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March 16, 2016

BY ELECTRONIC FILING AND EMAIL

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

Re: Notice of *Ex Parte* Communication in MB Docket No. 15-216 & No. 10-71

Dear Ms. Dortch:

On March 14, 2016, AT&T and its counsel met with staff of the Media Bureau and of the Office of General Counsel. The following were present at the meeting: Bill Lake (MB), Michelle Carey (MB), Martha Heller (MB), Steve Broeckert (MB), Diane Sokolow (MB), David Konczal (MB), Calisha Myers (MB), Susan Aaron (OGC), Raelynn Remy (OGC), Stacy Fuller (AT&T), Christopher Heimann (AT&T), Sean Lev (counsel to AT&T), and Dan Dorris (counsel to AT&T).

During the meeting, AT&T discussed its proposals to update the Commission's good-faith negotiation rules with respect to online blocking, joint negotiation, and charging retransmission fees for consumers who receive broadcasts over the air. *See* AT&T Comments at 12-14, 22-26; AT&T Reply Comments at 12-16, 21-24.

Online Blocking. AT&T explained that its proposal presents no First Amendment issue. The proposal only makes it a *per se* violation to restrict access to publicly available online video programming. Such a rule would not compel broadcasters to engage in any speech that they are not already making, nor to speak to any individual to whom they are not already speaking. Indeed, an MVPD subscriber subject to an online blackout could obtain the same "speech" by using a separate Internet connection.

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006), is instructive in this regard. There, the Court addressed the Solomon Amendment, which denied certain federal funds to educational institutions that did not give military recruiters access equal to that provided other recruiters. *See id.* at 51. Educational institutions argued that this law

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compelled them to speak in violation of the First Amendment because they would need to give notice to students of the availability of military recruiters. *See id.* at 61. The Court held this requirement was “a far cry” from unconstitutionally compelling speech because the Solomon Amendment “d[id] not dictate the content of the speech at all” and was “plainly incidental to the . . . regulation of conduct.” *Id.* at 62. The Court stated it would “trivialize[] the freedom” not to speak to suggest that the Solomon Amendment was anything like unconstitutional laws that had “forc[ed] a student to pledge allegiance, or forc[ed] a Jehovah’s Witness to display the motto ‘Live Free or Die.’” *Id.* (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977)).

So too here. The proposed online blocking rule would not dictate the content of broadcasters’ speech at all. It merely regulates the conduct of good-faith negotiations by prohibiting broadcasters from blocking one method by which certain members of the public access their speech, as a means to gain leverage. Thus, AT&T’s proposed rule poses no First Amendment issue because – like the Solomon Amendment – it regulates what broadcasters “must *do* . . . not what they may or may not *say*.” *Id.* at 60.

Even if the proposed rule did implicate broadcasters’ First Amendment interests, the rule would be content neutral and evaluated under intermediate scrutiny. The rule easily passes that test. It furthers the government’s important interest in ensuring that retransmission negotiations are conducted in good faith so that consumers are not harmed;¹ that government interest serves a purpose unrelated to suppressing speech; and the rule is narrowly tailored because it affects only blocking publicly available online video programming as a means to gain leverage during retransmission negotiations. Indeed, the D.C. Circuit has upheld statutes that impose far greater burdens on First Amendment rights. *See* AT&T Reply Comments at 13-14 (citing *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 977-79 (D.C. Cir. 1996) (upholding program access and exclusive contract prohibitions that effectively required certain programmers to make *all* of their content available to some MVPDs)).

Nor does the D.C. Circuit’s decision in *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002), suggest there are any First Amendment problems posed by this rule. In that case, the D.C. Circuit held the Commission did not have statutory authority to enact video description rules. It rejected the Commission’s reliance on Section 1 of the Act, 47 U.S.C. § 151, because “the video description rules regulate programming content,” but Section 1 “merely authorizes the agency to

¹ Section 325, which directs the Commission to promulgate regulations “prohibit[ing] a television broadcast station” from “failing to negotiate in good faith,” is ultimately concerned with the effect those negotiations have on consumers. 47 U.S.C. § 325(b)(3)(C)(ii); *see id.* § 325(b)(3)(A) (directing the Commission to consider the impact negotiations have on the rates for the basic service tier). Indeed, in STELAR, Congress “intend[ed] . . . the FCC to examine whether its current process for filing bad faith allegations based on the totality of the circumstances test is effective and actually helps to promote bona fide negotiations and *protect consumers*.” S. Rep. No. 113-322, at 14 (2014) (emphasis added).

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ensure that all people of the United States, without discrimination, have access to wire and radio communication transmissions.” *Id.* at 803-04. It noted that “[o]ne of the reasons why § 1 has not been construed to allow the FCC to regulate programming content is because such regulations invariably raise First Amendment issues.” *Id.* at 805.

Unlike *MPAA v. FCC*, Section 1 of the Act is not at issue here. Rather, a specific statutory provision, 47 U.S.C. § 325(b)(3), grants the Commission authority to regulate the conduct of good-faith retransmission negotiations, including broadcasters’ online blocking tactic. Moreover, in enacting STELAR, Congress specifically directed the Commission to address online blocking. *See* S. Rep. No. 113-322, at 13 (expressing Congress’s “concern[.]” with the practice of “block[ing] access to online programming during [retransmission] negotiations,” and stating its “expect[ation]” that the Commission will address this issue). As explained above, in all events, there is no need to interpret the Commission’s authority under Section 325 or STELAR narrowly to avoid First Amendment concerns.

AT&T also explained that its proposal is not contrary to the Copyright Act. The Copyright Act does not give copyright holders carte blanche to violate other provisions of federal statutes. For example, even though publishing companies may have the exclusive right under the Copyright Act to create copies of certain books, that would not give them license to agree not to produce paperback books so that they could increase profits through more expensive hardcopy versions. *See Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19 (1979) (“[T]he copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws.”). Likewise, broadcasters’ exclusive rights under the Copyright Act give them no license to violate the independent good-faith negotiation requirements of 47 U.S.C. § 325(b)(3). In both cases, the fact that a party generally can withhold copyrighted material does not mean that they can do so in a way that violates an independent requirement of federal law.

Moreover, broadcasters’ copyright interests are minimal because they have made their programming publicly available. *See* AT&T Reply Comments at 15 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-56 (1984)). It is difficult to see how a rule prohibiting online blocking would even implicate any copyright interest. Consumers already have license to view the broadcasters’ programming because it is publicly available online. And MVPDs cannot be liable for infringement merely for transmitting that programming to consumers. *See* 17 U.S.C. § 512 (safe harbor for transmissions of information by service providers).

Joint Negotiation. AT&T discussed the significant leverage broadcasters obtain by jointly negotiating retransmission consent agreements, and the ultimate harm to consumers. The Commission should prohibit such joint negotiations, and it has ample legal authority to do so. Section 310(d) prohibits transferring control of broadcast licenses without Commission authorization, which occurs when one broadcaster (or network) assumes control over the retransmission negotiations of another station. *See* AT&T Comments at 22-23. Section 325(b)(3)’s requirement for “good faith” negotiations also provides the Commission with

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authority. Labor law’s “good faith” negotiation requirement – which the Commission has found instructive – prevents multiple union bargaining units from insisting on collectively bargaining with a single employee. Likewise, multiple broadcasters cannot insist that they be allowed to jointly negotiate retransmission agreements. *See id.* at 24-25 (citing *Oil, Chemical & Atomic Workers, Int’l Union, AFL-CIO v. NLRB*, 486 F.2d 1266, 1268 (D.C. Cir. 1973)).

AT&T also explained that any prohibition on joint negotiation should cover *de facto* joint negotiations caused by the use of common consultants or outside counsel sharing confidential information across broadcasters. As the Commission previously recognized in prohibiting in-market joint negotiations, “a prohibition on joint negotiation must be crafted broadly enough to target collusive behavior effectively.”² Thus, the Commission prohibited “informal, formal, tacit, or other agreement and/or conduct” that facilitates collusion.³ AT&T would recommend the same standard here. *See* AT&T Comments at 23-24.

Finally, AT&T noted its firsthand experience with broadcasters demanding “hunting license” provisions in retransmission negotiation agreements. These provisions allow a broadcaster to apply the terms of the retransmission consent agreement to any other station for which the broadcaster obtains the rights to negotiate. The provision cited by Mediacom in its February 16, 2016 letter is consistent with the “hunting license” provisions AT&T has seen.

Charging for consumers who receive broadcasts over-the-air. AT&T discussed its proposal that would make it *per se* bad faith for a broadcaster to seek retransmission fees for subscribers who receive the broadcaster’s transmission over the air. There is simply no retransmission that occurs for these subscribers. Therefore, demanding payment for these subscribers is not a proper subject of retransmission negotiation. *See* 47 U.S.C. § 325(b) (addressing “retransmi[ssion] of a broadcasting station”). Demanding such fees is also contrary to broadcasters’ “duty to transmit programming for free, over-the-air.” *See* CBS Comments at 11.

AT&T also explained that indirect means to receive retransmission fees from consumers who receive subscribers over the air should be prohibited. For example, a broadcaster should not be allowed to include such subscribers in calculating minimum penetration requirements. Doing so would require MVPDs to transmit a broadcaster’s signal to subscribers who already receive that signal over the air in order to meet those penetration requirements.

* * *

² Report and Order and Further Notice of Proposed Rulemaking, *Amendment of the Commission’s Rules Related to Retransmission Consent*, 29 FCC Rcd 3351, ¶ 27 (2014).

³ *Id.*

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At the meeting, Commission Staff also raised the question whether it has given sufficient notice to warrant any rule change that would require interim carriage. In a 2011 notice of proposed rulemaking (MB Docket No. 10-71), the Commission invited comment on its tentative conclusion that it did not have authority to order interim carriage.⁴ That proceeding “remain[s] pending,” as the Commission has noted in its most recent notice of proposed rulemaking (MB Docket No. 15-216).⁵ The Commission therefore has provided sufficient notice that it may reconsider its tentative conclusion in MB Docket No. 10-71 that it does not have authority to order interim carriage. *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 632 (D.C. Cir. 1996) (sufficient notice is given where the final rule is the “‘logical outgrowth’ of the proposed rule”) (citing *Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 533 (D.C. Cir. 1982)).

Sincerely,

/s/ Sean A. Lev
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cc: Bill Lake
Michelle Carey
Martha Heller
Steve Broeckaert
Diane Sokolow
David Konczal
Calisha Myers
Susan Aaron
Raelynn Remy

⁴ See Notice of Proposed Rulemaking, *Amendment of the Commission’s Rules Related to Retransmission Consent*, 26 FCC Rcd 2718, ¶¶ 18-19 (2011).

⁵ See Notice of Proposed Rulemaking, *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, 30 FCC Rcd 10327, ¶ 5 n.30 (2015).