August 2, 2010

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

Re: Ex Parte Presentation in MB Docket No. 10-71

Dear Ms. Dortch:

On June 24, 2010, Bob Gessner of Massillon Cable TV, Inc. and Mark Palchick and Rebecca Jacobs of Womble Carlyle Sandridge and Rice, PLLC (“Petitioners”) met with members of the Media Bureau and General Counsel’s Office. Multiple questions were raised during the meeting that required follow-up from the Petitioners. Included herein are a copy of the questions and responses:

1. Why should broadcast stations be treated differently than cable networks? Are they really different?

Local television broadcast stations and cable networks are different. The negotiation for carriage of cable networks between cable operators and the networks occur in a free and open marketplace with little government intervention. The negotiation for retransmission consent between local television broadcast stations and cable operators takes place in a highly structured government controlled environment. Neither Congress nor the FCC has made a determination that cable networks are necessary for the preservation of a nationwide communications system. On the other hand, both Congress and the FCC have determined that it is necessary to preserve the television broadcast industry.\(^1\) Most importantly, the FCC has determined that the market power differential between cable operators and local television broadcast is excessive and that local television broadcast programming is “must have programming.”\(^2\) The extreme differential in market power creates a disconnect between the market power of the local television

\(^2\) General Motors Corporation and The News Corporation LimitedGeneral Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control, FCC 03-330, 498 at ¶44 (2004).
broadcasters and the Commission’s obligation, pursuant to 47 USC §325 (b)(3)(A), to “ensure that the rates for the basic service tier are reasonable.” To remedy this imbalance, the petitioners’ recommend that broadcast stations be required to provide cable operators with two levels of pricing: (1) pricing for carriage on the basic tier; and (2) pricing for carriage on a broadcast-only for-pay tier. Requiring broadcasters to offer pricing for a broadcast for-pay-tier, will provide a mechanism that (i) allows television broadcast station to obtain the compensation they believe they need for carriage of their station with (ii) the ability of consumers to lower the cost of receiving programming that is otherwise available over-the-air.

2. For purposes of enforcing the rule that local affiliates should control negotiations for retransmission consent, does it matter who is negotiating on behalf of the broadcast stations? Is there a difference between a network negotiating on behalf of a broadcast station and a station group owner or hired consultant doing so?

Section 310(d) of the Communications Act requires that a broadcast station licensee maintain control over its programming and station operations. The statute further prohibits the direct or indirect transfer of control of any station license to another entity except in cases where the Commission finds that “the public interest, convenience, and necessity will be served thereby.” The Commission has confirmed this obligation, finding that affiliates need to be protected against over-reaching by the networks: “Affiliates, as the licensees of local television stations, must retain ultimate control over station programming, operations and other critical decisions with respect to their stations, and network affiliations must not undercut this basic control. Retention of this control by the Commission licensees is required by Section 310(d) of the Communications Act and the Commission’s rules.”

Where networks try to force the affiliates to give up this right the affiliates should be able to have the Commission advise the networks that such demands are improper. The reason why local management needs to be involved is tied to the public interest obligation held by broadcasters. Local management is best equipped to negotiate in the interest of the community that they serve.

3. How would the Most Favored Nations clause work? Who would end up negotiating for a lowest rate? Would there be a two-tiered MFN, a rate for a lifeline tier and a rate for a separate tier that the cable operator could choose from? Would it be fair that one subscriber paid 25 cents for a station through the basic tier with one cable operator and $12 for carriage on a separate tier with another cable operator?

A Most Favored Nations (“MFN”) clause would significantly improve the broadcast station marketplace and ultimately benefit the consumer. However, the petitioners cannot predict how such an MFN would ultimately operate when put into effect. In the end, the logistics of which party would end up negotiating for a lowest rate would not make a difference, so long as the MFN remains an option.

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It would not be fair for one subscriber to pay $0.25 for a station through the basic tier and for another subscriber to pay $12 for a station carried by a different cable operator on a pay-tier. In fact, this disparate treatment is the exact reason why an MFN is so important. So long as the Commission believes that consumers have a right to broadcast programming, consumers located within the same market should not have to pay significantly different rates for the same local programming. To effectuate this position, the MFN should apply wholesale across a market and must be negotiated in the market for either basic tier carriage or pay-tier carriage.

4. Where is the authority for issuance of a regulation that would state that broadcasters would be negotiating in bad faith if they refused to provide the cable operator with a rate for carriage on a pay tier?

In 47 USC §325(b)(3), Congress imposed dual obligations on the Commission. 47 USC §325(b)(3)(A) mandates that the Commission create regulations that 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 prescribed under this subsection do not conflict with the Commission's obligation under Section 623(b)(1) to ensure that the rates for the basic service tier are reasonable.” 47 USC §325(b)(3)(C)(ii) mandates the Commission to create regulations prohibiting broadcast stations “from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.” The first section imposes on the Commission an obligation to regulate retransmission consent regulations to the benefit of consumers in order to ensure that rates for broadcast stations are reasonable. This authority does not conflict with the requirements of 47 USC §325(b)(3)(C)(ii), which only applies to a determination of bad faith. The Commission would not be making a determination that a refusal to offer a price for carriage on a pay tier is an act of bad faith, rather the Commission would find that in order to maintain reasonable rates for broadcast carriage it must mandate that a broadcaster be willing to offer a rate that will minimize, not maximize a subscriber’s bills.

5. What if the Commission only removed the requirement that broadcast stations must be carried on a basic tier?

This would not be sufficient, because cable operators, and especially smaller cable operators, do not have the market power to force broadcast stations to negotiate for carriage on a for-pay-tier. If broadcasters are not required to offer a separate for-pay-tier rate, negotiations would be no different than they are today. Broadcasters would come to the table and refuse to negotiate or threaten to remove their programming if they weren’t carried on the basic tier at their desired rate.

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4 47 USC §325(b)(3)(A).
5 Though this provision previously had an expiration date in 2009, STELA extended the mandate through 2014.
6. How does copyright play into this scenario? Why do the stations have to be placed on a separate tier alone, why not just add them to a tier with cable channels?

Copyright royalty fees are based on the gross receipts derived from all services or tiers that include one or more secondary transmissions of broadcast television signals. So, if a broadcast station were added to the cable tier, the gross receipts applicable to copyright royalty fees would increase exponentially. By including the broadcast stations in a separate pay-only tier, this additional liability would be avoided.

7. Isn’t this just an argument for a la carte carriage of broadcast stations/all services?

There has been no argument for a la carte carriage of broadcast stations. Petitioners have merely asked to be able to place “for pay” retransmission signals on a separate tier. While it may work that the retransmission cost for each broadcast station may become so high and disparate that consumers insist on the right to “buy” only the broadcast stations they desire, such is not the current proposal. It should also be noted that there are very fundamental economic differences between television broadcast stations and cable networks. Television broadcast stations are targeted to very broad audiences and have always stood by themselves economically. The economic model for television broadcast stations has never depended on the viewership of many local stations to support the cost of all stations. Cable networks, on the other hand, are typically niche services. The fact that a cable operator provides programming for varied tastes has been the economic engine for many different networks and types of programming to thrive.6

Please contact the undersigned if you have any questions about these issues.

Very Truly Yours,

Rebecca Jacobs

cc    Marilyn Sonn
      John Flynn
      Nancy Murphy
      William Lake
      Mary Beth Murphy
      Eloise Gore
      Ron Parver
      Diana Sokolow