

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71.

When it comes to retransmission consent negotiations, I take counsel from two wise communications experts—Rob Base & DJ E-Z Rock—whose hit song reminds us, “It takes two to make a thing go right.”¹ After carefully reviewing the record and meeting with numerous parties to this proceeding, I have concluded that good-faith retransmission-consent negotiations generally involve two parties: one multichannel video programming distributor (MVPD) and one broadcast company. Adding a third or fourth party to the mix raises troubling competitive concerns.

Accordingly, I am pleased to support today's item. The order states that the joint negotiation of retransmission consent agreements by separately-owned, top-four stations in the same market violates the statutory duty to negotiate in good faith.

To be sure, such joint negotiations may bring some benefits. But given that retransmission consent negotiations usually occur only once every three years, the cost savings are at best intermittent and do not compare with the efficiencies produced by television stations sharing sales staff or other backroom operations.

And in my judgment, the harms outweigh any such benefits. The record indicates that joint negotiations may result in supra-competitive increases in retransmission-consent fees.² This suggests that such conduct is collusive and could be a “contract, combination . . . or conspiracy, in restraint of trade” that is prohibited by the Sherman Act.³ The anti-competitive potential of joint negotiations here is only amplified by the regulatory context for video carriage, including the compulsory copyright license, network non-duplication rule, and syndicated exclusivity rule.

Also crucial to my vote is that the Commission today carefully remains within its limited authority over retransmission consent. Section 325(b)(3)(C) of the Communications Act instructs the FCC to enact regulations to prohibit a television broadcast station or MVPD from “failing to negotiate in good faith.” This provision allows the Commission to proscribe certain negotiating tactics in order to ensure good faith negotiations between broadcast stations and MVPDs, such as refusing to respond to a retransmission consent proposal.⁴ But it does not give the Commission the power to mandate the substantive outcome of retransmission consent negotiations. This will remain the case after today's vote.

I appreciate my colleagues' willingness to incorporate many of my suggestions into the item. In particular, I am pleased that today we are not extending the so-called “sweeps prohibition” to direct broadcast satellite providers. The record did not reveal a need for such regulation, and we should not impose new regulatory mandates where there is not a concrete problem to solve.

Finally, I support the Commission's decision to seek additional comment on whether we should eliminate or modify our network non-duplication and syndicated exclusivity rules. In particular, I encourage parties to focus their feedback on whether the interests these rules are designed to advance can and should be protected through private contractual arrangements or whether the compulsory copyright license would render such a scheme unworkable.

¹ Rob Base & DJ E-Z Rock, *It Takes Two* (It Takes Two, 1988).

² See Order at para. 16.

³ See 15 U.S.C. § 1.

⁴ See 47 C.F.R. § 76.65(b)(1)(v).

Many thanks to the Media Bureau for its efforts. It took more than two to make this item outta sight, so I particularly want to recognize Raelynn Remy, Diana Sokolow, Kathy Berthot, Michelle Carey, Nancy Murphy, Mary Beth Murphy, and Steven Broecker. For this recovering antitrust lawyer and staffer on the 2007 *MDU Order*,⁵ the item truly was a pleasure to read.

⁵ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007), *aff'd*, *National Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).