



May 9, 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 Thursday, May 5, 2016, the undersigned, as well as Erin Dozier and Scott Goodwin of the National Association of Broadcasters (NAB) met with Bill Lake, Michelle Carey, Susan Singer, Nancy Murphy, Martha Heller, Diana Sokolow, and Raelynn Remy of the Media Bureau, as well as Marilyn Sonn and Susan Aaron of the Office of General Counsel, plus Omar Nayeem of the Office of Strategic Planning, to discuss the Commission's open proceeding examining whether it should adopt changes to its rules governing good faith retransmission consent negotiations.

In the meeting, NAB focused primarily on multichannel programming distributors' (MVPD) push to convince the Commission to ban broadcasters from offering multiple channels during retransmission consent negotiations. We noted, in particular, the proposal put forth by the American Cable Association (ACA) to restrict broadcasters from even being allowed to offer a bundle that includes a local broadcast station and a regional sports network (RSN) or other undefined "must-have" programming.¹ ACA's proposal represents an extraordinary – and within the context of rules governing retransmission consent, an unprecedented – restraint on commerce with no corresponding benefit for consumers. Indeed, given that economic literature has long recognized pro-consumer benefits of bundling in many different contexts, ACA's proposal is more likely to harm consumers by introducing inefficiencies into the marketplace.

¹ See *Ex Parte* Communication of the American Cable Association, MB Docket Nos. 15-216 and 10-71 (April 28, 2016) (*ACA Ex Parte*).

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ACA's attempt to restrict broadcaster bundling relies on the incorrect assumption that the broadcast station programming is "must-have" and that many stations are monopolists.² There is simply no support for this position anywhere in the record. Moreover, if broadcasters were indeed individual monopolies with price-setting abilities, they should have been able to extract super-competitive prices in their negotiations with MVPDs. But as NAB and other commenters have shown repeatedly, broadcast stations are, if anything, underpaid compared to their cable programming competitors based on ratings and the value that they bring to MVPDs.³ No commenter has even argued that broadcasters are overcompensated relative to other non-broadcast channels.

NAB also noted that preventing or limiting bundling will likely lead to more negotiation impasses. Reducing flexibility in negotiations – in this case, by preventing broadcasters from even making the offer to bundle stations with other channels – circumscribes the options available to the negotiating parties and thus puts unnecessary pressure on a limited number of terms, including price.

Finally, NAB noted that a ban on bundling would be an unprecedented extension of the good faith rules into the substantive terms of retransmission consent negotiations, far outside the procedural rules the Commission has previously determined help identify whether a party is indeed negotiating in "good faith." The Commission has previously said that the "substance of the agreements generally should be left to the market."⁴ Broadcasters still very much agree with this longstanding determination. But now, 16 years after failing to sway the Commission to affirmatively limit the substantive terms of retransmission consent negotiations, MVPDs are back trying to persuade the Commission to deem the mere offering of certain terms, such as a bundled suite of channels, as evidence of bad faith. This would be a radical expansion of the good faith rules and would require the Commission to routinely involve itself into the nuts and bolts of hundreds of retransmission consent negotiations. This is not the role Congress had in mind for the Commission, especially in light of a retransmission consent marketplace that almost always results in successful agreements between broadcasters and MVPDs.

Respectfully submitted,



Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs

² *Id.* at 11-12.

³ See Reply Comments of the National Association of Broadcasters, MB Docket No. 15-216, at 23-26 (Jan. 14, 2016), see also Comments of Gray TV, MB Docket No. 15-216, at 15-17 (Dec. 1, 2015); Comments of The Writers Guild of America, West, Inc., MB Docket No. 15-216, at 7-8 (Dec. 1, 2015).

⁴ *Id.* at ¶39.

National Association of Broadcasters

cc: Bill Lake,
Michelle Carey
Susan Singer
Nancy Murphy
Martha Heller
Diana Sokolow
Raelynn Remy
Marilyn Sonn
Susan Aaron
Omar Nayeem