



August 26, 2010

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

Re: Notice of Ex Parte Communication, MB Docket No. 10-71

Dear Ms. Dortch:

Yesterday, Jane Mago, Jerianne Timmerman and the undersigned of the National Association of Broadcasters (NAB) met with Austin Schlick, Marilyn Sonn, and Susan Aaron of the Office of General Counsel, as well as Robert Ratcliffe and Diana Sokolow of the Media Bureau, to discuss issues relating to retransmission consent.

During the meeting, we discussed the statutory regime governing retransmission consent and the Commission's previous determinations that the statute does not authorize the adoption of rules requiring broadcasters to make their signals available to multichannel video programming distributors ("MVPDs"), even on an interim basis.¹ In particular, we raised the following points:

Strong incentives for parties to negotiate and reach deals would be impeded by government intervention.

- There are strong incentives for both MVPDs and broadcasters to successfully negotiate retransmission consent agreements under the current retransmission consent system.

¹ See Opposition of the Broadcaster Associations in MB Docket No. 10-71 (filed May 18, 2010) at 62-68 ("Opposition").

- The overall success of this system is evidenced by the extremely rare nature of carriage impasses, which affect only approximately one-one hundredth of one percent of annual television viewing hours.²
- Part of the reason that the current system works is that government intervention is limited to the good faith complaint process. The possibility of more extensive government intervention on either side of a retransmission consent negotiation, whether in the context of specific negotiations or through rule changes that would affect all negotiations going forward, would adversely affect the strong incentives that currently exist for both broadcasters and MVPDs to reach agreement.³
- The current retransmission system serves the public interest by allowing broadcast outlets to invest in local news, emergency information and public affairs content, and to maintain access to valued network programming that might otherwise migrate to pay TV platforms. MVPD proposals for change would tilt the market-based system in their favor, harming competition and local stations' service to their communities.
- Dismissing or denying the pending petition for rulemaking concerning retransmission consent will promote the goal of completing retransmission negotiations in a timely manner because all parties will have certainty about the potential for additional government intervention in retransmission consent.

Nothing in Section 325(b)(3)(A), which directed the FCC to consider the impact that retransmission consent might have on cable basic tier rates in the rulemaking that implemented the 1992 Cable Act, suggests that the FCC should interfere with the market-based system of retransmission consent.

- As discussed by NAB and others in this proceeding, retransmission consent fees are not responsible for rising MVPD retail rates, and MVPDs have not demonstrated any connection between retransmission fees and the rates they charge consumers. Instead, the record reflects that MVPD revenues and profits are increasing at a rate that outpaces all of their programming costs, and that retransmission consent fees represent only a small fraction of programming costs.⁴

² Navigant Economics, Jeffrey A. Eisenach, Ph.D. and Kevin W. Caves, Ph.D., *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010) at 19.

³ See Opposition at 61-62.

⁴ See Opposition at 45-50.

- Even if, contrary to Section 325(b)(1) of the Communications Act, the government established an exact formula or cap on retransmission consent fees, there would be no guaranteed impact on MVPD consumer pricing unless and until the Commission also regulated the consumer prices charged by MVPDs (which, of course, MVPDs strongly oppose). Absent rate regulation, the cost savings realized by MVPDs may not be passed on to consumers and could be applied to other expenses or business lines.
- The cable rate regulation and tier buy-through requirements apply only to cable systems (not satellite). Even then, they apply only where the Commission has not yet made a determination of effective competition.⁵ Considering these facts, NAB has estimated that roughly half of all MVPD households subscribe to a service that is not subject to these requirements—a percentage growing weekly as additional cable communities are found to face effective competition.⁶ There also is no evidence that retransmission fees ever contributed to a Commission finding that a cable system was not charging reasonable rates. Thus, there is no logical way for rate regulation requirements to justify increased Commission intervention in the retransmission consent regime—even if such intervention were permitted by the statute.
- As discussed in our comments, under basic principles of statutory construction, the basic tier rate provision of the statute does not, and cannot, trump the Commission's statutory obligation to preserve a market-based system of arm's-length negotiation free from government intrusion.⁷

Finally, we emphasized the value of consumer awareness as a means of avoiding consumer confusion and ensuring that viewers have consistent access to broadcast signals. Although impasses in retransmission negotiations are rare, consumers should be aware of their options, including accessing broadcast signals over-the-air.

⁵ See Opposition at 30-32.

⁶ See Opposition at 32.

⁷ See Opposition at 69-71. Under basic canons of statutory interpretation, statutes should be interpreted harmoniously with their dominant legislative purpose. See *Id.* at 70, citing *United States v. Nader*, 542 F.3d 713, 720 (9th Cir. 2008); *Department of the Air Force v. Federal Labor Relations Authority*, 294 F.3d 192, 196 (D.C. Cir. 2002). Statutes must also be read, whenever possible, to give effect to all of their provisions; no provision of a unified statutory scheme should be treated as superfluous or nullified altogether. See Opposition at 70-71, citing *United States ex rel. Eisenstein v. City of New York*, 556 U.S. ---, ---, 129 S. Ct. 2230, 2234 (2009).

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NAB reiterated its support for increased consumer notification as a means of avoiding consumer confusion.⁸

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'ERL Dozier', written in a cursive style.

Erin L. Dozier
Senior Vice President and Deputy General Counsel
Legal and Regulatory Affairs

cc: Austin Schlick, Marilyn Sonn, Susan Aaron, Robert Ratcliffe, Diana Sokolow

⁸ See Opposition at 62 (citing 47 C.F.R. §76.1601 *et seq.*). See also Letter from Erin L. Dozier of NAB to Marlene H. Dortch, FCC Secretary in MB Docket No. 10-71 (filed May 28, 2010) at 2 (MVPDs “can address potential consumer confusion by fully complying with their existing obligations to give notice to subscribers of any removal of a broadcast station from carriage...a technology-neutral requirement could be applied across MVPD platforms.”). We note, however, that the Commission should avoid adopting notification rules that would dictate certain content or otherwise raise First Amendment concerns.