May 31, 2016

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

Re: *Implementation of Section 103 of the STELA Reauthorization Act of 2015*, MB Docket No. 15-216, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71

Dear Ms. Dortch:

Representatives of Mediacom Communications Corporation, DISH Network L.L.C., the American Cable Association and other interested parties recently met with members of the Commission staff to the discuss the scope of the Commission's statutory authority to require interim carriage of a broadcast station as a means of remedying violations of the requirement that retransmission consent negotiations be conducted in "good faith.[1] This letter addresses whether Section 553 of the Administrative Procedure Act ("APA"), which generally requires agencies to provide notice and an opportunity to comment before a new rule is promulgated, stands as an obstacle to the Commission announcing that it can and will require interim carriage to remedy violations of the good faith rules under appropriate circumstances. As explained below, the APA notice rule is not an impediment to the Commission's finding in either the 2011 "Retransmission Consent Reform" proceeding (MB Docket No. 10-71) or the 2015 "Totality of the Circumstances" proceeding (MB Docket No. 15-216) that it has the authority to order interim carriage as a remedy for violations of the good faith rules.

First, the NPRMs in MB Docket No. 10-71 and MB Docket 15-216 gave interested parties the required level of notice. Section 553 of the APA requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The Commission has clearly met that standard with respect to interim carriage. MB Docket No. 10-71 was initiated by the Commission in March 2011 in response to a Petition for Rulemaking filed by a number of interested stakeholders that squarely put in issue the scope of the Commission's authority to order interim relief when retransmission consent negotiations break down. And while the NPRM in MB Docket No. 10-71 noted the Commission's belief that "imposing a temporary standstill or other interim carriage mechanism in the context of retransmission consent disputes would be inconsistent with Section 325(b)(1)," the agency nonetheless left the door

[1] *See* Letter from Seth Davidson, Counsel to Mediacom Communications Corporation to Marlene H. Dortch, Secretary, MB Docket Nos. 10-71 and 15-216 (May 5, 2016); Letter from Seth Davidson, Counsel to Mediacom Communications Corporation to Susan Aaron, Office of General Counsel, MB Docket Nos 10-71 and 15-216 (May 10, 2016); Letter from Michael Nilsson, Harris Wiltshire & Grannis to Marlene H. Dortch, Secretary, MB Docket Nos. 10-71 and 15-216.

open for a different result, stating that "Parties may comment on that conclusion."[2] That request for comment on the Commission's position that it lacked the authority to require interim carriage as a remedial measure clearly meets the requirement that the notice apprise potential commenters of the "subjects and issues" in play (a conclusion bolstered further, as discussed below, by the fact that dozens of commenters have addressed the issue).

The case that the APA notice requirement has been met also can be made with respect to the Totality of the Circumstances NPRM, which was issued in 2015 pursuant to Section 103 of the STELA Reauthorization Act of 2014. That notice explicitly acknowledged that issues raised in MB Docket No. 10-71 (which would include the interim carriage issue) remained open in MB Docket No. 15-216.[3] Furthermore, like the NPRM in MB Docket No.10-71, the Totality of the Circumstances NPRM broadly invited parties to discuss not only whether certain specific practices should be treated as violations of the good faith negotiation requirement, but also whether there were other actions that the Commission could take to address Congress' concerns about the growing number of retransmission consent blackouts. Again, many commenters responded to that invitation by addressing the scope of the Commission's interim carriage relief authority.

In any event, the fact that the most recent NPRM in MB Docket No. 15-216 did not go into the issue of interim carriage at length is irrelevant. This is because a notice will be deemed sufficient if the final agency action is "a logical outgrowth of the rule proposed." *National Black Media Coal. v. FCC*, 791 F. 2d 1016, 1022 (2d Cir. 1986). *See also Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013) (a final rule qualifies as a "logical outgrowth" of a notice if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period"). What remedies the Commission can and should apply to behavior that violates the good faith standard plainly is a "logical outgrowth" of rules defining what constitutes such a violation, particularly when the remedy (interim carriage) goes directly to the harm that the substantive rule is seeking to address (bad faith negotiating tactics that lead to an interruption of carriage).

Second, even if the NPRMs in MB Docket No. 10-71 and MB Docket No. 15-216 did not facially satisfy the APA notice requirement, the public's response to those NPRMs establishes that the deficiency was harmless error. Section 706 of the APA provides that while a reviewing court may invalidate agency action that has been taken without compliance with the APA's procedural requirements, the court is required to take "due account" of "the rule of prejudicial error." The Supreme Court has indicated that the prejudicial error rule (or, as it also is referred

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[2] *Amendment of Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, note 59 and ¶¶ 18-19. The Commission's statements regarding its authority were somewhat ambiguous on the question of whether it had decided that it lacked authority to order interim carriage even when there had been a finding of a violation of the good faith rules (as opposed to during the pendency of a good faith complaint). *See id.* at note 56.

[3] *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶ 5 n.30 (2015) ("We note that we previously initiated a rulemaking proceeding on retransmission consent issues in 2011 *and certain issues in that proceeding remain pending*.")

to, the "harmless error" rule) is intended to avoid situations in which actions are reversed for error even when the error does not affect the outcome.

The facts of the situation at hand are clear: dozens of parties, including MVPDs, broadcasters, and public interest organizations, have commented on the Commission's interim carriage relief authority in both MB Docket No. 10-71 and MB Docket No. 15-216. In fact, a full text search of MB Docket No. 10-71 using ECFS produced over 150 "hits" on the term "interim carriage" Of these hits, at least thirty represented submissions made during the official comment and reply comment periods.[4] A similar search indicates that the subject of interim carriage relief was addressed in a number of initial and reply comments in MB Docket No. 15-216. These filings have addressed both the general question of the Commission's authority to grant interim relief as an equitable and the pros and cons of such relief.[5] Notably, none of these comments appear to question whether the Commission has given sufficient notice that it might take action with respect to the subject of its interim carriage relief authority.

The history of these proceedings described above supports the conclusion that the notices in MB Docket Nos. 10-71 and 15-216 satisfy the APA notice requirement. This is because the filing of comments on the issue in question, particularly in the early stages of the proceeding, is considered significant evidence of a rulemaking notice's sufficiency. This fact alone distinguishes the situation at hand from that presented in the *Prometheus Radio* and *Time Warner Cable* cases, where the deciding courts relied heavily on the fact that the proposed rules were not addressed until well after the official comment periods had closed.

But even if the comments alone do not resolve the APA notice issue, they provide ample support for the conclusion that any deficiency in the notices was harmless error when measured against the facts and the purposes of the notice requirement. As the Third Circuit explained in *Prometheus Radio Project v. FCC*, 652 FCC 3d 431 (2011), the APA notice requirement is intended "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the

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[4] Broadcast commenters addressing interim carriage in their initial or reply comments in MB Docket No. 15-216 include Meredith Broadcasting ("the FCC cannot require a broadcaster to grant retransmission consent…A requirement by the government to consent is not real consent"); Media General (the Commission has no authority to force broadcasters to grant carriage); Disney (describing the NPRM as seeking comment on whether the Commission "should regulate contract expiration dates"); NAB (arguing that the adoption of interim carriage rules would be contrary to the plain language of Section 325(b)(1)(A)). MVPDs and others whose initial or reply comments in MB Docket No. 15-216 propose or support the Commission's assertion and exercise of interim carriage authority include Time Warner Cable Inc., WTA-Advocate for Broadband, ACA, Verizon, Professor James Speta, and Public Knowledge.

[5] Mediacom even filed an *ex parte* notice in MB Docket No. 15-216 prior to the announcement of the comment deadlines for the express purpose of putting interested parties on notice that Mediacom would be arguing, *inter alia*, that forfeitures are not a sufficient remedy for certain violations of the duty to negotiate in good faith and that the Commission is able and must be willing to require interim carriage when necessary and appropriate to protect the public interest. Letter to Chairman Thomas Wheeler from Seth Davidson, Counsel to Mediacom Communications Corporation, MB Docket No. 15-216 (Sept. 28, 2015).

quality of judicial review." *Id.* at 453, quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin*, 407 F. 3d 1250, 1259 (D.C. Cir. 2005).

Here, the Commission's interim carriage relief authority and the wisdom of its exercise of that authority were tested and re-tested via exposure to comment from a diverse array of parties. Given the amount of back and forth on the issue, no party can credibly claim that it would be unfair for the Commission to find that it has interim carriage relief authority and to give an indication as to when that authority will be exercised. And the fact that the parties have been debating the interim carriage relief issue for over five years (six counting the comments on the petition for rulemaking underlying MB Docket No. 10-71) obviates any objection that the affected parties did not have an opportunity to develop evidence in the record that would enhance the quality of judicial review of what are, essentially, questions of legislative interpretation and agency policy.

Put another way, the evidence plainly supports the conclusion that the parties to MB Docket No. 10-71 and MB Docket No. 15-216 had "actual notice" that the Commission's interim relief authority and its exercise of that authority could foreseeably be the subject of Commission action in either or both those proceedings. This actual notice has the effect of transforming a purported notice insufficiency into harmless error, thereby causing the parties commenting on the issue to lose their standing to complain about a lack of notice. *Allina Health Servs. v. Sibelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (where "the petitioner itself made...comment [on an issue], it would presumably be hoist on its own petard" and cannot complain about lack of notice).

Third, and finally, the Commission could take the requested action – finding that it has the authority to order interim carriage as a form of relief where the good faith rules are violated – without having put that question out for comment at all. The notice and comment requirement applies when an agency promulgates a "legislative" rule. But when an agency issues an "interpretive rule" or "statement of policy," it does not have to (although it can) go through the process of a notice and comment rulemaking subject to Section 553 of the APA. According to the Supreme Court, "the critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. ___, 135 S. Ct. 1199, 1204 (2015), citing *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99 (1995).

Without question the adoption of rules defining what behavior constitutes a presumptive violation of the good faith negotiation requirement is a legislative rule requiring notice and comment. Interim carriage, however, is one of several *potential remedies* to any such violations. It is not, in and of itself, a new substantive requirement and does not constitute a legislative rule.[6]

In conclusion, the NPRMs in MB Docket No. 10-71 and MB Docket 15-216 were not deficient in giving parties notice that those proceedings could result in action by the Commission

[6] The fact that the Commission has sought comment on substantive good faith standards that involve a party's refusal to extend an expiring agreement under certain circumstances does not transform the Commission's reinterpretation of its interim carriage remedial authority into a legislative rather than interpretive rule.

relating to its exercise of interim carriage relief authority. This is evident from the discussion of interim carriage in the comments filed in response to the NPRMs and from the logical link between the substantive rules the Commission is considering in those proceedings and options the Commission has for remedying violations of those substantive rules. In any event, the extensive opportunity that has been given to interested parties (and taken by them) to comment on the Commission's interim carriage relief authority and the wisdom of exercising that authority renders any deficiency in the notice given in the NPRMs harmless error. Finally, the Commission can find consistent with the APA that revising its prior interpretation of its statutory authority to require the restoration or continuation of carriage as a means of remedying the effects of a practice that has unlawfully interfered with good faith negotiations involves the promulgation of an interpretive rule and/or statement of policy, not a legislative rule and that, as such, it is not required to give notice of such action.

Respectfully submitted,

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