



October 21, 2011

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

Ex Parte Notice

Re: Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71; The Regional Sports Network Marketplace, MB Docket No. 11-128; Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, MB Docket No. 11-93; Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 11-121

Dear Ms. Dortch:

On October 20, the undersigned, from the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), Steve Fravel of the National Telecommunications Cooperative Association (NTCA), Micah Caldwell of the Independent Telephone and Telecommunications Alliance (ITTA), and Eric Keber of the Western Telecommunications Alliance (WTA) (collectively "the Associations," also representing the concurring views of the Rural Independent Competitive Alliance (RICA)), met with William Lake, Nancy Murphy, and Steven Broeckaert of the Media Bureau to discuss the above-captioned dockets.

The Associations asserted that the Federal Communications Commission has authority under the Cable Act of 1992 to reform the retransmission consent process. Furthermore, section 706 of the Telecommunications Act of 1996 conveys ancillary authority, as well as the responsibility to reduce barriers to broadband investment, including the outdated retransmission consent regime. The Associations provided the attached presentation and summary of examples providing more details and specifics to the Bureau staff.

The Associations' representatives also reviewed and summarized comments filed in proceedings related to the Commission's upcoming report on access to regional sports networks (RSNs), noting that both the RSN and retransmission consent dockets intersect with the section 706 proceeding regarding the deployment and adoption of broadband

services. The Associations also discussed the implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act.

In accordance with FCC rules, this letter is being filed electronically in the above-captioned dockets.

Sincerely,

/s/ Stephen Pastorkovich

Stephen Pastorkovich
Business Development Director/
Senior Policy Analyst
OPASTCO

2020 K Street, NW
7th Floor
Washington, DC 20006
202-659-5990

cc: William Lake
Nancy Murphy
Steven Broeckaert



**THE ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES**

**THE NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION**

**THE INDEPENDENT TELEPHONE AND
TELECOMMUNICATIONS ALLIANCE**

THE WESTERN TELECOMMUNICATIONS ALLIANCE

RURAL INDEPENDENT COMPETITIVE ALLIANCE

MB Docket No. 10-71

MB Docket No. 11-128

MB Docket No. 11-93

GN Docket No. 11-121

***Ex Parte* Presentation October 20, 2011**



- I. FCC Has The Authority & Responsibility to Reform Retransmission Consent
- II. Specific Suggestions
- III. Regional Sports Network Report
- IV. CALM Act Implementation

Retransmission Consent – Ancillary Authority via 706

- Program Access Is A Broadband Issue
 - RLECs Offering Video With DSL Have 24% Higher Broadband Adoption Rates.
- FCC Recognizes The Intrinsic Link Between Providers' Ability To Offer Video And To Invest In Broadband Infrastructure
 - Local Franchise Order, MB Docket No. 05-311, ¶51 (2007).
 - MDU Order, MB Docket No. 07-189, ¶47.

Retransmission Consent – Ancillary Authority via 706

- FCC 706 Precedent In Previous Orders
 - FCC found that steps to improve access to content and enhance video competition would also lower barriers to broadband investment.
 - Therefore, such measures are authorized by both the 1992 Cable Act and section 706 of the 1996 Act (LFA Order, ¶52, ¶62; MDU Order, ¶47, ¶52).
 - Both were *prior* to the FCC’s finding that deployment was “not reasonable and timely.”

Retransmission Consent – Ancillary Authority via 706

- Since it has been determined that deployment is not reasonable and timely, the FCC is *required* by section 706 to reduce barriers to investment.
- As lack of access to programming is a significant barrier to investment, the FCC has a responsibility to lower it.

Lack of Action Leading to Reduced, Not Enhanced, Consumer Choice

- Small MVPDs are being forced out of the video market, impeding Cable Act and Sec. 706 goals:
 - Competition,
 - Consumer choice,
 - Opportunity for increased broadband adoption and investment.
- NCTC reports 28 market exits since 2010 alone (NCTC *ex parte*, Sept. 28, 2011).
- Situation is contrary to Cable Act and Sec. 706.

“Good Faith” Requirements

The following should be considered *per se* violations of the requirement to negotiate in Good Faith:

- A broadcaster granting agreement approval rights to an affiliated network;
- Stations not commonly owned negotiating or approving agreements on behalf of other stations;
- The refusal of either party in a retransmission negotiation to offer *bona fide* proposals on important issues;

“Good Faith” Requirements Cont.

- The refusal of either party in a retransmission negotiation to agree to non-binding mediation in the event of an impasse;
- Either party engaging in behaviors designed to manipulate the expiration of retransmission consent agreements to coincide with “must have” broadcasts;
- Attempts by parties to deny customers access to significantly viewed out-of-market signals; and

“Good Faith” Requirements Cont.

- Engaging in practices that unfairly advantage the broadcaster to the detriment of the end-user, such as forced tying, multicast tying, broadband tying, or the inclusion of mandatory non-disclosure provisions.

In addition to fines, violations of the Good Faith rules should be considered when broadcast license renewals are considered.

Totality of Circumstances

- The “Totality of Circumstances” standard should clarify that non-market price discrimination against small MVPDs constitutes a violation.

Standstill

- Current rules allow one party to withhold necessary content with impunity.
- Broadcasters have no incentive to negotiate with small MVPDs.
- A standstill provision is necessary to insert market forces and provide an incentive to negotiate.

Most Favored Nation Rule

- Small and mid-sized MVPDs cannot gauge market value due to mandatory non-disclosure provisions, leading to price discrimination.
- A “Most Favored Nation” rule permitting access to the same rates and conditions as large MVPDs would even the playing field and enable more competition in the video marketplace.

Regional Sports Networks

The Commission's RSN Report should:

- Acknowledge that small/mid-sized MVPDs continue to encounter significant barriers to obtaining must-have RSN programming.
- These barriers impede their ability to compete in or enter the video market, which, in turn, impedes broadband adoption and investment.
- The Report should outline the FCC's next steps to lower these barriers consistent w/Cable Act and 706 goals.

CALM Act Implementation

- Small MVPDs have incentives to address consumers' dissatisfaction when possible.
- However, they lack the ability to adjust dialnorm settings in real time.
- An expedited waiver process should be available to small MVPDs.
- Enforcement should focus on the source of noncompliant content.



Retransmission Consent – Example Summary

1. WHO Television in Des Moines offers 10% discount if initial letter offer is accepted. No offer or suggestion of negotiations in good faith.
2. Sinclair Broadcast Group offers an immediate 10% discount for acceptance of the letter offer, suggesting that opting to negotiate a rate will result in a higher per subscriber fee.
3. Canby Telephone Associates receives a retransmission consent election letter with a fee attached, and no offer of negotiations. Follow up correspondence indicates that the individual responsible for the retransmission consent process wants e-mail negotiations only, ignoring an offer for a telephone discussion. Canby GM sent an e-mail with a counter offer at a lesser rate. The Canby GM notes that he received a response to his offer within seven minutes of sending an e-mail follow up. The response reiterated the need for the fees at the rates stated in the first message from the broadcaster. When questioned concerning the rate, the broadcaster informs Canby GM that they have benefited from “must carry” even though Canby should have been charged retransmission fees. When addressing questions on the high rate the broadcaster informs Canby GM that the “networks” are demanding higher payments from the local affiliate stations.