

December 11, 2013

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

Re: *Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71*

Dear Ms. Dortch:

On December 3, 2013, the undersigned parties met with Philip Verveer and Maria Kirby of Chairman Wheeler's office to discuss the urgent need for reform of the Commission's retransmission consent rules.¹ We are submitting this further letter to elaborate on the Commission's legal authority to implement reform proposals advanced by these parties and other stakeholders.² As discussed below, the Commission has broad authority to enforce its current rules and adopt rule changes that more effectively address the public interest harms arising from the existing retransmission consent regime, as well as to resolve particular disputes between broadcast stations and multichannel video programming distributors ("MVPDs").

First, Section 325(b)(3)(A) expressly directs the Commission "to govern the exercise by television broadcast stations of the right to grant retransmission consent."³ Congress further specified that, in carrying out that mandate, the Commission "shall consider ... 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 [governing retransmission consent] do not conflict with the Commission's obligation to ensure that the rates for the basic service tier are

¹ See Letter of Stacy Fuller, Vice President, Regulatory Affairs, DIRECTV, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 10-71 and 09-182 (filed Dec. 5, 2013).

² TWC and other interested parties have submitted comments and ex parte presentations addressing in greater detail the Commission's legal authority to implement a wide range of reforms to the retransmission consent rules. See, e.g., Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 30-32 (filed June 27, 2011); Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 39-41 (filed May 27, 2011); Joint Comments of Mediacom Communications Corporation *et al.*, MB Docket No. 10-71, at 3 n.6 (filed May 27, 2011); Reply Comments of Cablevision Systems Corporation, MB Docket No. 10-71, at 6-7 (filed June 3, 2010); Comments of Verizon, MB Docket No. 10-71, at 7-10 (filed May 18, 2010).

³ 47 U.S.C. § 325(b)(3)(A).

reasonable.”⁴ Broadcasters have suggested that their right to withhold retransmission consent pursuant to Section 325(b)(1)(A) of the Act somehow deprives the Commission of authority to impose constraints on retransmission consent negotiations and agreements. But that contention is contrary to the plain language of Section 325(b)(3)(A). Indeed, the statutory mandate to “govern” the exercise of retransmission consent not only *permits* the Commission to adopt rules designed to ameliorate the demonstrated consumer harms associated with unreasonable fee demands and programming blackouts, but affirmatively *requires* the Commission to do so.⁵

Second, the Commission’s general mandate to govern the exercise of retransmission consent is supplemented by its obligation to adopt and enforce rules that “prohibit a television broadcast station that provides retransmission consent from ... failing to negotiate in good faith.”⁶ The Commission has recognized that a broadcaster violates its good faith duty when its demands “include[] terms or conditions not based on competitive marketplace considerations.”⁷ Yet much of the conduct occurring in today’s retransmission consent negotiations—including brinkmanship tactics designed to exploit a broadcast station’s market power, anticompetitive collusion between and among local broadcast stations that are parties to various “sharing” agreements, and various other coercive tactics—cannot be squared with the outcomes that would occur in a genuinely competitive marketplace. The Commission therefore can and should use its good faith authority to police broadcasters’ abusive conduct.

Third, in addition to the specific mandates contained in Section 325, the Commission has independent authority (and, again, an obligation) to ensure that broadcast licensees act in furtherance of “the public interest, convenience, and necessity.”⁸ Broadcast stations were given immensely valuable rights to use the public airwaves at no charge in exchange for their

⁴ *Id.*

⁵ Consistent with that requirement, the Commission’s existing rules in one limited respect purport to restrict the substantive price and other terms that broadcast stations can impose on distributors. In particular, Section 76.65(a)(1) of the rules provides that it is not a violation of the good-faith requirement for stations to enter into “retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel programming distributors *if* such terms and conditions are based on competitive marketplace considerations.” 47 C.F.R. § 76.65(a)(1) (emphasis added). Thus, where stations *cannot* justify such differences in prices and terms based on “competitive marketplace considerations”—which is invariably the case, given the absence of any genuine “market” for retransmission consent—the Commission’s rules should be read to preclude stations from imposing such terms in their retransmission consent agreements. Although the Commission has not enforced that restriction, the Commission’s adoption of Section 76.65(a)(1) reflects its historical understanding that Section 325(b)(3)(a) of the Act authorizes the regulation of retransmission consent prices (among other aspects of retransmission consent agreements).

⁶ 47 U.S.C. § 325(b)(3)(C)(ii).

⁷ *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 32 (2011) (citing 47 U.S.C. § 325(b)(3)(C)).

⁸ 47 U.S.C. § 309(a).

commitment to operate in the public interest. And there is perhaps nothing more central to a broadcast station's public interest obligation than ensuring that the viewing public in its local license area receives the primary signal either free over the air or on reasonable terms through an MVPD. In light of this social compact, the Supreme Court has long recognized that the Commission's public interest authority is "expansive."⁹ The Commission thus may exercise its public interest authority over broadcast licensees in furtherance of its explicit responsibilities to govern broadcast stations' exercise of retransmission consent and to ensure that they conduct themselves in good faith.

Finally, the Commission's ancillary authority under Sections 303(r) and 4(i) of the Act complements the direct mandates established by Sections 325 and 309, and provides a supplementary source of legal authority on which the Commission may rely to implement reforms to the retransmission consent regime. Section 303(r) authorizes 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 Title III of the Act.¹⁰ As the D.C. Circuit has explained, Section 303(r) "supplements the Commission's ability to carry out its mandates via rulemaking even if it confers no independent authority."¹¹ Section 4(i) similarly grants the Commission authority 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."¹² The clear mandates in Title III to adopt rules governing retransmission consent provide just the sort of concrete statutory authority—in contrast to an amorphous statement of policy—that justifies the exercise of ancillary jurisdiction to adopt retransmission consent reforms.¹³

These far-reaching grants of authority empower the Commission to adopt new rules governing the retransmission consent process, and obligate the Commission to act under its existing rules to protect consumers from broadcasters' unreasonable fee demands, tying practices, and programming blackouts. In addition, the Commission has authority to require interim carriage pending the resolution of a retransmission consent dispute. The Commission has determined that it has authority to order interim carriage in the context of program access disputes,¹⁴ consistent with Supreme Court precedent,¹⁵ and there is no reason why retransmission

⁹ *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943).

¹⁰ 47 U.S.C. § 303(r).

¹¹ *Cellco P'ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

¹² 47 U.S.C. § 154(i).

¹³ *See Cellco P'ship*, 700 F.3d at 541 ("[T]he Commission has authority to promulgate regulations reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities." (internal quotation marks and citations omitted)).

¹⁴ *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶¶ 71-72 (2010) ("2010 Program Access Order") (relying on the Commission's ancillary authority to establish standstill rules for program access disputes).

consent disputes should be treated differently. In the program access proceeding, the Commission invited complainants to seek “a temporary standstill of the price, terms, and other conditions of an existing programming contract,” concluding such interim relief would confer “several benefits,” including “minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint; limiting the ability of vertically integrated programmers to use temporary foreclosure strategies (i.e., withholding programming to extract concessions from an MVPD during renewal negotiations); [and] encouraging settlement.”¹⁶ Relying on its ancillary authority (in conjunction with Section 628), the Commission found that these public interest benefits trumped the programmers’ asserted right under copyright law to withhold their programming.¹⁷ While broadcasters assert that ordering interim carriage following the expiration of a retransmission consent agreement would override their statutory right to withhold retransmission consent, doing so would be no different than overriding non-broadcast programmers’ statutory right (under the Copyright Act) to withhold their programming in the absence of an effective license agreement. Moreover, the legislative history confirms that Congress intended the Commission to order interim carriage and other relief where necessary to protect consumers.¹⁸

¹⁵ See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-81 (1968) (holding that Sections 303(r) and 4(i) authorize the Commission to maintain the status quo when “the public interest demands interim relief”).

¹⁶ *2010 Program Access Order* ¶ 71.

¹⁷ *Id.*

¹⁸ See 138 CONG. REC. S643 (Jan. 30, 1992) (statement of Sen. Inouye) (“I am confident, as I believe the other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which [retransmission consent] carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers If [the FCC] identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.); *id.* at S14615-16 (Sept. 22, 1992) (statement of Sen. Lautenberg) (remarking that “if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights;” but that “[i]nstead, cable operators will have an opportunity to seek relief at the FCC”). See also *id.* at S667 (Jan. 30, 1992) (statement of Sen. Inouye) (explaining, in a colloquy with Senator Levin, that “[t]he FCC does have the authority to require arbitration, and I certainly encourage the FCC to consider using that authority if the situation the Senator from Michigan is concerned about arises and the FCC deems arbitration would be the most effective way to resolve the situation”). More recently, in a 2007 letter to the Commission, the Chairman and Ranking Member of the Senate Commerce Committee wrote that Section 325’s directives meant, “[a]t a minimum,” that “Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution].” Letter from Sens. Inouye and Stevens to Chairman Kevin Martin, Federal

In conclusion, the Commission has the authority to address the significant public interest harms flowing from the current retransmission consent rules, and it should promptly exercise that authority to protect consumers and restore congressional intent.

Respectfully submitted,

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cc: Philip Verveer
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Communications Commission (Jan. 30, 2007), attached as Exhibit A to Retransmission Consent Complaint, *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, CSR No. 8233-C (filed Oct. 22, 2009).