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ALERT

FCC Seeks Comment on Proposals to Update "Totality of the Circumstances" Test for Retransmission Consent Negotiations

September 11, 2015

The Federal Communications Commission (FCC or Commission) is seeking comment on whether to update the standards that it considers for determining whether parties have negotiated in good faith for retransmission consent of a broadcast signal. Comments will be due 60 days after publication in the Federal Register; reply comments will be due 30 days later.

Under Section 325(b) of the Communications Act of 1934, as amended, multichannel video programming distributors (MVPDs) may not retransmit the signal of a broadcast station without the broadcaster's express authority. Meanwhile, the Act imposes a requirement upon both broadcasters and MVPDs to "negotiate in good faith" for retransmission consent. A party can violate this obligation by committing certain enumerated *per se* breaches of the good faith negotiation requirement or by committing conduct that, in the "totality of the circumstances," does not constitute negotiating in good faith.

In the 16 years since Congress adopted the good faith negotiation requirement, the FCC has had to resolve just four complaints, dismissing three and finding, in the fourth, that an MVPD violated the "good faith" requirement by carrying a third party's broadcast signal that duplicated the signal of another without consent during a retransmission consent dispute. Since 2011, the Commission has also had pending a proceeding that, among other things, proposed to provide more guidance to negotiating parties on good faith negotiation requirements. Nevertheless, in the STELA Reauthorization Act of 2014, Congress directed the Commission to "commence a

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rulemaking to review its totality of the circumstances test for good faith negotiations."

The resulting Notice of Proposed Rulemaking (NPRM) seeks comment on a number of issues relating to the totality of circumstances test, including whether specific proposals in the record—the majority of which were proposed by MVPD interests—should constitute evidence of bad faith. Although the NPRM's focus is on the totality of the circumstances test, the FCC also asks whether any of the factors discussed "should be considered additional *per se* violations," thereby raising the prospect of revising the entirety of the good faith test.

Below, we discuss the specific issues identified in the NPRM.

Totality of the Circumstance Test in General

The NPRM first asks whether there is a need to update the totality of the circumstances test at all, seeking specific comment on: (i) how the retransmission consent market is functioning; and (ii) whether the current process for alleging bad faith "help[s] to promote *bona fide* negotiations and protect consumers." In asking these questions, the Commission appears concerned not with the process for resolving complaints themselves, but for how the prospect of enforcement shapes underlying negotiations.

Next, the NPRM asks about the effectiveness of the totality of the circumstances test, and whether it should be more specific. In particular, the FCC asks whether certain practices should be considered evidence of bad faith or whether the test should remain a generic catch-all. Noting the test's origins in the field of labor law, the Commission also asks whether more recent labor law precedents may be useful in revising the test.

The NPRM also seeks comment on whether the agency should add, delete, or modify the list of bargaining proposals that are presumptively consistent and inconsistent with marketplace conditions.

- Proposals that are currently presumptively consistent with marketplace conditions are: (i) proposals for compensation above that agreed to with other MVPDs in the same market; (ii) proposals for compensation that are different from the compensation offered by other broadcasters in the same market; (iii) proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market; (iv) proposals for carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights; (v) proposals for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media; and (vi) proposals that allow termination of retransmission consent agreement based on the occurrence of a specific event.

- Proposals that are currently inconsistent with marketplace conditions are: (i) proposals that specifically foreclose carriage of other programming services by the MVPD that do not substantially duplicate the proposing broadcaster's programming; (ii) proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (*e.g.*, other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition; (iii) proposals that result from agreements not to compete or to fix prices; and (iv) proposals for contract terms that would foreclose the filing of complaints with the Commission.

In particular, the Commission asks whether any practices or bargaining proposals should be added to these lists to account for the extension of the good faith requirement to MVPDs. It also asks whether there are practices that only would violate the good faith negotiation requirement in combination, and whether there are any particular negotiating practices that are likely to result in a breakdown of negotiations. The FCC expresses concern in the NPRM about whether revising the totality of the circumstances test could "hinder a party's ability to tailor its proposals to the competitive environment."

Specific Practices for Consideration

The second part of the NPRM seeks comment on whether the FCC should consider specific practices identified in the record as evidence of bad faith negotiations under the totality of the circumstances test. Most of these practices relate to broadcaster behavior and have been suggested by MVPD interests including the American Television Alliance (a coalition that includes many MVPDs), cable company Mediacom Communications Corp., and the American Cable Association.

Preventing Online Access to Broadcast Programming: The Commission asks whether prohibiting access to a broadcaster's online content by an MVPD's broadband subscribers should be considered evidence of bad faith. While acknowledging that broadcast programming remains available for free, over the air, during a retransmission consent dispute, the FCC seeks comment on whether denying access to online content is "more egregious or harmful to consumers than other practices used to gain leverage in retransmission consent discussions" and whether it can be distinguished from news organizations restricting online content to their paid subscribers.

Third-Party Negotiations: The Commission asks whether certain network involvement, including the right to negotiate on a station's behalf or to approve the station's retransmission consent agreements, should be considered evidence of bad faith. The NPRM also asks whether any joint negotiations by non-commonly owned stations, whether or not in the same market, should be evidence of bad faith.

Bundling of Signals: The Commission, while observing that in-kind compensation was the only type of compensation available in early retransmission consent negotiations, asks whether circumstances have changed in the past 15 years such that bundling broadcast and non-broadcast programming should not be presumptively consistent with good faith bargaining. It specifically seeks comment on tying between a broadcast station and regional sports networks, multicast programming, duplicative stations, significantly viewed stations, and/or prospective stations that have not yet launched. In a footnote, the FCC also raises the issue of whether bundling increases or lessens programming diversity. The NPRM also seeks comment on how to analyze the legitimacy of a standalone offer for a broadcast station.

Miscellaneous Factors: In addition to the above categories, the FCC also seeks comment on whether a number of additional practices are inconsistent with negotiating in good faith, including:

- A broadcaster's timing potential blackouts to the time period just prior to the airing of a "marquee" sports or entertainment event;
- A broadcaster's preventing an MVPD from temporarily importing an out-of-market signal "in cases where the broadcaster has blacked out its local signal after negotiations failed;"
- A broadcaster's seeking to restrict the devices and functions on which its signal can be viewed;
- A broadcaster's demand that MVPDs pay per-subscriber fees for all subscribers that receive the broadcaster's signal over-the-air or who receive an MVPD's Internet or voice service, but not its video service;
- Either an MVPD's or broadcaster's refusal to provide "information substantiating reasons for positions taken when requested to in the course of bargaining";
- Either an MVPD's or broadcaster's engaging in conduct designed to delay negotiations;
- An MVPD-affiliated broadcaster's "discriminat[ion] in the prices, terms and conditions [for] retransmission consent among or between MVPDs based on vertical competitive effects";
- Either an MVPD's or broadcaster's demanding or negotiating retransmission consent based on "most favored nation" provisions;
- A broadcaster's demand for tier placement commitments;
- A broadcaster's imposition of minimum penetration requirements;
- A broadcaster's failure to make an initial contract proposal at least 90 days prior to the existing contract's expiration;
- A broadcaster's preventing an MVPD from disclosing rates, terms and conditions of a contract proposal or agreement to the Commission, a court of competent jurisdiction, and/or other state or federal governmental entities;
- A broadcaster's discrimination in price among MVPDs in a market absent a showing of direct and legitimate economic benefits associated with such price differences;
- Either an MVPD's or broadcaster's failure to negotiate terms and conditions for retransmission consent based on actual local market conditions;
- Either an MVPD's or broadcaster's attempt to manufacture a retransmission consent dispute in the hope of encouraging government intervention; or
- Any other practices that should be considered evidence of bad faith under the totality of the circumstances test.

Significantly Viewed Stations: The Commission seeks comment on whether a significantly viewed station must consent to out-of-market carriage and whether a station's failure to request permission from its network before declining a request should be considered evidence of bad faith.

Online Distribution Rights: Finally, the FCC asks what role an MVPD's demand for online distribution rights or a broadcaster's refusal to grant such rights should play in the totality of the circumstances analysis.

Adoption of even some of the proposals in the NPRM could have significant effects on the retransmission consent regime and lead to far more government oversight of the bargaining process between broadcasters and MVPDs, although the extent to which negotiations will be impacted depend on which proposals the FCC eventually adopts.

If you are interested in filing comments or have questions, please contact the Wiley Rein attorney who routinely handles your FCC matters or one of the attorneys listed on this alert.