



February 23, 2016

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Ex Parte Communication, MB Docket Nos. 15-216 and 10-71

Dear Ms. Dortch:

In a classic exhibit used in early 20th century traveling carnivals called the “Girl in the Fishbowl,” viewers were sold on the idea of seeing a five-inch girl (often dressed as a mermaid) living in a tiny underwater grotto. For a penny, viewers could look through a small hole to see what appeared to be a miniature girl swimming in her aquatic home. In actuality, a life-sized girl was swimming in a pool behind a lens that distorted the view to make her seem much smaller.

In several letters in these proceedings,¹ Mediacom, one of the nation’s larger pay TV operators,² attempts to create a similar illusion – although in reverse. Evoking carnival imagery,³ it has taken something very small – a proposed term in a contract negotiation – and turned it into something colossal. And like a carnival barker, it hopes to use this illusion to support fantastic tales designed to encourage the Commission to come rushing to its aid as they negotiate private contracts with local broadcasters.

Save your penny, FCC. Mediacom’s illusion is not worth the price of admission.

¹ See Letter from Thomas J. Larsen, Senior Vice President, Mediacom Comm., MB Docket No. 15-216 (Feb. 16, 2016) (Mediacom Feb. 16 Letter); see *also* Letter from Thomas J. Larsen, Senior Vice President, Mediacom Comm., MB Docket No. 15-216 (Feb. 3, 2016) (Mediacom Feb. 3 Letter).

² In a previous letter, NAB described Mediacom as being “among the Top 10 largest pay TV companies in the country.” Mediacom counters that it is actually the 11th largest pay TV operator. See Mediacom Feb. 16 Letter at FN1. As if 10 versus 11 makes a material difference, we note that the discrepancy likely comes from the fact that Mediacom views Bright House Networks as a stand-alone company and not majority-owned by Time Warner Cable (TWC). [Bright House Networks, LLC, is technically a limited liability company whose only member is an entity called Time Warner Entertainment-Advance/Newhouse Partnership, owned 33% by “Advance/Newhouse” and 67% by TWC. See “Public Interest Statement” of Charter Comm., MB Docket No. 15-149, at FN19 (June 25, 2015)]. Moreover, Mediacom will soon move up the charts yet again once the Charter Communications deal with Time Warner Cable and Bright House Networks closes.

³ The carnival theme is the latest in Mediacom’s parade of comical metaphors, which have compared the broadcast industry and its representatives to Nazis, drunk drivers, and now, “Age and Scale” operators. See, e.g., Letter from Joseph E. Young, Senior Vice President, General Counsel & Secretary of Mediacom Comm. Corp., MB Docket No. 10-71 (July 26, 2015) (comparing NAB to Nazi propagandists that painted “Poland as the aggressor”).

In its latest letter,⁴ Mediacom again attempts to demonize an apparent proposed term in a contract negotiation it dubs the “Additional Station” provision. It suggests that this term, which broadcasters apparently “demand,” would set off a cascade of increased retransmission consent fees as one broadcaster becomes the would-be agent for all other broadcasters.⁵

We noted in our initial response to Mediacom’s complaint how this provision, as described, is akin to a most favored nation (MFN) clause, a common provision that pay TV operators pioneered in retransmission consent negotiations.⁶ Mediacom countered that this provision is “not an MFN by any stretch of the imagination,”⁷ which is quite a surprise because Mediacom has shown itself to be quite imaginative.⁸

The question of whether or not this provision is, in fact, an MFN is immaterial. As a threshold consideration, what matters is that broadcasters have no ability to unilaterally demand terms and conditions from pay TV operators like Mediacom. Mediacom’s carnival-themed letter is appropriate because it relies on yet another illusion that pay TV operators have no choice but to accept whatever terms a broadcaster seeks in a negotiation. Yet pay TV advocates have completely failed to prove – indeed, Mediacom doesn’t even attempt to⁹ – that there exists a gross disparity in bargaining power between broadcasters and multichannel video programming distributors (MVPDs). And without that demonstration there is no reason for the Commission to even consider circumscribing what parties may bargain for in a negotiation. Every party to these negotiations has the power to say no.

Notably, Mediacom neglects to inform the Commission whether or not it accepted the phantom broadcaster’s proposal. Was the condition unilaterally imposed on Mediacom? And if it accepted it, has it been used in the manner in which Mediacom claims it was intended?

⁴ Mediacom Feb. 16 Letter.

⁵ Mediacom Feb. 3 Letter.

⁶ See Letter from Rick Kaplan, Executive Vice President and General Counsel, National Association of Broadcasters, MB Docket No. 15-216 (Feb. 10, 2016).

⁷ Mediacom Feb. 16 Letter.

⁸ Mediacom, the poster child for self-serving behavior in the pay TV industry, has a very clear record of trying almost anything to convince the Commission that broadcasters are evil and that a retransmission consent overhaul is necessary. For example, it lambasted the FCC for failing to inject itself into the free market. See Letter from Rocco Commisso, Chairman and Chief Executive of Mediacom Comm. Corp., to FCC Chairman Tom Wheeler (July 7, 2015) (saying that the Commission’s “refusal to become involved in specific disputes combined with an unwillingness to adopt corrective regulations add up to a do-nothing policy.”). It also filed an oft-ridiculed petition for rulemaking this past summer arguing that broadcasters should be forced to allow retransmission of their signal if their over-the-air signal does not reach 90 percent of viewers in the market. Petition for Rulemaking of Mediacom Comm. Corp., RM-11752 (July 7, 2015).

⁹ Mediacom will no doubt claim that increases in retransmission consent fees prove a disparity in bargaining power. That claim has no merit on its face. Not only are the numbers it uses entirely misleading – it’s not hard to come up with an outlandish percentage increase when compensation began at zero – but growth in rates can occur for many reasons. Most notably, marketplace equilibrium that occurs after a former-monopoly provider faces some competition hardly proves a gross disparity in bargaining power, especially considering that broadcasters, like all programmers, face far more competition now than they did a decade ago.

The essential truth missing from Mediacom's complaint is that negotiations between sophisticated businesses naturally involve many proposed terms. That's how deals get done. Terms are presented, rejected, modified, compromised and finalized in every negotiation, and each negotiation and final deal is highly specific to the businesses involved. The terms in each negotiation also evolve as the industries evolve. That's why the Commission's current and flexible totality of the circumstances test remains the most practical way to effectuate its statutory duty.

Parties are free to propose and negotiate for any terms and conditions they wish, including terms and conditions that are contingent on changing facts. If Mediacom wants to include a term that varies a broadcasters' compensation depending upon whether it airs enough carnival-related programming, for example, there is no legal reason it cannot propose this. And there shouldn't be. Parties can negotiate for any contingency. For example, the model retransmission consent agreement published by ACA for its membership¹⁰ encourages members not to pay any money for retransmission consent to a station that loses its affiliation with one of the four major broadcast networks.¹¹

To accede to Mediacom and pay TV's demands for a retransmission consent overhaul would require the Commission to delve deeply and frequently into the quagmire of thousands of negotiations and to judge the validity of tens of thousands of different proposed terms, even those terms that are never accepted. Companies like Mediacom will play this endless "gotcha" game to gain a regulatory advantage. And to what end? Having the Commission stand over every negotiation will only slow down the process and almost certainly result in more, not fewer, disputes.

Respectfully submitted,



Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs
National Association of Broadcasters

cc: Jessica Almond, Holly Saurer, Marc Paul, Matthew Berry, Robin Colwell, Bill Lake, Marybeth Murphy, Nancy Murphy, Martha Heller

¹⁰ American Cable Association (ACA) Model Retransmission Consent Agreement, available at: http://www.americancable.org/files/images/ACA-RTC_Sample_Agreement_111005.doc (viewed Feb. 17, 2016).

¹¹ *Id.* at 9(b) ("For any Station affiliated with a Big 4 Network on the Agreement Date, Cable Operator may terminate this Agreement upon 30 days notice to Broadcaster if the Station fails to maintain its Big 4 Network affiliate.").