



March 17, 2016

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

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

Dear Ms. Dortch:

Pay television providers continue to offer numerous proposals designed to disfavor broadcasters in retransmission consent negotiations, including proposals undermining the basis of the entire retransmission consent regime enacted by Congress – the consent of broadcasters to MVPD retransmission of their signals. These proposals include, for example, forced retransmission of broadcast signals before “marquee events”;¹ as part of schemes for mandatory mediation or arbitration;² during the carriage negotiations for a broadcaster’s Regional Sports Network or other affiliated “must have” programming;³ and as new, one-sided penalties for a broadcaster’s violation of the reciprocal duty to negotiate in good faith.⁴ The Commission, however, cannot adopt any MVPD proposals involving the forced retransmission of a broadcaster’s signal because, as it has correctly concluded, it “lacks authority” under Section 325(b)(1)(A) of the Communications Act of 1934 (Act) “to order carriage in the absence of a broadcaster’s consent.”⁵

¹ See, e.g., Comments of American Television Alliance (ATVA), MB Docket No. 15-216, at 47-48 (Dec. 1, 2015) (ATVA Comments); Reply Comments of ATVA, MB Docket No. 15-216, at 28-29 (Jan. 14, 2016) (ATVA Replies).

² See, e.g., Comments of Mediacom Comm. Corp., MB Docket No. 15-216, at 22-26 (Dec. 1, 2015) (Mediacom Comments); Mediacom Notice of *Ex Parte* Communication, MB Docket No. 15-216, at 2 (Mar. 3, 2016).

³ See Comments of American Cable Association (ACA), MB Docket No. 15-216, at 26-33 (Dec. 1, 2015) (ACA Comments); Reply Comments of ACA, MB Docket No. 15-216, at 40-48 (Jan. 14, 2016) (ACA Replies).

⁴ See Mediacom Comments at 40-41; Comments of Time Warner Cable Inc., MB Docket No. 15-216, at 27-28 (Dec. 1, 2015); ATVA *Ex Parte* Communication, MB Docket Nos. 15-216 and 10-71, at 1-2; 5 (Mar. 15, 2016) (ATVA *Ex Parte*).

⁵ *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2728 (2011) (2011 NPRM) (stating that the statute “expressly prohibits the retransmission of a broadcast signal without the broadcaster’s consent”). In numerous submissions, the National Association of

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Despite the clear language of Section 325(b)(1)(A) and the FCC's previous decisions interpreting that provision,⁶ pay TV interests urge the Commission to ignore the plain meaning of the statute and adopt proposals requiring the retransmission of broadcasters' signals without consent. In particular, Professor James Speta, in reply comments cited by the pay TV industry,⁷ ignores basic precepts of statutory interpretation and administrative law, citing a laundry list of other provisions of the Act and irrelevant cases – indeed, relying on anything and everything but the actual language of the statutory prohibition on retransmission without a station's "express authority" – in a vain attempt to justify violating the clear intent of Congress.⁸ As discussed in detail below, the arguments made by or on behalf of MVPDs are contrary to the "one, cardinal canon" identified by the Supreme Court in interpreting a statute: that one "must presume that a legislature says in a statute what it means and means in a statute what it says there."⁹

I. A Proper Statutory Analysis Begins – And Ends – With The Language Of Section 325(b)(A)(1)

"It is axiomatic that the starting point in every case involving construction of a statute is the language itself."¹⁰ Beginning with the "language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose,"¹¹ it is obvious that only a broadcast station can authorize an MVPD's retransmission of its signal. Section 325(b)(1)(A) could scarcely be more clear on this point. The provision unequivocally states that "no" MVPD shall retransmit a broadcast station's signal, except "with the express authority of the originating station."¹² The statutory language contains no qualifiers that would

Broadcasters (NAB) also has explained that forced retransmission violates the Act. See Reply Comments of NAB, MB Docket No. 15-216, at 49-56 (Jan. 14, 2016) (NAB Replies), and additional filings cited therein.

⁶ 47 U.S.C. § 325(b)(1)(A) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except (A) with the express authority of the originating station").

⁷ ATVA's March 15 filing calling for forced carriage, for example, summarizes Professor Speta's comments. ATVA *Ex Parte* at 6-9.

⁸ Reply Comments of Prof. James B. Speta, MB Docket No. 15-216 (Jan. 14, 2016) (Speta Comments or Comments). Professor Speta opines that the FCC has "authority to order interim carriage as a remedy for a broadcasters' violation of its statutory duty to negotiate in good faith," and to enact rules requiring retransmission consent agreements to include provisions pertaining to negotiations to renew those agreements, including "cooling off and extension periods during which interim carriage might continue." *Id.* at 1-2.

⁹ *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

¹⁰ *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (internal citations omitted).

¹¹ *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004); accord *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004).

¹² 47 U.S.C. § 325(b)(1)(A).

limit the power or right of a broadcaster to direct or control its signal.¹³ Notably, even ATVA describes retransmission consent as a “unique, inalienable” right in the broadcast signal.¹⁴

Given the lack of ambiguity in the statutory language, moreover, the “first canon” of construction “is also the last,” and “inquiry” into the meaning of Section 325(b)(1)(A) “is complete.”¹⁵ Although “there is no reason to resort to legislative history” in light of the “straightforward” statutory terms,¹⁶ NAB notes that the most “authoritative” legislative history of the retransmission consent provision fully supports the unqualified nature of the language.¹⁷ The Senate Commerce Committee’s report explains that a new subsection (b) was added to the existing Section 325 of the Act “to establish the right of broadcast stations to control the use of their signals” by all MVPDs.¹⁸ In fact, the Senate Report states that the preexisting Section 325(a), which provided that no “broadcasting station” shall “rebroadcast the program” of “another broadcasting station without the express authority of the originating station,”¹⁹ had been intended (but not interpreted by the FCC) “to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means,” and that Section 325 was amended to “close” an unintended “gap” in the retransmission consent provisions.²⁰ The legislative history of Section 325(b) thus reconfirms Congress’s intent to grant broadcasters full control over their signals.

Because “Congress has directly spoken to the precise question” of the retransmission of broadcast stations’ signals, “that is the end of the matter,” as the Commission and any reviewing court “must give effect to the unambiguously expressed intent of Congress.”²¹ The Commission accordingly has concluded, under the “unambiguous” terms of Section 325(b)(1)(A), that it has “no latitude” to “adopt regulations permitting retransmission consent . . . where the broadcaster has not consented to such retransmission.”²² Indeed, the FCC has

¹³ Merriam-Webster’s online dictionary defines “authority” as “the power to give orders or make decisions”; “the power or right to direct or control someone or something.” See <http://www.merriam-webster.com/dictionary>

¹⁴ ATVA Comments at 4.

¹⁵ *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002), quoting *Germain*, 503 U.S. at 254; accord *Nat’l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001).

¹⁶ *U.S. v. Gonzales*, 520 U.S. 1, 6 (1997).

¹⁷ *Garcia v. U.S.*, 469 U.S. 70, 76 (1984). “In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.” *Id.* (internal citations omitted). Congress approved Section 325(b)(1)(A) as part of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), with the conferees adopting the retransmission consent provision in the Senate bill (S. 12). The House bill (H.R. 4850) did not contain a comparable provision. See H. Conf. Rep. No. 102-862, at 76 (1992), reprinted in 1992 U.S.C.C.A.N. 1231, 1258. The report of the Senate Commerce, Science, and Transportation Committee discussed in detail the retransmission consent provision that became law.

¹⁸ S. Rep. No. 102-92, at 34 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1167 (Senate Report).

¹⁹ 47 U.S.C. § 325(a).

²⁰ Senate Report at 34-36 (emphasis added).

²¹ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

²² First Report and Order, 15 FCC Rcd 5445, 5471 (2000) (Good Faith Order).

recognized that the statute prevents it from “ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement.”²³ The FCC thus has already and correctly concluded that it lacks the authority to adopt MVPD proposals entailing the forced carriage of stations’ signals.

II. The Errors In The Speta Comments And Other MVPD Submissions Are Manifest And Manifest

The Speta Comments err most obviously and seriously by starting in the wrong place. Ignoring the courts’ directive to start with the actual language of the relevant statute, Professor Speta begins his statutory analysis with the FCC’s “broad authority over the broadcast and cable industries generally,”²⁴ and does not set forth or discuss the text of Section 325(b)(1)(A) until a single paragraph on page 20, two-thirds of the way through his comments. That approach is exactly backwards.

Like other MVPD filings, the Speta Comments embark on a veritable tour of the Communications Act. They search in vain among numerous other provisions of the Act for a way to justify ignoring, or at least obscuring, the plain meaning of Section 325(b)(1)(A), citing cases irrelevant to questions of MVPDs’ retransmission of broadcast signals, and creating inapposite arguments that have no grounding in statutory text. In short, the Speta Comments disregard the Supreme Court’s consistent direction from the 19th through the 21st centuries – that, in the words of Chief Justice John Marshall, the “intention of the legislature is to be collected from the words they employ,” and “[w]here there is no ambiguity in the words, there is no room for construction.”²⁵

A. The Various General Provisions of the Act Cited by MVPDs Do Not Override the Unambiguous, Specific Language of Section 325(b)(1)(A)

To support their claims that the Commission has the power to override Congress’ clearly expressed intention in Section 325(b)(1)(A) and force the retransmission of stations’ signals without broadcasters’ consent, the Speta Comments and other MVPD filings cite numerous provisions of the Act, including Sections 151, 154(i), 201(b), 303(r), 309, 312, 402, 502 and 503, none of which actually pertain to retransmission consent.²⁶ These arguments are without merit.

²³ 2011 NPRM, 26 FCC Rcd at 2728. See also *id.* at 2720 n. 6 (“The Commission does not have the power to force broadcasters to consent to MVPD carriage of their signals”); at 2727 (FCC cannot “order that a station continue to be carried notwithstanding the parties’ failure to reach an agreement” because Section 325(b)(1)(A) “does not authorize carriage without the station’s consent”); at 2728 n. 58 (“imposing a temporary standstill or other interim carriage mechanism in the context of retransmission consent disputes would be inconsistent with Section 325(b)(1)”).

²⁴ Speta Comments at 4.

²⁵ *U.S. v. Wiltberger*, 18 U.S. 76, 95-96 (1820).

²⁶ See Speta Comments at 4-9; see also, e.g., ATVA Comments at 56-57; ACA Replies at 23-24.

“[I]t is a commonplace of statutory construction that the specific governs the general.”²⁷ However inclusive may be the general language of a statute, it “will not be held to apply to a matter specifically dealt with in another part of the same enactment,” as “[s]pecific terms prevail over the general in the same or another statute.”²⁸ “That is particularly true,” according to the Supreme Court, where “Congress has enacted a comprehensive scheme and has deliberately targeted specific problems” – such as MVPDs’ resale of broadcast signals without consent – “with specific solutions.”²⁹

Thus, the Act’s various provisions cited by MVPDs pertaining to the overall purposes of the Act; the FCC’s general rulemaking power; the FCC’s authority to impose penalties and forfeitures; and its authority to grant applications for broadcast licenses cannot prevail over Section 325(b)(1)(A) on the question of broadcasters’ control of the retransmission of their signals, as the FCC itself previously indicated.³⁰ If such general provisions authorized the FCC to usurp Congress’s precise judgment about retransmission consent, then Section 325(b)(1)(A) would be made “insignificant” (as could, by implication, any other specific provision Congress adopted to address a particular communications issue).³¹ The courts have rejected construing statutes in this manner, unequivocally concluding that, when interpreting statutes containing both “general authorization[s]” and “more limited, specific” ones, the “terms of the specific authorization must be complied with.”³²

Notably, the courts have overturned the decisions of administrative agencies made pursuant to their general authority under a statute because they overrode or bypassed more specific statutory provisions in doing so. For example, in *Markair, Inc. v. Civil Aeronautics Board (CAB)*,³³ the court rejected the CAB’s reliance on its general authority, under the Airline Deregulation Act, to grant certificates consistent with the “public convenience and necessity”

²⁷ *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 384 (1992).

²⁸ *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). *Accord Bloate v. U.S.*, 559 U.S. 196, 207 (2010) (quoting *D. Ginsburg & Sons* with approval).

²⁹ *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (internal citations omitted).

³⁰ See 2011 NPRM, 26 FCC Rcd at 2728 n. 57 (citing case law stating that “[i]t is a fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs”).

³¹ *Corley v. U.S.*, 556 U.S. 303, 314 (2009) (a “statute should be construed . . . so that no part will be inoperative or superfluous, void or insignificant”) (internal citations omitted).

³² *RadLAX Gateway Hotel*, 132 S. Ct. at 2071. See also, e.g., *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (“well-established principles of statutory interpretation . . . require statutes to be construed in a manner that gives effect to all of their provisions”); *Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (under “accepted canons of statutory interpretation,” courts must make “every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous”). The courts also would conclude that the inclusion by Congress of a statutory provision establishing that broadcasters control the retransmission of their signals means, under the “ancient maxim” of *expressio unius est exclusio alterius*, that Congress denied the FCC authority to adopt other, inconsistent rules. *Nat’l RR Passenger Corp. v. Nat’l Ass’n of RR Passengers*, 414 U.S. 453, 458 (1974) (that maxim means that “[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode”) (internal citations omitted).

³³ 744 F.2d 1383 (9th Cir. 1984).

when it granted certificates to several airlines allowing them to provide charter service in Alaska, because that Act included a specific provision pertaining to air transportation in that state. The court found the CAB's interpretation of the Act "unsound," as it "bypass[ed]" the specific statutory provision, "ignor[ing] the well-settled rule of statutory construction that the specific terms of a statute override the general terms."³⁴ The courts similarly have reversed other decisions of federal administrative agencies and governmental bodies for relying on general statutory provisions or grants of authority to disregard a more specific provision.³⁵ MVPD arguments that the FCC could rely on any of the general statutory provisions in its laundry list to override Section 325(b)(1)(A) – the provision specifically addressing broadcasters' control of their signals – and order retransmission without consent therefore fails as a matter of statutory interpretation and would be rejected by a reviewing court.

Looking more closely at the various sections of the Act cited in the Speta Comments and by other MVPDs reveals additional bases beyond those discussed above for concluding that these provisions cannot justify FCC action contrary to Section 325(b)(1)(A).

1. *Section 151 – Purposes of FCC.*³⁶ While statutes are to be read consistent with their overall purpose, the Supreme Court has rejected the idea that government agencies can adopt regulations based on the "broad purposes" of legislation at the expense of specific provisions" of the statute.³⁷ The Speta Comments argue that the Supreme Court found Section 151 "powerful enough to justify the regulation of cable television *at a time that nothing in the Act mentioned that specific service,*"³⁸ thereby completely undermining its own argument. Unlike the *Southwestern Cable* case, there is a very specific something – Section 325(b)(1)(A) – that "mentions" retransmission consent and the unqualified control broadcasters have over their signals. The FCC's authority

³⁴ *Id.* at 1385-86.

³⁵ See, e.g., *Regular Common Carrier Conference v. U.S.*, 820 F.2d 1323, 1331 (D.C. Cir. 1987) (rejecting Interstate Commerce Commission's statutory construction because it sought to rely on a general statutory provision to "bypass" a specific one, which the ICC had no authority to do); *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (reversing decision of the Secretary of Department of Transportation made pursuant to a broad statute authorizing the Secretary to delegate certain powers and duties to any Transportation officer or employee because it "disregarded" a more specific statutory provision requiring particular powers to be delegated only to Coast Guard officials); *Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000) (rejecting the Comptroller of the Currency's reading of a general statute conferring powers on national banks because it rendered "meaningless" specific, related statutory provisions pertaining to banks acting as insurance agents). See also *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1566 (D.C. Cir. 1987) (overturning FCC decision where agency had departed from specific statutory language, relying on, *inter alia*, "general deregulatory focus" of the legislation at issue).

³⁶ 47 U.S.C. § 151 (creating FCC for the "purpose of regulating interstate and foreign commerce in communication" so as to make available to all people of U.S. a rapid, efficient, nationwide and worldwide wire and radio communication service).

³⁷ *Bd. of Governors of Fed. Res. Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986) (setting aside regulation of Federal Reserve Board). See also *FCC v. NextWave Pers. Communs. Inc.*, 537 U.S. 293, 305 (2003) (rejecting reliance on "purpose" of a statute "in splendid isolation" from its language); *So. Cal. Edison Co. v. FERC*, 195 F.3d 17, 25 (D.C. Cir. 1999) (finding that Federal Energy Regulatory Commission erred in relying on a statute's "broad purpose," which is not a basis for "ignor[ing] a statutory limitation").

³⁸ Speta Comments at 5 (emphasis added), discussing *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

to regulate on a blank slate differs entirely from its (nonexistent) authority to regulate contrary to a specific congressional enactment.³⁹

2. *Sections 154(i), 303(r) and 201(b) – FCC’s rulemaking authority.*⁴⁰ Sections 154(i) and 303(r) do not grant the FCC authority to adopt rules entailing forced retransmission because, under the express terms of those sections, such rules would be “inconsistent” with Section 325(b)(1)(A).⁴¹ Indeed, the FCC has concluded that Section 154(i) does not authorize it to “act in a manner that is inconsistent with other provisions of the Act, and thus does not support Commission-ordered carriage.”⁴²

The Speta Comments’ reliance on Section 201(b) is similarly unavailing. While this section contains another general grant of rulemaking authority,⁴³ it does not, for the reasons stated above, permit the adoption of rules overriding the specific congressional enactment set forth in Section 325(b)(1)(A). And the cases cited here are inapposite to say the least. The Comments make much of the fact that the Supreme Court found that the FCC’s rulemaking powers in Section 201(b) extend to implementation of the 1996 Telecommunications Act’s local competition provisions (*i.e.*, interconnection and unbundling), because Congress expressly directed that the 1996 Act be inserted into the Communications Act and 201(b) provides that the FCC may prescribe rules to carry out the provisions of the 1934 Act.⁴⁴ NAB fails to see how these cases relate to the issue at hand. We do not dispute that the FCC has broad, but not unlimited, general rulemaking authority over broadcasting and other services. That

³⁹ The Speta Comments, moreover, err in their reading of *Southwestern Cable*. Although the Court briefly referred to Section 151, it based its decision on Section 152(a). See 392 U.S. at 178 (finding no need to determine the limits of the FCC’s authority “we recognize today under 152(a)”). The Speta Comments (at 5-6) also misread the 2011 NPRM, stating that the FCC has previously said that Section 151 does not support its authority to order interim carriage. In fact, the FCC stated in the 2011 NPRM that Section 154(i) does not provide such authority. See 2011 NPRM, 26 FCC Rcd at 2728 & n. 57.

⁴⁰ See Speta Comments at 6-7 (citing 303(r) and 201(b)); ACA Replies at 24 (citing 154(i) and 303(r)); ATVA Comments at 56 n. 198 (citing 154(i) and 303(r)). Rather than arguing that any particular section of the Act, such as 154(i), 303(r) or 309, justifies forced carriage specifically, ATVA and ACA cite these provisions as providing significant authority for the FCC to regulate broadcasters’ negotiation of retransmission consent, and in their comments make some proposals that include forced carriage.

⁴¹ 47 U.S.C. § 154(i) (FCC may “make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary in the execution of its functions”); *Id.* at § 303(r) (FCC may “[m]ake such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law*, as may be necessary to carry out the provisions of this chapter”) (emphases added).

⁴² 2011 NPRM, 26 FCC Rcd at 2728. See also Reply Comments of Broadcaster Ass’ns, MB Docket No. 10-71, at 3-5 (June 3, 2010) (explaining that Sections 154(i) and 303(r) do not provide FCC authority to compel carriage).

⁴³ “The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.” 47 U.S.C. § 201(b).

⁴⁴ Speta Comments at 7-8, discussing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999). The Comments also cite cases involving disputes as to whether the FCC or localities have authority over the regulation of a SMATV operator and the awarding of competitive local cable franchises. *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008); *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999).

fact changes nothing about the FCC's inability to utilize its general rulemaking authority to override a specific statute passed by Congress.

3. *Sections 312, 402, 502 and 503 – FCC's authority to impose penalties and forfeitures.* As the Speta Comments point out, the FCC may impose a range of sanctions on licensees, including license revocations, cease and desist orders and forfeitures, for violating FCC rules or failing to operate in accordance with license terms.⁴⁵ That fact is irrelevant to the question of forced retransmission of stations' signals. The FCC may not impose as a penalty a requirement contrary to a specific congressional enactment. Dressing up forced carriage as a "remedy" for a broadcaster's failure to negotiate in good faith⁴⁶ does not make MVPDs' proposals consistent with the law. Broadcasters' exercise of their statutory right to control the retransmission of their signals is not a problem for the FCC to "remedy."

The Speta Comments also inaccurately refer to Section 402 as an "enforcement" provision "broadly permit[ting] the FCC to issue 'any order.'"⁴⁷ In actuality, this section concerns the right to appeal and obtain judicial review of FCC orders and decisions, and has no relevance here.

4. *Section 309 – FCC authority to grant broadcast license applications.* Section 309 directs the FCC to grant license applications if it finds that the "public interest, convenience, and necessity would be served" by such grant.⁴⁸ ATVA and the Speta Comments offer vague generalities about the FCC's broad powers to regulate broadcasting in the public interest.⁴⁹ NAB of course does not dispute that the FCC has authority to regulate broadcasting in the public interest and that broadcasters have an obligation to serve the public. But those basic principles do not permit the FCC to adopt regulations inconsistent with a congressional enactment.⁵⁰ Here, Congress defined the "public interest" with regard to broadcasters' control of their signals by legislating on that precise issue.⁵¹

⁴⁵ Speta Comments at 8-9. See 47 U.S.C. §§ 312(a)(4); 312(b); 502; 503(b).

⁴⁶ See Speta Comments at 1-2; Mediacom Comments at 40-41.

⁴⁷ Speta Comments at 9, citing 47 U.S.C. § 402.

⁴⁸ 47 U.S.C. § 309(a).

⁴⁹ See ATVA Comments at 56-57 (stating that the FCC has an expansive mandate to ensure that broadcasters operate in public interest); Speta Comments at 6-7 (stating that Congress empowered the FCC to protect the public interest by giving it broad authority over broadcasting); see also ACA Replies at 23.

⁵⁰ See, e.g., *Markair*, 744 F.2d at 1385-86 (overturning CAB's decision that the "public convenience and necessity" required the grant of multiple certificates for providing air service in Alaska because it was contrary to a more specific statutory provision regarding transportation in that state); *Regular Common Carrier*, 820 F.2d at 1331 (observing that an agency is not "free to pick and choose between statutory provisions"); n. 53, *infra*.

⁵¹ See, e.g., Senate Report at 35 (concluding that MVPDs' use of stations' signals without consent and without compensating broadcasters for the value of those signals had distorted the video marketplace and threatened the future of free, over-the-air broadcasting, and that "public policy" should not support such a system).

The Speta Comments' claim that the Commission, citing Section 309, "may impose any conditions on broadcast licenses that it finds to be in the public interest" is completely erroneous.⁵² Surely Professor Speta does not suggest that the FCC could impose an unconstitutional restriction or condition on broadcast licensees. Nor could the FCC adopt a restriction that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁵³ Despite MVPDs' claims about the FCC's supposedly untrammelled discretion to impose restrictions on broadcast licensees, the courts have not hesitated to strike down broadcast rules that violate constitutional and legal requirements.⁵⁴ Moreover, pay TV providers may not agree with the Speta Comments' assertion that the FCC has "similarly broad authority" over cable and other MVPDs (except with regard to the very "most local issues"),⁵⁵ but NAB refrains from addressing that claim.

B. The Speta Comments Fundamentally Misunderstand How Congress Delegates Power to and Withholds Power from Administrative Agencies

The Speta Comments argue at some length that the Act's "prohibitions" on FCC authority are "rare and specific."⁵⁶ Coupling that observation with its claims discussed above about the breadth of the FCC's rulemaking authority over the broadcast and cable services, the Comments seemingly conclude that the FCC has authority to reduce stations' control over the retransmission of their signals because Congress did not expressly prohibit the FCC from restricting or limiting the right Congress specifically established in Section 325(b)(1)(A).⁵⁷

To be clear, under the Speta Comments' conception of the relationship between Congress and administrative agencies, Congress could pass a statute on a particular issue, but an agency would still retain the power under its general authority to alter (or perhaps even undo) that statutory enactment. This would force Congress, every time it passed legislation in an area where an agency has jurisdiction, to enact an additional statutory provision preventing the agency from taking action or adopting rules contrary to congressional intent as expressed

⁵² Speta Comments at 6 (emphasis added).

⁵³ 5 U.S.C. § 706. "[F]ederal agencies must obey all federal laws, not just those they administer." *NextWave*, 537 U.S. at 299, quoting *NextWave Pers. Communs., Inc. v. FCC*, 254 F.3d 130, 133 (D.C. Cir. 2001).

⁵⁴ See, e.g., *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002); *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001); *Trinity Broadcasting v. FCC*, 211 F.3d 618 (D.C. Cir. 2000); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

⁵⁵ Speta Comments at 7. See also *id.* at 6 (FCC has "plenary authority" over broadcast and cable industries).

⁵⁶ Speta Comments at 9-11. The Comments identify "section 152(a)" as the "poster child of such provisions," *id.* at 10, although it is Section 152(b) that contains the language cited in the Comments. See 47 U.S.C. § 152(b) (limiting FCC "jurisdiction" over several aspects of "intrastate communication service").

⁵⁷ See Speta Comments at 12-13 (concluding that Congress's grants of authority to FCC demonstrate that Congress "intended the agency to have broad authority over all aspects of broadcasting and cable services," and "[w]here Congress intended to cut back that broad authority, it stated so explicitly in the statute").

in the specific enactment. This is not only absurd as a practical matter, but also flatly contrary to basic precepts of administrative law and controlling precedent.

“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”⁵⁸ The Supreme Court has specifically “admonish[ed]” the Commission that “only Congress can rewrite” the Communications Act,⁵⁹ and here Congress did “rewrite” the Act by establishing retransmission consent. Congress, however, was in no way obligated to add to the Act language expressly negating any administrative power of the FCC to reach a differing determination about stations’ control of their signals because statutes are “not written in ‘thou shalt not’ terms.”⁶⁰ In fact, the D.C. Circuit has concluded that presuming a “delegation of power absent an express *withholding* of such power” would result in agencies “enjoy[ing] virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”⁶¹

Similarly, in a case where Congress had directed the FCC to prepare a report on video description, the D.C. Circuit found “entirely untenable” the FCC’s position that it could adopt video description rules applicable to television broadcasters and MVPDs because “Congress did not expressly foreclose the possibility.”⁶² The court in *MPAA*, moreover, rejected the FCC’s argument that its video description rules served the public interest and were therefore justified under Section 303(r),⁶³ because the Commission “cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue.”⁶⁴

Thus, arguments that the Commission has essentially unbounded power over broadcast and cable services, unless Congress explicitly “cut[s] back” on that authority by specifically prohibiting the FCC’s exercise of it,⁶⁵ is directly contrary to precedent and cannot support MVPDs’ forced carriage proposals. Congress in fact “cut back” on the FCC’s authority in the area of retransmission consent by enacting legislation giving broadcasters, not MVPDs, the FCC or any third party, control over the retransmission of station signals. Because the “absence of an express proscription” does not “allow[] an agency to ignore a proscription implied by the limiting language of a statute,” any claim that the FCC can force the retransmission of stations’ signals due to Congress’ supposed failure to expressly proscribe

⁵⁸ *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

⁵⁹ *Id.* at 376.

⁶⁰ *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

⁶¹ *Id.* (emphasis in original). *Accord*, e.g., *ABA v. FTC*, 430 F.3d 457, 468-69 (D.C. Cir. 2005); *Aid Ass’n for Lutherans v. U.S. Postal Service*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995).

⁶² *MPAA v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002), *citing Ry. Labor*, 29 F.3d at 671.

⁶³ 47 U.S.C. § 303(r) (granting FCC authority to make rules, “not inconsistent with law, as may be necessary to carry out the provisions” of the Act).

⁶⁴ *MPAA*, 309 F.3d at 806 (stating that an “action in the public interest is not . . . necessarily authorized by the Act”).

⁶⁵ Speta Comments at 12-13.

that action is untenable.⁶⁶ In short, the Speta Comments' conception of the relationship between agencies and Congress is upside down, and must be rejected.

C. Other Provisions of Section 325 Also Fail to Justify Forced Carriage

After its lengthy tour through much of the Act, the Speta Comments finally arrive at Section 325, but still do not address Section 325(b)(1)(A), the crux of the matter. Instead, the Comments turn to other provisions of Section 325 to continue the fruitless quest for statutory language authorizing forced retransmission of broadcast signals.⁶⁷

Pay TV providers have long cited Section 325(b)(3)(A) as supposedly providing authority for forced carriage.⁶⁸ The first sentence of Section 325(b)(3)(A) provides that, within 45 days after October 5, 1992, the FCC must commence a rulemaking to “establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent” and of the right to must carry.⁶⁹ This subsection does not authorize the Commission to adopt regulations permitting MVPDs to carry broadcast signals without the stations' consent. It would be absurd to contend that Congress specifically enacted an unqualified right for broadcasters to control their signals in Section 325(b)(1)(A), and then turned around and granted the FCC power to undo its own legislative enactment in Section 325(b)(3)(A). An agency's “rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.”⁷⁰

The second sentence of Section 325(b)(3)(A) states that the FCC must “consider” the “impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier” and ensure that regulations under this subsection “do not conflict with the Commission's obligation under section 543(b)(1)” to “ensure that the rates for the basic

⁶⁶ So. *Cal. Edison Co.*, 195 F.3d at 24 (rejecting FERC's interpretation of a statute that would have the “effect of requiring Congress to state expressly that the exceptions” set out in a statute are the only ones permitted).

⁶⁷ See Speta Comments at 15-17. The Comments also assert that Section 325 is part of a “broader regulatory regime” that includes copyright law, as if that somehow derogates from broadcasters' retransmission consent rights. *Id.* at 13-14. It does not. As even ATVA recognizes, Congress intended broadcasters' rights in their signals to be separate and distinct from the rights of copyright owners in the programming. See Senate Report at 36 (carefully “distinguish[ing] between the authority granted broadcasters under the new section 325(b)(1) . . . to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained on the signal”); ATVA Comments at 4, n. 11 (citing Senate Report). See also 47 U.S.C. § 325(b)(6) (“[n]othing” in § 325 “shall be construed as modifying the compulsory copyright license established in section 111 of Title 17”).

⁶⁸ See, e.g., ATVA Comments at 53-54 (contending that Section 325(b)(3)(A) gives the FCC broad authority to regulate retransmission consent and justifies adoption of ATVA's various proposals, some of which include forced carriage); Speta Comments at 16-17 (arguing that Section 325(b)(3)(A) authorizes the FCC to regulate substantive aspects of retransmission consent and citing that section as among those providing the FCC authority to order interim carriage); Petition for Rulemaking, MB Docket No. 10-71, at 35-38 (Mar. 9, 2010) (contending that this section authorizes FCC to adopt rules providing for forced interim carriage while negotiations are ongoing and while dispute resolution proceedings are underway).

⁶⁹ 47 U.S.C. § 325(b)(3)(A). See Senate Report at 37 (describing this rulemaking as “establish[ing] procedures for broadcasters to exercise” their retransmission consent rights consistent with their rights for signal carriage and channel positioning).

⁷⁰ *Bd. of Governors of Fed. Res. Sys.*, 474 U.S. at 374.

service tier are reasonable.”⁷¹ Similarly, nothing about this sentence suggests that the Commission could undo broadcasters’ unqualified retransmission consent rights that Congress had just authorized in Section 325(b)(1)(A). The plain language of Section 325(b)(1)(A) does not reference Section 325(b)(3)(A), refer to the basic tier or suggest in any way that concerns about rates may limit the unlimited right established by Congress. Section 325(b)(3)(A), in turn, does not direct the Commission, or even suggest that the Commission has the discretion, to enact regulations contravening broadcasters’ express retransmission consent rights.⁷²

In addition, Section 325(b)(3)(A)’s instructions regarding reasonable rates for the basic service tier “under section 543(b)(1)” are now legally and practically irrelevant with regard to virtually all MVPDs, given recent FCC actions. Although not acknowledged in the Speta Comments or in other MVPD submissions, basic tier rate regulation under Section 543(b)(1) only applies to cable systems, not to satellite or other types of MVPDs.⁷³ Even then, cable rate regulations apply only where the Commission has not yet made a determination of effective competition.⁷⁴ But in its 2015 effective competition order,⁷⁵ the FCC essentially determined that thousands of cable systems across the country were subject to effective competition (except for systems in a tiny proportion of local franchise areas), and, thus, not subject to basic tier rate regulation by the FCC or any state or local authority. Because only a miniscule number of cable systems remain subject to rate regulation, Section 543(b)(1)’s now virtually non-existent basic tier rate requirements cannot logically or rationally justify increased FCC intervention in the retransmission consent process via Section 325(b)(3)(A) – let alone intervention entailing forced carriage in violation of Section 325(b)(1)(A).⁷⁶

⁷¹ 47 U.S.C. § 325(b)(3)(A).

⁷² NAB also addressed these arguments in earlier submissions. See, e.g., Opposition of the Broadcaster Ass’ns, MB Docket No. 10-17, at 30-32; 69-71 (May 18, 2010); Reply Comments of NAB, MB Docket No. 10-71, at 21-23 (June 27, 2011).

⁷³ Section 543 authorizes the regulation of “rates for the provision of cable service,” but only under certain specified conditions. 47 U.S.C. § 543(a)(1). Section 543(b)(1) obligates the FCC to ensure that the rates for the basic service tier of cable systems are “reasonable.” 47 U.S.C. § 543(b)(1).

⁷⁴ Section 543 makes clear that if the FCC “finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation” by the FCC or by a state or a franchising authority. 47 U.S.C. § 543(a)(2); see also § 543(b)(1) (rules to protect subscribers by ensuring that basic tier rates are reasonable apply to cable systems “not subject to effective competition”).

⁷⁵ See Report and Order, 30 FCC Rcd 6574 (2015); see also Public Notice, MB Docket No. 15-53, DA 15-1441 (Dec. 17, 2015).

⁷⁶ Even when cable rate regulations were in force, no MVPD, to NAB’s knowledge, provided empirical data showing that retransmission consent fees caused the FCC to find any cable system to be in violation of rules requiring reasonable rates for the basic service tier. NAB is not aware of any FCC determination ever linking a cable system’s violation of rate regulations to retransmission consent fees. NAB also has long observed that restrictions on retransmission consent negotiations would be wholly ineffective in promoting reasonable consumer rates in the absence of FCC rules regulating the prices MVPDs actually charge consumers (which, of course, MVPDs adamantly oppose). Absent rate regulation, the cost savings realized by MVPDs, as the FCC recognized in this proceeding, “might not translate to lower consumer prices for video programming service” because pay TV providers “are not required to pass through any savings derived” from retransmission consent

Finally, Section 325(b)(3)(C) imposes a reciprocal duty on broadcasters and MVPDs to negotiate retransmission consent in “good faith,”⁷⁷ and many MVPD commenters rely on it as justifying the adoption of forced carriage.⁷⁸ While this section provides the FCC with authority to implement rules defining good faith and the types of negotiating conduct consistent with good faith, Section 325(b)(3)(C), like other provisions discussed above, cannot be used to override Section 325(b)(1)(A)’s prohibition on MVPD retransmission of broadcast signals without consent.⁷⁹

ATVA, however, claims that without limitations on broadcasters’ rights to withhold retransmission consent, Section 325(b)(3)(C) becomes a “nullity.”⁸⁰ This argument makes no sense, and appears to confuse rights with remedies. Specifically, ATVA contends that, under broadcasters’ conception of Section 325(b)(1)(A) and their rights to withhold consent to retransmission, a broadcaster could negotiate in bad faith and then subsequently withhold its signal, leaving the Commission helpless to address the situation because “withholding its signal[]” is a broadcaster “get out of jail free” card.⁸¹ Obviously, this is not the case.

While a broadcaster has the right to withhold retransmission consent, that right does not deprive the Commission of various enforcement remedies – including forfeitures or even license revocation – to address instances of broadcasters (or MVPDs) negotiating in bad faith. Contrary to ATVA’s suggestion, any subsequent withholding of its signal by a broadcaster that had negotiated in bad faith does not shield that broadcaster from the FCC’s exercise of its Section 325(b)(3)(C) authority or the imposition of remedies responding to that broadcaster’s original bad faith conduct. What the Commission cannot do, however, is to trample on a station’s unqualified right to control its signal by ordering forced carriage as the remedy for a broadcaster’s violation of the good faith rules. Section 325(b)(3)(C) is not a nullity merely

fees lowered through FCC regulation. Notice of Proposed Rulemaking, MB Docket No. 15-216, at ¶ 3 n.21 (rel. Sept. 2, 2015).

⁷⁷ 47 U.S.C. §325(b)(3)(C).

⁷⁸ See, e.g., Mediacom Comments at 40-41 (FCC should order forced carriage as a remedy for a violation of the duty to negotiate in good faith); Speta Comments at 1-2, 17 (contending that this section “contemplates” that FCC will “review the substance of retransmission consent agreements” and arguing that FCC has authority to order “interim carriage as a remedy” for a broadcaster’s failure to negotiate in good faith); ATVA Comments at 42-51 (urging FCC to adopt several proposals, including forced carriage before “marquee events,” under its good faith authority).

⁷⁹ The Speta Comments’ brief discussion of labor law seems beside the point. The fact that the FCC, in the absence of direction from Congress, drew upon the conception of good faith bargaining in § 8(d) of the Taft-Hartley Act in adopting its rules under Section 325(b)(3)(C) does not make the power of the NLRB and the FCC analogous. See *id.* at 19-20. The Comments also repeat the inapposite comparison between broadcasters in negotiations with MVPDs and employers in negotiations with unions. *Id.* As NAB previously explained, commercial negotiations between experienced MVPDs and broadcasters do not closely resemble negotiations between employers and employees. NAB Replies at 11-12. And to the extent that an analogy can be drawn, broadcasters are more like employees. Just as employees have the right to withhold their labor (i.e., strike), broadcasters have a legal right to withhold their consent to retransmission of their signals. *Id.* at 13-14.

⁸⁰ ATVA *Ex Parte* at 5.

⁸¹ *Id.*

because it does not empower the Commission to adopt good faith rules or impose a remedy contrary to another congressional enactment. As the FCC has recognized, the proper course is to give effect to both Sections 325(b)(3)(C) and 325(b)(1)(A), as required under basic canons of statutory construction and numerous court decisions,⁸² by implementing and enforcing its good faith rules without violating broadcasters' rights to prevent retransmission of their signals without their "express authority."

If in fact Congress wanted to limit broadcasters' rights to control the retransmission of their signals under Section 325(b)(3)(C), it has had ample opportunity to do so. Congress amended Section 325 in 1999 when enacting the initial good faith requirement applicable only to broadcasters, and then amended Section 325 again in 2004 to extend that requirement to MVPDs. On neither occasion did Congress alter the retransmission consent provision in Section 325(b)(1)(A); nor did it define good faith in Section 325(b)(3)(C) so as to limit (or even reference) stations' control of their signals. In late 2014, Congress enacted the STELA Reauthorization Act (STELAR), which directed the Commission to commence a proceeding examining one part – the totality of the circumstances test – of the FCC's good faith standards.⁸³ Again, Congress referenced only Section 325(b)(3)(C) and gave no hint that it intended to limit broadcasters' rights under Section 325(b)(1)(A). In light of this consistent congressional history and the terms of both Sections 325(b)(1)(A) and 325(b)(3)(C), ATVA's claim that the "good faith rules reflect *explicit statutory* limitations on a broadcaster's right to withhold consent" is absurd.⁸⁴ A limitation that cannot be found in statutory text is not "explicit" – "invisible" is closer to the mark.

The Commission, moreover, cannot read into its authority to implement good faith negotiation standards any implicit congressional intent to alter the clear prohibition on retransmission of broadcast signals without stations' consent. As the Supreme Court has held, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."⁸⁵ Congress would not have hidden its alteration of the most fundamental aspect of retransmission consent – the consent itself – in the mouseholes of other provisions that make no reference to broadcasters' control of their signals under Section 325(b)(1)(A).⁸⁶

⁸² See p. 5, n. 31 & n. 32, *supra*.

⁸³ Section 103(c), STELAR, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014).

⁸⁴ ATVA *Ex Parte* at 4-5 (emphasis added).

⁸⁵ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

⁸⁶ Neither can MVPDs rely on a few statements made during congressional debates to support claims that the FCC has authority to order parties to reach agreement if they cannot resolve their retransmission consent dispute through negotiation. Speta Comments at 22; see also ATVA Comments at 54; ATVA *Ex Parte* at 8 n. 42. Legislative history cannot trump clear statutory language as an expression of congressional intent, and the Supreme Court has specifically "eschewed reliance on the passing comments of one Member" or "casual statements from the floor debates." *Garcia*, 469 U.S. at 76; see also *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

D. The Speta Comments Cannot Reconcile the Plain Language of Section 325(b)(1)(A) with their Arguments for Forced Carriage

When the Speta Comments finally arrive where they should have begun – with the provision establishing retransmission consent – the one paragraph discussion is most notable for what it lacks. The Comments make no real effort to reconcile the plain meaning of Section 325(b)(1)(A) with their conclusion that the Commission has authority to usurp broadcasters’ control of their signals and order “interim carriage,” both as a “remedy” for failing to negotiate in good faith and during negotiations to renew retransmission agreements as part of “cooling off and extension periods.”⁸⁷ Instead, based on their previous discussion of other sections of the Act, the Comments simply assert that the FCC “may set substantive and procedural terms for the exercise of retransmission consent rights” and “may put in place remedies for denials of good faith and may set procedures for renewal negotiations,” so long as the agency “respects *some* right [of broadcasters] to bargain in good faith to impasse” and “to deny a retransmission consent agreement.”⁸⁸

That conclusion is blatantly contrary to the unqualified language of Section 325(b)(1)(A). Congress did not grant broadcasters’ “some” right to control their signals or the right to refuse to grant retransmission consent only in “some” instances. Instead, Congress unequivocally said that “no” MVPD “shall retransmit” a broadcaster’s signal without the “express authority of the originating station.”⁸⁹ No exceptions are included in the statutory language. Contrary to the Speta Comments’ position, the FCC cannot create exceptions to Section 325(b)(1)(A) that Congress declined to create, as “only Congress can rewrite” the Communications Act.⁹⁰

Interestingly, the U.S. Court of Appeals for the D.C. Circuit came to the same conclusion in a case involving Section 325(a), which provides that no broadcasting station shall “rebroadcast the program or any part thereof of another broadcasting station *without the express authority of the originating station.*”⁹¹ In *Frontier Broadcasting Co. v. FCC*,⁹² the Commission sought to construe Section 325(a) to mean that a broadcast station’s consent to the rebroadcast of its local programs by another station satisfied the statute sufficiently to imply that consent for rebroadcasting all of the originating station’s programs had been given. The court reversed, finding that the FCC’s “construction contravene[d] the plain words of the statute.”⁹³ The court concluded with language remarkably responsive to the arguments presented by and for MVPDs in this proceeding:

⁸⁷ Speta Comments at 1-2.

⁸⁸ *Id.* at 20-21 (emphasis added).

⁸⁹ 47 U.S.C. § 325(b)(1)(A).

⁹⁰ *Louisiana Pub. Service Comm’n*, 476 U.S. at 376.

⁹¹ 47 U.S.C. § 325(a) (emphasis added). Section 325(a) was included in the Act when enacted in 1934. Congress used the same language decades later when enacting Section 325(b)(1)(A). See Senate Report at 34.

⁹² 412 F.2d 162 (D.C. Cir. 1969).

⁹³ *Id.* at 164.

A great deal of authority has been delegated to the Commission to enable it to carry out its function of regulating the public airways ‘in the public interest.’ However, Congress has seen fit to legislate from time to time to protect significant interests in this field. Section 325(a) of the Communications Act is an effort by Congress to recognize the right of the originating station to control its programs What is important is that ‘express authority’ [for rebroadcasting] was not received as to these stations and the clear words of Section 325(a) must be held controlling. Its revision, if desirable as a matter of policy, must be left to Congress.⁹⁴

E. The Speta Comments’ Property Law Argument Is Specious

Perhaps recognizing that its arguments have no basis under accepted tenets of statutory construction and administrative law, the Speta Comments create out of whole cloth a property law argument. The Comments somewhat confusingly contend that the Commission erroneously concluded that it lacks authority to mandate retransmission because it improperly treats broadcasters’ right to withhold consent to the retransmission of their signals as a common law property right.⁹⁵ This argument is specious.

By interpreting Section 325(b)(1)(A) as prohibiting the retransmission of broadcast signals without the originating station’s consent, the Commission did not create an extra-statutory property right for broadcasters. The FCC, instead, properly construed the plain language of the statute.⁹⁶ The Speta Comments’ invocation of property law appears to be a vain attempt to obscure the clear legal right that Congress granted to broadcasters to control their signals. Attaching a meaningless property law label to that legal right, however, does not derogate from broadcasters’ authority to consent, or to refrain from consenting, to any MVPDs’ retransmission of stations’ signals.

To bolster its red herring of an argument, the Comments assert that a “fundamental premise[] of broadcast regulation is that a broadcaster does not have a property right in its license.”⁹⁷ The extent to which broadcasters have or do not have any property (or property-like) rights in their licenses is beside the point. A *property* right in a broadcast *license* has nothing to do with a broadcaster’s *legal* right to control the retransmission of its *signal*. That latter right does not create any ownership right in the broadcast license “beyond the terms, conditions, and periods of the license.”⁹⁸

Finally, the fact that the FCC – quoting the Supreme Court no less – found in its good faith order that the duty to negotiate in good faith should be “narrowly construed” because it derogated from common law contract rights, did not somehow grant broadcasters a property

⁹⁴ *Id.* at 165 (internal quotations and citations omitted).

⁹⁵ Speta Comments at 4-5, 18.

⁹⁶ See Section I., *supra*.

⁹⁷ Speta Comments at 18, citing 47 U.S.C. § 301.

⁹⁸ 47 U.S.C. § 301.

right beyond the legal right Congress established in Section 325(b)(1)(A).⁹⁹ The Comments' claim that the Commission created a mountain of a new property right out of the molehill of its brief discussion of a "rule of statutory construction" is illogical on its face and has no rational basis.¹⁰⁰

In reality, it is the unqualified nature of the retransmission consent right that the Speta Comments and many MVPD submissions take issue with, and the FCC's implementation of the good faith negotiation requirement did nothing to expand, or detract from, broadcasters' legal right to control their signals. And that, of course, is the crux of MVPDs' complaints. They want the Commission to exceed its good faith authority under Section 325(b)(3)(C) and cut back on the congressionally-established retransmission consent right. For all the reasons set forth above, the Commission lacks authority to do so, as it has correctly recognized on multiple occasions.

F. Contrary to the Arguments of Some MVPDs, Section 103(c) of STELAR Did Not Expand the FCC's Authority

Section 103(c) of STELAR directs the FCC to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations" under Section 325(b)(3)(C). That is all. As NAB observed in its comments, this provision "only required the Commission to 'commence' a review of its totality of the circumstances test," and "did not direct the Commission to change its good faith rules in any way."¹⁰¹

ATVA, however, claims that STELAR "gives the Commission new and additional authority to add" to its list of *per se* violations of the good faith rules.¹⁰² This is nonsense. Section 103(c) merely directed the FCC to begin a review of its existing totality of the circumstances test; such language obviously did not give the FCC any new or additional authority. The fact that ATVA resorts to arguing that Congress' modest instructions to the FCC in Section 103(c) actually granted new authority suggests that ATVA harbors serious doubts as to the FCC's existing authority to adopt various anti-broadcaster proposals, including forced carriage.

G. MVPD Proposals Would Not Pass Muster Under *Chevron*

Under the two-step framework established in *Chevron* for a court's review of an agency's interpretation of a statute it administers, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue."¹⁰³ "If the intent of Congress is clear,

⁹⁹ Good Faith Order, 15 FCC Rcd at 5453. Citing Supreme Court precedent, the FCC stated that it is a "rule of statutory construction" that a statutory provision derogating from the common law must be strictly construed. *Id.*

¹⁰⁰ See Speta Comments at 17-19.

¹⁰¹ NAB Comments at 26 & n. 70. We also noted how unusual it was for Congress to direct the FCC to initiate a review without any requirement for a final action. *Id.* ACA misstated our position, citing NAB as arguing that Section 103(c) affirmatively restricts the FCC's authority to amend its good faith rules and, in the alternative, that STELAR only permits the Commission to reexamine its totality of the circumstances test. ACA Replies at 22. NAB made no such argument, as any reasonable reading of our comments shows.

¹⁰² ATVA Comments at 55.

¹⁰³ *Chevron*, 467 U.S. at 842.

that is the end of the matter,” as a reviewing court and the FCC “must give effect to the unambiguously expressed intent of Congress.”¹⁰⁴ As shown in Section I., *supra*, Congress’ intent to grant broadcasters’ full control over their signals – ascertained by “employing traditional tools of statutory construction”¹⁰⁵ and “begin[ning] with the language employed by Congress”¹⁰⁶ – is clear. Any reviewing court accordingly would reject, as violating Section 325(b)(1)(A), any FCC rule adopting MVPD proposals entailing the retransmission of broadcast signals without consent.

Only if a statute is “silent or ambiguous with respect to the specific issue,” would a reviewing court move to the second step of *Chevron* and defer to the agency’s interpretation as long as it is “based on a permissible construction of the statute.”¹⁰⁷ Given the clarity of the language of Section 325(b)(1)(A), no court would proceed to the second step of *Chevron*. If one did, however, it would quickly conclude that an interpretation of that section permitting retransmission without consent is not a “reasonable” construction of the statute, given its “text,” as well as its “legislative history” and “purpose.”¹⁰⁸

The section of the Speta Comments entitled “*Chevron* Analysis” bears little or no resemblance to the analysis set forth by the Supreme Court in that case. Instead, the Comments start their “Step One” analysis by rehashing their previous erroneous argument that nothing in Section 325 or elsewhere in the Act “clearly and precisely precludes” the FCC from requiring retransmission consent agreements to contain procedures concerning renewal negotiations, such as cooling-off periods and mediation with interim carriage, or ordering interim carriage as a remedy for failing to negotiate in good faith.¹⁰⁹ That argument is contrary to basic tenets of administrative law and has been repeatedly rejected by the D.C. Circuit as “plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”¹¹⁰ As explained in Section II.B., Congress’ supposed “failure to negate” the FCC’s power to adopt a regulation restricting retransmission consent rights “does not advance” the Speta Comments’ “cause at all.”¹¹¹ Under a proper statutory analysis, Congress in fact “clearly and precisely precluded” the FCC from adopting MVPDs’ proposals by enacting Section 325(b)(1)(A) providing that only broadcasters can authorize the retransmission of their signals. That plain language, which is

¹⁰⁴ *Id.* at 842-43.

¹⁰⁵ *Id.* at 843 n. 9.

¹⁰⁶ *Engine Mfrs. Ass’n*, 541 U.S. at 252.

¹⁰⁷ *Chevron*, 467 U.S. at 843. But an agency is “given no deference at all on the question whether a statute is ambiguous,” which is for the court to determine “on its own.” *Wells Fargo Bank, N.A. v. FDIC*, 310 F.3d 202, 206 (D.C. Cir. 2002) (internal citations omitted).

¹⁰⁸ *Global Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 744 (D.C. Cir. 2001); *So. Cal. Edison Co. v. FERC*, 116 F.3d 507, 511 (D.C. Cir. 1997). See also, e.g., *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151, 156 (D.C. Cir. 2005) (rejecting FCC’s construction of an ambiguous statutory provision as “unreasonable”).

¹⁰⁹ Speta Comments at 23-25.

¹¹⁰ *Ry. Labor*, 29 F.3d at 671, discussed at p. 10, *supra*.

¹¹¹ *ABA v. FTC*, 430 F.3d at 468 (rejecting FTC’s claim of authority to regulate practicing attorneys based on the fact that the relevant statute failed to negate the regulation of attorneys).

also supported by the most “authoritative” legislative history,¹¹² makes crystal clear Congress’ intent on the precise issue of retransmitting broadcast signals without the originating station’s consent – it is simply not permitted.

Perhaps recognizing that their proposals run afoul of Section 325(b)(1)(A)’s terms, the Speta Comments additionally contend that requiring all retransmission consent agreements to contain renewal procedures, including those with interim carriage, satisfies the statute because broadcasters would “in fact consent” to those procedures and interim carriage in the parties’ initial retransmission consent agreement.¹¹³ That argument is fallacious. “Consent” cannot be something forced by FCC rule or otherwise coerced, as the Commission has recognized in the retransmission consent context. The FCC has specifically rejected MVPD calls for “mandatory binding dispute resolution procedures” for carriage disputes as “inconsistent” with both Section 325 and the Administrative Dispute Resolution Act, which authorizes an agency to use arbitration “whenever all parties consent.”¹¹⁴ A “mandatory binding” FCC rule requiring a broadcaster to surrender its right to control its signal in the future in order to enter into any retransmission consent agreement with any MVPD obviously usurps the station’s authority to consent to retransmission. The Comments’ interpretation of Section 325(b)(1)(A) would never pass muster with a reviewing court.

The Speta Comments’ *Chevron* “Step Two” arguments are no improvement over “Step One” – in fact, they are virtually incomprehensible. As an initial matter, the Comments neglect to explain why a reviewing court would ever reach a “Step Two” analysis, given the clarity of Congress’ intent under Section 325(b)(1)(A). The Comments return to the irrelevant (to the issue at hand here) *AT&T Corp. v. Iowa Utilities Board* case and the Supreme Court’s rejection of the FCC’s initial implementation of the 1996 Act’s unbundling provisions, connecting that to the need to give “some substance” to Section 325(b)(1)(A) by maintaining broadcasters’ right to negotiate in good faith to impasse.¹¹⁵ NAB points out that the most obvious way to give “substance” to any statutory provision is to give full (not some) effect to its terms – and that is what the FCC is legally obligated to do.¹¹⁶ The Speta Comments also opine that the FCC “likely could proceed directly” and order a broadcaster to consent to interim carriage as a remedy for bad faith negotiating, repeating previous erroneous assertions about the FCC’s authority under Sections 325(b)(3)(C) (the good faith negotiation requirement) and Section

¹¹² *Garcia*, 469 U.S. at 76. The report of the Senate Commerce Committee addressed the retransmission consent provision that became law and strongly reaffirmed that Congress intended to give broadcasters full control over their signals. See Section I., *supra*.

¹¹³ Speta Comments at 7-8; 25.

¹¹⁴ 2011 NPRM, 26 FCC Rcd at 2728-29, *citing* 5 U.S.C. § 575(a)(1).

¹¹⁵ Speta Comments at 27-28.

¹¹⁶ See, e.g., *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955) (stating that a “cardinal principle of statutory construction is to save and not to destroy,” and, thus, a court must “give effect, if possible to every clause and word of a statute”) (internal citations omitted); *Regular Common Carrier*, 820 F.2d at 1331 (reversing ICC’s construction of a statute because it “fails to give full effect” to all relevant provisions).

325(b)(3)(A) (to adopt rules governing the “exercise” of retransmission consent).¹¹⁷ Repeating meritless arguments in a different context does not give them the merit they lack.

None of this confused discussion remotely resembles a proper “Step Two” analysis, as set forth by the Supreme Court and described above. The failure of the Speta Comments to present even a coherent (let alone meritorious) *Chevron* second step argument is unsurprising, as no reasonable construction of Section 325(b)(1)(A) would permit the forced carriage of broadcast signals. An interpretation of Section 325(b)(1)(A) contravening the fundamental basis of retransmission consent – the express consent of the broadcaster – is patently unreasonable.

* * * * *

Despite the detail of the above discussion, the pay TV industry’s claims that the Commission can and should adopt proposals involving the forced retransmission of stations’ signals can be satisfactorily refuted in one short answer: “Congress did not write the statute that way.”¹¹⁸ All of the MVPDs’ lengthy comments, elaborate analyses and convoluted arguments to the contrary cannot obscure or overcome that single determinative fact.

Respectfully submitted,



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¹¹⁷ Speta Comments at 28. These claims are refuted in Section II.C., *supra*. As shown in Section II.A., moreover, the fact that the FCC may issue cease and desist orders does not give it authority to issue orders contrary to Section 325(b)(1)(A) or any other act of Congress. See *id.* at 25.

¹¹⁸ *Corley*, 556 U.S. at 315 (citations omitted).