October 6, 2015

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

Re: Ex Parte Communication: Amendment to the Commission’s Rules Related to Retransmission Consent, MB Docket No. 10-71

Dear Ms. Dortch:

On October 2, 2015, the undersigned met with Matthew Berry of Commissioner Pai’s office to discuss the Chairman’s proposal to eliminate the FCC’s network non-duplication and syndicated exclusivity rules.

As an initial matter, we reiterated the concerns each of us had raised previously with respect to the difficulty of enforcing private contractual rights given the effect of the compulsory license. We stated that the FCC’s characterization of its proposed action as deregulatory is misplaced: repeal of the rules would not return the programming market to a purely private marketplace because of the continuing existence of the compulsory licenses. We also described the actual operation of the compulsory licenses, noting that the below-market rates set by government and not the private market would not deter the importation of distant signals and that, moreover, the cable distant signal license rates do not cover network programming. Given this, we stressed that the FCC should leave the rules in place unless and until there is a holistic review of the entire statutory and regulatory structure, including the compulsory licenses.

We noted that repeal of the rules would not benefit viewers or consumers. With the rules repealed, a network’s most direct contractual remedy to enforce any contractual exclusivity would be to terminate its entire affiliation agreement with the station being imported into a distant market and any other stations commonly owned with that station. It would clearly take significant time for the network to enter into a new affiliation agreement. The viewer disruption in the distribution of network programming in this scenario would be significant (including over-the-air transmissions) and far greater than a retransmission consent impasse.
We also discussed our concerns that it is far from settled that contract law alone can efficiently enforce the contractual provisions at issue and that there are significant questions about the viability and validity of third-party beneficiary provisions and liquidated damages clauses. In contrast to the efficiency of the FCC’s current process, we argued that the most efficient result – especially for viewers - would be to leave the rules in place.

Finally, we explained that the network non-duplication and syndicated exclusivity rules and the sports blackout rules are not similar. The sports blackout rules involve situations where in-market viewers cannot view events in their market even on an over-the-air basis. In contrast, under the exclusivity rules, access to network and syndicated programming remains available and the rules address duplication.

Please do not hesitate to contact us for further information.

Respectfully submitted,

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cc: Matthew Berry