers subject to *post hoc* approval by a third party, Fox’s alternative interpretation would effectively strip any station representative of the ability to perform the function required under the Commission’s rules.

Curiously, in another portion of its comments discussing potential mediation of disputes, Fox recognizes that subjecting retransmission consent to the oversight of a third party would tend to frustrate negotiations. Specifically, “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.”²⁸ Fox goes on to assert that, “[i]f anything, bringing a new party into the

²⁴ *Id.* at 17.

²⁵ Fox also attempts to justify its approval rights on the grounds that broadcast networks must be permitted to try to recoup some of the money they invest in content from their affiliates. *See* Fox Comments at 19. Of course, the amount of any reverse compensation flowing from affiliate to network is an entirely separate matter from the question of whether or not to grant retransmission consent on particular terms and conditions.

²⁶ *Implementation of Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd. 5445, ¶ 35 (2000).

²⁷ Comments of The Walt Disney Company, CS Docket No. 99-363, at 5 (filed Jan. 12, 2000).

²⁸ Fox Comments at 24.

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.”²⁹ DIRECTV submits that Fox’s statements aptly describe one problem with network interference in an affiliate’s retransmission negotiations.

Fox also contends that a network should be allowed to negotiate retransmission consent on behalf of its affiliates, and that a contrary rule would be an “unnecessary intrusion into the network-affiliate relationship.”³⁰ As DIRECTV demonstrated in its initial comments, giving the network a station’s proxy implicates the same policy concerns as a right-of-refusal clause.³¹ It would place the ever increasing retransmission revenue stream outside the station’s control, subject to the different (and potentially adverse) strategic objectives of the network operator. Given that network operators have traditionally negotiated for carriage of their controlled cable channels along with O&O retransmission consent, it is easy to conceive of instances in which the station’s interests would be subordinate to the network operator’s concern with a larger (and largely unrelated) suite of programming. The Commission has previously adopted prophylactic rules to prohibit network representation of affiliates when their respective interests could be expected to diverge.³² It should do so again here.

²⁹ *Id.*

³⁰ *See id.* at 20-21. Fox also contends that the Commission has implicitly approved network representation of affiliates in retransmission negotiations through conditions imposed in two transactions. *See id.* at 20 and n.62 (citing *Comcast/NBCU Order*, App. A; *General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, 572 (2004)). However, in neither case was the question of good faith negotiation raised or considered. Moreover, far from approving network representation, the Commission imposed significant conditions on the networks to ameliorate anticompetitive effects that would otherwise arise.

³¹ *See* DIRECTV Comments at 14-18.

³² Concerned that networks could pressure affiliates to raise their national spot advertising rates so as to make network ads more attractive to advertisers, and thus increase the network’s profits at the expense of the affiliates, the Commission prohibited networks from representing their non-owned affiliates in the sale of non-network advertising time. *See* 47 C.F.R. § 73.658(h); *Review of the*

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Contrary to the broadcasters' assertions, eliminating preferential exclusivity rules and enhancing good faith negotiation requirements does not determine the outcome of retransmission consent negotiations.³³ Rather, doing so merely creates a somewhat more level playing field that is more conducive to arriving at agreement without broadcaster brinksmanship or actual withholding of signals. DIRECTV urges the Commission to update its rules as expeditiously as possible in order to avoid any more needless disruption to consumers.

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June 27, 2011

Commission's Regulations Governing Broadcast Television Advertising, 10 FCC Rcd. 11853, ¶ 17 (1995) ("The public interest may be harmed if networks possess sufficient bargaining power over their affiliates such that exercise of this bargaining power would result in reductions of affiliate advertising revenues significant enough to inhibit the affiliates' ability to present programming that best serves its community.").

³³ See, e.g., Sinclair Comments at 9-10; Comments of the National Association of Broadcasters, MB Docket No. 10-71, at 2 (filed May 27, 2011).