

United States Senate
WASHINGTON, DC 20510-2102

October 19, 2010

1661

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20004

Dear Chairman Genachowski:

As you know, News Corp. (FOX) and Cablevision failed to reach an agreement on Friday for the retransmission of WNYW (NY channel 5), WWOR (NJ channel 9) and WTXF (Philadelphia channel 29). As a result, approximately 3 million Cablevision subscribers in New Jersey, New York and Connecticut were left without access to these broadcast channels, including the widely watched New York Giants game this weekend. As the New York Times recently reported, these sorts of confrontations are now “a regular event;” indeed, Bloomberg News recently reported that “TV blackouts in the U.S. have reached the highest level in a decade and may climb as pay-TV operators fight higher fees sought by content producers.”

Rather than take sides in a conflict of corporate interests, we can all agree that this system works least of all for consumers, the primary interest we represent in matters of public policy-making. I hope you will agree that the current process – which forces all sides and particularly consumers into lousy choices – is broken and in need of reform. Currently, either party, sufficiently strong willed, can play a game of negotiating chicken with the consumer caught in the middle. It incentivizes conflict over negotiation.

The voices of angry consumers in this weekend’s news coverage speak volumes. Many football fans had to leave home, denied the service they faithfully pay for, and even bring their children to bars to watch the game. As one person, Marilyn Odell, told the New York Times, shouting to be heard above the crowd, “We’re too old to be in this place.” A separate Associated Press story detailed one of the owners of a bar that depends on its Cablevision subscription complaining, “This is ridiculous!...I’m relying on people to come in who are Giants fans – and they’re walking out, even though I pay for the football package.” He went on to say that “regular, everyday people get caught in the middle.”

There are important equities and business interests at stake in these negotiations, and in this most recent case, both sides believe they’ve negotiated in good faith. It’s not our job to take sides – but it is clearly our responsibility to ask whether there’s a better way forward as these kinds of situations rise in frequency. In addition to this most recent dispute, just last March, Cablevision and Disney/WABC-TV failed to reach an agreement and the WABC-TV signal was pulled from Cablevision. While that signal was eventually restored, it was only after Cablevision

customers were without WABC-TV for approximately 20 hours, including the first 15 minutes of the Academy Awards (Oscars) broadcast. And upcoming retransmission consent negotiations between FOX and the DISH Network which will include thousands of households in Boston and millions nationwide, and in December between Mediacom and Sinclair Broadcasting, could put even more Americans at risk of losing television programming that they have come to expect and rely on for their local news and entertainment.

This Spring, you testified before the Senate Commerce Committee that the retransmission consent system was under review and had been since the previous New Year. Further, a petition that seeks to modify the FCC's rules for retransmission consent negotiations has been pending before the FCC since March 2010. The FCC has had sufficient time to consider the comments that have been filed on that petition and begin the process to revise its rules. But in the absence of FCC action, I feel a responsibility to begin to consider the smartest, least intrusive actions to reform the law.

A discussion draft of the legislative language is attached. The process we are trying to effect is two party negotiations that have a big impact on an unrepresented third party; consumers. The goal is to offer a path to potential resolution of differences and protect consumers. It would stave off the termination of carriage on expiration of an agreement and allow signals to continue transmitting until the FCC evaluates the behavior of the parties and recommends or does not recommend binding arbitration during which carriage would continue. At the end of the day, the broadcaster would retain the right to pull the signal when there is a good faith impasse on terms, but it would not be able to do so without much greater transparency in process and a more systemic effort at reaching agreement without consumers getting caught in the middle.

In short, in any broadcaster-distributor negotiation, there are four basic possible impasse scenarios, for which I am considering a new process of resolution as follows. Once both parties agree that they have reached an impasse, they both submit their last best offer for FCC evaluation and:

- Scenario 1 – The FCC finds that the broadcaster is negotiating in good faith and making an offer consistent with market conditions but the distributor is not. In this case, the distributor shall agree to the broadcaster's last best offer or terminate carriage and the FCC may fine the distributor for negotiating in bad faith. In lieu of termination of the signal, the broadcaster can withdraw the last best offer and ask the Commission to require binding arbitration.
- Scenario 2 – The FCC finds that the broadcaster is not negotiating in good faith or making an offer consistent with market conditions and the distributor is negotiating in good faith and making an offer consistent with market conditions, then the FCC can

require binding arbitration. The penalty for the broadcaster is forced participation in binding arbitration.

- **Scenario 3 – This will be the most likely scenario in most cases.** The FCC finds that both parties have negotiated in good faith but reached a true impasse based on an honest disagreement on the value of the signal. In this case, the FCC may *request* them to submit to binding arbitration. If one party or the other refuses to engage in binding arbitration, then the FCC will provide both parties with a model notice by which to inform consumers of the potential loss of service as well as the difference in offers on the table so that consumers can judge for themselves who was making the fairest offer. This adds a more consumer friendly and transparent way to end transmission of services if necessary and creates an attractive option for arbitration for both parties.
- Scenario 4 – The FCC finds that neither party is negotiating in good faith, then it can *require* binding arbitration and fine both parties.

I look forward to working with you on a solution to this problem. If you have an alternative solution or believe you can make the process work for consumers using your regulatory authority, please let me know.

Sincerely,



John F. Kerry

[STAFF WORKING DRAFT]

OCTOBER 18, 2010

111TH CONGRESS
2D SESSION

S. _____

To amend the Communications Act of 1934 to facilitate retransmission agreement conflict resolution.

IN THE SENATE OF THE UNITED STATES

NOVEMBER _____, 2010

Mr. KERRY (for himself, Mr. _____, and Mr. _____) introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend the Communications Act of 1934 to facilitate retransmission agreement conflict resolution.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Retransmission Nego-
5 tiation Reform and Transparency Act of 2010".

1 **SEC. 2. FINDINGS.**

2 The Congress finds the following:

3 (1) Broadcast television stations rightly receive
4 free use of the public spectrum to transmit a broad-
5 cast signal in the public interest. Broadcasters also
6 receive special government-granted benefits to en-
7 sure that they are able to fulfill their mandate to
8 serve the public. These include the right to choose
9 either mandatory carriage called "must carry" or
10 negotiated carriage from a multichannel video pro-
11 gramming distributor under retransmission consent.

12 (2) Under the Federal Communication Commis-
13 sion's network nonduplication regulations, a broad-
14 caster, in most cases, effectively is the sole source of
15 popular, non-substitutable, network programming in
16 a given designated market area. As a result, when
17 a broadcaster threatens to pull its signal, the multi-
18 channel video programming distributor cannot ac-
19 cess an existing alternative source for the network
20 programming.

21 (3) When retransmission consent rights were
22 granted to commercial television broadcast stations
23 in 1992, it was expected that such rights would be
24 exercised in a manner that would benefit consumers
25 by enhancing competition in the video programming
26 marketplace while preserving and protecting the

1 broadest availability of local television broadcast sta-
2 tions to all members of the viewing public at reason-
3 able prices.

4 (4) Between 1992 and 2007, these expectations
5 were largely met. Most television broadcast stations
6 electing retransmission consent were able to reach
7 carriage agreements with multichannel video pro-
8 gramming distributors on mutually agreeable terms
9 that provided additional value to consumers at a rea-
10 sonable price. As recently as 2005, the Federal Com-
11 munications Commission found that most retrans-
12 mission consent agreements were based on an ex-
13 change of “in-kind” consideration.

14 (5) Retransmission consent negotiations have,
15 however, become increasingly contentious with
16 threats of impasse rising. As a result, a growing
17 number of negotiations create a period of uncer-
18 tainty and confusion for consumers as to their con-
19 tinued access to programming from broadcasters
20 that they reasonably expected they would receive as
21 part of their multichannel video programming dis-
22 tributor service.

1 **SEC. 3. RETRANSMISSION NEGOTIATION POST-IMPASSE**
2 **TRANSPARENCY AND RESOLUTION.**

3 Section 325(b) of the Communications Act of 1934
4 (47 U.S.C. 325(b)) is amended—

5 (1) by redesignating paragraph (7) as para-
6 graph (8); and

7 (2) by inserting after paragraph (6) the fol-
8 lowing:

9 “(7) RESOLUTION OF RETRANSMISSION AGREEMENT
10 RENEWAL CONFLICT.—

11 “(A) IN GENERAL.—Upon the expiration of an
12 existing carriage agreement (including any mutually
13 agreed upon extension thereof) between a MVPD
14 and a broadcaster that has elected its right to grant
15 retransmission consent under this subsection—

16 “(i) the MVPD shall continue to carry the
17 signal or signals of the broadcaster on the same
18 terms as the expired agreement;

19 “(ii) the broadcaster shall allow continued
20 carriage of its signal or signals on the same
21 terms as the expired agreement; and

22 “(iii) within 10 days after the date on
23 which the agreement expired, each party shall
24 submit its last best offer to the Commission for
25 a determination as to whether offer is incon-
26 sistent with—

1 “(I) the duty to negotiate in good
2 faith; or

3 “(II) market conditions, including
4 changes in the consumer price index.

5 The Commission shall make its determination with
6 respect to each such offer within 20 business days
7 after the date on which the agreement expired.

8 “(B) BROADCASTER LAST BEST OFFER INCON-
9 SISTENT WITH GOOD FAITH NEGOTIATIONS OR MAR-
10 KET CONDITIONS.—If the Commission determines
11 that—

12 “(i) the television broadcast station’s last
13 best offer was inconsistent with the duty to ne-
14 gotiate in good faith or with market conditions,
15 and

16 “(ii) the MVPD’s last best offer was not
17 inconsistent with the duty to negotiate in good
18 faith or market conditions,

19 then the Commission shall require the parties to
20 submit to binding arbitration. The broadcaster shall
21 allow continued carriage of its signal or signals dur-
22 ing the pendency of arbitration pursuant to the
23 terms of the expired agreement.

1 “(C) MVPD LAST BEST OFFER INCONSISTENT
2 WITH GOOD FAITH NEGOTIATIONS OR MARKET CON-
3 DITIONS.—

4 “(i) If the Commission determines that the
5 MVPD’s last best offer was inconsistent with
6 the duty to negotiate in good faith or with mar-
7 ket conditions, and the television broadcast sta-
8 tion’s last best offer was not inconsistent with
9 the duty to negotiate in good faith or market
10 conditions, then the Commission may fine the
11 MVPD and the MVPD shall have 2 business
12 days to agree to the terms of the television
13 broadcast station’s last best offer retroactive to
14 the date on which the existing agreement ex-
15 pired and continue to carry the signal or sig-
16 nals.

17 “(ii) If the MVPD does not agree to the
18 terms of the television broadcast station’s last
19 best offer within that 2-day period, then the
20 MVPD shall terminate carriage of the signal or
21 signals upon 14 days notice to consumers un-
22 less the broadcaster requests, within 2 business
23 days after the end of that 2-day period, that
24 the Commission require the parties to submit to
25 binding arbitration. If the broadcaster requests

1 the Commission to require binding arbitration,
2 it shall allow continued carriage of its signal or
3 signals during the pendency of arbitration pur-
4 suant to the terms of the expired agreement.

5 “(iii) If the MVPD does not accept the tel-
6 evision broadcast station’s last best offer and
7 the broadcaster does not request binding arbi-
8 tration (or the Commission denies such re-
9 quest), then the MVPD and the broadcaster
10 shall notify consumers, in accordance with regu-
11 lations prescribed by the Commission, of the
12 MVPD’s termination of carriage.

13 “(D) MUTUALLY EXCLUSIVE GOOD FAITH OF-
14 FERS.—

15 “(i) If the Commission determines that
16 both parties negotiated in good faith but
17 reached a true impasse and simply disagree on
18 a fair price, it shall request the parties to sub-
19 mit to binding arbitration and notify the Com-
20 mission of its decision within 5 business days.

21 “(ii) If either party declines to accept the
22 Commission’s request within the 5-day period,
23 then each party shall provide 14 days notice to
24 consumers of the pending disruption in service
25 and publicly disclose the retransmission consent

1 terms that it had offered in its last best offer.
2 The Commission may provide a model notice
3 for parties to disclose the terms of their last
4 best offer that would be accessible to consumers
5 and a model notice to consumers regarding the
6 pending termination of carriage of the signal.

7 “(E) BOTH OFFERS INCONSISTENT WITH GOOD
8 FAITH NEGOTIATIONS.—If the Commission deter-
9 mines that the last best offer of both parties was in-
10 consistent with the duty to negotiate in good faith
11 or with market conditions then—

12 “(i) the Commission shall require the par-
13 ties to submit to binding arbitration;

14 “(ii) the Commission may impose a fine on
15 each party; and

16 “(iii) the broadcaster shall allow continued
17 carriage of its signal or signals during the
18 pendency of arbitration pursuant to the terms
19 of the expired agreement.

20 “(F) ARBITRATION.—Any arbitration required
21 or requested under this paragraph shall be con-
22 ducted under the auspices of the Commission or the
23 American Arbitration Association, as determined by
24 mutual agreement of the parties or by the Commis-
25 sion in the absence of such agreement. The final ar-

1 bitrated terms of an arbitration under this para-
2 graph shall be retroactive to the date on which the
3 agreement expired.

4 “(G) CONTINUED NEGOTIATION NOT PRE-
5 CLUDED.—Nothing in this subparagraph shall be
6 construed to preclude a broadcaster and a MVPD
7 from continuing to negotiate after the expiration of
8 an existing carriage agreement and agreeing, at any
9 time, to continued carriage on mutually acceptable
10 terms.

11 “(H) DEFINITIONS.—In this paragraph:

12 “(i) BROADCASTER.—The term ‘broad-
13 caster’ means a television broadcast station as
14 defined in subsection (d)(7)(B) of this section.

15 “(ii) MVPD.—The term ‘MVPD’ means
16 multichannel video programming distributor as
17 defined in section 602 of this Act.”.

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