

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**REPLY COMMENTS OF 21st CENTURY FOX, INC. AND  
THE WALT DISNEY COMPANY**

21st Century Fox, Inc. and The Walt Disney Company (collectively, the “Joint Commenters”) respectfully submit these reply comments in the above-captioned proceeding for the specific purpose of addressing the ill-considered and unlawful suggestion by some commenters that the Commission should use its authority to regulate good faith bargaining in the retransmission consent context in order to limit the contractual relationship between broadcast networks and their affiliated television stations.<sup>1</sup> The Joint Commenters strongly believe, as the Commission itself has made abundantly clear, that Congress never intended for the law authorizing good faith negotiation rules to restrict network-affiliate bargaining or to preclude privately-negotiated arrangements through which stations and networks agree on the scope of a station’s right to redistribute network programming. Put simply, the good faith rules address bargaining between broadcast stations and multichannel video programming distributors (“MVPDs”). They have no place in any conversation about the relationship between networks and their affiliates.

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<sup>1</sup> See Comments of American Cable Association (“ACA”), MB Docket No. 10-71 (filed June 26, 2014); Comments of Mediacom Communications Corp., Cequel Communications, LLC D/B/A/ Suddenlink Communications, and Bright House Networks, LLC, MB Docket No.10-71 (filed June 26, 2014) (together with ACA, the “RTC Opponents”).

The RTC Opponents' arguments to the contrary are another salvo in their ongoing campaign to use FCC processes to get a leg up in retransmission consent negotiations. ACA, for instance, makes plain its desire for cable operators to freely import distant station signals in the event of a retransmission consent bargaining impasse.<sup>2</sup> ACA asserts that it should be a violation of the obligation to negotiate retransmission consent in good faith for a station to agree with its network not to authorize MVPD carriage of network programming outside of a geographic market.<sup>3</sup> Mediacom *et al.* similarly ask the FCC to prohibit any agreements, arrangements or understandings that grant affiliates first call rights to broadcast certain programming within their local markets.<sup>4</sup> This of course would redound to MVPDs' short-term pecuniary benefit. But the public interest certainly would not be served if networks and stations were prevented from entering into arms-length agreements that support economically healthy and competitively vibrant local stations in markets across the country.<sup>5</sup>

Beyond ignoring the will of Congress and more than 20 years of Commission precedent, the RTC Opponents also attempt to recast the Further Notice in this proceeding into a re-litigation of the original Notice of Proposed Rulemaking. Given that the Commission already has issued a Report & Order in which it declined to heed MVPD calls for the FCC to interfere in the network-affiliate relationship, the RTC Opponents' plea should be rejected.

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<sup>2</sup> See ACA Comments at 14-15.

<sup>3</sup> See *id.*

<sup>4</sup> See Mediacom *et al.* Comments at 16.

<sup>5</sup> We note that for more than fifty years the FCC's rules expressly have provided that an affiliated station in a local market may have a "first-call" upon the programs of its network. See 47 C.F.R. § 73.658(a).

**I. COMMISSION PRECEDENT MAKES CLEAR THAT CONGRESS NEVER INTENDED FOR GOOD FAITH OBLIGATIONS TO RESTRICT NETWORK-AFFILIATE BARGAINING**

The FCC consistently has found that contractual arrangements between networks and affiliates are not implicated in broadcasters' obligation to negotiate in good faith with MVPDs. The Commission said specifically that "neither the text nor the legislative history" of the 1992 Cable 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."<sup>6</sup> Section 76.65 of the FCC's rules was "not intend[ed] to affect the ability of a network affiliate agreement to limit redistribution of network programming."<sup>7</sup> Furthermore, the Commission has said that it "perceive[d] no intent on the part of Congress that the reciprocal bargaining obligation interfere with the network-affiliate relationship or . . . preclude specific terms contained in network-affiliate agreements . . . ."<sup>8</sup> In essence, "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."<sup>9</sup>

Thus, it comes as no surprise that even as the Further Notice contemplates the possibility of modifications to the network non-duplication and syndicated exclusivity rules, the Commission nonetheless made clear "that contractual arrangements between networks and their

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<sup>6</sup> *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").

<sup>7</sup> *Id.* at 10355.

<sup>8</sup> *Id.* at 10354.

<sup>9</sup> *In re Monroe, Georgia Water Light and Gas Commission D/B/A/ Monroe Utilities Network v. Morris Network, Inc.*, 19 FCC Rcd 13977, 13981 (2004) ("Monroe").

affiliates may bar a broadcaster from agreeing to the importation of its distant signal.”<sup>10</sup>

Moreover, the FCC emphasized that, if the exclusivity *rules* were eliminated, “free market negotiations between broadcasters and networks or syndicated program suppliers would continue to determine the exclusivity *terms* of affiliation and syndicated programming agreements, and broadcasters and MVPDs would continue to conduct retransmission consent negotiations in light of these privately negotiated agreements . . . .”<sup>11</sup>

Even beyond the Commission’s clear statements in the Further Notice, FCC precedent makes clear that broadcast stations are permitted to enter into, and honor, network-affiliation agreements that contain first-call and other bargained-for provisions.<sup>12</sup> In *ATC Broadband*, for instance, the FCC stressed 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 terms of its network-affiliation agreement from granting consent to the MVPD with respect to its network programming.<sup>13</sup> The Commission “decline[d] to find that [the station’s] conduct” in ceasing negotiations “violated the Commission’s good faith standards.”<sup>14</sup> In particular, the FCC said that a “negotiation[ ] for which a broadcaster is contractually precluded from reaching consent may be truncated . . . .”<sup>15</sup>

The RTC Opponents ignore all of this and attempt to direct the Commission away from the narrow question posed in the Further Notice – whether the FCC’s exclusivity rules themselves remain necessary – and toward the much broader question of whether the FCC

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<sup>10</sup> Further Notice, at ¶ 58.

<sup>11</sup> *Id.* at ¶ 66 (emphasis supplied).

<sup>12</sup> See *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.

<sup>13</sup> See *ATC Broadband*, 24 FCC Rcd at 1645.

<sup>14</sup> *Id.* at 1649.

<sup>15</sup> *Id.* (citing *Reciprocal Bargaining Order*, 20 FCC Rcd at 10345).

should outright prohibit first call or other voluntary contractual arrangements in the broadcast industry. But that massive overhaul of the network-affiliate relationship is not on the table in the Further Notice and should not be a part of the Commission's deliberations here. The RTC Opponents attempt to drag this proceeding off course without so much as acknowledging that the Further Notice accompanied a Report & Order in which the FCC declined to heed MVPD calls for the FCC to interfere in the network-affiliate relationship. There is no reason for the Commission to address this issue here. If, as the Commission itself has long acknowledged, Congress did not intend to restrict in any way the ability of a network and its affiliates to enter into first call arrangements or agreements related to the redistribution of network programming, then the FCC cannot possibly accede to proposals to dismantle such provisions as part of this proceeding.<sup>16</sup>

In short, neither the Communications Act nor the FCC's rules governing good faith negotiations restrict network-affiliate bargaining. The good faith rules apply with respect to the relationship between stations and MVPDs, not stations and their networks. The Commission should reject calls to cast aside Congressional will and FCC precedent and instead reaffirm, as proposed in the Further Notice, that the FCC has no intention of interfering with free market negotiations between networks and their affiliated stations under the guise of "reforming" retransmission consent.

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<sup>16</sup> Entangled in the RTC Opponents' argument is the faulty notion that networks interfere with station preferences by demanding or extracting geographic limitations or first call rights. But the facts belie this argument. Not only are these contractual provisions freely bargained for as part of a free market negotiation between a network and a station, but stations as much as networks benefit from having the broadcast first call rights. It is simply wrong to posit that these arrangements constitute a "third party" placing a "limit" on a station's control over its retransmission consent rights. *See Mediacom et al. Comments*, at 2.

## **II. COMMISSION INTERFERENCE IN THE PRIVATE CONTRACTUAL UNDERTAKINGS OF NETWORKS AND THEIR AFFILIATES WOULD DISSERVE THE PUBLIC INTEREST**

Wholly apart from the absence of any legal foundation for their request, the RTC Opponents do not -- and, indeed, they cannot -- provide any public interest justification for their proposal. They urge the Commission to eradicate the concept of market exclusivity, but in doing so completely disregard that broadcast first call arrangements and geographic limitations between stations and program suppliers, including networks, existed long before Congress enacted retransmission consent laws. These provisions were not devised as a way to thwart a station's ability to negotiate in good faith with MVPDs over retransmission rights. Whatever the Commission decides to do with the exclusivity rules on the books today, it should take care not to interfere with freely bargained-for contractual arrangements that promote the free over-the-air television service upon which so many viewers rely.

