

April 28, 2016

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

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

Dear Ms. Dortch:

This letter responds to an April 25th letter from CenturyLink¹ in which the pay TV distributor asks the Commission to actively intervene on its behalf in retransmission consent negotiations. CenturyLink, like many of its pay TV cohorts, seeks a series of rules that have nothing to do with whether a broadcaster has made good faith efforts that show an intention to reach an agreement with a pay TV distributor, but are instead designed to lessen a broadcaster's leverage and ultimately reduce its ability to secure fair market value for carriage of its signal.

Among other things, CenturyLink asks the Commission for rules that would mandate certain broadcaster speech online, limit how a broadcaster may negotiate for compensation, restrict broadcasters from exercising exclusivity contracts, prevent stations from alerting the public about a possible impasse and effectively prevent any kind of proposal for carriage of multiple channels, *even as CenturyLink itself mandates bundled services for its Prism TV service customers.*²

We believe it important to highlight in particular CenturyLink's odd request that broadcasters should be prevented from alerting customers, through the use of crawls or other notifications, that there may be a disruption in service on a particular pay TV operator's system. First, CenturyLink provides no legal argument to support this request, even though such a rule would

¹ See Letter from Melissa E. Newman, CenturyLink, MB Docket No. 15-216 (filed April 25, 2016) (CenturyLink Letter).

² See Taylor Soper, "CenturyLink launches Prism TV service in Seattle," GeekWire.com (Aug. 18, 2015) ("CenturyLink requires that you also purchase monthly phone or high-speed Internet service to use Prism TV").

clearly violate the First Amendment.³ Second, it makes a tortured attempt to justify the limitation as a benefit to consumers who are apparently “unnecessarily worried” about a potential loss of programming. In CenturyLink’s world, it is more of a consumer benefit to keep subscribers in the dark than to alert them that one of their local channels may no longer be provided by a pay TV distributor. Thankfully, of course, most down-to-the-wire negotiations never result in a station dropping off a pay TV distributor’s channel lineup.⁴ But in the few unfortunate cases where a negotiation cannot be completed before expiration of an existing contract, it is clearly better for consumers to have advance warning that a station may not be available.

CenturyLink’s request for a new rule that would ban consumer alerts is transparently self-serving and comes at the direct expense of consumers. It is less concerned with consumer well-being than with the potential that some consumers may choose to subscribe to a different multichannel video programming distributor if CenturyLink does not provide all local channels. In truth, however, those fears are mostly unfounded because CenturyLink, like other pay TV companies, uses Early Termination Fees, or ETFs, to make it financially painful to drop its service. Indeed, CenturyLink imposes some of the most draconian ETFs in the pay TV business. According to CenturyLink’s current Prism TV terms, an “early termination fee of up to \$20, *multiplied by the number of months remaining in customer’s then-current term commitment* if customer terminates Prism service before the end of the applicable term commitment, will apply.”⁵ This confusingly-worded disclaimer means that consumers wishing to switch pay TV services may have to pay several hundred dollars for the privilege of cancelling their existing contract, even if they are no longer receiving the service they elected.

CenturyLink’s other demands, as outlined in its letter, are likewise nothing more than a manifest attempt to use the Commission to shield it from the rigors of the marketplace. Its proposed new rules have nothing to do with the ultimate questions of this proceeding: whether more regulation is needed to incent broadcasters and pay TV operators to negotiate for carriage of broadcast stations and whether certain pay TV operators are unable to compete in the marketplace because they cannot negotiate for carriage of local broadcast stations. According to publicly available information, CenturyLink currently carries every local broadcaster available in its service areas and has not been involved in a recent retransmission consent dispute. It has operated successfully in the marketplace to secure carriage of both broadcast and pay TV channels, and it continues to make competitive inroads versus incumbent pay TV providers that have for decades dominated the television distribution marketplace. Indeed, its relatively recent entry into the video marketplace strongly suggests

³ Content-based speech restrictions are “presumptively invalid” as a violation of the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

⁴ See Marc R. Fratrik, Ph.D., *Updated Analysis of Carriage Interruption on Viewing Hours: 2011-2015* (Feb. 3, 2016), attached to Letter from Rick Kaplan, National Association of Broadcasters, MB Docket No. 15-216 (filed Feb. 8, 2016) (showing that total viewing hours impacted by retransmission consent disputes was exceedingly low, ranging on an annual basis “from a low of 0.00423% in 2011, to a high of 0.02977% in 2013”).

⁵ CenturyLink “Product Details,” available at <http://www.centurylink.com/common/disclaimers/general.html#prismtv>.

that the business of pay TV distribution is still highly attractive to profit-minded corporations like CenturyLink, a sophisticated and large telecommunications company.⁶

CenturyLink's complaints about broadcaster "behavior" are really just complaints that market negotiations can be difficult and contentious. It wants the Commission to significantly expand what Congress intended when it imposed a good faith requirement on negotiating parties, and, for the first time, enact rules that affirmatively limit which substantive proposals can be made in a negotiation rather than merely define which procedural tactics – such as a refusal to designate a negotiator – suggest a party is not serious about reaching an agreement for carriage. In this way, CenturyLink hopes to artificially suppress the value of broadcast signals and lower the cost of one of its key inputs. Its focus, as highlighted by its anti-consumer "prohibit crawls" request, is merely about its bottom line. We urge the Commission to dismiss these demands and resist any call by the pay TV industry to warp Congressional intent in a manner that will serve nothing more than the financial interests of major corporations like CenturyLink.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

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

⁶ Although a relatively new entrant into the video distribution marketplace, CenturyLink is an established player in telecommunications, and has been part of the wave of consolidation that has characterized both telecommunications and pay TV markets over the course of the last decade. See, e.g., "FCC Conditionally Approves CenturyLink/QWEST Merger," FCC News Release (March 18, 2011).