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[STAFF WORKING DRAFT]

October 18, 2010

111th CONGRESS
2d Session

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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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Retransmission Negotiation Reform and Transparency Act of 2010".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) Broadcast television stations rightly receive free use of the public spectrum to transmit a broadcast signal in the public interest. Broadcasters also receive special government-granted benefits to ensure that they are able to fulfill their mandate to serve the public. These include the right to choose either mandatory carriage called "must carry" or negotiated carriage from a multichannel video programming distributor under retransmission consent.

(2) Under the Federal Communication Commission's network nonduplication regulations, a broadcaster, in most cases, effectively is the sole source of popular, non-substitutable, network programming in a given designated market area. As a result, when a broadcaster threatens to pull its signal, the multichannel video programming distributor cannot access an existing alternative source for the network programming.

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

broadest availability of local television broadcast stations to all members of the viewing public at reasonable prices.

(4) Between 1992 and 2007, these expectations were largely met. Most television broadcast stations electing retransmission consent were able to reach carriage agreements with multichannel video programming distributors on mutually agreeable terms that provided additional value to consumers at a reasonable price. As recently as 2005, the Federal Communications Commission found that most retransmission consent agreements were based on an exchange of "in-kind" consideration.

(5) Retransmission consent negotiations have, however, become increasingly contentious with threats of impasse rising. As a result, a growing number of negotiations create a period of uncertainty and confusion for consumers as to their continued access to programming from broadcasters that they reasonably expected they would receive as part of their multichannel video programming distributor service.

SEC. 3. RETRANSMISSION NEGOTIATION POST-IMPASSE TRANSPARENCY AND RESOLUTION.

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

(1) by redesignating paragraph (7) as paragraph (8); and

(2) by inserting after paragraph (6) the following:

"(7) RESOLUTION OF RETRANSMISSION AGREEMENT RENEWAL CONFLICT.—

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

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

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

"(iii) within 10 days after the date on which the agreement expired, each party shall submit its last best offer to the Commission for a determination as to whether offer is inconsistent with—

"(I) the duty to negotiate in good faith; or

"(II) market conditions, including changes in the consumer price index.

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

"(B) BROADCASTER LAST BEST OFFER INCONSISTENT WITH GOOD FAITH NEGOTIATIONS OR MARKET CONDITIONS.—If the Commission determines that—

"(i) the television broadcast station's last best offer was inconsistent with the duty to negotiate in good faith or with market conditions, and

"(ii) the MVPD's last best offer was not inconsistent with the duty to negotiate in good faith or market conditions,

then the Commission shall require the parties to submit to binding arbitration. The broadcaster shall allow continued carriage of its signal or signals during the pendency of arbitration pursuant to the terms of the expired agreement.

"(C) MVPD LAST BEST OFFER INCONSISTENT WITH GOOD FAITH NEGOTIATIONS OR MARKET CONDITIONS.—

"(i) If the Commission determines that the MVPD's last best offer was inconsistent with the duty to negotiate in good faith or with market conditions, and the television broadcast station's last best offer was not inconsistent with the duty to negotiate in good faith or market conditions, then the Commission may fine the MVPD and the MVPD shall have 2 business days to agree to the terms of the television broadcast station's last best offer retroactive to the date on which the existing agreement expired and continue to carry the signal or signals.

"(ii) If the MVPD does not agree to the terms of the television broadcast station's last best offer within that 2-day period, then the MVPD shall terminate carriage of the signal or signals upon 14 days notice to consumers unless the broadcaster requests, within 2 business days after the end of that 2-day period, that the Commission require the parties to submit to binding arbitration. If the broadcaster requests the Commission to require binding arbitration, it shall allow continued carriage of its signal or signals during the pendency of arbitration pursuant to the terms of the expired agreement.

"(iii) If the MVPD does not accept the television broadcast station's last best offer and the broadcaster does not request binding arbitration (or the Commission denies such request), then the MVPD and the broadcaster shall notify consumers, in accordance with regulations prescribed by the Commission, of the MVPD's termination of carriage.

"(D) MUTUALLY EXCLUSIVE GOOD FAITH OFFERS.—

"(i) If the Commission determines that both parties negotiated in good faith but reached a true impasse and simply disagree on a fair price, it shall request the parties to submit to binding arbitration and notify the Commission of its decision within 5 business days.

"(ii) If either party declines to accept the Commission's request within the 5-day period, then each party shall provide 14 days notice to consumers of the pending disruption in service and publicly disclose the retransmission consent terms that it had offered in its last best offer. The Commission may provide a model notice for parties to disclose the terms of their last best offer that would be accessible to consumers and a model notice to consumers regarding the pending termination of carriage of the signal.

"(E) BOTH OFFERS INCONSISTENT WITH GOOD FAITH NEGOTIATIONS.—If the Commission determines that the last best offer of both parties was inconsistent with the duty to negotiate in good faith or with market conditions then—

"(i) the Commission shall require the parties to submit to binding arbitration;

"(ii) the Commission may impose a fine on each party; and

"(iii) the broadcaster shall allow continued carriage of its signal or signals during the pendency of arbitration pursuant to the terms of the expired agreement.

"(F) ARBITRATION.—Any arbitration required or requested under this paragraph shall be conducted under the auspices of the Commission or the American Arbitration Association, as determined by mutual agreement of the parties or by the Commission in the absence of such agreement. The final arbitrated terms of an arbitration under this paragraph shall be retroactive to the date on which the agreement expired.

"(G) CONTINUED NEGOTIATION NOT PRECLUDED.—Nothing in this subparagraph shall be construed to preclude a broadcaster and a MVPD from continuing to negotiate after the expiration of an existing carriage agreement and agreeing, at any time, to continued carriage on mutually acceptable terms.

"(H) DEFINITIONS.—In this paragraph:

"(i) BROADCASTER.—The term 'broadcaster' means a television broadcast station as defined in subsection (d)(7)(B) of this section.

"(ii) MVPD.—The term 'MVPD' means multichannel video programming distributor as defined in section 602 of this Act.".

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