



February 11, 2016

FILED VIA ECFS

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

RE: Notice of Ex Parte Communication, MB Docket No. 15-216

Dear Ms. Dortch:

On February 9, 2016 the undersigned, Eric Keber and Gerry Duffy representing WTA – Advocates for Rural Broadband (“WTA”), Pat McGowan of Interstate Communications (“Interstate”), and Pat McElroy of Northeast Nebraska Telephone Company (“NNTC”) met with William Lake, Martha Heller, Nancy Murphy, Raelynn Remy, Diana Sokolow, and Steven Broeckaert in the Media Bureau to discuss the Commission’s review of the good faith standard and “totality of the circumstances” test in retransmission consent negotiations.

WTA, Interstate and NNTC discussed the challenges for small rural multichannel video programming distributors (“MVPDs”) negotiating for retransmission consent with local commercial broadcast stations, particularly with local stations affiliated with national broadcast networks. Because WTA members and other small rural MVPDs operate on the sparsely populated peripheries of television markets and generally serve well less than one percent (1.0%) of the households in such markets, they are in a vastly inferior bargaining position vis-à-vis most network affiliates. Because of these disparities, most rural MVPD-network affiliate retransmission consent negotiations occur on a “take it or leave it” basis in which the network affiliate proposes a per-subscriber rate and other terms and conditions which the MVPD has little choice but to accept. NNTC described a recent “negotiation” in which the rate proposed by a local national network affiliate exceeded the rate paid to another network affiliate in the same market which regularly accounted for more than twice the viewership on NNTC’s IPTV distribution system. During this dispute, the affiliate ran screen-crawls throughout the day with McElroy’s name and phone number asking all northeast Nebraska viewers—and not just those subscribing to NNTC’s IPTV service—to call McElroy directly to prevent the affiliate from being removed from NNTC’s system.¹ After attempts to negotiate a rate based on actual viewership data failed to garner any decrease in the proposed rate, NNTC was required to remove the affiliate from its system for nearly nine months until the start of college football season when NNTC reluctantly agreed to the rate initially requested and restored carriage of the network affiliate on its system. WTA highlighted potential consequences of similar circumstances in instances in which retransmission consent agreements contain “most favored nation” clauses that, as a result of the increased fee paid to one station, require increases in fees paid to all stations in the market.

¹ This led to consumers from all over northeast Nebraska and the surrounding areas to call and express concerns that they would be losing access to the network affiliate’s programming despite the fact that they were not NNTC subscribers.

Primarily as a result of “take it or leave it” proposals by local broadcast stations, Interstate and NNTC have seen the aggregate per-subscriber amount of retransmission consent fees paid to local broadcast stations increase exponentially in the last ten years, as shown in the attached graphs. WTA explained that these graphs are generally reflective of increases in retransmission consent fees paid by its members that offer cable and/or IPTV services. WTA also explained that due to non-disclosure and confidentiality provisions contained in these agreements, small rural MVPDs and their representatives have no way to determine if the retransmission consent fees they pay are higher, lower, or comparable to those paid by larger MVPDs such as cable MSOs and national DBS providers. Increased transparency into the marketplace would allow the Commission to determine whether large MVPDs pay significantly less in retransmission consent and other programming fees than small MVPDs negotiating individually or through the same attorney or buying groups to which they might belong.

Regardless of whether there are unjustified disparities in prices paid by large and small MVPDs, it is ultimately consumers who pay for increased retransmission consent fees through increased basic service rates. WTA explained that the vast majority of small providers operate at a loss and have no choice but to pass exponentially increasing retransmission consent and other programming costs onto their customers. Interstate and NNTC both explained that rate increases passed along to their customers in recent years reflect their increased programming costs, with retransmission consent fees accounting for a substantial portion of the increases. WTA explained that some MVPDs see inclusion of “broadcast fees” as an additional line item on customer bills as a way to provide additional transparency for their customers regarding the origin of cable/IPTV rate increases while still complying with their contractual non-disclosure obligations.

WTA, Interstate and NNTC highlighted the existence of provisions in retransmission consent agreements that require carriage of other networks, such as unnamed “new linear cable networks” that might be acquired or created in the future. Such provisions also typically include the requirement that the non-broadcast network be carried on packages with the widest distribution and set a pre-determined rate for the new network. As with broadcast station demands for increased retransmission consent fees, these provisions are non-negotiable in the vast majority of circumstances regardless of whether an MVPD’s customer base desires the new network. Such demands by broadcasters as a condition of granting retransmission consent directly result in larger and more expensive basic service tiers to the detriment of consumers.

WTA and NNTC also pointed out that many rural MVPDs must engage third parties to assist in receiving local broadcast signals at their head-ends as a result of being located at the outskirts of DMA boundaries and broadcast signal coverage areas. This directly results in increased costs for small MVPDs to retransmit broadcast signals (and their customers). WTA’s members have found that local broadcast stations are largely unwilling to consider retransmission consent terms that reflect these increased costs despite the benefits incurred by broadcast stations as a result of small MVPDs retransmitting signals via their cable/IPTV systems into areas in which free, over-the-air signals are unavailable.

WTA, Interstate and NNTC also discussed the fact that small MVPDs have not pursued filing formal complaints with the Commission regarding broadcast station conduct during retransmission consent negotiations primarily due to the cost and the uncertainty regarding how quickly complaints would be addressed. They explained that in many circumstances, the legal costs involved and economic damage from failure to reach agreement (including loss of customers to competing providers) could likely outweigh the benefits of pursuing a complaint at the Commission. Similar concerns are relevant to mandatory mediation or arbitration proposals in the record.

Finally, WTA, Interstate and NNTC discussed ways to slow the rise in increasing retransmission consent fees and other programming costs and increasing consumer choice such as through adoption of a la carte pricing and allowing MVPDs to negotiate for retransmission consent with stations located outside of their assigned DMA,

particularly when rural consumers share a community of interest with more than one DMA. Requiring local broadcast stations to compete for carriage with non-local, but relevant broadcast stations could assist in constraining the unsustainable growth in retransmission consent fees.

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

Sincerely,
/s/ Patricia Cave
Patricia Cave
Director, Government Affairs

cc: William Lake
Martha Heller
Nancy Murphy
Raelynn Remy
Diana Sokolow
Steven Broeckaert