Mediacom

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

Extreme Poodles is a TV show devoted to "the world of competitive poodle grooming,"[1] allowing us to watch "[t]he best groomers around transform their curly canines into outrageous creations."[2]

Another place where the public can experience a conjoining of a poodle with an outrageous creation is a public statement by the National Association of Broadcasters (NAB) growing out of a February 3rd letter bringing to the Commission's attention demands by some broadcasters for inclusion of a particular form of "Additional Station" provision in retransmission consent agreements.[3] In a February 11th filing, NAB, after dispensing its usual quota of ad hominem attacks against Mediacom which have nothing to do with the merits of the issue at hand, responded by mischaracterizing the Additional Stations provision as nothing more than a kind of MFN already widely used to bring under an existing retransmission consent contract additional stations over which the broadcaster later acquires management authority.[4]

Because of the factual premises underlying NAB's position were so faulty, Mediacom

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[1] http://www.tlc.com/tv-shows/other-shows/videos/extreme-poodles/.

[2] http://www.tlc.com/tv-shows/other-shows/videos/extreme-poodles/.

[3] Letter from Thomas J. Larsen, Senior Vice President, Government & Public Relations, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, MB Dkt No. 15-216 (filed Feb. 3, 2016).

[4] *See* Letter from Rick Kaplan, Executive Vice President & General Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dkt No. 15-216 (filed Feb. 11, 2016).

felt compelled to correct the record through a submission made on February 16th.[5] NAB quickly countered with this response reported by *Communications Daily*:

> Mediacom's lonewolf [*sic*] conspiracy tale is exactly what one expects from the most shrill [*sic*] voice in pay TV. You can't put horns on a poodle, call it the devil and expect people to believe you.[6]

Ever since this statement was reported, we have been scratching our heads in bewilderment over what it might mean and what it could possibly have to do with the substance of the issue raised by Mediacom. We briefly considered asking Apple Inc. to put its in-house geniuses to work decrypting the statement, but recent news stories suggest that it probably wouldn't be receptive. The obscurity of NAB's intended point, the curious use of an obvious non-sequitur about a "lone wolf" conspiracy (which, like a retrans dispute, logically requires a minimum of two parties) and the cringe-worthy mixing of hackneyed canine-species metaphors has led to wild speculation: Perhaps the CIA is cleverly using NAB to convey coded messages to agents in the field by disguising them as incomprehensible statements about retransmission consent, brilliantly selecting a topic which is sure to cause any foreign spies monitoring our nation's media to tune out or doze off.

Although by no means certain, we think that the reference to poodle in NAB's statement might have been intended to accuse Mediacom of nefariously seeking to fool the gullible Commission into viewing as a snarling Cerberus what in reality is "only" a poodle. In doing so, NAB obviously presumes that the rest of us agree with its stereotyping of poodles as cute, cuddly, meek and mild creatures. That misconception has made poodles easy targets for undeserved scorn and ridicule. The legendary author Henry Miller, for instance, included "poodle dogs" among his long litany of the undesirable byproducts of civilization.[7] The comedian Rita Rudner once pondered whether "other dogs think poodles are members of a weird religious cult."[8] We could give many more examples of the kind of prejudice that the breed encounters every day.

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[5] Letter from Thomas J. Larsen, Senior Vice President, Government & Public Relations, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dkt No. 15-216 (filed Feb. 16, 2016).

[6] Communications Daily, Feb. 17, 2016, at page 24.

[7] "Civilization is drugs, alcohol, engines of war, prostitution, machines and machine slaves, low wages, bad food, bad taste, prisons, reformatories, lunatic asylums, perversion, brutal sports, suicides, infanticide, cinema, quackery, demagogy, strikes, lockouts, revolutions, putsches, colonization, electric chairs, guillotines, sabotage, floods, famine, disease, gangsters, money barons, horse racing, fashion shows, poodle dogs, chow dogs, Siamese cats, condoms, peccaries, syphilis, gonorrhea, insanity, neuroses, etc., etc." Henry Miller, *An Open Letter to Surrealists* (1939), available at http://tsunamibooks.jimdo.com/2013/03/29/henry-miller-an-open-letter-to-surrealists-everywhere-1939/. While lobbyists are not specifically mentioned, they were undoubtedly meant to be included within the first "etc." Were Miller compiling his list today, he would, we are confident, include retransmission consent. Relative to this docket, note the fact that lockouts are one of the enumerated evils.

[8] http://www.brainyquote.com/quotes/quotes/r/ritarudner104845.html.

Those who perpetuate the stereotype of poodles as wimps with outlandish hairdos are obviously unaware of the brave and loyal military service rendered to this nation by "Poodles Against Hitler" during World War II.[9] As recounted by one chronicler: "When after the perfidious attack of the Nipponese at Pearl Harbor on Dec. 7, 1941, the United States was plunged into the all-out struggle against the Axis aggressors, a nation-wide organization sprang up for the training of dogs for defense."[10] And, who were some of the first recruits to join the program? Why poodles, of course.[11] Moreover, Winston Churchill, who was known as "the British Bulldog" because of his iron-willed determination to fight the fascists to the bitter end, had a poodle as his personal pet. So did both John F. Kennedy, a veritable icon of virility, and Richard Nixon, a consummate tough guy. Obviously, beneath the billowy fluff of the typical poodle forced to endure unspeakable tonsorial indignities lies a backbone of steel and the heart of a warrior.

Shortly after displaying a distinct lack of appreciation for the poodle's inner dog, NAB filed yet another letter on the subject of Mediacom's point about the Additional Stations language in which it demonstrated a more consequential blind spot, arguing that Mediacom's

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[9] *See* Kate Kelly, *Poodles Against Hitler: A Canine Unit for World War II,* http://americacomesalive.com/2014/04/26/poodles-against-hitler/#.Vs0Ci-ZmpME.

[10] William F. Brown, *How to Train Hunting Dogs* at 221 (1942).

[11] *See* Suzanne Carter Isaacson, *Poodles in WWII*, http://www.poodlehistory.org/PoodlesinWWII.HTM. The German military did not stand idly by in the face of the allies' willingness to unleash the dogs of war. Among other things, there have been reports of efforts to create an army of super-intelligent, talking attack dogs to defend the Third Reich, with one of the dogs, when asked "Who is Adolf Hitler?" being able to reply "'Mein Führer." *See* The Museum of the UnNatural Mystery, *Attack of the Nazi Talking Dogs!,* http://www.unmuseum.org/nazidogs.htm. Apparently, the Germans also sued the Finnish owner of a pharmaceutical company because he and his wife, a German citizen strongly opposed to Nazi ideology, referred to their pet dog as "Hitler" and had allegedly trained it to raise its paw into the air in a mocking imitation of the Nazi salute. *See Nazis were Furious About a Dog They Thought Mocked Hitler,* http://thepoodleanddogblog.typepad.com/the_poodle_and_dog_blog/2011/01/nazis-were-furious-about-a-dog-they-thought-mocked-hitler.html. We mention all this despite the obvious risk that it will encourage NAB to continue its whining in recent FCC filings that Mediacom has compared broadcasters to the Nazis. Of course, like other "facts" cited by NAB on the subject of retransmission consent, this is not true. All Mediacom has done is use Germany's justification for its invasion of Poland in 1939 as an example of use of a propaganda tool which NAB has employed in its efforts to defend the status quo in retransmission consent. The Nazis did not invent or copyright the technique and it has been used many times before and after the Nazi-era by many others, both good and evil. Interestingly, we also noted that the "scapegoating" technique had been mocked in the *Blame Canada* song from an animated film. By NAB's logic, this must mean that we have dissed broadcaster representatives as being nothing more than cartoon characters. Of course, our comments cannot fairly or even reasonably be read as painting people in the broadcasting industry as either Nazis or cartoonish. Perhaps metaphor and allegory are simply not NAB's strong suits. In any event, since NAB repeatedly brings up the alleged comparison to the Nazis in its Commission filings, it obviously thinks that raising the point gains it some kind of advantage in the policy debate over retransmission consent. We, on the other hand, think that the constant repetition of the allegation is just silly, and so we see no harm in extending the shelf-life of the accusation by using the words "Nazi" and "Hitler" in this letter as well. (As an aside, it would come as no surprise to see in the near future a claim by NAB that Mediacom has called broadcast industry representatives "talking attack dogs" simply because that phrase appears someplace in this letter.)

concerns were meritless because parties to a retransmission consent negotiation "are free to propose and negotiate for any terms and conditions they wish."[12]

That proposition certainly seems to be true in the case of bargaining with movie and rock stars.[13] Because the stars of popular TV shows play such an important role in the broadcast business, perhaps broadcasters think that the spoiled, self-centered, imperious and over-bearing behavior displayed by some celebrities is the norm for all of us and are unaware that not everyone in every setting can or should act in the same way. (That confusion, actually, would explain much of what goes on in negotiations for retransmission consent.)

Of course, celebrities are not subject to a federal statute requiring them to negotiate in good faith, but employers and employees engaged in collective bargaining and broadcasters and MVPDs undertaking retransmission consent negotiations are bound by that kind of law.

A statutory obligation to act in good faith is inherently a restriction on the degree of freedom of the parties to go to any extreme in defining and pursuing their selfish interests.[14] The

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[12] Letter from Rick Kaplan, Executive Vice President & General Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dkt No. 15-216 (filed Feb. 23, 2016), at page 3.

[13] *See* Ashley Lutz & Kirsten Acuna, *Here Are Ridiculous Things Celebrities Demand Backstage*, Business Insider, Apr. 14, 2012, http://www.businessinsider.com/here-are-15-ridiculous-celebrity-backstage-demands-2012-4?op=1. Will Farrell reportedly has demanded that he be given backstage a flight of stairs on wheels, a painted rainbow on wheels and a fake tree on wheels. Of course, Farrell is a comedian and so it is not inconceivable that he was pulling someone's chain. The article cited does not say whether the requested items were actually supplied.

[14] In the British and American legal systems, contract law was originally entirely a matter of common law and he guiding principle was "freedom of contract." Two competent parties were entirely free to decide for themselves whether or not to enter into contract with each other. If they chose to bargain, there were almost no restraints on process, substance or conduct. Once an agreement was signed, its terms governed the relationship and as long as a party acted consistently with the letter of the contract, it was free to exercise its contractual rights and discretion as it saw fit, including by acting entirely selfishly. As an industrial economy characterized by mass production and consumption evolved and as life in general became more complicated in the late 19th and early 20th centuries, the principle of "freedom of contract" came under increasing stress. Among other things, there was a growing recognition that society had a stake in the outcomes of putatively private commercial transactions, and that disparity in bargaining power was producing results that many considered detrimental to the broader conception of the public interest. The doctrine that every contract contains an implied covenant of good faith and fair dealing emerged as a tool for preventing one contractual party with some advantage conferred by contract language from acting in ways that would undermine the justifiable expectations of the weaker party in entering into the contract.

It is undeniable that the creation of the implied covenant of good faith and fair dealing narrowed the traditional freedom of contract that parties to an existing agreement formerly enjoyed. That, of course, was the purpose of the new legal obligation—to disallow some ways of behaving that used to be perfectly permissible in a world of unrestrained freedom of contract. It would be illogical for someone to claim that after the covenant became applicable, that the range of what was and was not allowed was as broad as ever. The same is true in the very limited number of cases in which a statute imposes a duty of good faith in pre-contract negotiations—the purpose is to narrow the range of permissible behavior.

imposition of a duty of good faith in pre-contract bargaining logically requires a dividing line between terms that are permitted to be insisted upon to the point of break-down of the negotiations and those that are not, just as it creates a line between permissible and impermissible conduct during the bargaining process. Thus, labor law draws a distinction between mandatory, non-mandatory (or "permissive"), and illegal subjects of bargaining. The significance of these distinctions is that agreements relating to illegal subjects are unenforceable, while agreements relating to non-mandatory subjects voluntarily entered into by the parties can be enforced, but insisting on a non-mandatory term to the point of impasse is a violation of the duty to bargain in good faith.[15]

Because a good faith obligation in pre-contract negotiations logically implies a boundary between proposals that can be made conditions to a deal and those that cannot, the Commission needs to draw a clearer line for retransmission consent negotiations, as Mediacom and American Television Alliance have advocated in there filings in this proceeding.[16] Otherwise, there indeed would be nothing preventing broadcasters or MVPDs from insisting to the point of a negotiating impasse on inclusion in the contact of "any terms and conditions they want," as NAB says. Logically, that would include even such items as a broadcaster's demand for an agreement that the MVPD's executives contribute to NAB's political action committee, a covenant by the MVPD to cease filing complaints with the FCC about broadcaster behavior in retransmission consent negotiations or requirement that all of the MVPD's employees with pet poodles have them groomed to look like Yoda from the *Star Wars* movies. While these examples may be extreme, they illustrate our point that there needs to be a clear boundary between permissible and impermissible demands during negotiations.

Actually, turning poodles into four-legged Yodas would be one of the lesser affronts that they have been forced to endure. A few minutes spent browsing through the photographs

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[15] Section 8(d) of the Taft-Hartley Act was adopted in order to change how labor contract negotiations were conducted with the hope that limiting the previously unrestrained freedom of the parties in negotiations would contribute to the public interest in avoiding strikes and lockouts in key industries by making it more likely that a mutually acceptable contract would be reached. The parties are required to meet and bargain in good faith over their respective proposals on mandatory subjects, but not those which are non-mandatory. One party's insistence to impasse that the contract include its proposal on a non-mandatory subject of bargaining is an unfair labor practice. *See generally* Federal Labor Relations Authority, *Guidance on Scope of Bargaining https://www.flra.gov/Guidance_scope%20of%20bargaining.*

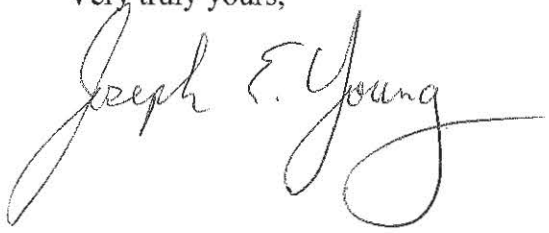
[16] Comments of Mediacom Communications Corporation, MB Dkt No. 15-216 (filed Dec. 1, 2015); Comments of American Television Alliance, MB Dkt No. 15-216 (filed Dec. 1, 2015). Mediacom believes that proposals or demands, whether by the broadcaster of the MVPD, that are not directly and necessarily related to the retransmission of a station's signal within its DMA by an MVPD should be permitted to be raised, but should not be allowed to be insisted upon to the point of impasse. We are asking that the Commission make that point clear to both parties in the case of "Additional Station" demands. The matters that are "directly and necessarily" related to retransmission of the signal would be the length of the contract, the price or consideration to be paid by the MVPD for consent, permissible tier of carriage, channel positioning, technical terms related to the reception and retransmission of the signal and other topics reasonably incidental to the enumerated terms (e.g., calculation of number of subscribers when there is a per-subscriber fee and audit rights).

appearing in a *DailyMail.com* piece from a couple of years ago makes us almost believe the remark that "the major cause of death with poodles is shame and a sense of unreality."[17] While the Spike network's show *1000 Ways to Die* teaches us that there are a lot of mortal threats to worry about, we think that this is one cause of death that many broadcasters have little reason to fear—some of the silly, implausible and factually incorrect things they say in their filings with the Commission suggest that they have neither a sense of shame nor any awareness that there is a distinction between the real and the unreal.

In any event, Mediacom's communications with the Commission about the "Additional Stations" provision is an effort on our part—made in good faith, by the way—to present a case that it would be inconsistent with the good faith requirement for a broadcaster to insist on such a provision to the point that there is a negotiating impasse and an ensuing blackout. NAB's ad hominem attacks, mischaracterization of the nature of the provision and misunderstanding of the legal implications of a statutory good faith requirement do nothing to diminish whatever merit may be found in our arguments.

Thank you for your consideration.

Very truly yours,



[17] *See* https://in.pinterest.com/pin/491103534336558936/.