



June 28, 2010

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Presentation in MB Docket No. 10-71

Dear Ms. Dortch:

On June 24, 2010, Bob Gessner of Massillon Cable TV, Inc. and Mark Palchick and Rebecca Jacobs of Womble Carlyle Sandridge and Rice, PLLC participated in a meeting with the following members of the Media Bureau and the General Counsel's Office:

- Marilyn Sonn – General Counsel's Office
- John Flynn – General Counsel's Office
- Nancy Murphy – Media Bureau
- William Lake – Media Bureau
- Christopher Hickman – Intern, Media Bureau
- Mary Beth Murphy – Media Bureau
- Eloise Gore – Media Bureau
- Ron Parver – Media Bureau
- Diana Sokolow – Media Bureau

During the meeting, the participants discussed the comments that they filed in MB Docket No. 10-71 in support of the Petitioners. The participants emphasized that the need to repair the retransmission consent process had been proven and that the Commission had remedies available to it that did not require statutory changes. The participants discussed three main remedies: (1) Wireline multichannel video providers should be permitted to place for-pay broadcast channels on a non-mandatory tier and a broadcaster that will not provide a tiered retransmission consent rate would be deemed to be negotiating in bad faith; (2) enforcement of the existing statutory obligation that local licensees must be responsible for the operation of their station; and (3) mandating a most favored nation provision in broadcast retransmission contracts.

The importance of the proposed remedies for small to mid-sized cable operators cannot be overemphasized. Smaller cable operators serve 10-15 percent of the current cable market, often serving in rural areas where consumer choice is already at a minimum. These cable operators provide key local services to their communities, such as PEG channels, cable to the class room and local religious programming. Local cable television companies are also a key element in advancing the goals identified by the Commission's Broadband initiative. Small and mid-sized operators often bring high-speed broadband to communities that would otherwise lack those services. When smaller cable operators face revenue loss due to higher fees for carriage of broadcast signals, local community programming and the expansion and development of broadband service suffer.

The remedies addressed during the meetings go to the heart of Congress' mandate that the Commission consider, in the creation of the retransmission consent process, "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 623(b)(1) to ensure that the rates for the basic service tier are reasonable."¹ 47 USC §325(b)(3)(A). While the retransmission consent process may at one time have worked to fulfill these goals, the current rules have permitted the creation of a marketplace that unfairly penalizes consumers.

Mr. Gessner noted that is ironic that broadcasters complain that they receive less money than the cable networks, since many of the broadcast networks are owned by the same entities that own the satellite networks. In the end, it is the affiliates in these situations that suffer greater monetary losses because they are required to pay a larger and larger portion of their fees to the networks.

The participants suggested placing cable operators on par with satellite providers who are permitted to place broadcast signals on a separate tier. As the participants noted in their comments, in the 2001 Digital Must Carry Order the Commission granted systems subject to effective competition the right to place digital signals on a separate tier.² For those systems that are not subject to effective competition and remain rate-regulated, the Commission should permit creation of a separate tier for pay-broadcast signals and require that cable operators: (1) pass through directly to the customer no more than the cost that the broadcaster charges for the signal, and (2) only recapture the actual cost of the set-top box using a Form 1240. Where a cable operator chooses to offer a for-pay broadcast tier, a broadcaster that does not offer a tiered rate for retransmission consent would be deemed to have failed to negotiate in good faith.³ For example, a broadcaster could negotiate for carriage for \$0.25

¹ In response to a question from Eloise Gore about whether passage of the Satellite Television and Localism Act of 2010 ("STELA") affected the analysis of the participants, the participants conveyed that they would follow-up with a response at a later time.

² *Carriage of Digital Television Broadcast Signals Amendments to Part 76 of the Commission's Rules Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*. First Report and Order and Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2642-3 at ¶¶101-103 (2001).

³ For copyright purposes, the broadcast stations would be offered to customers on an individual, separate tier. The reasoning behind this is that copyright fees are based upon the royalties derived from any tier that includes broadcast signals. Thus, if broadcast signals were added to an expanded basic tier, for example, the cable operator would have to calculate a copyright fee based upon the higher revenues received from the expanded basic service. If the tiered broadcast

cents per subscriber on a basic tier or for \$12 for carriage on a for-pay tier. By permitting cable operators to place for-pay broadcast signals on a separate non-mandatory tier, the Commission would increase transparency to consumers regarding the cost of the broadcast signal and would allow the consumer to decide if the cost was merited.

The second remedy that the participants request is that the Commission enforce the existing statutory obligation that licensees must be responsible for the operation of their station. The participants noted that it does not matter what type of third party is negotiating on behalf of the affiliate, the issue is that the local affiliate should be the party negotiating for retransmission consent or at least in control of those negotiations. The participants also told the Bureau that they would provide a follow-up answer to the Bureau's question regarding the differences between the rights of broadcasters and satellite programmers to negotiate carriage agreements.

To emphasize the importance of this issue, Bob Gessner described a recent situation that Bill Beaty of Comporium faced with the carriage of station WIS in Comporium's Rock Hill cable system. WIS is a distant station to Comporium's Rock Hill cable system. However, for years, in order to bring the local Columbia, SC news to its customers, Comporium the four blocks of local news provided by the station and blocked the remaining programming due to the network non-duplication rules. After years of contracting amicably with the local station, Mr. Beaty was sent a letter last year stating that he would have to negotiate directly with a consultant and was no longer permitted to contact the local station. After the consultant demanded payment for carriage of the local news programming, Mr. Beaty had no choice but to run a crawl on his cable systems notifying his customers that the WIS programming would no longer be carried by Comporium. When Comporium's customers saw the crawl they were enraged and immediately called Mr. Beaty to complain. Because of the intensity of viewers complaints, Mr. Beaty received a call from the local station manager who explained that she had had no idea that Comporium was about to discontinue their signal and promised to remedy the situation. If Comporium was negotiating directly with the local licensee, or at least a representative under the control of the local licensee, viewers would never have been put in the position of being on the brink of losing their primary source of South Carolina news and information. As this situation exemplifies, taking the local element out of the negotiations often leads to an undesirable situation for not only the cable operator and the local station, but for the customers, as well.

The last remedy that the participants discussed is that they are in favor of Cablevision's proposal for a most favored nations ("MFN") provision in retransmission consent contracts. An MFN provision would help to level the playing field between smaller and larger MVPDs. While the mechanics of an MFN should ultimately be reviewed in a Notice of Proposed Rulemaking, the participants discussed options for combining an MFN with a for-pay tier, such that the rate negotiated through the MFN could be in place for both carriage on a basic service tier and a for-pay tier.

Congress has recognized the unique right that viewers have to view local television broadcast stations. To make a customer pay more to receive local television broadcast signals because of the multichannel provider it chooses is fundamentally at odds with the concept of localism that is the underpinning of the broadcast provisions of the Communications Act, and is anathema to Congress' mandate that basic tier rates be reasonable for consumers. If the Commission still believes that broadcast stations deserve special treatment because they provide a unique local service to customers, the cost of those stations to subscribers should not be disparate in such a way that it is patently unfair to one subscriber base over another.

The participants requested that the Commission issue a Notice of Proposed Rulemaking ("NPRM") which acknowledges the need to fix the retransmission consent and which proposes adoption of the remedies discussed by participants.

Please contact the undersigned if you have any questions about these issues.

Very truly yours,



Rebecca Jacobs

cc Marilyn Sonn
John Flynn
Nancy Murphy
William Lake
Mary Beth Murphy
Eloise Gore
Ron Parver
Diana Sokolow