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Year-End Retransmission Consent Negotiations: Bargaining in Good Faith

Many MVPDs are negotiating retransmission consent agreements as this year comes to an end. As you negotiate, there are FCC rules you should be familiar with, including the requirement that a broadcaster negotiate retransmission consent in good faith.

The FCC's Media Bureau last month released an [Order](#) granting a good faith complaint filed by AT&T against seven station groups, all represented by a single negotiator. Between this recent action and Congress's current work toward renewing the Satellite Television Extension Act, it is especially important to be diligent about negotiating in good faith.

As a reminder, the FCC's rules allow broadcasters to do the following based on competitive marketplace conditions:

- Ask for compensation above that agreed to with other MVPDs in the same market
- Ask for compensation that is different from the compensation offered by other broadcasters in the same market.
- Ask for terms and conditions different from that offered to other MVPDs in the same market.

The rules have also been interpreted to allow broadcasters to do the following without constituting a pro-se violation of the rules:

- Propose that carriage be conditioned on carriage of other programming.
- Propose that carriage be conditioned on a broadcaster obtaining channel positioning or tier placement rights.
- Ask for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media.

On the other hand, there are several examples of broadcaster bargaining positions that presumptively conflict with the good faith negotiation requirement. These include:

- Proposals that specifically foreclose carriage of other non-duplicative programming services.
- Proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station the effect of which is to hinder significantly or foreclose MVPD competition.
- Proposals that result from agreements not to compete or to fix prices.
- Proposals for contract terms that would foreclose the filing of complaints with the Commission.

The FCC has also concluded that the following broadcaster conduct violates the obligation to negotiate in good faith:

- Refusal to negotiate retransmission consent.

- Refusal to designate a representative with authority to make binding representations.
- Refusal to meet and negotiate at reasonable times and locations.
- Unreasonably delaying negotiations.
- Refusal to put forth more than a single, unilateral proposal.
- Failure to respond to a proposal from an MVPD, including the reasons for rejecting a proposal.
- Executing an agreement that prevents the broadcaster from entering into a retransmission consent agreement with any other MVPD.
- Refusal to execute an agreement that sets forth the full understanding of the parties.
- Two non-commonly owned stations in the same DMA jointly negotiating retransmission consent.
- A station limiting an MVPD from carrying into the DMA a station that has been deemed significantly viewed unless such stations are commonly owned.

In addition, an MVPD may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that the broadcaster breached its duty to negotiate in good faith.

If you have questions about the FCC's good faith rules, or retransmission consent negotiations in general, please contact Scott Friedman at (314) 462-9000 or sfriedman@cinnamonmueller.com or Bruce Beard at (314) 394-1535 or bbeard@cinnamonmueller.com.

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