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**FILED THROUGH ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

MB Docket No. 15-216—Implementation of Section 103 of the STELA Reauthorization Act of 2014: Totality of the Circumstances Test

Dear Ms. Dortch:

During a 2013 appearance on MSNBC's *Morning Joe* program, Russell Brand, the English comedian, actor, radio host, author and activist, befuddled the hosts by departing from the inanity typical of celebrity interviews on morning TV shows. Among other things, he took the mass media to task for its shallowness and for having "a particular agenda" which he claimed is pursued through manipulation of the information conveyed to audiences.<sup>1</sup> While that accusation is hardly novel, Brand's explanation of the phenomenon was unique.

Usually, the superficiality of TV news is blamed on the tendency to pander to the lowest common denominator in pursuit of ratings, while media bias is attributed to the journalist's ideological bent or directives from corporate headquarters. Brand, on the other hand, appeared to be saying that psychology plays an important role. Through a process of operant conditioning and self-selection, he seemed to suggest, the media industry over time has come to be dominated at all levels by personalities predisposed to superficiality and manipulation. So, even when not driven by a political agenda, self-interest or ambition, people involved in the television business are nonetheless compelled by the very wiring of their brains to take a one-dimensional, perfunctory and slanted approach to issues.

That is an intriguing idea. If true, it certainly would help explain some features of many of the comments filed by some broadcast interests in this proceeding.

To be clear, we do not mean to fault broadcasters for writing comments with the purpose of furthering their "particular agenda" regarding retransmission consent or even attempting to disguise their self-interest as the public interest by posturing themselves as

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<sup>1</sup> See <http://www.nbcnews.com/id/52243191/t/watch-russell-brand-takes-over-morning-joe-makes-fun-our-newsroom/#video-transcript>. Ironically, at the time Brand had his own television show, *Brand X*, which ran on the FX network in 2012 and 2013. It routinely featured guests from the counter-culture as well as those with controversial political or social views.

consumer champions because the status quo is supposedly the best of all possible worlds for TV viewers. After all, there are billions of dollars at stake in the debate over retransmission consent. Perhaps understandably, broadcasters' real goal is not furthering truth, justice and the American way, but protecting their pocketbooks. We recognize that whenever the proceeding concerns retransmission consent, the comment process almost perfectly corresponds to Ambrose Bierce's description of politics as a "[s]trife of interests masquerading as a contest of principles."

However, the truth that businesses and lobbyists arguing one side or the other are advocates rather than scholars or saints does not mean that anything goes. As Daniel Moynihan is credited with remarking, everyone is entitled to his own opinion, but not to his own facts. All too frequently, however, broadcast interests display a cavalier attitude toward the facts, inventing, massaging or ignoring them. And while it would be unrealistic to expect a contending party to be disinterested or to make its opponent's case, the Commission has every right to demand intellectual honesty. Unfortunately, that is a quality often missing in the advocacy of some broadcasters, who distort, overlook or summarily dismiss the arguments and supporting evidence presented by MVPDs.

We think that a recent example of this regrettable style can be found in the ex parte letter from the National Association of Broadcasters ("NAB") dated April 5, 2016<sup>2</sup> ("NAB's April 5<sup>th</sup> Letter"), which was filed in this proceeding in reaction to a March 28<sup>th</sup> letter from Networks for Competition and Choice Coalition (the "Coalition") calling for changes to the Commission's good faith rules.<sup>3</sup>

Of course, we are not aware of a single time in the entire history of the world when NAB has found merit in any significant point made by MVPDs about retransmission consent. And an MVPD that says something NAB doesn't like is never simply mistaken or misguided. Instead, every assertion that deviates from NAB-think is, to borrow an expression from a character in the TV series *Scrubs*, "disturbing in, like, eight different ways."<sup>4</sup> Consistent with this tendency, NAB finds virtually everything said by the Coalition in its March 28<sup>th</sup> submission to have "no rational basis," to rest on "house-of-cards logic" and "strained arguments" or to be "fallacious," "illogical," "counterfactual," "wholly impractical" or "impossible."

Indeed, NAB thinks that the Coalition's submission is so icky that it urges the Commission to immediately apply a form of brain bleach,<sup>5</sup> writing that "[b]ecause the Coalition's rationale for FCC interference in retransmission consent negotiations fails so

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<sup>2</sup> Notice of Ex Parte Communication, MB Docket Nos. 15-216 and 10-71 (Apr. 5, 2016).

<sup>3</sup> Notice of Ex Parte Communication, MB Docket Nos. 15-216 and 10-71 (Mar. 28, 2016).

<sup>4</sup> See <http://www.tv.com/shows/scrubs/my-female-trouble-2-371553/>.

<sup>5</sup> "Brain bleaching" is a concept in popular culture that refers to the reaction of someone who "has just witnessed something so icky, so unsettling, so horrific, and so weird" that "continued knowledge of this subject is an unbearable affront to his sanity. He will not be at peace until he can remove his brain from his skull, scrub the offending mental image out with steel wool and mental floss, then disinfect the entire area with bleach (disinfecting his eyes or ears with fire is optional)." <http://tvtropes.org/pmwiki/pmwiki.php/Main/BrainBleach>.

conspicuously, the Commission should reject the Coalition's various specific proposals for government intervention on that basis alone."<sup>6</sup>

We could spend a lot of time addressing the many flaws we see in the style and substance of NAB's response to the Coalition, such as its misleading treatment of the views of ACA's Chairman and President regarding the decline in the video part of the businesses of the organization's members due in large part to the pricing, bundling and other practices of video content owners;<sup>7</sup> its persistence in claiming that leverage in retransmission consent bargaining is a function of market capitalization and ignoring (rather than acknowledging and attempting to refute) the explanation by Mediacom and others of why that is not true;<sup>8</sup> and its fatuous pretense that MVPDs have never produced a shred of evidence supporting their opinions on the subject of the Commission's authority to order interim carriage or the economic and other implications of the bundling practices of station owners, even though various MVPDs and their representatives have submitted hundreds of pages of materials on these topics. The good news for those inside and outside the Commission whose jobs require them to read the stuff filed in this docket is that we are going to confine ourselves in this letter to responding to a single manipulation of the facts—namely, the attempt to discredit Mediacom's addendum to one of the Coalition's suggested changes to the good faith rules by telling less than half of the story.

In a March 30<sup>th</sup> letter,<sup>9</sup> Mediacom expressed its support for the Coalition's proposals. We also opined that the Coalition's idea that the parties to an expiring retransmission consent

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<sup>6</sup> NAB's April 5<sup>th</sup> Letter at 1.

<sup>7</sup> ACA's comments in this proceeding clearly show that NAB has mischaracterized the quoted statements of its two officers. Even if NAB were correct in its silly claim that Messrs. Gessner and Polka believe that video service no longer matters to ACA's members, as usual it tries to lift an elephant with a thread, going to the extreme of arguing that the statements of the two ACA executives mean that there can be no justification for revisions to the good faith rules. That is nonsense. If, contrary to reality, Messrs. Gessner and Polka did hold the opinion attributed to them, then we would simply say that Mediacom and other MPVDs strongly disagree and believe that changes to the rules would be both justified and in the best interests of their own as well as ACA members' subscribers. After all, roughly 100 million households subscribe to a pay TV service, and, on average, they spend more money each month for video service than for broadband or cellular service. According to one estimate, the average subscriber was paying \$123 per month for pay TV in 2015 as compared to an estimated \$86 in 2011, an increase of 9.4% annually during a period when the Consumer Price Index rose by only 1.6% annually. Rising programming costs were cited as the primary reason for the increase. See <http://www.fool.com/investing/general/2015/02/01/the-average-american-pays-this-amount-for-cable-ho.aspx>. Regardless of what ACA's executives may or may not think, given the fact that most households continue to buy video subscription service and that the costs of retransmission consent and programming continue to grow at astronomical rates, from the perspective of consumers the title of an August 29, 2013 article by Jeff Baumgartner in *Multichannel News* continues to be true: "Linear TV Viewing Still Matters." See Letter from Joseph Young, General Counsel, Mediacom Communications Corporation, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (filed Dec. 13, 2013).

<sup>8</sup> See Letter from Joseph Young, General Counsel, Mediacom Communications Corporation, to William Lake, Media Bureau Chief, Federal Communications Commission, MB Docket Nos. 09-182 and 10-71 (filed Dec. 1, 2011).

<sup>9</sup> Letter from Thomas Larsen, Senior Vice President, Government & Regulatory Affairs, Mediacom Communications Corporation, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 15-216 (filed Mar. 30, 2016).

contract should be required to start negotiations six months before the expiration date dovetailed with Mediacom's suggestion of a cooling off period/mediation process if there is a negotiating impasse. We presented two separate versions of that recommendation. In the first, the sixty-day cooling-off period and mediation process would begin when an existing consent expired. In the second, the process could be triggered sixty days before the contract expiration date. We expressly stated that the second alternative was offered as a solution if the Commission continued to doubt whether it has the statutory authority to mandate interim carriage, as might be required if the cooling-off period started upon contract expiration.

NAB's April 5<sup>th</sup> Letter says this about Mediacom's suggestion:

Mediacom's proposal, with its forced interim carriage requirement during the cooling off period, is contrary to the plain language of Section 325(b)(1)(A) of the Act, and Mediacom makes no effort to justify its proposal under the statute. Because the "Commission does not have the power to force broadcasters to consent to MVPD carriage of their signals," it may not adopt Mediacom's proposal.<sup>10</sup>

There are a couple of problems with this statement. First of all, it completely ignores the second version of the cooling off proposal, which we expressly said in our March 30<sup>th</sup> letter was offered as a way of avoiding the need for mandated interim carriage. Recognizing the difficulty of making a case that this alternative would violate Section 325(b)(1), NAB simply pretends that it was never presented.

Even if it were legitimate to focus solely on the first iteration of our cooling-off idea, NAB's claim that "Mediacom makes no effort to justify its proposal under the statute" is patently untrue. We first presented the cooling-off idea in our original comments in this proceeding,<sup>11</sup> where we clearly expressed our view that the Commission has ample authority to mandate interim carriage and included citations to our prior filings in which we devoted scores of pages to that subject.<sup>12</sup> In addition, we asked Professor James Speta to independently and objectively examine the authority issue, and he has filed comments in which he concludes that the Commission does have the power to require that retransmission consent agreements include consent to interim carriage during a cooling off period or mediation.<sup>13</sup> Nonetheless, NAB's April 5<sup>th</sup> Letter disingenuously claims that Mediacom "makes no effort to justify its proposal."

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<sup>10</sup> NAB's April 5<sup>th</sup> Letter at 6 (footnotes omitted).

<sup>11</sup> See Comments of Mediacom Communications Corporation, MB Docket No. 15-216, at 22-26 (filed Dec. 1, 2015).

<sup>12</sup> See, e.g., Joint Reply Comments of Mediacom Communications Corporation and Cequel Communications LLC D/B/A Suddenlink Communications, MB Docket No. 10-71 (filed June 3, 2010); Reply Comments of Mediacom Communications Corporation, MB Docket No. 10-71 (filed June 27, 2011); Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC D/B/A Suddenlink Communications, and Bright House Networks, LLC, MB Docket No. 10-71 (filed June 26, 2014).

<sup>13</sup> See Comments of James Speta, MB Docket No. 15-216 (filed Jan. 14, 2016).

This manipulation of the facts about Mediacom's proposal is typical of the approach of many broadcast interests in retransmission consent proceedings before the Commission. After years of reading their submissions, we are reminded of a remark made by Dr. Who, the time-traveling adventurer in the BBC TV series of the same name: "The very powerful and the very stupid have one thing in common. They don't alter their views to fit the facts, they alter the facts to fit their views."

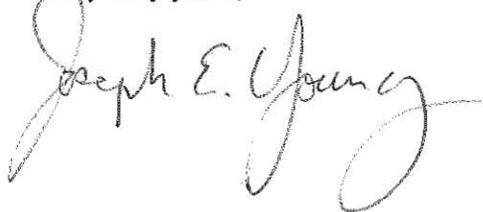
We suspect that the reason for these tactics can be found in Mr. Brand's observation in his book *Revolution* that "[t]he most potent tool in maintaining the status quo is our belief that change is impossible." Station owners have a strong interest in maintaining the current retransmission consent system, which forces consumers to pay billions more each year for the same old TV fare, whether they want it or not. For the roughly one hundred million households that rely on a pay TV service, watching broadcast television has become something aptly described by a lyric from the song, *If You Can Afford Me*, by Mr. Brand's ex-wife, Katy Perry: "If you want me you're gonna have to break the bank."<sup>14</sup>

NAB knows that its best shot at preserving the regulatory regime that produces ever-increasing billions for big station owners and broadcast networks is for the Commission to continue to believe that it lacks the power to make meaningful changes. The last thing it wants to do is draw attention to plausible arguments to the contrary or to proposals that avoid the need to even address the issue of the Commission's authority to order interim carriage, such as Mediacom's second version of its cooling-off suggestion.

In any event, we think that the debating style of some broadcast interests is unfortunate for a number of reasons, not the least of which is the danger noted by Mr. Brand in his appearance on *Morning Joe* that "you allow the agenda to be decided by superficial information." The resort to manipulation and shallowness impedes the Commission in gaining an accurate understanding of all of the relevant facts and evaluating the merits of the arguments and proposals made by the contending parties so that it can make fully informed decisions about what will best serve the interests of consumers.<sup>15</sup>

Thank you for your consideration.

Very truly yours,



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<sup>14</sup> <http://www.azlyrics.com/lyrics/katyperry/ifyoucanaffordme.html>.

<sup>15</sup> NAB complains that proceedings like this one act as "flypaper" attracting "flies" like Mediacom who leave their droppings in the form of filings that more than one poor soul at the Commission has to read, by telling only part of the story in its own submissions (which NAB obviously thinks are more akin to missives from heaven than to fly specks). Ironically, NAB creates the necessity of filings like this one that have to cover old ground yet again in order to correct NAB's attempts to distort the record.