



March 18, 2016

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

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

Dear Ms. Dortch:

On March 10, 2016, WaveDivision Holdings, LLC (Wave) submitted an ex parte letter concerning its retransmission negotiations with broadcasters.¹ Wave asserts that broadcasters propose clauses that would allow for additional, non-commonly owned stations to receive the same agreement without further negotiations in the future.² As detailed below, the very questions Wave raises should give the Commission serious pause before it layers additional regulations onto its good faith standard.

In Wave's discussion of broadcasters' alleged proposals to effectively assume rates of stations they do not own, two things are immediately clear. First, to the extent that Wave asserts "these provisions allow circumvention of the [FCC's] joint-negotiation prohibition,"³ the current retransmission consent proceeding is irrelevant. If a broadcaster violates an existing Commission rule, then Wave already has the ability to raise that issue with the Commission. The instant proceeding need not address that apparent concern.

Second, it's telling that Wave cannot even describe the effect of the provision in question. Rather, Wave merely claims that these alleged provisions raise a series of questions. In Wave's own words:

¹ Letter from James A. Penney, General Counsel, WaveDivision Holdings, LLC, MB Docket No. 15-216 (March 10, 2016) (Wave Letter).

² *Id.* at 1.

³ *Id.* at 1-2.

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What are their plans? What new services, no matter how slight, might trigger such a provision, especially on the other side of the broadcast incentive auction? *We can only imagine.*⁴

Thus, Wave does not claim a concrete and immediate harm. Rather, Wave appears to be suspicious of what broadcasters might do with such a proposal. This certainly is not enough to allow the Commission to engage in any kind of reasoned decision-making.⁵ If the Commission believes that such provisions – should they even exist – present problems, it must have a clear articulation of that problem and be able to explain why a rule is necessary to prevent their operation. Neither Wave nor Mediacom before it⁶ offers any such information that would give the Commission a basis to suddenly outlaw these kinds of discussions in the course of retransmission consent negotiations. Moreover, eliminating the parties' flexibility within negotiations only serves to make service disruptions more likely and places upward pressure on pricing.

As NAB noted before, the instant proceeding is the fly paper that will continue to attract proposals like Wave's. We now see a constant stream of MVPD gripes about topics that arise in the course of retransmission consent negotiations. This proceeding is providing pay TV operators an opportunity to complain about anything and everything they don't enjoy about the retransmission consent process. While perhaps cathartic, mere listing of objectionable subjects that don't present any concrete harms and are outside the scope of the Commission's authority is not enough to warrant the dramatic step of adding regulations to the retransmission consent regime that already takes into account the totality of the circumstances.

Respectfully submitted,



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

⁴ *Id.* at 2 (emphasis added).

⁵ See, e.g., *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (An "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (internal citations omitted)).

⁶ Letter of Thomas J. Larsen, Senior Vice President, Government & Public Relations, Mediacom Comm., MB Docket No. 15-216 (Feb. 16, 2016).