

May 5, 2016

SUBMITTED ELECTRONICALLY VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Communication
MB Docket No. 15-216 – Implementation of Section 103 of the STELA
Reauthorization Act of 2014: Totality of the Circumstances Test
MB Docket No. 10-71 – Amendment of the Commission’s Rules Related to
Retransmission Consent

Dear Ms. Dortch:

On May 4, 2016, the undersigned, appearing on behalf of Mediacom Communications Corporation (“Mediacom”), together with Michael Nilsson of Harris, Wiltshire, & Grannis, appearing on behalf of the American Television Alliance (“ATVA”), met with the following members of the Commission staff: Nancy Murphy, Michelle Carey, Martha Heller, Raelynn Remy, Steve Broeckaert, Dave Konczal, and (by telephone) Diana Sokolow (by telephone) of the Media Bureau and Susan Aaron of the Office of General Counsel. The purpose of the meeting was to discuss the scope of the Commission’s authority to adopt rules governing the retransmission consent regime and, in particular, rules under which broadcasters would be directed to grant retransmission consent for a limited period of time (or such consent would be deemed granted by operation of law) as a prophylactic or remedial measure in furtherance of the statutory goals of the Communications Act.

At the outset, the undersigned noted that the Commission has never addressed the specific substantive case presented by Mediacom and others in support of the Commission’s statutory authority to order interim carriage of a broadcast signal as a prophylactic or remedial measure. In any event, the Commission has the clear authority (which it has exercised on numerous occasions) to revisit its past statutory interpretations in light of changed circumstances. In this instance, the relevant changed circumstances include the dramatically increased use of blackout threats and actual blackouts by broadcasters as a coercive negotiating tactic. We also noted that no action that Congress has taken over the years can be reasonably construed as “ratifying” the Commission’s past failure to adopt rules providing for interim carriage as a remedial or prophylactic measure; if anything, Congress in STELARA made it clear that it expected the Commission to do more, not less, to address retransmission consent-related service interruptions.

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The undersigned then turned to the arguments recently presented by the broadcasters in an attempt to rebut the industry's legal case¹ and the support for that case reflected in the *ex parte* paper submitted by Professor James Speta of the Northwestern University's Pritzker School of Law.² According to the broadcasters, the Commission lacks the authority to require stations to give temporary consent to the carriage of their signals or deem such consent to be granted by operation of law under any circumstances. This is because, the broadcasters argue, Congress has spoken to this "precise issue" in Section 325(b)(A)(1).

While the broadcasters are right that Congress has expressly provided that MVPDs may not retransmit a broadcaster's signal without the broadcaster's consent, that is not the "precise question" before the Commission. The "precise question" is whether Congress has, in Section 325 or elsewhere, barred *the Commission* from ordering a station to give the required consent (or from deeming such consent to have been granted) on a limited time basis in furtherance of its authority under Section 325 (including the good faith negotiation requirement) or other provisions of the Act. The answer to that question is clear: in contrast to other portions of the Act where Congress has expressly limited the Commission's authority to take specific actions, there is nothing in Section 325 or elsewhere that imposes such a limitation on the Commission (and nothing in the Act's legislative history to suggest Congress intended to impose such a limitation on the Commission).

To the contrary, as Professor Speta demonstrated in his paper, there are multiple sources of authority for the Commission to adopt rules under which broadcasters could be directed to consent to continued carriage of their signals on a temporary basis (or be deemed to have granted such consent by operation) of law as a prophylactic or remedial measure. These include Section 325(b)(3)(A)'s broad grant of authority to the Commission to "establish regulations to govern the exercise" of retransmission consent. The Commission has relied on this authority in the past to adopt substantive restrictions on broadcaster retransmission consent practices, including a ban on exclusive agreements (later codified by Congress) and a prohibition on "unreasonable" refusals to grant retransmission consent. Other, broader sources of Commission authority to adopt such rules include Section 201(b) and Section 303(r). These provisions and the numerous actions taken by the Commission under them (and upheld by the courts) fully answer the broadcasters' assertions that Congress has given them "unqualified" control over the use of their signals. Given the Commission's plenary authority over the broadcast industry, it is safe to say that there is virtually no part of a broadcaster's operations that are within its "unqualified" control and immune from the Commission's regulatory authority absent an express and specific withdrawal of that authority by Congress.

Finally, the undersigned noted the striking parallels between the issue of the Commission's authority to require broadcasters' to consent to carriage of their signals on an interim basis (or to deem such consent to have been granted) as a prophylactic or remedial

¹ See, e.g., NAB Written *Ex Parte* Communication, MB Dockets Nos. 15-216, 10-71(March 17, 2016); Affiliate Groups *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71 (April 14, 2016).

² Reply Comments of Prof. James B. Speta, MB Docket No. 15-216 (Jan 14, 2016).

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measure and the issue of the Commission's authority to deem an interim franchise to have been granted to a competing cable operator in response to a franchising authority's unreasonable refusal to act on a pending franchise application. Just as Section 325(b)(1)(A) requires an MVPD to have obtained broadcaster consent as a condition to the carriage of the station's signal, Section 621(b)(1) requires a cable operator to have obtained a franchise from a state or local franchising authority before providing cable service. The Commission found, and the Sixth Circuit (in *Alliance for Community Media v. FCC*³) affirmed, that notwithstanding Section 621(b)(1), Sections 201(b) and 303(r) gave the Commission the necessary authority to adopt a rule deeming a temporary franchise to have been granted as a remedial measure where Congress had not expressly prohibited such action by the Commission.

The broadcasters' attempts to distinguish these two situations on the grounds that the Commission was acting pursuant to its authority to implement a specific Congressional directive prohibiting unreasonable denials of franchises are unavailing. Just as in the context of Section 621 the Commission was acting to carry out a prohibition on unreasonable franchise denials, in the context of retransmission consent the Commission would be acting to carry out a specific Congressional directive prohibiting bad faith negotiating tactics (as well as the Commission's longstanding interpretation of Section 325(b) as not allowing unreasonable denials of retransmission consent).

In light of the foregoing, we urged the Commission to expressly find that it has the authority to order a station to consent to limited time carriage (or to deem such carriage granted) in appropriate situations. The undersigned also directed the staff's attention to the two "cooling off period" proposals that Mediacom has submitted in this proceeding, emphasizing that they include a version in which interim carriage would not be required as well as a version that includes an interim carriage element.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,



Seth A. Davidson

Counsel to Mediacom Communications Corporation

³ 529 F. 3d 763, 774 (6th Cir. 2008).

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