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The voice of mid-size communications companies

August 13, 2015

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

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

Dear Ms. Dortch:

On August 12, 2015, Genny Morelli and I met with Maria Kirby in Chairman Wheeler's office to discuss the Commission's forthcoming Notice of Proposed Rulemaking ("*NPRM*") reviewing the good faith standard and "totality of the circumstances" test for retransmission consent negotiations.[1] We expressed our support for a number of proposals calling for changes to the good faith rules that have been presented to the Commission in recent weeks, particularly those aimed at limiting program tying and at creating a competitive marketplace for retransmission consent negotiations.[2]

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[1] *See* STELA Reauthorization Act of 2014 ("STELAR"), Pub. L. No. 113-200, § 103(c), 128 Stat. 2059, 2062 (directing the Commission to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations").

[2] *See, e.g.*, Letter from Mike Chappell, on behalf of the American Television Alliance, to Marlene H. Dortch, FCC, MB Docket No. 10-71 (filed July 22, 2015) (advocating that broadcaster practices such as program tying, blocking of online content, limitations on importation of out-of-market signals, and demands for fees for subscribers who do not receive the station as part of their subscription to video service, should be considered a *per se* violation of the duty to negotiate in good faith). *See also* Letter from Samuel L. Feder, on behalf of Cablevision Systems Corporation, to Marlene H. Dortch, FCC, MB Docket No. 10-71 (filed July 31, 2015) (encouraging the Commission to consider tier placement and subscriber penetration requirements as evidence of bad faith to the extent the Commission stops short of taking steps to prohibit program tying). As ITTA previously pointed out, many broadcasters routinely dictate how multichannel video programming distributors ("MVPDs") must package programming in their retail offerings to consumers by including in affiliation agreements provisions that effectively require MVPDs to include the broadcaster's unrelated programming on the basic or expanded basic tier (the most highly-penetrated tiers). *See* Comments of ITTA, *In the Matter of Mediacom Communications Corporation Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728 (filed Sept. 29, 2014) ("ITTA Comments"), at 3. Sometimes this entails a contract provision that expressly requires carriage on either the first or second most highly-penetrated tier. *Id*. In other cases, broadcasters achieve the same result indirectly by incorporating a graduated license fee schedule that imposes a significantly higher charge if weaker programming is not carried on the same tier as more popular programming. *Id*. By employing these and other practices that tie tier placement to subscriber penetration and related metrics, broadcasters make it impossible for an

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In addition, we highlighted a number of other troubling tactics engaged in by broadcasters that target or are particularly problematic for smaller and new entrant MVPDs. These include:

- Manipulating the timing of the initial contract offer to present a last-minute, "take-it-or-leave-it" proposal, which impedes an MVPD's ability to engage in meaningful negotiations, and often causes confusion for subscribers because of the Commission's rules requiring 30 days' notice of programming changes;
- Insisting on non-disclosure provisions that prevent smaller and new entrant MVPDs from pursuing legal or regulatory remedies because of their inability to disclose to regulators the prices, terms, and conditions offered; and
- Engaging in discriminatory pricing against smaller and new entrant MVPDs that is not based on objective competitive marketplace conditions.[3]

Thus, ITTA proposes that the FCC tentatively conclude in the *NPRM* that it is a *per se* failure to negotiate in good faith for a television broadcast station to:

> *Not make its initial contract proposal at least 90 days prior to the existing contract's expiration, which would automatically extend the existing term for 90 days beyond the contract's expiration.*
>
> *Prevent an MVPD from disclosing the rates, terms, and conditions of a contract proposal or agreement to the Federal Communications Commission, court of competent jurisdiction, and/or other state or federal governmental entities in connection with a formal retransmission consent complaint or other legal or administrative proceeding.*
>
> *Discriminate in price among MVPDs in a market unless the broadcaster can demonstrate that there are direct and legitimate economic benefits associated with charging different prices to different MVPDs.*

MVPD to offer programming on a stand-alone basis, on a separate tier, at a certain retail price, or in whatever other manner the MVPD or its subscribers would prefer. *Id.* at 3-4.

[3] It is well settled that programmers charge larger MVPDs less for programming on a per-subscriber basis than smaller MVPDs through volume discounts, which are based on the number of subscribers the MVPD serves. One study indicates that "small and medium-sized MVPDs pay per-subscriber fees for national cable network programming that are approximately 30% higher than the fees paid by the major MSOs." *See* Comments of the American Cable Association, MB Docket No. 07-269 (filed June 8, 2011), at 9. In the experience of ITTA member companies, fees paid for RSN programming in particular are as much as 50% higher for smaller MVPDs than for larger providers. *See* ITTA Comments at 5. This trend of higher programming fees that are inversely proportional to MVPD size extends to broadcast programming, as well. However, program production and acquisition costs are sunk, and the transmission and administrative costs associated with delivery of programming are the same for all MVPDs, regardless of size. *Id*. Thus, volume discounts or other pricing methods that favor larger providers are not reflective of the costs of programming, placing smaller retail video providers at an unreasonable competitive disadvantage vis-à-vis their larger rivals. *Id*.

ITTA also urges the Commission to develop a robust record on other anti-competitive negotiating tactics that lead to higher prices for consumers. Without non-discriminatory access to programming content under reasonable terms and conditions, smaller and new entrant MVPDs face a competitive disadvantage that impedes their ability to compete and/or deters them from entering new video markets altogether. The Commission must address the types of broadcaster behavior identified above to ensure that smaller and new entrant MVPDs can compete effectively in the video distribution marketplace and provide an affordable competitive alternative for video programming subscribers.

Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,

Mel Caldwell

Micah M. Caldwell
Vice President, Regulatory Affairs

cc: Maria Kirby