



February 24, 2011

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, Jerianne Timmerman and the undersigned of the National Association of Broadcasters (NAB) had telephone conferences with Joshua Cinelli of the Office of Commissioner Clyburn and Rosemary Harold of the Office of Commissioner McDowell to discuss the Commission's anticipated notice of proposed rulemaking on retransmission consent.

During both conference calls, we emphasized the importance of keeping the notice of proposed rulemaking focused on issues that may be within the scope of the Commission's authority, rather than focusing on well-settled legal issues such as the Commission's lack of authority to mandate carriage in the absence of broadcasters' consent or to require negotiating parties involuntarily to submit to arbitration. In this regard, we again noted:

- As NAB and others have repeatedly explained, and as the Commission has repeatedly held, the statutory regime governing retransmission consent 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 Section 325(b)(1) of the Communications Act prohibits MVPDs from retransmitting any broadcast station's signal "except . . . with the express authority of the originating station."² In light of this clear statutory language, the Commission

¹ See Opposition of the Broadcaster Associations in MB Docket No. 10-71 (filed May 18, 2010) at 62-68 ("Opposition"); Reply Comments of the Broadcaster Associations in MB Docket No. 10-71 (filed Jun. 3, 2010) at 2-3 ("Replies").

² 47 U.S.C. § 325(b)(1).

has stated that it has “no latitude . . . to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission.”³

- For the reasons set forth in comments previously filed,⁴ the Commission’s authority under Sections 4(i), 303(r) or 309 of the Communications Act also does not authorize the Commission to issue rules requiring carriage of broadcast signals without consent.⁵ Although the Commission has delegated authority to act under Sections 4(i) and 303(r) of the Communications Act, any action taken pursuant to either section must be consistent with other provisions of the Act, including Section 325.⁶ Similarly, Section 309’s general mandate to ensure that broadcast licensees operate in the public interest cannot be read to authorize the Commission to take actions directly contradicting the congressional directive to establish a retransmission consent marketplace in which private negotiations, not government regulation, establish the terms and conditions of retransmission consent agreements.⁷
- The Commission lacks the authority to mandate involuntary arbitration in broadcast retransmission consent disputes. As a previous order adjudicating a good faith complaint expressly acknowledged, the “Commission does not have the authority to require the parties to submit to binding arbitration.”⁸ That ruling is consistent with

³ *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000) at ¶ 60.

⁴ Opposition at 71-72; Replies at 3-5.

⁵ See Letter from Matthew A. Brill, Latham & Watkins, Counsel for Time Warner Cable, to Marlene H. Dortch in MB Docket No. 10-71 (Feb. 23, 2011) at 1 (alleging that these provisions provide such authority) (“Brill Letter”).

⁶ Section 4(i) authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this Act*, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i) (emphasis added). Similarly, Section 303(r) empowers the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law*, as may be necessary to carry out the provisions of this Act,” including Section 325. *Id.* § 303(r) (emphasis added).

⁷ See 47 U.S.C. § 309(a). It is, moreover, a fundamental principle of statutory construction that the “[s]pecific terms” of a statute “prevail over the general in the same or another statute.” *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957); *accord Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). The *general* mandate that the Commission act in “the public interest” cannot override the *specific* statutory provisions that unambiguously prohibit the retransmission of broadcast signals by MVPDs without consent of the broadcast stations.

⁸ *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 35 (2007) at ¶ 25.

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the statutory prohibition on administrative agencies requiring arbitration, which states that: “[a]n agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.”⁹

We also emphasized that the Commission’s notice should approach retransmission consent issues in a balanced manner, and should ask questions about the roles that both broadcasters and MVPDs play in the retransmission consent marketplace, including questions as to how MVPD market share and regional clustering affects MVPDs’ leverage in and conduct during retransmission consent negotiations.

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,



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

cc: Joshua Cinelli
Rosemary Harold

⁹ 5 U.S.C. § 575(a)(3). See also S. REP. NO. 101-543 (1990), at 13 (observing that the Administrative Dispute Resolution Act “prohibits a federal agency from requiring any person to consent to arbitration as a condition of receiving a contract or benefit,” and this “prohibition is intended to help ensure that the use of arbitration is truly voluntary on all sides”); *Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in Which the Commission Is a Party*, Initial Policy Statement and Order, 6 FCC Rcd 5669 (1991). Time Warner Cable’s reliance on the FCC’s imposition of arbitration-related conditions in the context of specific transactions is inapposite. See Brill Letter at 2. Conditions imposed in the context of transaction approvals are based upon FCC analysis of specific facts and circumstances involving particular companies, are often proposed by the parties to the transaction in the first instance, and also are subject to the merger applicants’ consent. Merger conditions therefore cannot form the legal basis for an across-the-board arbitration mandate for retransmission negotiations. NAB has further previously explained that the arbitration-related conditions cited by Time Warner and other MVPDs were designed to address potential issues arising from the vertical integration of the merging parties’ broadcast stations and MVPD platforms, and are not relevant to broadcasters generally. See Opposition at 75.