Advocates for Rural Broadband
Paul Kelly
President
Kelly Worthington
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April 25, 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 in MB Docket Nos. 15-216; 16-41

Dear Ms. Dortch:

On April 21, 2016 the undersigned and Gerry Duffy representing WTA – Advocates for Rural Broadband ("WTA") and Jimmy Todd of Nex-Tech met with 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 and other issues faced by small multichannel video programming distributors ("MVPDs") in obtaining rights to carry broadcast and cable network programming.

Nex-Tech discussed its experience negotiating for retransmission consent with local commercial broadcast stations and the challenges that arise in discussions with large broadcast ownership groups in particular. Nex-Tech and WTA explained that many of small providers operate their video businesses at a loss and have no choice but to pass exponentially increasing retransmission consent and other programming costs onto their customers to the extent that customers are willing to pay. Because WTA members and other small rural MVPDs like Nex-Tech 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. As a result, most rural MVPD-network affiliate retransmission consent negotiations are not true negotiations at all, rather they occur largely on a "take it or leave it" basis in which the network affiliate proposes a substantial per-subscriber rate increase and other terms and conditions which the MVPD has little choice but to accept. Small MVPDs have seen per-subscriber retransmission consent fees paid to local broadcast stations increase exponentially from zero in the last ten years. Nex-Tech explained that it did not start paying for retransmission consent until 2008. Mr. Todd also described his experience handling retransmission consent negotiations for another small MVPD in which a network affiliate's opening offer constituted a 700% increase in the current per-subscriber rate.

Nex-Tech and WTA expressed concerns regarding the fact that retransmission consent negotiations increasingly go well beyond carriage of the subject broadcast station to entail demands for carriage of non-broadcast networks, including even unnamed "new linear cable networks" that might be acquired or launched in the future. Such provisions typically include the requirement that the non-broadcast network be included in service packages with the widest distribution and set a pre-determined rate for the unnamed network for the duration of the agreement. As with broadcast station demands for increased cash compensation for the broadcast signal that is the true subject of retransmission consent negotiations, these provisions tend to be non-negotiable in the vast majority of circumstances. Such demands directly result in larger and more expensive "super" basic service tiers to the detriment of consumers.

Broadcasters generally allege that any intervention by the Commission would increase prices and "reduce the flexibility of the parties to reach a mutually acceptable deal."[1] More specifically, Sinclair Broadcasting has alleged that MVPDs "could [offer] alternative value in place of carrying that cable channel, such as additional cash compensation (which [Sinclair] would have considered)."[2] Sinclair also points to the "flexibility provided by combinations of cash and non-cash consideration" and their "vital role in increasing the likelihood of arriving at retransmission consent agreements expeditiously and without service impasses."[3] However, it is illusory to say that an MVPD may offer additional cash compensation to avoid other conditions when the rate demanded by the broadcaster without carriage of the additional network(s) or after-acquired station clauses substantially exceeds the current rate paid by an MVPD to the negotiating broadcast station or any other station in the local market without justification, and the MVPD is unable to make any assessment of the relative value of the bundled offer to it and its customers due to the fact that the non-broadcast network is *unidentified*.[4] The functional result is no choice at all for the MVPD.

Nex-Tech noted that although some small cable systems are able to avoid forced carriage of additional networks due to capacity constraints, such systems often are required to agree to make the changes necessary to accommodate additional networks in the future. Nex-Tech also discussed potential increased equipment and network costs for systems that are not capacity constrained but that might need modifications or investment at the head-end to carry an additional network(s) as a condition of retransmission consent (or as required in agreements with satellite programming vendors). The MVPD could potentially be required to incur expenses for an additional receiver, encoding gear, head-end chassis equipment or possibly a new receiver dish. These additional equipment costs could exceed $20,000. In addition to equipment costs, man-hours are required to procure, receive, install and turn-up each device plus several hours required for system integration for the new equipment. This labor has significant cost that is not taken into consideration during retransmission consent (and satellite programming) agreements requiring carriage of additional networks. Ultimately these costs are borne by the subscribers of small MVPDs, regardless of whether they watch or want to subscribe to the additional network(s).

Broadcast networks and their affiliates appear to believe that "smooth functioning" of the relationship between broadcasters and MVPDs means simply that small MVPDs accept the rates and largely non-negotiable terms dictated by broadcasters, or alternatively that small MVPDs are forced to increase their customer rates significantly in order to retain the rights to retransmit the network affiliates in their market. The Commission's retransmission consent rules must ensure not merely that the parties agree to negotiate, but that the parties enter retransmission consent negotiations with a "sincere desire to reach an agreement that is *acceptable to both* parties[.]"[5] Accordingly, the Commission should amend its rules to include the bundling of broadcast with non-

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[1] *See* Letter from Rick Kaplan to Marlene Dortch at 2 (filed Mar. 14, 2016).

[2] *See* Letter from Rebecca Hanson, Senior Vice President, Strategy and Policy, Sinclair Broadcast Group to Marlene Dortch at 3 (filed March 15, 2016) ("Sinclair Letter").

[3] *Id.*

[4] *See* Southern California Pipe Trades District Council No. 16, 167 NLRB 1004, 1009 (1967) (stating that "the counter proposals advanced by [one party] were so extreme as to preclude a reasonable expectation of acceptance and that the ostensible choice they offered was illusory. In reality, it was no choice at all for the [party advancing the counter proposals] had no intention of deviating from the original provisions embodied in the standard agreement[.]").

[5] Good Faith Order, 15 FCC Rcd 5458, ¶ 32 (emphasis added, footnote omitted). *See* Lathers Local 42, 223 NLRB 37, 42 (1976) (stating that "[t]he law relating to mandatory subjects of bargaining would be meaningless if [a negotiator] were

broadcast programming without providing a real economic alternative as a presumptive violation of the duty to negotiate in good faith.

Nex-Tech also pointed out a substantial portion of rural MVPD customers are unable to obtain viewable and reliable broadcast signals using antennae available off-the-shelf and rely on their local MVPD or national DBS provider to obtain their local news. Nex-Tech also explained 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, including Nex-Tech, have found that despite efforts to address this challenge during retransmission consent negotiations, in the vast majority of instances local broadcast stations are 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.

Nex-Tech then explained the increasingly troubling trend of programmers that offer authenticated online applications to demand per-subscriber compensation based on the number of broadband, rather than video, subscribers an MVPD has. This practice is particularly egregious because Nex-Tech's customers must first subscribe to its video service before obtaining access to the authenticated application, but all of Nex-Tech's broadband subscribers end up bearing the cost whether or not they subscribe to video.

Finally, WTA 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 injection of true market forces into MVPD market. WTA and Nex-Tech also discussed 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. For example, the agricultural community located in Nex-Tech's northwestern Kansas service area bordering Nebraska finds Nebraska-based weather to be most relevant. Nex-Tech described customer complaints received after a recent reconfiguration of the Nielson DMA assignments in which portions of Nex-Tech's service territory that previously received Nebraska stations were reassigned to the Kansas DMA. Requiring local broadcast stations to compete for carriage on rural MVPD systems with non-local, but relevant broadcast stations would allow consumer demand to drive retransmission consent negotiations and 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: Martha Heller
Nancy Murphy
Raelynn Remy
Diana Sokolow
Steven Broeckaert

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permitted to force [the other party] to choose between acceptance of a demand on a nonmandatory subject and an alternative that the [the negotiator] knows the [other party] cannot live with.").