

May 18, 2016

**BY ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**Re: Notice of *Ex Parte* Communication in MB Docket Nos. 15-216 and 10-71**

Dear Ms. Dortch:

On May 16, 2016, representatives of the American Television Alliance met with Commission staff to discuss the Commission's authority under its good faith rules to order temporary, interim carriage of broadcast signals. Present on behalf of the Commission were General Counsel Jonathan Sallet; Susan Aaron, David Konczal and Linda Oliver of the Office of General Counsel; and Nancy Murphy, Diana Sokolow, and (by telephone) Raelynn Remy of the Media Bureau. Present on behalf of ATVA were Jeff Blum and Alison Minea of DISH; and Michael Nilsson, outside counsel to ATVA. Present on behalf of ATVA by telephone were Ross Lieberman of the American Cable Association; Matt Brill, outside counsel to Time Warner Cable; and Seth Davidson, outside counsel to Mediacom.

The discussion followed the attached presentation, which we distributed to Commission staff.

Pursuant to the Commission's rules, I am filing one copy of this letter in MB Docket No. 15-216 and another in MB Docket No. 10-71. Should you have any questions, please contact me.

Respectfully submitted,

/s/

Michael Nilsson

*Counsel to the American Television Alliance*

Marlene H. Dortch

May 18, 2016

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## THE FCC POSSESSES AUTHORITY TO ORDER INTERIM CARRIAGE

### 1. The plain language of Section 325 gives the Commission authority to order interim carriage.

- a. Here is NAB's argument: Section 325(b)(1)(A) says that *MVPDs* may not retransmit a broadcaster's signal without its consent. "Because 'Congress has directly spoken to the precise question' of the retransmission of broadcast stations' signals," NAB argues, "that is the end of the matter,' as the Commission and any reviewing court 'must give effect to the unambiguously expressed intent of Congress.'"
- b. NAB has answered the wrong question. Nobody disputes that *MVPDs* may not carry broadcast signals without consent.
- c. The question here, however, is what the *Commission* can do in governing the exercise of such consent.
  - i. Section 325(b) does not expressly bar the Commission from ordering interim carriage, or deeming such carriage granted by operation of law.
  - ii. To the contrary, it quite plainly gives the Commission authority to regulate the retransmission consent marketplace:
    1. Section 325(b)(3)(A) provides that the Commission "shall . . . establish regulations to govern the exercise by television broadcast stations of the right of retransmission consent . . . and of the right to signal carriage."
    2. It also provides that the Commission "shall consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier."
    3. Section 325(b)(3)(C)(ii) states that it shall not be bad faith to enter into distribution agreements "based on competitive marketplace considerations"—which indicates that the Commission could prohibit agreements *not* based on marketplace considerations.
- d. NAB itself argues that "[a]s the FCC has recognized, the proper course is to give effect to [each of these provisions], as required under basic canons of statutory construction and numerous court decisions." We agree.
- e. We think, however, that the way to "give effect to" each of these sections—to read them "in their context"—is to read them together, not to minimize or ignore the ones NAB does not like. So, for example, the "no retransmission without permission" applies by its terms *to MVPDs*. The other provisions apply by their

terms *to the Commission*—which therefore can order interim carriage if it finds that a broadcaster has negotiated in bad faith, or deem it to have occurred by operation of law in certain limited circumstances.

- f. The Commission and the courts have engaged in this straightforward reading of analogous statutory provisions before.
  - i. In *Time Warner Cable*, 15 FCC Rcd. 7882 (CSB 2000), for example, a cable operator’s retransmission consent agreement expired during a “sweeps week,” when the statute prohibited cable operators from dropping broadcast stations. Time Warner Cable argued that “upon the expiration of retransmission consent, carriage of the affected programming is no longer authorized by Section 325(b)(1)(B).” *Id.* ¶ 7. The Commission disagreed, however, concluding that *it* could require carriage pursuant to separate provisions contained in Section 614. *Id.*
  - ii. Likewise, in *Alliance for Community Media v. F.C.C.*, 529 F.3d 763 (6th Cir. 2008), the Sixth Circuit found that a statutory provision prohibiting cable operators from providing cable service without a franchise from a franchising authority did not bar the FCC from establishing an interim franchise remedy where a franchising authority failed to timely act on a franchise application. The Sixth Circuit, finding that the statute was silent as to *the Commission’s* role in the franchising process, concluded that the Commission acted within its authority, stating that “Where petitioners’ argument falls short... is in equating the omission of the agency from section 621(a)(1) with an absence of rulemaking authority.” *Id.* 529 F.3 at 773.

## **2. Congress expected the Commission to take an active role in regulating retransmission consent, and reiterated that expectation in STELAR.**

- a. The Senate Report, for example, notes its expectation that the retransmission consent regime will result in “minim[al] disruption to broadcasters and cable operators” and that the rights will be exercised “harmoniously.” 1992 U.S.C.C.A.N. at 1169, 1171.
- b. A variety of the Cable Act’s authors spoke contemporaneously about the Commission’s “supervisory” authority in this area, albeit with the understanding that good faith negotiations could (very rarely) lead to impasse. 138 Cong. Rec. S 643 (Sen. Inouye) (“[T]he FCC has the authority under the Communications Act to address what would be the rare instances in which such carriage agreements are not reached.”); *id.* 138 Cong. Rec. S14604 (Sen. Wellstone) (“[E]xisting law provides the FCC with both the direction and authority to ensure that the

retransmission consent provision will not result in a loss of local TV service”) (citing assurance from Commerce Committee legal counsel).

- a. In STELAR, Congress sent an unmistakable signal that it wants the Commission to act.
  - a. Congress made clear that it intended for the Commission in this “rulemaking” to “include a robust examination” of retransmission consent negotiation practices, to consider “whether certain *substantive* terms offered by a party may increase the likelihood of negotiations breaking down and to examine “the *practices* engaged in by both parties if negotiations have broken down and a retransmission consent agreement has expired.” S. Rep. No. 113-322, at 13 (2014).
  - b. Likewise, Congress noted that “the rulemaking . . . should be used to update” the totality of the circumstances test, by taking “a broad look at *all facets* of how both television broadcast station owners and MVPDs approach retransmission consent negotiations to make sure that the tactics engaged in by both parties meet the good faith standard set forth in the Communications Act.” *Id.* (emphasis added).
  - c. Congress explicitly stated that it expected the Commission to address “consumer harm from programming blackouts.” Congress even specified that “negotiations for retransmission consent have become significantly more complex in recent years, and in some cases one or both parties to a negotiation may be engaging in tactics that push those negotiations toward a breakdown and result in consumer harm from programming blackouts.” *Id.*

### **3. The Act’s structure reinforces the Commission’s authority over retransmission consent.**

- a. The Communications Act provides the Commission with broad authority over both the broadcast and cable industries. 47 U.S.C. § 303(r) (authority over spectrum services); 47 U.S.C. § 309 (public interest authority over broadcast services); *NBC v. United States*, 319 U.S. 190, 216 (describing such authority); *United States v. Sw. Cable Co.*, 392 U.S. 157, 168 (describing authority over the cable industry)).
- b. This authority, among other qualities, also includes strong remedial powers. 47 U.S.C. § 312(a)(4) (license revocation); 47 U.S.C. § 312(b) (cease and desist orders).
- c. Specific regulatory provisions governing the relationship between these two industries (such as the consent provision in Section 325(b)(1)(A)) are presumed to

exist *within* this broad grant of authority. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999).

- d. Section 325 does not exist on its own—rather, it is part of a broader regulatory regime. It is “nested” within several related provisions of the Copyright and Communications Acts. No one provision of this statute (such as “no carriage without consent”) should be read in isolation. The structure of broadcast regulation defeats any analogy to “common law rights” that broadcasters might use to justify the withholding of signals.

#### **4. Courts would uphold the Commission’s ordering interim carriage.**

- a. Nothing in the Act “directly” precludes the Commission from exercising such authority by requiring interim carriage and other remedies. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).
- b. And the exercise of such authority would be a “permissible” reading of the statute. *Iowa Utils. Bd.*, 525 U.S. at 391-92 (finding that the Commission had failed to give “some substance” to the relevant statutory provision).
- c. Nor would the Commission’s prior findings with respect to its remedial authority change this analysis. Agencies can change their interpretation of statutes so long as they recognize that they are doing so and the new interpretation is reasonable. *Nat’l Cable Television Ass’n v. Brand X Internet Servs., Inc.*, 545 U.S. 967, 981 (2005).

#### **5. ATVA’s specific proposals do not depend on interim carriage.**

- a. While we think the Commission has authority to adopt interim carriage remedies, ATVA’s proposals do not depend on interim carriage.
- b. *Even if* the Commission lacks authority to order interim carriage (which it does not), it surely has authority to identify instances of bad faith and to impose other remedies in response to them.
- c. So nothing about the “no retransmission without permission” provision prohibits the Commission from adopting each of them. This has always been clear, and Congress made it even clearer when it directed the Commission to “commence a rulemaking to review its totality of the circumstances test for good faith negotiations.”

47 U.S.C. 325(b)(1) and (b)(3)

(b) Consent to retransmission of broadcasting station signals

(1) No **cable system or other multichannel video programming distributor** shall retransmit the signal of a broadcasting station, or any part thereof, except—

(A) with the express authority of the originating station;

(B) under section 534 of this title, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section; or

(C) under section 338 of this title, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section.

[MATERIAL OMITTED]

(3)

(A) Within 45 days after October 5, 1992, **the Commission shall commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent** under this subsection and of the right to signal carriage under section 534 of this title, and such other regulations as are necessary to administer the limitations contained in paragraph (2). **The Commission** shall consider in such proceeding the impact that the grant of retransmission consent by television stations 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 543(b)(1) of this title to ensure that the rates for the basic service tier are reasonable**. Such rulemaking proceeding shall be completed within 180 days after October 5, 1992.

(B) The regulations required by subparagraph (A) shall require that television stations, within one year after October 5, 1992, and every three years thereafter, make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under section 534 of this title. If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems.

(C) **The Commission shall** commence a rulemaking proceeding to revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent under this subsection, and such other regulations as are necessary to administer the limitations contained in paragraph (2). Such regulations shall—

(i) establish election time periods that correspond with those regulations adopted under subparagraph (B) of this paragraph;

(ii) until January 1, 2020, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors **if such different terms and conditions are based on competitive marketplace considerations;**

(iii) until January 1, 2020, prohibit a multichannel video programming distributor from failing to negotiate in good faith for retransmission consent under this section, and it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations **if such different terms and conditions are based on competitive marketplace considerations;**

(iv) prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market (as defined in section 122(j) of title 17) to grant retransmission consent under this section to a multichannel video programming distributor, unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission; and

(v) prohibit a television broadcast station from limiting the ability of a multichannel video programming distributor to carry into the local market (as defined in section 122(j) of title 17) of such station a television signal that has been deemed significantly viewed, within the meaning of section 76.54 of title 47, Code of Federal Regulations, or any successor regulation, or any other television broadcast signal such distributor is authorized to carry under section 338, 339, 340, or 534 of this title, unless such stations are directly or indirectly under common de jure control permitted by the Commission.