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By Electronic Mail

May 9, 2016

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12 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, representatives of the Smaller Market Coalition (“Coalition”), together with undersigned counsel to the Coalition, met with the following officials of the Commission to discuss the *Notice of Proposed Rulemaking* in the above referenced dockets: Commissioner Clyburn and David Grossman, Chief of Staff and Media Policy Advisor to Commissioner Clyburn; Commissioner Rosenworcel and Marc Paul, Legal Advisor to Commissioner Rosenworcel; Commissioner Pai and Matthew Berry, Chief of Staff to Commissioner Pai; Commissioner O’Rielly and Robin Colwell, Chief of Staff and Senior Legal Advisor to Commissioner O’Rielly; Philip Verveer, Senior Counselor to Chairman Wheeler, and Jessica Almond, Legal Advisor, Media, Public Safety and Enforcement to Chairman Wheeler; and William Lake, Steve Broecker, Diana Sokolow, Raelynn Remy, Nancy Murphy, Susan Singer, and Martha Heller of the Media Bureau. The Coalition representatives present at the meeting included Randall Bongarten, Bonten Media Group, Chris Cornelius, Morgan Murphy Media, Terry Hurley, Cordillera Communications, and Pervis Parker, WLOO, Tougaloo College

Coalition representatives explained that the Coalition was formed in 2006 to highlight the challenges and unique perspectives of television broadcasters serving smaller markets. The Coalition’s current membership includes more than 85 smaller market television stations owned by the companies referenced above, Bayou City Broadcasting, LLC, California Oregon Broadcasting, Inc., Fort Meyers Broadcasting Company, Quincy Media, Inc., and Raycom Media Inc.

The Coalition representatives expressed concern that arguments made to support changes to the retransmission consent rules that would restrict or disadvantage broadcasters are based on inaccurate information about the manner in which negotiations play out in the real world. The members of the Coalition have been able to successfully conclude the vast majority of negotiations without impasses or disruptions to viewers. To the extent that there are impasses, the Coalition representatives discussed that a root cause appears to be a small number of operators that push broadcasters to impasse through obstructionist negotiating tactics, such

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as refusing to counter for long periods of time, refusing to commence or continue negotiations unless certain unilateral conditions have been met, or waiting until the very last minute to provide counter proposals. By creating impasses, these large operators further a political agenda of regulatory change for their commercial advantage.

The Coalition explained that the proposed restrictions on broadcasters and other proposals to disadvantage local stations (e.g., allowing distant signals to be imported into local markets) are not going to protect consumers from service disruptions because they do not address the underlying causes of the small number of impasses that have occurred. Indeed, there seems to be little relationship between the proposals advanced by MVPD advocates and the facts underlying service disruptions, in the rare instances that they happen. The types of obstructionist negotiating tactics that cause most service disruptions already are inconsistent with the Commission's good faith negotiation rules, so adherence to the existing rules would go a long way towards addressing the concerns the Commission has raised. In connection with these discussions, the representatives of the Coalition discussed and provided Commission officials with copies of an *ex parte* letter previously submitted on behalf of Morgan Murphy Media on August 18, 2015 in MB Docket Nos. 10-71 and 12-1.

Further, the Coalition representatives explained that the imposition of certain of the restrictions advanced by MVPDs will make negotiations even more difficult — particularly for broadcasters that serve smaller markets and/or are smaller station groups. Such restrictions limit both parties' flexibility to achieve compromises by taking certain terms off the table. Likewise, the adoption of proposals that would increase costs and require additional resource expenditures (such as mandating alternative dispute resolution mechanisms) would be prohibitively expensive for smaller market broadcasters already strained by the resources required to engage in negotiations with the largest operators, but would be afforded easily by such MVPDs. Proposals that unfairly target broadcasters also will make it more difficult for broadcasters to recover market-based retransmission consent fees that are necessary for continued investment in programming, including local news and investigative journalism, sports programming and high quality entertainment programming that is made available to all viewers, regardless of whether they pay for television service or not.

If the Commission believes that any changes to the retransmission consent framework are needed, the Coalition representatives urged that they should be targeted to the *actual* underlying causes of the small number of impasses that have been experienced. Further, the Commission should not adopt any proposals that would not have *equal application and equal effect on both broadcasters and MVPDs*. The statutory good faith negotiation requirement is a reciprocal requirement that applies to both broadcasters and MVPDs, and the FCC's implementation of the standard also must be even-handed to ensure consistency with the statutory design and to advance the goal of fair, market-based outcomes. Consistent with this, Chairman Wheeler recently stated a key goal of this proceeding is to ensure that these

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negotiations are conducted *fairly*.¹ As such, the Coalition representatives explained that any changes to the good faith negotiations rules must be even-handed, without creating undue burdens on broadcasters with limited resources or unduly disadvantaging one party to a negotiation. In particular, the members of the Coalition expressed concern that a number of proposed restrictions on which the Commission has invited comment are asymmetrical and one-sided.

In the meetings, the Coalition representatives were asked whether they were advocating for particular changes to the retransmission consent rules. The Coalition responded that, like other broadcasters, the Coalition does not believe that changing the good faith negotiation rules is warranted. But if the Commission nonetheless determines that it will change these rules, it must ensure that these changes equally affect both parties. This result is demanded by the statute and by the principles of fairness that the Commission has indicated it will follow in this proceeding. In other words, the fact that broadcasters have not advocated for the types of changes to the good faith negotiation rules that the MVPDs have sought cannot be used as a justification for adopting any proposals that are one-sided in nature — the statutory obligation to negotiate in good faith is reciprocal, and so must be the implementing rules.

For example, if the Commission were to adopt any restrictions on broadcasters' flexibility to negotiate for certain types of after-acquired stations provisions (as has been advocated by some parties), then those restrictions must be mirrored by restrictions on MVPDs' flexibility to negotiate for after-acquired systems provisions. Moreover, it would be unworkable and unfair to restrict only one party from negotiating a particular clause in a complex retransmission consent agreement, and regulating the particular terms and conditions of retransmission consent agreements in this manner would reach far beyond the narrow scope of the good faith negotiation requirement. Likewise, any restrictions relating to "surface bargaining," requirements to make an initial proposal a certain period of time prior to a contractual expiration, or other similar requirements and restrictions must apply equally to both MVPDs and broadcasters.

The Coalition members further explained how any changes to the rules that would undermine broadcasters' exclusivity in their local markets (e.g., allowing distant signals to be imported into local markets) would be inherently one-sided and asymmetrical and beyond the scope of the statutory direction to adopt regulations that prohibit television stations and MVPDs from failing to negotiate in good faith. Such proposals undermine localism not only by facilitating the broadcast of a distant signal instead of continued availability of locally-oriented broadcast coverage, but also by significantly disadvantaging broadcasters in their negotiations and undermining the contractual exclusivity for which they have contracted. As noted above, proposals that unfairly target broadcasters make it more difficult for broadcasters to recover market-based retransmission consent fees that allow them to invest in the unique local programming that only local stations provide.

¹ See Letter from FCC Chairman Tom Wheeler to the Honorable Xavier Becerra dated April 15, 2016.

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The Coalition representatives also were asked whether they perceived an escalation in fees over the years. Coalition representatives explained that percentage increases in fees significantly overstate the change since most broadcasters were paid nothing at all for retransmission consent until recent years. Even small increases of pennies can be characterized as high percentage increases (e.g., an increase from 1 to 3 cents is a 300 percent increase in fees). Coalition representatives explained when the actual dollar value of retransmission consent payments are evaluated, the rates paid to broadcasters remain only a fraction of what lower rated cable channels are paid by MVPDs. They also noted that as retransmission consent revenues begin to catch up to market rates, price increases (both in actual dollar value and in terms of percentages) already have and will continue to moderate. In any event, using the good faith negotiation rules to indirectly suppress broadcaster rates would be inconsistent with the purpose of the rules, which are designed to facilitate good faith, market-based negotiations and not to dictate the results of those negotiations. Using the good faith negotiation rules to suppress broadcaster rates also would not help consumers: if broadcasters lose the revenues needed to support high quality local and national programming, then higher priced programming will migrate behind a pay wall and local programming will simply diminish. Either way, subscribers will pay MVPDs for the higher priced content, but the free over-the-air local service provided by broadcasters will be harmed.

Sincerely,

/s/

Jennifer Johnson
Elizabeth Canter

*Counsel for the Smaller
Market Coalition*

CC: Commissioner Clyburn
Commissioner O'Rielly
Commissioner Pai
Commissioner Rosenworcel
Philip Verveer
William Lake
Jessica Almond
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