

May 10, 2016

SUBMITTED ELECTRONICALLY VIA ECFS

Susan Aaron
Office of General Counsel
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. Aaron:

As a follow up to our meeting last week, I am enclosing a copy of the “legal authority” section of the joint reply comments filed by Mediacom and Suddenlink in MB Docket No. 10-71 on June 3, 2010.¹ The discussion therein recites in greater detail (and with relevant citations) the points made during our meeting regarding the scope of the Commission’s authority to adopt rules under which broadcast stations are directed to grant retransmission consent on a limited time basis (or are otherwise deemed to have granted such consent by operation of law) as a prophylactic or remedial measure.²

Mediacom submits that the issue of whether the Commission should adopt interim carriage requirements as a prophylactic or remedial measure is squarely before the agency in the instant proceeding. Consideration of the range of actions that the Commission can take to reduce the number of good faith violations and in response to such violations when they occur are integral to the Congressionally-mandated review of the good faith negotiations “totality of the circumstances” test. Moreover, the adoption of interim carriage requirements has been addressed at length by parties both for and against such requirements.

¹ While both Mediacom and ATVA were represented at last week’s meeting, this letter is submitted solely on behalf of Mediacom and does not purport to represent the views of ATVA or its counsel, Michael Nilsson.

² Mediacom also commends to your attention the paper analyzing the scope of the Commission’s authority submitted in MB Docket No. 15-216 by Professor James Speta of Northwestern University’s Pritzker School of Law.

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Under the circumstances, the Commission has an unequivocal legal duty to consider and respond to these arguments. *See, e.g., Fox TV Stations, Inc. v. FCC*, 280 F. 3d 1027 (D.C. Cir. 2002) (a reviewing court is required to reverse as arbitrary and capricious a Commission decision that fails to consider an important aspect of the issue addressed in a rulemaking proceeding). Failure to do so not only would be unfair to the parties, it would constitute reversible error.

Thus, Mediacom urges the Commission, both as a matter of good policy and as a matter of administrative law, to fully explore and address the arguments that have been presented to it regarding the scope of its statutory authority to prevent or remedy good faith violations by establishing rules under which carriage of a broadcast signal continues for a limited period of time.

Also as a follow-up to last week's meeting, Mediacom is attaching for your convenience a copy of Mediacom's March 3, 2016 *ex parte* notice describing two "cooling off period" proposals. It should be noted that one of Mediacom's "cooling off period" proposals would not require mandated interim carriage.

A copy of this letter and the attachments thereto is being provided to each of the participants in last week's meeting and is being filed in MB Docket No. 15-216. If there are any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,



Seth A. Davidson

*Counsel to Mediacom Communications
Corporation*

cc: Marlene H. Dortch
Michelle Carey
Nancy Murphy
Diana Sokolow
Steven Broeckaert
David Konczal
Raelynn Remy
Martha Heller
Michael Nilsson

II. The Commission Has the Authority to Update and Reform Its Rules Governing the Exercise of Retransmission Consent in Order to Protect the Public Interest.

The second thread that runs through most of the comments opposing the Petition is the argument that the Commission lacks the requisite legal authority to regulate how retransmission consent negotiations are conducted and resolved. The broadcast commenters declare with utter certainty that Section 325(b)(1)(A) – which states only that “No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except with the express authority of the originating station” – unambiguously bars the Commission from adopting rules such as those proposed by the Petition.¹ However, the relevant statutory language, legislative history, and case law all compel a much broader interpretation of the scope of the Commission’s authority with respect to retransmission consent.

A. Section 325(b)(1)(A) is not an “unambiguous” prohibition against Commission regulation of the retransmission consent process.

The broadcast commenters read the words of Section 325(b)(1)(A) as if they said “the Commission may not regulate the conduct of retransmission consent negotiations or adopt any dispute resolution procedures, including binding arbitration or orders for interim carriage pending resolution of a dispute.” But that, of course, is not what the

¹ See, e.g., Broadcast Networks Comments at 7-11; NAB et al. Opposition at 62-74. NAB et al argues not only that Section 325(b)(1) bars the Commission from adopting retransmission consent dispute resolution mechanisms, but also that the Commission is precluded for requiring the parties to submit to arbitration under the terms of the Alternative Dispute Resolution Act (ADRA). NAB et al. Opposition at 74. However, the Commission has held that the ADRA does not bar mandatory arbitration where either party may seek *de novo* review of the arbitrator’s decision. See, e.g., *Comcast Corporation, Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, 22 FCC Rcd 17938 at n.13 (2007); *Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783, ¶¶ 52-53 (MB 2008).

statute says. Rather, it merely says that cable operators and other MVPDs may not retransmit a broadcasting station without that station's "express authority." Thus, on its face, Section 325(b)(1)(A) does not expressly restrict the Commission from ordering a station, as a temporary or remedial measure, to give its "express authority" to an MVPD or to otherwise deem such express authority to have been given by operation of law.

The fact that the statute does not contain an express prohibition on the Commission's general or specific authority with regard to the exercise of retransmission consent is significant. When Congress intends to restrict or otherwise limit the scope of the Commission's authority to regulate, it knows how to express that intent. For example, in Section 623(a)(1) of the Communications Act (as amended by the 1992 Cable Act), Congress expressly declared that "No Federal agency . . . may regulate the rates for the provision of cable service except to the extent provided under this section and section 612."² Similarly, Section 623(e)(1) states that "no Federal agency . . . may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts."³ And in Section 624A(b)(2), Congress used the following words to restrict the Commission from adopting certain rules relating to the use of scrambling or encryption technology: "the Commission shall not limit the use of scrambling or encryption technology where the use of such technology does not interfere with the functions of subscribers' television receivers or video cassette recorders."⁴

² 47 U.S.C. § 543(a)(1).

³ *Id.* § 543(e)(1).

⁴ *Id.* § 544a(b)(2).

There is a world of difference between the provisions cited above and Section 325(b)(1)(A). The former are unambiguous restrictions on the Commission's regulatory authority. The latter most decidedly is not. Admittedly, neither Section 325(b)(1)(A) or anything else in the Communications Act expressly declares that the Commission may adopt retransmission consent dispute resolution or interim carriage requirements; but that silence does not divest the Commission of the authority to act pursuant to authority granted to it elsewhere in the Communications Act.⁵ At most, it confirms that the scope of the Commission's authority can be determined only by considering the statute as a whole, its legislative history, and the relevant case law. There can be no question, based on these traditional sources of statutory construction, that Congress intended the Commission to have and exercise broad regulatory authority over the retransmission consent process.

B. The plain language of Section 325(b)(3)(A) and other provisions support the conclusion that the Section 325(b)(1)(A) does not constitute a bar on the adoption of rules addressing the conduct and resolution of retransmission consent negotiations.

The starting point for interpreting Section 325(b) as it relates to the Commission's authority to regulate the conduct and resolution of retransmission consent negotiations is the statutory language of that section. First and foremost, Section 325(b)(3)(A) expressly directs the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection. . . ."⁶ As discussed in the Petition and in a number of the comments supporting the Petition, Section 325(b)(3)(A) also contains within its terms language specifically requiring the

⁵ See, e.g., *Alliance for Community Media v. FCC*, 529 F. 3d 763, 774 (6th Cir. 2008).

⁶ 47 U.S.C. §325(b)(3)(A).

Commission “to consider . . . the impact that the grant of retransmission consent may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission’s obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable.”⁷

These provisions constitute, respectively, a broad, facial grant of authority for the Commission to engage in regulatory oversight with respect to the general operation of the retransmission consent regime and a specific mandate to consider the impact of retransmission consent on rates. Nothing in these provisions supports the restrictive view of the Commission’s authority that the broadcasters seek to attribute to Section 325(b)(1)(A).⁸

Second, subsequent amendments to the Communications Act provide further evidence of the broad scope of the Commission’s authority to regulate the broadcasters’ exercise of their retransmission consent right. In particular, Section 325(b)(3)(C), which was added to the Act in 1999, commands the Commission to adopt rules prohibiting a broadcasting station that elects retransmission consent from “failing to negotiate in good faith.”⁹ On its face, this provision does not in any way constrain or otherwise limit the

⁷ *Id.*

⁸ Certain broadcast commenters claim that that, on its face, Section 325(b)(3)(A) limits the Commission’s retransmission consent rulemaking authority to the 45-day period that followed the enactment of the 1992 Cable Act. *See* Opposition of The Local Television Broadcasters, MB Docket 10-71 at 15-16 (filed May 18, 2010) (“Local Broadcasters Opposition”). A virtually identical “one and done” argument was considered and rejected by the Commission in the *Terrestrial Program Access Order*. Citing its own rulings as well as court decisions the Commission noted that it “has an obligation to consider, on an on-going basis, whether its rules should be modified in response to changed circumstances.” *See Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, 752 n.23 (2010) (“*Terrestrial Program Access Order*”).

⁹ 47 U.S.C. § 325(b)(3)(C).

Commission's exercise of the more general rulemaking authority previously granted it in Section 325(b)(3)(A); to the contrary, by imposing on the Commission the obligation to establish and enforce rules requiring good faith negotiations, the 1999 amendment represents an independent grant of authority for the Commission to exercise oversight with respect to both procedural and substantive elements of the retransmission consent process.¹⁰

Third, as several commenters have pointed out, the Commission also has long-standing authority under Section 309(a) to adopt rules to ensure that broadcasters operate in the public interest as well as ancillary authority under Sections 303(r), 201(b), and 4(i) to prescribe such rules as may be necessary in the public interest to carry out the provisions of the Communications Act.¹¹ Both the courts and the Commission have broadly construed these grants of authority and several of the instances in which the Commission has relied on this authority are pertinent here. For example, the Commission has relied on its direct and ancillary authority to ensure broadcasters operate in the public interest as the basis for regulating the network-affiliate relationship and for adopting rules governing the circumstances under which a broadcast station make certain

¹⁰ In 2004, Congress amended Section 325(b)(3)(C) to direct the Commission to adopt rules extending the good faith negotiation obligation to MVPDs. Satellite Home Viewer Extension and Reauthorization Act of 2004, § 207, passed as part of Pub.L. 108-447, 118 Stat. 2809 (2004).

¹¹ See, e.g., APPA Comments at 15; 47 U.S.C. §§ 309(a); 303(r), 201(b), 154(i). See also, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

operational changes that impact the availability of the station's signal to the viewing public it is licensed to serve.¹²

C. The legislative history of Section 325(b) supports a broad interpretation of the Commission's authority to regulate the conduct and resolution of retransmission consent negotiations.

In the Introduction and Background section of these reply comments, Mediacom and Suddenlink have set out in detail a number of specific statements from the legislative history of the 1992 Cable Act regarding Congress' understanding of the scope of the Commission's authority to engage in meaningful oversight of retransmission consent and to intervene to protect consumers from unreasonable retransmission consent terms and conditions and from service interruptions. The quoted statements leave absolutely no doubt that Congress understood the Commission to have broad authority to ensure retransmission consent operates in the public interest and expected the Commission to use that authority when necessary. While we will not repeat all of those statements here, it is worth highlighting the following comments made by Senator Inouye, whose views should be accorded significant weight in light of his position as author of the retransmission consent provision:

I am confident, as I believe the other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section following its rulemaking implementing the regulations that will

¹² See, e.g., 47 C.F.R. §§ 73.658 (network-affiliate territorial exclusivity); 73.1125 (main studio location); 73.1690 (modification of transmission systems); 73.1740 (minimum operating schedule).

govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.¹³

It is difficult to imagine a clearer, more direct rebuttal of the arguments that the broadcasters have made concerning the scope of the Commission's authority. Senator Inouye's statement acknowledges that the Commission has the authority to intervene to help resolve retransmission consent disputes under both existing law and the terms of Section 325 and confirms that the Commission is expected to exercise its oversight on an on-going basis and adopt new rules if "unforeseen" problems arise. That course of action is precisely the course of action proposed in the Petition but opposed by the broadcasters.

Nothing that has occurred since then supports a different understanding of Congress' intent with respect to the scope of the Commission's authority to ensure that consumers are not harmed by the retransmission consent process. For example, in January 2007, Senator Inouye (joined by Senator Stevens, the then ranking member of the Senate Commerce Committee), wrote to Chairman Martin, citing the 1992 floor debate and urging that the Commission take steps to ensure that Americans "not be shut off from broadcast programming" while the parties negotiate for retransmission consent.¹⁴ And even more recently, on December 30, 2009, Senator Kerry (the current chairman of the Senate Commerce Committee's Subcommittee on Communications, Technology and the Internet) cited the Inouye-Stevens letter in a press statement urging the Commission "to intervene and mandate continued carriage and arbitration" in

¹³ 138 Cong. Rec. S643 (Jan. 30, 1992) (emphasis added). Senator Inouye made the above statement as part of a colloquy with Senator Burdick.

¹⁴ Letter from Senators Daniel Inouye and Ted Stevens to FCC Chairman Martin (Jan. 30, 2007).

connection with Time Warner Cable's year-end retransmission dispute with FOX.¹⁵

These various statements by key legislators, made contemporaneously with the enactment of Section 325(b) and adhered to over an extended period of time, constitute weighty evidence in favor of a broad reading of the Commission's authority to adopt new rules to protect consumers from the imbalance that is distorting retransmission consent negotiations.

D. Commission precedent and case law confirm that the Commission can and should find that it has the requisite legal authority to protect consumers through the adoption of meaningful changes to its rules governing the exercise of retransmission consent.

The final sources of interpretive guidance that the Commission can and should consult in considering whether Section 325(b)(1) bars it from engaging in meaningful oversight of the conduct and resolution of retransmission consent negotiations are its own decisions and the relevant case law. At every turn, these sources dictate the conclusion that the broadcasters have mischaracterized the law and that the Commission has the requisite authority and, indeed, the responsibility, to update its rules governing the exercise of retransmission consent so that they protect the public interest.

As a counter to the argument that Section 325(b)(3)(A) allows the Commission to adopt the types of regulatory reforms proposed in the Petition and in the comments supporting the Petition, some broadcasters argue that Section 325(b)(3)(A) merely authorizes the Commission to adopt procedural rules relating to a broadcaster's must carry/retransmission consent election.¹⁶ That construction is contrary to the legislative

¹⁵ See Press Release, Kerry on Time Warner Cable-Fox Dispute: Denying 4 Million Consumers Programming is No Negotiation Tactic (December 30, 2009) *available at* <http://kerry.senate.gov/cfm/record.cfm?id=321258>.

¹⁶ See, e.g., NAB et al. Opposition at 69.

history discussed above. Moreover, it is contradicted by the Commission's own actions in its initial retransmission consent rulemaking proceeding in 1993.

In the 1993 rulemaking proceeding, the Commission considered regulatory proposals covering a wide range of issues arising in connection with the exercise of retransmission consent, including issues relating to the substance of retransmission consent contracts.¹⁷ While the Commission considered, but declined to adopt rules specifically addressing retransmission consent rates or limiting the assertion of network non-duplication protection by stations electing retransmission consent,¹⁸ it did not claim that it lacked the authority to do so. Rather, the Commission deferred adopting rate rules based on its assumption that its general rate rules would be sufficient to protect consumers.¹⁹ Significantly, the Commission indicated that it would “closely monitor” retransmission consent fees and “reexamine” whether additional measures were needed to ensure that such fees were not having “an unwarranted impact on basic tier rates.”²⁰ Similarly, the Commission decided not to make changes in the network non-duplication rules based principally on the absence of record evidence “that subscribers are being

¹⁷ See generally *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 (1993) (“*Broadcast Signal Carriage Issues Order*”).

¹⁸ *Broadcast Signal Carriage Issues Order*, 8 FCC Rcd at 3006.

¹⁹ See *id.*

²⁰ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, ¶ 247 (1993). Today, however, it is far from clear that the rules governing basic service tier rate increases are sufficient to protect consumers from rapidly escalating retransmission consent fees that could hit \$20 per subscriber per month within the next few years if left unchecked.

deprived of network programming” as a result of demands for network non-duplication protection by stations electing retransmission consent.²¹

Although the Commission did not adopt rate rules or network non-duplication relief, it did adopt other rules directly impacting the substance of retransmission consent agreements. In particular, the Commission adopted a specific rule barring local broadcasters and MVPDs from entering into exclusive retransmission consent agreements, even though participants in a “free” marketplace typically can negotiate over exclusivity and even though there was nothing in the Act expressly authorizing the Commission to adopt such a limitation. The Commission’s adoption of this prohibition contradicts claims that Section 325(b)(1) leaves the decision as to whether to enter into a retransmission consent agreement with an MVPD solely in the hands of the broadcaster without Commission scrutiny.²²

The Commission also found that it had the authority to require that retransmission consent agreements cover an “entire program” day (despite the absence of an express grant of authority to do so) and to extend various requirements found in the must carry provision (Section 614 of the Act) to retransmission consent stations despite an express

²¹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6787 (1994). The use of network non-duplication by retransmission consent stations to deny consumers an alternative source of programming in the event of a shut down order has become a reality; indeed, in order to further increase their leverage in retransmission consent negotiations, broadcasters have begun pursuing relief from the “significantly viewed” exception to the network non-duplication rules with renewed vigor. *See, e.g., Providence TV Licensee Corp.*, DA 10-769 (MB 2010); *KXAN, Inc.*, 49 CR 1184, DA 10-589 (MB 2010); *WUPW Broadcasting, LLC*, 49 CR 1055, DA 10-460 (MB 2010).

²² Congress subsequently codified the bar on exclusive retransmission consent agreements in Section 325(b)(3)(C). However, that action was taken principally to place a “sunset” on the prohibition, not to address some perceived limitation in the Commission’s authority to have adopted it.

statutory provision stating that “the provisions of section 614 shall not apply to the carriage of the signal” of a station electing retransmission consent.²³ Indeed, the Commission even concluded that it had the power to decide that the refusal of a network affiliate to grant retransmission consent may be “unreasonable” in certain circumstances.²⁴

Finally, the issue of whether the Commission has the authority to require interim carriage warrants specific attention. The Commission can and does order temporary relief in order to maintain the status quo in a wide range of circumstances, even in the absence of express authority to do so.²⁵ Indeed, the seminal case establishing the broad scope of the Commission’s ancillary authority, *United States v. Southwestern Cable Co.*, ratified the Commission’s power to grant interim relief.²⁶ Yet, relying on a ten-year old statement by the Commission in its *Good Faith Order*, the broadcasters contend that the Commission already has concluded that Section 325(b)(1)(A) leaves it without the legal

²³ *Broadcast Signal Carriage Issues Order*, 8 FCC Rcd at 3004; 47 U.S.C. § 325(b)(4).

²⁴ *Id.* at 3000. The Commission specifically noted that it had interpreted Section 325(a), which bars a broadcaster from retransmitting another broadcaster’s signal without its express consent, as not sanctioning arbitrary or unreasonable denials of such consent. *Id.* (citing *KAKE-TV and Radio*, 10 R.R. 2d 799, 801 (1967)).

²⁵ For example, in 2000, the Commission issued an order authorizing a cable operator to continue to carry a broadcast station on a channel other than the station’s over-the-air channel despite having made an initial finding that the station had an absolute statutory right to on-channel carriage. *Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12883 (CSB 2000). The order authorizing carriage remained in effect for nearly a year and a half while the Commission considered RCN’s application for review. And even after denying RCN’s application for review, the Commission concluded that the public interest would be served by extending the period of interim relief for another 180 days to allow RCN to reconfigure its system. *Brunson Communications, Inc. v. RCN Telecommunications Services, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 21499 (2000).

²⁶ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

authority to adopt a rule requiring interim carriage pending resolution of a retransmission consent dispute.²⁷

Mediacom and Suddenlink submit that, insofar as the Commission concluded in the *Good Faith Order* that Section 325(b)(1)(A) reflected an expression of Congress' "unambiguous" intent to bar the Commission from adopting an interim carriage requirement, the Commission should reconsider the wisdom of that judgment. It is well settled that "an initial agency interpretation is not instantly carved in stone."²⁸ To the contrary, as the Commission recently observed in its *Terrestrial Program Access Order*, it is the Commission's duty to consider varying interpretations and policy judgments on an on-going basis.²⁹ In this case the Commission certainly has ample grounds for revisiting and reversing its now ten-year old interpretation of Section 325(b)(1)(A).

More specifically, as detailed throughout these reply comments, circumstances are radically different today than they were when the Commission first considered its authority to adopt an interim carriage requirement. In addition, Section 325(b)(1)(A) does not contain language of the type Congress typically uses when it seeks to limit the scope of the Commission's authority. Yet, there is no indication in the *Good Faith Order* that the Commission gave any consideration to either the legislative history of Section 325(b) or to the affirmative grants of authority in Section 325(b)(3)(A) and the Commission's ancillary authority to carry out those grants of authority.

²⁷ See, e.g., NAB et al. Opposition at 17-18; Local Broadcasters Opposition at 13-14 (citing *Good Faith Order*, 15 FCC Rcd at 5469).

²⁸ *Terrestrial Program Access Order*, 25 FCC Rcd at 752 n.23 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-964 (1984); *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

²⁹ *Id.*

Actions taken by the Commission subsequent to the *Good Faith Order* lend further support to the conclusion that the agency erred in finding that it lacked the legal authority to adopt an interim carriage rule. For example, as the Petition and several of the comments filed in support of the Petition correctly note, the Commission on two recent occasions has asserted the authority to order interim carriage of non-broadcast cable networks even in the absence of a contractual agreement between the parties authorizing such carriage.³⁰

Lastly, there are striking parallels between the instant proceeding and the Commission's 2007 *Cable Franchising Order* proceeding. In that proceeding, the Commission interpreted a statutory provision – Section 621(A)(1) – that was not dissimilar to Section 325(b)(1) in that, like Section 325(b)(1), it barred cable operators from engaging in certain acts without the express consent of a third party (in this case providing cable service without a “franchise” – *i.e.*, an express written authorization for the cable operator to build and operate a cable system).³¹

Relying on language in Section 621(a)(1) prohibiting unreasonable denials of franchise applications – a provision that contains no reference to the Commission whatsoever – and on its ancillary authority under Sections 201(b), 303(r), and 4(i), the

³⁰ See *id.* at 794-797; *Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, DA 10-679 (MB 2010). In its January 2007 order denying Mediacom's retransmission consent complaint against Sinclair, the Commission expressly stated that, if Mediacom and Sinclair would agree to submit to arbitration, the Commission would “require Sinclair to authorize Mediacom's continued carriage of its stations' signals” – a statement that necessarily implies a determination on the part of the Commission that it has the authority to issue an interim carriage order. See *Mediacom Communications Corporation*, 22 FCC Rcd 47, ¶ 25.

³¹ *Id.* See also 47 U.S.C. §§ 621(b)(1) (barring cable operators from providing cable service without a franchise); 602(9), (10) (definitions of “franchise” and “franchising authority”).

Commission concluded that it had the requisite legal authority not only to establish a time limit within which a franchise had to either grant or deny a franchise application, but also to adopt a rule under which a franchising authority's failure to act within the specified term period would be deemed by operation of law to constitute a grant of the required franchise on an "interim" basis on terms and conditions set by the Commission.³² In reaching this conclusion, the Commission noted that "[t]here is nothing in the statute or the legislative history to suggest that Congress intended to displace the Commission's explicit authority to interpret and enforce provisions in Title VI, including Section 621(a)(1)."³³ The Commission's *Cable Franchising Order* was upheld by the United States Court of Appeals for the Sixth Circuit, which found that the absence of any express provision giving the Commission a role in the franchising process did not preclude the Commission from "filling the gap" in the statute through the exercise of its regulatory authority.³⁴

In light of the above-described case law and the relevant statutory language and legislative history, there can be no doubt that the Commission has broad authority to adopt and enforce rules governing the exercise of retransmission consent. Moreover, to the extent that the Commission previously concluded that Section 325(a)(1) prevents it from adopting interim carriage or dispute resolution rules in order to protect consumers,

³² *Cable Franchising Order*, 22 FCC Rcd at 5134.

³³ *Id.* at 5131-32.

³⁴ *Alliance for Community Media v. FCC*, 529 F.3d 763.

the Commission should now find that it reached that conclusion in error and is no longer bound by such an interpretation of its authority.³⁵

³⁵ *Cf. Terrestrial Program Access Order*, 25 FCC Rcd at 795. The Broadcast Networks argue that an interim carriage requirement would constitute “forced speech” in violation of their rights under the First Amendment. Network Broadcasters Comments at 11-12. We expect that the Commission will see the irony in the broadcasters, who have argued for decades that the First Amendment is not offended when the government requires cable and DBS providers to carry their stations, now claiming to have a constitutional right to prevent their signal from being delivered to the viewers that they are licensed to serve. Leaving aside some of the more laughable aspects of the Network Broadcasters misreading of the forced speech doctrine (*e.g.*, presumably the broadcasters believe that Commission rules and license terms obligating stations to serve a particular geographic area also are unconstitutional), this argument once again serves to highlight the distinction between a broadcaster’s signal and the content transmitted by that signal. An interim retransmission consent carriage rule would only relate to the signal, which in and of itself is not “speech.” The retransmission of the broadcaster’s “speech” (*i.e.*, the programs transmitted via its signal) is addressed by the compulsory license provisions of the Copyright Act. If, after 34 years, the broadcasters intend to launch a constitutional challenge to the Copyright Act, we would expect that they would include within that challenge other statutory copyright licenses, including those relied upon by segments of the broadcasting industry. *See, e.g.*, 17 U.S.C. §§ 112 (ephemeral recordings), 114 (public performance of sound recordings).

March 3, 2016

SUBMITTED ELECTRONICALLY VIA ECFS

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

**Re: Notice of *Ex Parte* Communication in MB Docket No. 15-216 –
Implementation of Section 103 of the STELA Reauthorization Act of 2014:
Totality of the Circumstances Test.**

Dear Ms. Dortch:

On March 1, 2016, the undersigned, together with Joseph E. Young, Senior Vice President and General Counsel of Mediacom Communications Corporation (“Mediacom”) and Thomas J. Larsen, Mediacom’s Senior Vice President, Government and Public Relations met with the following staff members from the Media Bureau and Office of General Counsel: Bill Lake, Michelle Carey, Steve Broeckaert, Nancy Murphy, Martha Heller, Diana Sokolow, Kathy Berthot, and Raelynn Remy (Media Bureau); Marilyn Sonn and Susan Aaron (Office of General Counsel).

During the meeting, Mr. Young, Mr. Larsen and I discussed the opportunity presented by the Totality of the Circumstances proceeding mandated by STELARA for the Commission to adopt effective, meaningful reforms to the current retransmission consent regime. We reviewed the dysfunctional nature of the current retransmission consent regime and the consumer harm that results from the Commission’s failure to update its rules to ensure that retransmission consent negotiations produce outcomes that are consistent with and promote the consumer welfare objectives that led Congress to grant retransmission consent rights to broadcasters.

We specifically urged the Commission staff to review and consider the specific proposals contained in Mediacom’s Comments and Reply Comments in this proceeding, including:

- I. Adopt a “cooling off period/mediation” requirement.
 - The Commission can and should consider adopting a “cooling off period/mediation” requirement (loosely modeled on concepts drawn from labor law) to create conditions

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- whereby negotiations would be more likely to result in a mutually agreeable meeting of the minds and less likely to result in a threatened or actual disruption of service to consumers.
- Under the version of this proposal described in Mediacom's comments, it would be evidence of bad faith for a negotiating party not to agree to an extension of an expiring agreement (with a true-up) unless that party had publicly declared that the negotiations were at an impasse.
 - Such a declaration would trigger a 60-day cooling off period during which the existing agreement would remain in place and the MVPD could seek to arrange for the carriage of a substitute station to mitigate the harm to subscribers.
 - If the MVPD initiated the cooling off period by declaring an impasse, it would have to respect exclusivity requirements and contractual restrictions that may limit its ability to find a substitute station; however, if the station declares that the negotiations have reached an impasse, it would be a presumptive violation of the good faith requirement for that station to invoke exclusivity protection and/or for a distant station to refuse to negotiate with the MVPD based on a contractual agreement purporting to limit its authority to grant retransmission consent for out-of-market carriage.
 - During the cooling off period, it also would be presumptively bad faith for either party to refuse to submit to a fast track mediation process based on the parties' last offers. The outcome of this mediation would be the issuance (within 30 days) of a report to the parties that would be made public if the parties do not reach an agreement within 10 days after receiving the report.
 - If a blackout occurs at the end of the cooling off period and the parties thereafter resume negotiations and reach an agreement, the MVPD would be required to terminate carriage of any station carried as a substitute for the blacked out station.
 - Under a variation of this cooling off period proposal discussed at the meeting, there would be no post-expiration "interim carriage" requirement. Rather, the cooling off period/mediation requirement would commence 90 days prior to the expiration date and a blackout could occur if, at the end of the 90 day period, no agreement had been reached.
 - During the first 30 days of this period, the parties would be required to exchange offers and counteroffers. If no agreement was reached by the end of the 30th day, it would be deemed a presumptive violation of the good faith negotiation requirement for either party to refuse to submit its last proposal to a mediator for review (with the cost of mediation shared).
 - The mediator would attempt to bring the parties together, but if no meeting of the minds is reached within 30 days, the mediator would present a report to the two parties that would become public if the parties

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still had not reached an agreement within 10 days. Either party could then rely on the report as part of a good faith complaint if it believes the findings in the report support such a complaint.

2. Adopt a rule **reconciling the expiration date** of all retransmission consent agreements.
 - The adoption of a rule making it a presumptive violation of the good faith requirement for a negotiating party to insist on a contract term with an expiration date that differs from the date on which the three-year election cycle ends. We noted that the legislative history of the retransmission consent provision indicates that the three-year cycle was not intended as a mere convenience, but rather was intended to provide a measure of protection against runaway price increases.
3. Adopt **transparency** requirements.
 - The adoption of a transparency requirement under which, as is the case with labor law, a bargaining party not only would be required to give a reason for rejecting the other party's proposal (which currently is the rule in retransmission consent negotiations), but also would have to substantiate that explanation.

We also urged the Commission to consider the adoption of a rule making it a presumptive violation of the good faith requirement for a negotiating party to refuse to negotiate for retransmission consent on a local station/local system basis. Such a requirement would mitigate a station group's ability to use the leverage it has with respect to its most valuable properties to bring up the price obtained for less valuable properties. It also would be consistent with and in furtherance of the Commission's plenary authority to promote localism (which first and foremost is the purpose of retransmission consent) and with the wide range of station-specific requirements imposed by the Communications Act and the Commission's rules (such as the granting of station specific licenses and the election of retransmission consent on a station-by-station basis).

Finally, we reiterated our support for the adoption of a rule prohibiting broadcasters from blocking otherwise freely available Internet transmissions as a negotiating tool.

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

Sincerely,



Seth A. Davidson

Counsel to Mediacom

Communications Corporation

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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