



August 28, 2008

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

Re: CS Docket No. 98-120

Dear Ms. Dortch:

On Wednesday, August 27, 2008, Erin L. Dozier and the undersigned of the National Association of Broadcasters ("NAB") participated in separate meetings with Krista Witanowski of the Office of Chairman Martin, Rick Chessen of the Office of Commissioner Copps, and Monica Desai, Eloise Gore, Mary Beth Murphy, and Lyle Elder of the Media Bureau.

At the meetings, we discussed a few of the many reasons that the Commission should deny the petition for expedited rulemaking filed by Cequel Communications, LLC, *et al.*, which requests that the Commission establish a period surrounding the digital television ("DTV") transition date during which cable operators can carry broadcast signals even if they do not have broadcaster consent to such carriage (the "Petition").¹

First, we outlined the resolution adopted by the NAB Board of Directors which would establish a four-week period surrounding the DTV transition (February 4-March 4, 2009) during which broadcasters would voluntarily agree not to withhold their signals from multichannel video programming distributors ("MVPDs").² This resolution enjoys

¹ Petition for Expedited Rulemaking of Cequel Communications, LLC d/b/a Suddenlink Communications; Charter Communications, Inc.; GCI Cable, Inc.; Insight Communications, Inc.; and Mediacom Communications Corporation (filed Apr. 24, 2008) (the "Petition"). Although this letter is being filed in CS Docket 98-120, Carriage of Digital Television Broadcast Signals, we note that because the Petition is not the subject of an open proceeding, the filing of an *ex parte* notice is not required.

² National Association of Broadcasters, *NAB Members Pledge Continuation of TV Service Before and After DTV Transition: Resolution Passed to Ensure Successful Switch to Digital*, press release, August 12, 2008.

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the widespread support of numerous broadcast stations, including NAB members and non-members. The number of supporters is growing daily, and the current tally stands at 73% of all commercial television broadcast stations.

Second, we observed that although the Commission has not yet adopted a Notice of Proposed Rulemaking or even released a public notice seeking comment on the Petition, it is reportedly contemplating final action on the Petition. Such action would violate the Commission's notice and comment obligations under the Administrative Procedure Act. See 5 U.S.C. § 553(b).

Third, we stated that the retransmission consent regime carefully crafted by Congress specifically grants broadcast stations the right to control whether their signals may be retransmitted, and to negotiate the terms of such carriage through private agreements.³ Both the statutory language and legislative history make clear that Congress intended to establish a system of marketplace negotiations for the right to carry broadcast signals.⁴ Regulatory interference in such negotiations was never contemplated by Congress, and is contrary to Congressional intent.⁵ We stated that the Petition's reference to the inability of cable operators to drop broadcast signals

³ 47 U.S.C. § 325(b). Section 325 of the Act unequivocally states that no multichannel video programming distributor ("MVPD") "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station." 47 U.S.C. § 325(b)(1)(A).

⁴ The legislative history of Section 325 demonstrates that Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals" and did not intend to determine "the outcome of ensuing marketplace negotiations." See S. Rep. No. 92, 102d Cong., 1st Sess. 1 (1991) at 36.

⁵ The Commission has consistently and correctly concluded that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent." *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd 5445, 5450 (2000). *Accord Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 3006 (1993). Instead, as the Commission has recognized, Congress chose to allow the terms and conditions of carriage to be negotiated by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith. *Id.*

during sweeps periods is inapposite and therefore unavailing.⁶ The sweeps exception is a *statutory* provision which prevents broadcasters' signals from being dropped by cable operators.⁷ Far from supporting the view taken by the Petition, the sweeps exception only proves that Congressional intervention is required in order for the Commission to interfere with marketplace negotiations for retransmission consent.

Fourth, we stated that even if the Commission could suspend broadcaster retransmission consent rights, there are several reasons that it need not do so. Marketplace negotiations have worked for five rounds of cable elections and three rounds of direct broadcast satellite ("DBS") elections. Thousands of retransmission consent agreements have been negotiated during the 15 years since the first election cycle, not one of which has resulted in a finding of a broadcaster failure to negotiate in good faith.⁸ In the very rare instances where carriage disputes have made broadcast signals unavailable, affected viewers have been inundated with information about the dispute by DBS and cable providers as well as local news outlets. At the same time, DTV consumer education efforts are continually ramping up and will peak in January

⁶ Petition at 17 (citing 47 C.F.R. § 76.1601, Note 1, which states that: "No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. For this purpose, such periods are the four national four-week ratings periods—generally including February, May, July and November—commonly known as audience sweeps.").

⁷ 47 U.S.C. § 534(b)(9) ("...[n]o deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations...").

⁸ NAB is aware of only three of these "good faith" retransmission complaints being decided on the merits, none of which resulted in a finding that a broadcaster failed to negotiate in good faith. See *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (Cable Bur. 2001) (broadcaster was exonerated and the complaint denied, while the complainant (EchoStar) itself was found to have abused the Commission's processes); *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, DA 07-3 at ¶¶ 6, 24 (Media Bur. rel. Jan. 4, 2007) (broadcaster did not breach its obligation to negotiate in good faith; MVPD complaint denied); Letter from Steven Broecker, Deputy Chief, Policy Division, Media Bureau to Jorge L. Bauermeister, DA 07-1264 (rel. March 13, 2007) (broadcaster complainant prevailed; Media Bureau held that cable operator "breached its duty to negotiate in good faith" with the television licensee).

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and February. There is no chance that consumers will confuse a retransmission consent dispute that began in December or January with some kind of equipment failure or other snafu connected to the DTV transition in mid-February. Thus, grant of the Petition is not necessary to prevent any consumer confusion.

Finally, we noted that many major broadcast events occur in the early part of 2009. The core goal of the 1992 Cable Act was to ensure that broadcasters could continue to offer free over-the-air television service to the public and to compete on a level playing field. Suspending broadcaster retransmission consent rights for a period longer than February 4 – March 4, 2009 would shift significant negotiating leverage away from broadcasters to MVPDs, without any offsetting public interest benefit.

Please direct any questions to the undersigned.

Respectfully submitted,



Marsha J. MacBride
Executive Vice President
Legal and Regulatory Affairs

cc: Krista Witanowski
Rick Chessen
Rudy Brioché
Amy Blankenship
Cristina Pauzé
Monica Desai
Eloise Gore
Mary Beth Murphy
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