

July 21, 2011

VIA ELECTRONIC FILING

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

Re: In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42

Dear Ms. Dortch:

On July 19, 2011, the undersigned of Willkie Farr & Gallagher LLP, representing Comcast Corporation, had a phone conversation with Erin McGrath, Acting Legal Advisor to Commissioner Robert McDowell. We discussed several reasons why the Commission should not issue a final rule on a proposed carriage “standstill” requirement in the above-captioned proceeding.

During our discussion, I explained that the Commission does not have the authority under Section 4(i) of the Communications Act to impose an interim standstill in the program carriage context, because Sections 616 and 624(f) limit any order mandating carriage to cases where an actual Section 616 violation has been found *after* an adjudication on the merits. This limitation is reflected in the current program carriage rules, which only authorize an order requiring carriage “upon completion of [the] adjudicatory proceeding.” 47 C.F.R. § 73.1302(g)(1).

I also explained that relevant case law casts doubt on whether the four-part preliminary injunction test that the Commission adopted in the *Terrestrial Exemption Order*¹ – and would presumably seek to adopt here – is appropriate in this context. Generally speaking, the purpose of a preliminary injunction is to preserve the status quo. However, a standstill in the program carriage context would not preserve the status quo; rather, it would extend the terms of privately negotiated contracts that were set to expire on an agreed-upon date, essentially forming a new contract.² This kind of mandatory injunction does not merely preserve existing rights and obligations, but interferes

¹ *In re Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report & Order, MB Docket No. 07-198, ¶ 73 (2010).

² *See, e.g., Philadelphia Hous. Auth. v. HUD*, 553 F. Supp. 2d 433, 437 (E.D. Pa. 2008); *Maddog Software, Inc. v. Sklader*, 382 F. Supp. 2d 268, 282-83 (D.N.H. 2005).

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with and extends them to the benefit of one party. Courts have been wary to view their equitable powers so broadly, and the FCC should be even more so.³

Lastly, I reiterated the concern that the standstill presents significant policy and practical problems for program carriage negotiations between private parties.⁴ Because the Commission has not provided notice concerning these and other substantive issues, they are not ripe for resolution in a rulemaking order.

Kindly direct any questions regarding this matter to my attention.

Sincerely,

/s/ David P. Murray

David P. Murray

Counsel for Comcast Corporation

cc: Erin McGrath

³ See, e.g., *Veitch v. Danzig*, 135 F. Supp. 2d 32, 35 n.2 (D.D.C. 2001) (citing *Phillip v. Fairfield Univ.*, 118 F.3d 131, 133 (2d Cir. 1997)); see also *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (“the power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised”) (internal quotations and citations omitted).

⁴ See Comcast Corporation Ex Parte, MB Docket No. 07-42 (July 5, 2011).