

March 25, 2016

BY ELECTRONIC FILING

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

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

Dear Ms. Dortch:

In further response to requests from Commission staff, this letter on behalf of the American Television Alliance discusses the following subjects:

- The ongoing need for Commission action with respect to technology restrictions, notwithstanding DISH's settlement with FOX.
- Details regarding ATVA's proposal to restrict forced bundling, including how the Commission could easily administer such a rule—and identify “sham” standalone offers.
- NAB's continuing insistence that only one provision of the Communications Act—the one prohibiting MVPDs from retransmitting signals without reauthorization—really means anything when it comes to retransmission consent.

I. Broadcasters Continue to Insist on Technology Restrictions.

ATVA's comments described a variety of technology restrictions demanded by broadcasters in the context of retransmission consent negotiations.¹ ATVA thus proposed making it at least a presumptive violation of the Commission's good-faith rules if a broadcaster:

Conditions retransmission consent on (i) an MVPD's acceptance of restrictions on providing, or assisting consumers' use of, lawful devices or functionality; or (ii) an MVPD's commitment to install a set-top box in each home on each television receiver.²

¹ Comments of the American Television Alliance at 30-31 (filed Dec. 14, 2015) (“ATVA Comments”), (citing *Notice* ¶ 16). Unless otherwise indicated, all pleadings cited herein were filed in MB Docket No. 15-216.

² ATVA Comments at 48 (citing *Notice* ¶ 16).

The most notorious set of broadcaster demands for technology restrictions were imposed on ATVA member DISH—particularly with respect to its “AutoHop” ad-skipping, “PrimeTime Anytime” auto-recording, and Sling place-shifting features.³ DISH recently settled its litigation with FOX about these issues.

In light of this settlement, Commission staff have asked whether broadcaster restrictions on technology functions are still a concern to ATVA members. The answer is unequivocally “yes.” To take just one example, an ATVA member has provided an anonymized version of a recent broadcaster demand regarding technology.

This Agreement authorizes only retransmission of the Stations’ Programming as a linear video programming stream on a simultaneous or near-simultaneous basis over the MVPD’s wired infrastructure only to set-top boxes or television receivers directly connected to such wired infrastructure in Subscribers’ homes and only for viewing on a television set. This Agreement does not authorize MVPD to, and it shall not, directly or indirectly, retransmit or facilitate the retransmission of the Station’s Programming or any other portion of the Station Signal(s) over the public system known as the Internet, via IP distribution, by a broadband connection or through any wireless technology to mobile or other devices. MVPD shall not furnish any subscriber that receives the Station Signal(s) with any device, service, or technology that automatically or at a subscriber’s election deletes commercials or other material from any Station’s Programming (or accomplishes the functional equivalent of deletion, including, without limitation, through automatic skipping or fast-forwarding through commercials) or promote, advertise, or instruct subscribers in the use of any device, technology, application or service that enables subscribers to accomplish such deletion fast-forwarding; provided, however, that the foregoing sentence shall not prohibit the use by Subscribers of personal home video recording equipment, such as traditional VCRs and digital video recorders, solely to the extent used for viewing any Station’s Programming on a Subscriber’s television set (and not other devices) and which shall in no event involve the retransmission of any Station’s Programming over the public Internet), in all cases for personal, non-commercial purposes, so long as such use is permitted under then-existing law without a license or authorization from Station Owner. In addition, MVPD shall not sell or insert into programming it carries any third party advertising or promotions of any such device, service, or other technology.

³ See, e.g., *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2014) (denying rehearing and upholding DISH’s use of AutoHop and related technologies); *Fox Broad. Co. v. Dish Network LLC*, No. CV 12-4529 DMG SHX, 2015 WL 1137593, at *12 (C.D. Cal. Jan. 20, 2015) (upholding DISH’s use of Sling-enabled devices).

This provision at least arguably prohibits the MVPD from providing all three of the legal functionalities at issue in the DISH litigation, as well as any number of as-yet-introduced technologies. Many other ATVA members report having received similar demands recently.⁴ Some report also receiving demands that would restrict network DVRs, guide innovations including picture-in-picture and mosaics, and search and recommendation functionality.

II. The Commission Can Readily Administer a Restriction on Forced Bundling.

ATVA has proposed to restrict *forced* bundling (not all bundling, as the broadcasters have suggested). Under ATVA's proposal, it would be at least a presumptive violation of the good faith rules if a broadcaster:

Requires an MVPD to carry cable network, non-broadcast programming, multicast programming, duplicative stations, or a significantly viewed station as a condition to granting retransmission consent to the MVPD for carriage of the television broadcast station's primary signal, including, but not limited to, by refusing to make a standalone offer for the MVPD's carriage of the television broadcast station that is a real economic alternative to a bundle of broadcast and non-broadcast or multicast programming (for example, justified by actual prices for other similar broadcast channels in the same market).⁵

This proposal, in large part, derives from labor law precedent upon which the good faith rules are based. Labor law flatly prohibits bargaining parties from insisting on bargaining for "non-mandatory subjects." As the Supreme Court has put it:

[G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory

⁴ Again, ATVA members would be pleased to provide documentation supporting these and other claims, if so requested by the Commission and under an appropriate protective order. ATVA Comments at 15 n.54.

⁵ ATVA Comments at 44 (citing Notice ¶ 15).

subject of bargaining [S]uch conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.⁶

Under what has become known as the *Borg-Warner* doctrine, proposing terms relating to a non-mandatory subject is not unlawful from the outset—but a party may not “lawfully insist upon them as a condition to any agreement.”⁷

This doctrine applies squarely to retransmission consent. As the Affiliate Associations have conceded,⁸ retransmission consent is a right specific to broadcasters—a right that relates only to the “signal” of a “broadcasting station.”⁹ Carriage of the station’s primary programming stream, in other words, is the “mandatory subject” of a retransmission consent negotiation. Carriage of anything else is a non-mandatory subject of such a negotiation. As *Borg-Warner* teaches, such bargaining practices frustrate the objective of reaching agreement on the mandated subject. As such, absent agreement from both parties, such conduct violates the good faith requirement.

Broadcasters’ principal argument against a forced-bundling restriction seems to be that, by restricting the kinds of offers that could be made, the Commission might inadvertently reduce the “pathways to a deal.” This, the argument goes, could make deals harder to reach and could even lead to higher prices.¹⁰

This concern, however, misconstrues the proposal on the table. Under ATVA’s proposal, a broadcaster could make whatever *offers* for bundled carriage it wanted. It merely could not *insist* on such carriage over the objection of the MVPD. To the extent a broadcaster’s non-cash offer actually provides “flexibility . . . to reach a mutually acceptable deal” (such as, for

⁶ *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, 349 (1958).

⁷ *Id.*

⁸ Comments of the ABC Television Affiliates Association *et al.* at 45 (filed Dec. 1, 2015) (arguing that it is “the right and responsibility of [individual stations] to negotiate retransmission consent” under Section 325 of the Communications Act”).

⁹ 47 C.F.R. § 325(b).

¹⁰ See Letter from Rick Kaplan to Marlene Dortch at 2 (filed Mar. 14, 2016) (“Even those that may seem innocuous often reduce the flexibility of the parties to reach a mutually acceptable deal. For example, NAB noted that restricting the ability of broadcasters to negotiate for carriage of additional channels would limit a broadcaster’s ability to accommodate an MVPD’s request for a lower price point in favor of additional capacity. A restriction of this sort will thus increase the upward pressure on price.”); Letter from Rebecca Hanson to Marlene Dortch at 4 (filed Mar. 15, 2016) (“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 [ATVA’s proposal] . . . then the FCC would be effectively reducing retransmission negotiations to purely cash transactions.”).

example, a significant discount for bundled carriage) the MVPD would want to consider it. Again, nothing about ATVA's proposal prevents such an offer—or, for that matter, *any* offer. But to argue that ATVA's proposal would eliminate “pathways to a deal,” then, is really to argue that MVPDs do not know what is good for them.

Of course, when we say that a broadcaster should not be allowed to insist on a bundled offer over the objection of the MVPD, we are saying that the broadcaster *should* be required to make a *bona fide* standalone offer as an alternative. Despite claims to the contrary, ATVA members report that broadcasters often refuse to make such offers—even when specifically asked to do so. If the Commission required broadcasters to make standalone offers, however, they might be tempted to make sham offers for the sole purpose of evading the requirement. This, in turn, raises an enforcement question: How can the Commission tell sham ones from *bona fide* ones with the limited resources it has?

We have suggested that the standalone offer must be a “real economic alternative” to the bundled offer. Labor law has a parallel, and perhaps more elegant, formulation—one party cannot insist on an alternative that it “knows the [other party] cannot live with.”¹¹ That is: offers made *with the intention that they not be accepted* do not count. In our view, the Commission could help determine whether a broadcaster's offer is one made with the intention of being rejected by asking four simple questions. The answer to any one of these questions may not, in and of itself be dispositive in determining bad-faith conduct. The answers can, however, represent “yellow flags.” Taken together, they can indicate the possibility, or even the probability, of bad faith.

- ***First, is the standalone offer the same or higher than the bundled offer?*** This question is not determinative. A broadcaster, for example, might want to “purchase” carriage of otherwise unwanted networks—and nothing about an offer to do so is necessarily in bad faith.¹² Such an offer, however, should at least alert the Commission to the possibility that it is being made with the intention that it be rejected.
- ***Second, has the broadcaster provided any explanation for the standalone offer at all?*** If a broadcaster truly wants to purchase the carriage of otherwise unwanted networks, one would expect it to at least say so. Often, however, when broadcasters

¹¹ *Lathers Local 42*, 223 NLRB 37, 42 (1976). See also *Southern California Pipe Trades District Council No. 16*, 167 NLRB 1004, 1009 (1967) (where “the counterproposals advanced by [the party that had been insisting on a nonmandatory subject] were so extreme as to preclude a reasonable expectation of acceptance [such] that the ostensible choice they offered was illusory,” the party was in effect continuing to insist on the nonmandatory subject even though it had been removed from the counterproposal, and the party thus failed to bargain in good faith).

¹² Comments of 21st Century Fox Inc. and Fox Television Stations, LLC at 12 n.25 (filed Dec. 1, 2015) (citing to prior submissions by Dr. Bruce Owen).

make standalone offers today, the course of conduct makes absolutely clear that they are intended to be rejected. In many cases, the conversation goes something like this:

MVPD: I don't like the bundled offer. Please make me a standalone offer.

Broadcaster: No.

MVPD: C'mon. Make me a standalone offer. You say you always make standalone offers.

Broadcaster: No.

MVPD: Seriously, make me a standalone offer. Please?

Broadcaster: Fine. It's the same price as the bundle.

Such exchanges—or the lack of any justification for the standalone offer—can also suggest that it was made in order to be rejected.

- ***Third, has anybody ever accepted the standalone offer?*** If a standalone offer is intended to be accepted, one would expect some MVPD to have actually accepted it, or something like it. If nobody has accepted the standalone offer, the Commission can begin to infer that it is intended to be rejected.
- ***Fourth, how does the offer compare with the prices charged by close substitutes?*** In many cases, forced bundling occurs between network owned-and-operated stations and affiliated cable networks. Non-owned affiliates of the same network in other markets, however, sell the same network programming without the cable bundle. If the standalone price offered by a network for its owned-and-operated stations is significantly higher than the rates charged by same-network, non-owned affiliates in other markets, the Commission may also potentially infer that the offer is intended to be rejected.

Again, none of these questions are meant to identify hard and fast rules. Sometimes, for example, a standalone offer is made in good faith even if nobody has ever accepted it before. These questions do suggest, however, that determining when offers are intended to be rejected is not so difficult. The Commission can take further comfort in this regard from the fact that retransmission consent complaints are expensive and difficult to prosecute. No rational MVPD would undergo this expense for a “close call” standalone offer, or one in which the facts would

be difficult to establish. Filing a complaint for a broadcaster's failure to offer a "true economic alternative" would make sense only in the most egregious of circumstances.

III. The Commission Possesses Ample Authority Both to Adopt ATVA's Proposals and to Order Interim Carriage.

In the last two weeks, we have filed fifteen pages summarizing our view of the law (plus another 277 pages of previously filed pleadings)¹³ and NAB has filed twenty pages of its own.¹⁴ We would be remiss, however, if we did not respond to what we think is the principal remaining disagreement between the two sides.

NAB's essential argument, as we understand it, is this: The Communications Act clearly says that MVPDs may not retransmit a broadcaster's signal without its consent.¹⁵ "Because 'Congress has directly spoken to the precise question' of the retransmission of broadcast stations' signals," NAB argues, "that is the end of the matter,' as the Commission and any reviewing court 'must give effect to the unambiguously expressed intent of Congress.'"¹⁶ Thus, NAB concludes, the Commission may neither require interim carriage nor adopt any of ATVA's proposals.

Nobody disputes that *MVPDs* may not carry broadcast signals without consent. The question here, however, is what the *Commission* can do in governing the exercise of such consent. In this regard, the Communications Act says other pertinent things, including the following:

- Section 325(b)(3)(A) provides that the Commission "shall . . . establish regulations to govern the exercise by television broadcast stations of the right of retransmission consent . . . and of the right to signal carriage."¹⁷
- It also provides that the Commission "shall consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier."¹⁸

¹³ Letter from Michael Nilsson to Marlene Dortch (filed Mar. 15, 2016).

¹⁴ Letter from Rick Kaplan to Marlene Dortch (filed Mar. 17, 2016) ("NAB Legal Letter").

¹⁵ *Id.* at 1 (citing 47 U.S.C. § 325(b)(1)(A)).

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 16 (citing 47 U.S.C. § 325(b)(3)(A)).

¹⁸ *Id.*

- Section 325(b)(3)(C)(ii) states that it shall not be bad faith to enter into distribution agreements “based on competitive marketplace considerations”—which indicates that the Commission could prohibit agreements *not* based on marketplace considerations.¹⁹

NAB itself argues that “[a]s the FCC has recognized, the proper course is to give effect to [each of these provisions], as required under basic canons of statutory construction and numerous court decisions.”²⁰ We agree. As the Supreme Court said just this week, statutory language “cannot be construed in a vacuum.”²¹ “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”²²

We think, however, that the way to “give effect to” each of these sections—to read them “in their context”—is to read them together, not to minimize or ignore the ones NAB does not like. So, for example, the “no retransmission without permission” applies by its terms *to MVPDs*.²³ The other provisions apply by their terms *to the Commission*—which therefore can order interim carriage if it finds that a broadcaster has negotiated in bad faith.²⁴

¹⁹ *Id.* at 17 (citing 47 U.S.C. § 325(b)(3)(C)(ii)).

²⁰ *Id.* at 14 (citing, e.g., *Corley v. United States*, 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); *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”).

²¹ *Sturgeon v. Frost*, No. 14-1209, 2016 WL 1092415, at *10 (U.S. Mar. 22, 2016) (quoting *Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 1357 (2012)).

²² *Id.*

²³ 47 U.S.C. 325(b)(1)(A) (providing that “[N]o cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station”) (emphasis added).

²⁴ Both the Commission and courts have dealt with this sort of statutory dichotomy before. In *Time Warner Cable* 15 FCC Rcd. 7882, (CSB 2000), for example, a cable operator’s retransmission consent agreement expired during a “sweeps week,” when the statute prohibited cable operators from dropping broadcast stations. Time Warner Cable argued that “upon the expiration of retransmission consent, carriage of the affected programming is no longer authorized by Section 325(b)(1)(B).” *Id.* ¶ 7. The Commission disagreed, however, concluding that *it* could require carriage pursuant to separate provisions contained in Section 614. *Id.* Likewise, in *Alliance for Community Media v. F.C.C.*, 529 F.3d 763 (6th Cir. 2008), the Sixth Circuit found that a statutory provision prohibiting cable operators from providing cable service without a franchise from a franchising authority did not bar the FCC from establishing an interim franchise remedy where a franchising authority failed to timely act on a franchise application. The Sixth Circuit, finding that the statute was silent as to *the Commission’s* role in the franchising process, concluded that the Commission acted within its authority, stating that “Where petitioners’ argument falls short... is in equating the omission of the agency from section 621(a)(1) with an absence of rulemaking authority.” *Id.* 529 F.3 at 773. Likewise, where NAB’s

In any event, while we think the Commission has authority to adopt interim carriage remedies, ATVA's seven proposals do not depend on interim carriage. So nothing about the "no retransmission without permission" provision prohibits the Commission from adopting each of them. This has always been clear, and Congress made it even clearer when it directed the Commission to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations."²⁵

NAB, for its part, seems to agree that the FCC can impose remedies other than interim carriage when it finds that bad faith has occurred. Here is what it had to say in its most recent letter:

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.²⁶

Again, we disagree with NAB about the Commission's authority to require interim carriage. Yet the rest of NAB's passage supports our view of the law: *Even if the Commission lacks authority to order interim carriage (which it does not), it surely has authority to identify instances of bad faith and to impose other remedies in response to them.* NAB may not agree with the sets of behavior ATVA has identified as at least presumptively constituting bad faith. But it can no longer seriously maintain that the Commission lacks authority to address this behavior.

* * *

Pursuant to the Commission's rules, I am filing one copy of this letter in MB Docket No. 15-216 and another in MB Docket No. 10-71. Should you have any questions, please contact me.

argument falls short is in equating 47 U.S.C. § 325(b)(1)(A)'s prohibition on *what an MVPD can do* with a prohibition on *what the Commission, in furtherance of other specific grants of authority, can do.*

²⁵ STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014) (emphasis added).

²⁶ NAB Legal Letter at 14 (emphasis added).

Respectfully submitted,

/s/

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