



May 17, 2016

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

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

Dear Ms. Dortch:

This letter is in response to the March 25, 2016 *ex parte* filing by the American Television Alliance (ATVA),<sup>1</sup> in which various pay TV providers, yet again, urge the Commission to enact substantive rules that would tilt retransmission consent negotiations in their favor. In its latest overture, the pay TV industry seeks a rule that would effectively prohibit both bargaining for restrictions on the use of certain “devices and functionalities” and negotiating for requirements governing the use of set-top boxes in subscribers’ homes.

NAB and others have pointed out in prior comments the fundamental defect in MVPDs’ relentless press for Commission intervention in retransmission consent negotiations: Pay TV providers’ repetitive proposals have nothing at all to do with whether broadcasters have made “good faith” efforts to reach agreement for retransmission consent and everything to do with obtaining a government-granted negotiating advantage for MVPDs. ATVA’s latest proposals should be summarily rejected for these same reasons.

ATVA’s March 25 filing supporting FCC prohibitions on bargaining about MVPD-supplied consumer devices and functionalities additionally raises serious practical and legal considerations not only for broadcasters, but also for the Commission and consumers.

Specifically, ATVA takes issue with what it describes as an anonymized version of broadcaster language that restricts the right to retransmit a station’s programming to

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<sup>1</sup> See American Television Alliance, Notice of *Ex Parte* Communication in MB Docket Nos. 15-216 and 10-71 (Mar. 25, 2016) (ATVA *Ex Parte* Letter) at 1-3.

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“simultaneous or near-simultaneous [transmission] over the MVPD’s wired infrastructure only to set-top boxes or television receivers directly connected to such wired infrastructure in Subscribers’ homes and only for viewing on a television set.”<sup>2</sup> ATVA’s complaint, which does not discuss the “wired infrastructure” language in any detail, fails to acknowledge that the technological capabilities of set-top boxes in subscribers’ homes are of critical importance to broadcasters, consumers and the Commission. Among other things, the devices and methods used to receive and transport broadcast signals within a subscriber’s home determine whether transmission from one device to another also transports “program-related material” contained in a station’s signal, including (among other things) closed captioning, video description and V-chip/parental guideline information. Commission rules in fact require MVPDs to pass through closed captioning and video description information.<sup>3</sup> MVPDs can hardly be heard to object to provisions that ensure that set-top boxes in subscribers’ homes are technologically capable of complying with the Commission’s regulatory requirements.

Broadcasters, similarly, have a legitimate interest in ensuring that set-top boxes and other devices used to transmit a station’s signal within a subscriber’s home are technically capable of transmitting Nielsen ratings data embedded in the signal. If in-home set-top boxes and other connecting devices do not receive and pass through ratings data to a subscriber’s television set, neither the local affiliate station nor its network would receive “ratings credit” for each viewing.

Nothing in ATVA’s generic challenge to the supposedly anonymized “set-top box” language suggests that the good faith negotiating requirement should be stretched to prohibit broadcasters from negotiating for assurance from MVPDs that every television within a subscriber’s home will receive in full—and not merely a portion of—a station’s signal. A Commission rule tying broadcasters’ hands on that critically important issue would be inconsistent with the FCC’s expressly limited regulatory authority, would reward MVPDs with a government-granted competitive advantage and ultimately would deprive consumers of access to important program-related material.

ATVA also takes issue with the supposedly illustrative language that prohibits MVPDs from furnishing subscribers with devices or technologies that enable viewers to delete, skip or fast-forward through commercials or other program material.<sup>4</sup> But broadcasters have equally compelling reasons to negotiate limitations on services that enable consumers to

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<sup>2</sup> ATVA *Ex Parte* Letter at 2.

<sup>3</sup> See, e.g., 47 C.F.R. §§ 79.1(c)(1) (“All video programming distributors shall deliver all programming received from the video programming owner or other origination source containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of this part unless such programming is recaptioned or the captions are reformatted by the programming distributor.”), 79.3(b)(5) (“Multichannel video programming distributor (MVPD) systems of any size . . . [m]ust pass through video description on each broadcast station they carry, when the broadcast station provides video description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the video description, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description . . .”).

<sup>4</sup> ATVA *Ex Parte* Letter at 2.

skip, delete or modify parts of the broadcast signal, such as DISH's "AutoHop" ad-skipping technology. Nothing in the good faith rules allows an MVPD to insist upon the unilateral right to skip, delete, fast-forward through or otherwise alter, modify or manipulate advertisements or any other content contained in the broadcast signal—or to facilitate their subscribers' ability to do so. The critical importance of advertising revenues to broadcast stations' continued ability to provide valuable local programming (and to acquire sought-after network and syndicated programming) is well and thoroughly documented in this and other dockets, and the potentially ruinous effect of ad-skipping technologies like "AutoHop" on broadcasters' ability to obtain advertising revenue requires no explanation.<sup>5</sup>

It is, of course, understandable that MVPDs, who compete head-to-head with broadcast stations for national and local advertising revenues, would seek a Commission-mandated competitive market advantage in the form of the proposed "devices and technologies" and "set-top box" rules. But it would be patently *anticompetitive* for the Commission, in the guise of the "good faith" negotiating requirement, to prohibit broadcast stations from negotiating conditions on the retransmission and resale of their signals that would prevent MVPDs from stripping or modifying each station's signal and impairing the Commission's own regulatory requirements. It is a core regulatory responsibility of the Commission to promote and enhance competition, not to impair it – and certainly not to reward pay TV companies with a competitive marketplace advantage over free-over-the-air broadcast stations.

ATVA further complains about negotiating proposals that would prohibit MVPDs from retransmission of a station's signal over the public "Internet, via IP distribution, by a broadband connection or through any wireless technology to mobile or other devices."<sup>6</sup> NAB and other commenters have explained at length why the Commission is without authority to mandate consent to distribution of a broadcast station's signal on non-broadcast platforms, including those listed in ATVA's *ex parte* letter: The Commission's good faith regulatory authority under the Communications Act of 1934 does not compel broadcast stations to provide their signals for retransmission on ancillary video distribution platforms, and Section 106 of the Copyright Act gives copyright owners the *exclusive* right to control the distribution of their intellectual property and broadcast programming.<sup>7</sup> Under Section 106, the copyright

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<sup>5</sup> That the Ninth Circuit has found DISH's AutoHop technology "lawful" in the face of (among other things) Copyright Act challenges, see *Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060, 1068-69 (9th Cir. 2014), is of no moment. The appellate court's ruling says nothing about broadcasters' considerable financial and operational interest in negotiating with MVPDs for limits on ad-skipping technologies. In fact, the Ninth Circuit suggested that a negotiated provision that precluded fast-forwarding during commercials in broadcast content shown via video on demand would be enforceable. *Id.* at 1071-82 (finding that Fox was unlikely to prevail on its breach of contract claim relating to disabling of fast-forwarding during commercials because PrimeTime Anytime service was more akin to a DVR service than to the video-on-demand service covered by the fast-forwarding provision).

<sup>6</sup> ATVA *Ex Parte* Letter at 2.

<sup>7</sup> See, e.g., Written Ex Parte Communication of NAB, MB Docket Nos. 15-216, 10-71 (Apr. 26, 2016); Comments of NAB, MB Docket No. 15-216, at 36-39 (Dec. 1, 2015); Reply Comments of NAB, MB Docket No. 15-216, at 41-44 (Jan. 14, 2016); Comments of the Affiliates Ass'n's, MB Docket No. 15-216, at 53-58 (Dec. 1, 2015); Reply Comments of the Motion Picture Ass'n of America, MB Docket No. 15-216, at 20-21 (Dec. 1, 2016); Comments of News-Press & Gazette Co., MB Docket No. 15-216, at 20-21 (Dec. 1, 2015).

holder retains *exclusive* authority to authorize – or, conversely, to decline to authorize – the public performance of its copyrighted work by third parties, on any platform or by any method, for any reason or no reason at all.<sup>8</sup> ATVA’s displeasure at a negotiated limitation on public-Internet-based or non-broadcast “wireless” retransmission should be rejected out of hand, because the Copyright Act plainly and emphatically empowers broadcasters to restrict the distribution of their copyrighted programming in precisely that fashion.

To be clear, broadcasters remain free to negotiate separately for the distribution and resale of their copyrighted programming on other, non-traditional-MVPD platforms, and to monetize the value of that distribution – which is plainly at the root of ATVA’s complaint about negotiated limits on Internet or broadband distribution. ATVA would have the Commission confer upon pay TV providers a government-granted right to distribute broadcast content on non-MVPD platforms without having to obtain a station’s consent. The Copyright Act does not permit the Commission to assist pay TV providers in blocking broadcaster efforts to seek and obtain payment for the value of their *exclusive* right.<sup>9</sup>

ATVA’s latest proposal, as does the catalog of pay TV proposals that precede it, ignores the inherent contradiction in MVPD demands for authority to transmit broadcast signals over the public Internet and by other non-broadcast platforms and devices: In a single breath, ATVA both condemns stations’ jointly negotiating the right to retransmit broadcast signals together with multicast channels, other stations or other program services, yet ATVA demands a Commission rule that would give MVPDs the right to *condition* traditional cable or satellite retransmission consent on the right to retransmit a station’s signal by the Internet and to deploy technologies that facilitate ad-skipping, recordation or modification of the broadcast signal. The hypocrisy of ATVA’s proposals is self-evident.<sup>10</sup>

In summary, NAB respectfully urges the Commission to reject any rules that would affirmatively limit the substantive proposals that MVPDs and broadcasters can offer in market-based retransmission consent negotiations. The substance of agreements reached by participants in this highly competitive marketplace should not and cannot be lawfully dictated by the Commission.

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<sup>8</sup> See 17 U.S.C. § 106; *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) (“Nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, . . . a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.”) (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

<sup>9</sup> See also NAB Written Ex Parte Communication, MB Docket Nos. 15-216, 10-71 (Apr. 26, 2016) at 2-3.

<sup>10</sup> Indeed, broadcasters in this proceeding have reported that MVPDs routinely demand during retransmission consent negotiations the right to distribute stations’ signals (and the content contained therein) online, even though broadcasters explain they do not have the legal right to grant online distribution rights to all the programming within their signals. See, e.g., Comments of Nexstar Broadcasting, Inc., MB Docket No. 15-216, at 20-21 (Dec. 1, 2015) (also reporting that MVPDs seek during negotiations to block lawful broadcast functionalities, including interactivity). *Id.* at 18-19 & n.47. See also Comments of Morgan Murphy Media, MB Docket No. 15-216, at 6 (Dec. 1, 2015) (stating that “MVPDs have sought to tie additional rights to the grant of retransmission consent,” particularly “online distribution rights” for which MVPDs “have placed contractual pressure” on Morgan Murphy “to secure” and “grant” to them).

Respectfully submitted,

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

Rick Kaplan  
Executive Vice President and General Counsel  
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CC: Bill Lake  
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