



March 15, 2016

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street
Washington, D.C. 20554

Re: American Cable Association Letter dated March 7, 2016; Implementation of Section 103 of STELA Reauthorization Act of 2014, MB Docket No. 15-216 (the “NPRM”)

Dear Ms. Dortch:

This filing responds to the letter dated March 7, 2016 (the “Letter”) from Barbara Esbin, Counsel to the American Cable Association (the “ACA”), discussing the March 3, 2016 ex parte presentation made by representatives of the ACA and five ACA member companies to certain officials of the Federal Communications Commission (the “FCC”). Our response addresses two aspects of retransmission consent negotiations that the ACA and its members incorrectly characterize as constituting “bad faith bargaining practices and proposals” in retransmission consent negotiations, namely (1) broadcaster requests for carriage of prospective programming, and (2) the inclusion of after-acquired clauses.

Negotiating Involves a Mix of Different Forms of Value

During retransmission consent discussions, parties discuss various forms of consideration. Negotiating is the process by which each party seeks to arrive at the right combination of these forms of consideration through assigning relative priority and value to each element, and offering different combinations of those elements to the other party in a series of back-and-forth exchanges. While the cash value of the right to add a television station’s signal to a multi-channel video programming distributor (“MVPD”) programming package is a significant part of such negotiations, other forms of consideration that broadcasters often seek include channel placement, advertising avails on the cable system, and/or carriage of multicast and/or non-broadcast channels. And, while MVPDs are primarily seeking rights to the broadcaster’s programming signal, they also ask for other value, such as advertising avails in our broadcast streams, the right to place programming on our broadcast stations, and obligations for us to purchase (or at least consider purchasing) ancillary services provided by MVPDs, such as cable and/or telephone services. We don’t consider these requests to be in “bad faith,” but rather part of the normal exercise of piecing together an appropriate value proposition with the tools at



the MVPDs' disposal. Similarly, the FCC should not be persuaded that broadcaster requests for various forms of consideration are acts of "bad faith."

Bad Faith is a Behavior, not a Form of Consideration

The ACA is asking the FCC to declare the requests for consideration described above, as well as others laid out in the NPRM, as "per se" violations of the good faith rules. But the definition of "bad faith" in the retransmission consent context is *behavior* that demonstrates an unwillingness to reach an agreement. Including a variety of forms of value to the mix of a retransmission consent negotiation can't be deemed "bad faith" because it actually demonstrates a willingness to reach an agreement by allowing for multiple combinations of value factors, which increase the chances that the parties will be able to conclude an agreement. There is no basis for the FCC to determine that such bargaining flexibility is in itself "bad faith," especially since the other party can respond with alternative forms or combinations of consideration. Just as the FCC is (rightly) loath to insert itself in retransmission rate setting, neither should the FCC inquire into other substantive consideration terms in retransmission negotiations.

Carriage of Prospective Programming

Broadcasters negotiating MVPD carriage for multiple channels has been commonplace for many years, beginning over 20 years ago.¹ With respect to non-broadcast channels, this has been typical for the broadcast networks.² But station groups do this too, such as E.W. Scripps Company, which used retransmission consent negotiations to launch cable channels such as HGTV, before spinning them off into a separate company.

With the advent of multicast channels, made possible by the transition from analog to digital broadcasting, many broadcasters began seeking carriage of their multicast streams as part of retransmission consent negotiations. It is significant to note that broadcasters often receive MVPD carriage for multicast streams in their retransmission consent arrangements without specific programming or other content requirements. Since the MVPD does not require a commitment to the type or category of these streams, the MVPD doesn't necessarily know what programming will be on that multicast stream over the course of the retransmission agreement. This, in turn, is analogous to negotiating for a prospective channel.

¹ See, e.g. "Tuned in: Capital Cities/ABC and Hearst Corp. have reached an agreement with Time Warner Cable to continue carrying their broadcast signals. In exchange Time Warner will help launch ESPN2 on its systems" Chicago Tribune, August 19, 1993 (http://articles.chicagotribune.com/1993-08-19/business/9308190006_1_time-warner-cable-retransmission-capital-cities) (visited March 10, 2016).

² "Telecom law primer: Retransmission consent and must carry rules" discussing the use of retransmission consent negotiations by not only ABC to launch ESPN2, but also by FOX to launch the F/X Network and NBC to launch a defunct channel called America's Talking. TechPolicyDaily.com, March 5, 2014 (visited March 10, 2016). (<http://www.techpolicydaily.com/communications/telecom-law-primer-retransmission-consent-must-carry-rules/>)



The Letter claims that Cass Cable was “forced to negotiate” with us for an unidentified cable channel. We question how we could have “forced” this channel onto Cass Cable, when this cable channel was merely one element in the negotiating mix. In that negotiation, Cass Cable could have offered alternative value in place of carrying that cable channel, such as additional cash compensation (which we would have considered). In our experience, MVPDs generally prefer to carry non-broadcast channels than to pay higher retransmission fees. This appears to be just what Cass Cable chose to do, and that agreement closed without a service interruption. So how could anyone claim that either party’s behavior demonstrated an unwillingness to reach an agreement? How could this one element of consideration be considered “bad faith” when it was part of the bargaining mix that Cass Cable ultimately accepted?

After-Acquired Clauses

After-acquired clauses are another form of consideration involved in the retransmission negotiation mix. A broadcast after-acquired clause states that, if a broadcast group acquires a television station in the MVPD’s territory after signing a retransmission consent agreement, the MVPD will pay fees for that new television station’s signal at the agreed-upon rate in the current retransmission agreement. Sometimes this increases the rate an MVPD pays for that new television station, and sometimes it decreases the rate (*i.e.*, if the acquiring group’s rate was lower than the selling group’s rate). One reason broadcasters seek after-acquired clauses is so that their contracts with MVPDs have uniform terms (such as having the same end dates, same carriage requirements, etc.) for ease of contract management. Broadcasters understand the risk that an after-acquired clause could reduce their retransmission revenue, but we accept and plan for this risk as a normal aspect of our business. Cable companies should also be able to accept and plan for this risk as part of running their businesses, without asking the FCC to shelter them from the ebbs and flows of the free market.

The FCC should also appreciate that after-acquired clauses reduce the risk of service disruptions when a television station is acquired by another station group, by providing a seamless transition of a station’s MVPD carriage after an acquisition. In the absence of an after-acquired clause, a station group acquiring a television station might have no agreement in place with the relevant MVPD for carriage of that station on its system. This is because MVPDs often prohibit assignment of their retransmission agreements in the acquisition context. Thus, without the automatic assumption of the acquired station into the purchaser’s retransmission agreement, such stations would likely face an increased risk of being off an MVPD system while a separate carriage agreement is being negotiated.

MVPDs also seek after-acquired clauses, which allow an MVPD that buys a cable system to pay that acquired system’s retransmission consent rate, even if it is lower than the rate the acquiring MVPD currently pays to a broadcaster. In that event, the broadcaster must accept that



lower rate for its stations in that newly acquired cable system. Similarly, MVPDs often insist on provisions that state if a broadcaster acquires a television station covered by the MVPD's retransmission consent agreement, then the MVPD may choose whether that station retains the retransmission rate under the selling broadcaster's agreement or whether that station assumes the retransmission rate under the acquiring broadcaster's agreement. Not surprisingly, in such circumstances MVPDs choose the lower rate. We don't consider this "bad faith" behavior, but rather rational business decision-making, which *both* sides of a retransmission equation should be free to exercise without FCC interference.

Because both broadcast and MVPD after-acquired clauses are commonplace in retransmission consent agreements, and have been for many years, the FCC has no basis for deciding now that broadcasters who negotiate them are negotiating in "bad faith".

The ACA's and the FCC's Proposals will Increase Retransmission Consent Rates and Service Impasses

The flexibility provided by combinations of cash and non-cash consideration play a vital role in increasing the likelihood of arriving at retransmission consent agreements expeditiously and without service impasses. If the FCC were to adopt the proposals in the Letter, and in the NPRM for that matter, *i.e.*, to eliminate one or more forms of bargaining consideration by declaring them "per se" violations of the FCC's good faith rules, then the FCC would be effectively reducing retransmission negotiations to purely cash transactions. This unnatural simplification of otherwise multifaceted transactions would result in (1) higher retransmission consent rates, because it would make cash the only bargaining item available, and (2) more frequent service impasses, because it would have taken away the multitude of bargaining elements that help parties agree on the right combination of value.

The Current Good Faith and Totality of the Circumstances Test Should Not be Altered

In closing, we ask that the FCC continue its prudent restraint with respect to intervention into private bargaining for retransmission consent. The current good faith standard and totality of the circumstances test have proven adequate for FCC review of infrequent retransmission consent disputes and therefore should not be changed. The FCC was correct in refusing to allow this process to "...serve as a "back door" inquiry into the substantive terms negotiated between the parties,"³ which is precisely what the ACA is asking the FCC to do in its Letter and in its comments to the NPRM. We also appreciate the FCC's limiting its review of good faith complaints to proposals that are "outrageous" and/or "not based on competitive marketplace

³ See NPRM, 30 FCC Rcd 10327, paragraph 2 (2015).



considerations,”⁴ which the ACA has failed to demonstrate with respect to the contract terms complained about in its Letter.

Participants in the very competitive video market that exists today each face their own set of costs. In retransmission relationships, each side tries to minimize those costs in negotiations, but then must accept and manage those costs once an agreement is signed. It is not the FCC’s role to help one side manage its costs to the detriment of the other side. Rather, it is the FCC’s role to ensure the smooth functioning of the interdependent relationship between broadcasting and MVPDs for the benefit of consumers’ access to content on the platform of their choice, and the current good faith framework does this appropriately.

Sincerely,

_____/s/_____

Rebecca Hanson
Senior Vice President, Strategy and Policy

cc: Michelle Carey
Nancy Murphy
Martha Heller
Steve Broeckaert
Brendan Murray

⁴ *Id.*