Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Mediacom Communications Corporation, Complainant	)	
v.	)	CSR Nos. 8233-C, 8234-M
Sinclair Broadcast Group, Inc., Defendant	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] hereby submits this reply to certain comments filed in connection with the above-captioned proceedings. Mediacom Communications Corporation ("Mediacom") filed a complaint alleging that Sinclair Broadcast Group, Inc. ("Sinclair") failed to exercise good faith in retransmission consent negotiations, as well as a "Petition for an Emergency Order Granting Interim Carriage Rights." Following the filings, the Media Bureau of the Federal Communications Commission ("FCC" or "Commission") released an order modifying the restricted status of these proceedings and designating them as "permit-but-disclose" under the FCC's ex

[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

parte rules.[2] Several companies, associations, and other organizations have subsequently filed comments or other pleadings referencing these proceedings (the "Outside Commenters").[3]

As discussed further below, NAB believes that the broad arguments made in the comments submitted by those other than actual parties to the instant proceedings are not properly part of these proceedings. Outside Commenters present arguments that are well beyond the scope of the instant proceedings, request relief that cannot be granted in the context of these proceedings, and/or request relief that cannot lawfully be granted by the Commission or its staff under the Communications Act. For all of these reasons, NAB urges the FCC not to consider these arguments and requests for relief. To the extent that the FCC entertains arguments from the Outside Commenters, however, NAB respectfully requests that its comments also be considered as part of the record.

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[2] Public Notice, *Establishment of "Permit but Disclose" Ex Parte Procedures for Mediacom Communications Corporation's Retransmission Consent Complaint and Petition for an Emergency Order Granting Interim Carriage Right*s, CSR-8233-C/CSR-8234-M (rel. Nov. 6, 2009) ("*Ex Parte Status Order*").

[3] *See* Comments of the American Cable Association ("ACA"), CSR-8233-C/CSR-8234-M (Nov. 18, 2009)("ACA Comments"); Letter from Angela Campbell, Counsel for Media Council Hawai'i, and Corie Wright, Counsel for Free Press to Marlene H. Dortch, Secretary, FCC, CSR-8233-C/CSR-8234-M (Nov. 20, 2009); Comments of the National Cable & Telecommunications Association ("NCTA"), CSR-8233-C/CSR-8234-M (Nov. 23, 2009) ("NCTA Comments"); Letter from Kathryn A. Zachem of Comcast Corporation to Marlene H. Dortch, Secretary, FCC, CSR-8233-C/CSR-8234-M (Nov. 20, 2009)("Comcast Ex Parte"); Ex Parte Comments of Time Warner Cable, Inc. CSR-8233-C/CSR-8234-M (Dec. 8, 2009) ("Time Warner Comments"); Letter from David Honig, Counsel for Rainbow PUSH Coalition to Marlene H. Dortch, Secretary, FCC, CSR-8233-C/CSR-8234-M (Dec. 14, 2009); Letter from Stacy Fuller of DIRECTV, Inc., Linda Kinney of DISH Network, LLC, and Elliott Brecher of Insight Communications Company, Inc., CSR-8233-C/CSR-8234-M (Dec. 14, 2009)("DIRECTV, DISH & Insight Ex Parte"); Ex Parte Comments of Suddenlink Communications, CSR-8233-C/CSR-8234-M (Dec. 14, 2009)("Suddenlink Comments").

I. The Issues Raised by the Instant Complaint and Petition Are Best Addressed by the Parties—Not Outside Commenters

In evaluating the merits of the Mediacom complaint, the FCC's task is to determine whether Mediacom has met its burden of proving that: (1) Sinclair has failed to meet an objective list of negotiation standards;[4] *or* (2) given the totality of the circumstances, Sinclair has failed to negotiate in good faith.[5] Commenters without actual knowledge of facts or information concerning the negotiating strategies and behavior of Sinclair or Mediacom with regard to the specific stations and systems at issue cannot inform this decision.

The *Ex Parte Status Order* permitted "*both Mediacom and Sinclair* to make *ex parte* presentations regarding any issue arising under Mediacom's Complaint or Petition for Interim Carriage."[6] Despite this narrow direction, Outside Commenters have attempted to turn the instant proceedings into a broad rulemaking to consider such matters as the FCC's authority to permit multichannel video programming distributors ("MVPDs") to retransmit the signals of television broadcast stations without their consent while a good faith complaint is pending,[7] and various proposals to handicap a broadcaster's ability to negotiate retransmission consent agreements on behalf of multiple stations.[8] None of these issues should be addressed in the context of these

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[4] *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 at 5462-5464 (2000) ("*First Good Faith Order*"); 47 C.F.R. §§ 76.65(b)(1)(i)-(vii).

[5] *First Good Faith Order,* 15 FCC Rcd at 5458; *see* 47 C.F.R. § 76.65(b)(2).

[6] *Ex Parte Status Order* at 2 (emphasis added).

[7] As noted below, and as the FCC has consistently acknowledged, no such authority exists.

[8] Some Outside Commenters even suggest that the FCC should evaluate whether negotiating a retransmission consent agreement on behalf of a station gives an entity

narrowly-defined adjudicatory proceedings. Accordingly, that the wide-ranging requests for investigations, actions, and other relief made by Outside Commenters are misplaced and do not warrant FCC consideration.

II. Granting the "Right" to Carry a Broadcast Signal Without the Broadcaster's Consent is Unlawful and Contrary to the Public Interest

Several parties propose that the Commission permit cable operators to carry a broadcast station while a good faith negotiation complaint is pending.[9] This repetitive argument, which has been offered time and time again by ACA and other MVPDs, has

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"control" of that station. *See, e.g.,* Letter from Angela Campbell, Counsel for Media Council Hawai'i, and Corie Wright, Counsel for Free Press to Marlene H. Dortch, Secretary, FCC, CSR-8233-C/CSR-8234-M (Nov. 20, 2009) at 2; Suddenlink Comments at 5-9. This argument is without merit. In analyzing claims that a licensee has relinquished ultimate control over a broadcast station, in violation of Section 310(d) of the Communications Act, the Commission considers whether the licensee has retained control over the station's programming, personnel and finances. *See, e.g., Hicks Broadcasting of Indiana, LLC,* Hearing Designation Order, 13 FCC Rcd 10662, 10677 (1998). Retransmission consent agreements do not implicate personnel matters, such as the hiring, firing and compensation of employees. The FCC's analysis of control over finances has traditionally focused on whether the licensee or some other party is paying station expenses (e.g., utilities) – a question also unrelated to retransmission consent. Finally, FCC analysis of control over programming relates to whether the licensee maintains ultimate control over what programming the station airs, not whether another party represents a station in negotiating an agreement for MVPD carriage of that station's programming. NAB observes that under the reasoning of these Outside Commenters, a law firm engaging in retransmission consent negotiations on behalf of a client station would be regarded as having gained control of that station – a clearly erroneous position. Not surprisingly, the Outside Commenters raising this issue cite no FCC precedent for the idea that negotiating a retransmission agreement raises issues regarding an unauthorized transfer of control.

[9] ACA Comments at 3-5. *See also*, NCTA Comments at 12; Suddenlink Comments at 14-16; Mediacom Petition for an Emergency Order Granting Interim Carriage Rights. ACA's outline of its proposal reveals its fundamental misunderstanding of how the retransmission regime and the good faith complaint process are intended to work. ACA states that "[d]uring *contested* negotiations, cable operators may file complaints with the Commission over retransmission consent practices …" ACA Comments at 3 (emphasis added). This is a telling reflection of exactly how ACA views the good faith complaint process – as a mechanism for cable operators to exploit if negotiations become contentious, regardless of whether the broadcast station has negotiated in good faith.

always failed because it is plainly unlawful. It is, quite simply, a blatant attempt to skew the negotiation process in favor of MVPDs.

The Commission considered and rejected proposals like this one when it first implemented the good faith negotiation requirement.[10] Allowing carriage of signals without consent would violate Section 325 of the Communications Act and would be inconsistent with the statute's legislative history. Congress granted broadcast stations the right to control others' retransmission of their signals, and to negotiate the terms of such retransmission through private agreements.[11] As the Commission has consistently and correctly concluded, Congress did not intend for it to intrude in retransmission consent negotiations,[12] but for the terms and conditions of carriage to be negotiated by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith. There is nothing in the statute or its legislative history to suggest that Congress intended the Commission to suspend broadcasters' statutory retransmission consent rights for *any* length of time.[13] Any proposal that would place the Commission in the position of enforcing a "status quo" that has not been negotiated by the affected parties

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[10] *See First Good Faith Order* at ¶ 60 ("… we see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission.").

[11] 47 U.S.C. § 325(b). Section 325 of the Communications Act of 1934, as amended, unequivocally states that no MVPD "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station." 47 U.S.C. § 325(b)(1)(A).

[12] *First Good Faith Order,* 15 FCC Rcd at 5450. *Accord Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 3006 (1993).

[13] To the contrary, legislative history of Section 325 demonstrates that Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals" and did not intend the government to "dictate the outcome of ensuing marketplace negotiations." S. Rep. No. 92, 102d Cong., 1st Sess. 1 (1991) at 36.

would directly contravene the statute, its legislative history, and prior Commission decisions.

Grant of the interim carriage proposal would be harmful to the public interest. The proposal would create incentives that are completely counterproductive to the ultimate goal of reaching a retransmission consent agreement. Permitting carriage of broadcast signals pending resolution of every MVPD complaint would give MVPDs the incentive to file complaints, even non-meritorious ones. An MVPD that files a complaint would have no incentive to reach a new agreement, because it would enjoy a government-granted authorization to continue carrying a station's signal on the same terms and for the same compensation, regardless of any changes in marketplace conditions. There is no public interest reason to tilt the negotiation process in such a way. Broadcasters continue to satisfy their statutory obligation to carry out retransmission consent negotiations in good faith, even though, on occasion, certain MVPDs have failed to do so and have abused the good faith complaint process.[14]

Governmental intrusion into the well-functioning free marketplace for retransmission consent would needlessly disrupt a system that has, for years, effectively supplied broadcast programming to MVPD subscribers and enhanced the

[14] *See* NAB Comments in MB Docket No. 07-269 (filed Jul. 29, 2009) at 13-14, citing *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (Cable Bur. 2001)(broadcaster met good faith standard while complaining MVPD was admonished for abuse of Commission processes and lack of candor); *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, DA 07-3 at ¶¶ 6, 24 (Media Bur. rel. Jan. 4, 2007)(holding that broadcaster met good faith standard); *Letter from Steven F. Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable TV*, 22 FCC Rcd 4933 (2007) (cable operator failed to meet good faith standard); *ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, 24 FCC Rcd 1645 (2009)(broadcaster met good faith standard).

quantity, diversity, and quality of available programming.[15] Broadcasters that receive compensation for pay television providers' use of their stations' signals also rely upon this revenue to help finance their operations and programming—the unique mix of news, information and entertainment that meets the needs and interests of their local communities. For all these reasons, the Commission should reject the Outside Commenters' request to tilt the free market for retransmission consent in favor of MVPDs, as such governmental intrusion is not only unwarranted but will ultimately harm the public interest.

III. The Free Market System for Retransmission Consent Does Not Prohibit Negotiations Involving More than One Station, Cable System or Market

Certain Outside Commenters, including ACA, argue that the Commission should "examine the impact of local marketing agreements ('LMAs') and similar agreements that broadcasters utilize and open a proceeding examining their impact on retransmission consent negotiations."[16] Concerns about the relationship between broadcaster agreements and retransmission consent negotiations are misplaced. First, such arrangements are not a new development. The agreements referenced by several

[15] *See, e.g., Retransmission Consent And Exclusivity Rules: Report To Congress Pursuant To Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 220670 ¶ 44 (Sept. 8, 2005) (the current retransmission consent system generates multiple public interest benefits for viewers, broadcasters, and MVPDs and should not be revised); Empiris, LLC, *The Economics Of Retransmission Consent,* Jeffrey A. Eisenach, Ph.D. (Mar. 2009) (filed as Appendix A of NAB Reply Comments in MB Docket No. 07-269 on Jun. 22, 2009)(the retransmission consent process benefits viewers by "enriching the quantity, diversity, and quality of available programming, including local programming," and proposals to modify the system would harm consumers).

[16] ACA Comments at 5. *See also* NCTA Comments at 4-12; Time Warner Comments at 17-18; Suddenlink Comments at 4-9; DIRECTV, DISH & Insight Ex Parte at 2-3; Comcast Ex Parte.

Outside Commenters—LMAs, Time Brokerage Agreements, and Joint Sales Agreements—were in common use when Congress adopted the good faith negotiation requirement, when the Commission adopted its rules implementing the statute, and in each of the previous rounds of retransmission consent negotiations. Yet, neither Congress nor the Commission placed any limitations on the number of markets, systems, or stations that could be simultaneously addressed as part of the same rounds of retransmission consent negotiations. Nor has there been any evidence of a need to do so. The Outside Commenters have presented no legal or economic reason why such limits should exist.[17]

Outside Commenters' arguments that the limited common ownership of broadcast stations or other broadcaster agreements could somehow be "violative of national policies favoring competition" or otherwise anti-competitive simply ring hollow.[18] This is particularly true when cable operators, in contrast to broadcasters, are permitted to combine an unfettered number of systems at the local, regional, and national levels. MVPDs face no limits on clustering of systems, no limits on local, regional or national subscriber share, and no limits on ownership of other communications outlets.[19] Thus,

[17] NAB notes that the Commission has previously declined to approve such requested limitations on retransmission negotiations. As NCTA itself points out, it previously requested the Commission to prohibit agreements that would allow broadcasters to negotiate retransmission consent for more than one station affiliated with a major network in the same market. *See* NCTA Comments at 7 (citing Reply Comments of NCTA in MB Docket Nos. 06-121 and 02-277, filed Jan. 16, 2007). The Commission did not grant this request and there is no reason for the Commission to do so in the instant adjudicatory proceeding.

[18] ACA Comments at 6; NCTA Comments at 10-12; Comcast Ex Parte at 3; DIRECTV, DISH & Insight Ex Parte at 2-3; Time Warner Comments at 16-19.

[19] Unlike broadcasters, MVPDs are free to acquire newspapers, television stations, radio stations, or programming networks without limitations. In contrast, broadcasters face limits on the number of radio stations that can be commonly owned in the same

any "examination" of the alleged impact of LMAs on retransmission consent agreements would only demonstrate that there is no need for FCC intrusion into the congressionally-mandated system of market-based negotiations for retransmission consent.[20]

IV. Conclusion

In the instant proceedings, NAB urges the FCC to continue focusing on the specific facts and circumstances of the retransmission consent negotiations between Sinclair and Mediacom. None of the arguments raised by Outside Commenters are relevant to the current proceedings. Instead, Outside Commenters raise arguments and seek relief that is beyond the scope of these proceedings, and, in some instances, any proceeding, because the relief sought is simply contrary to statute. The FCC's application of the existing good faith standard and relevant precedent to any disputes between MVPDs and broadcasters continues to safeguard against potential abuses, ensuring that disruptions do not occur because of bad faith negotiation. As NAB has repeatedly demonstrated, the public interest is best served by the continued operation of the congressionally established, free market system of negotiations for the rights to retransmit broadcast signals. NAB urges the FCC to continue to reject the repetitive

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market; limits on the number of television stations that can be commonly owned in the same market; a ban cross-ownership of broadcast and newspaper outlets; limits on cross-ownership of radio and television outlets; national limits on television station ownership; and national limits on network ownership (i.e., the "dual network" rule). *See* 47 C.F.R. § 73.3555 (2009); 47 C.F.R. § 73.3555(b)-(d)(2002) (current versions of the local television ownership, the radio/television cross-ownership, and the newspaper/broadcast cross-ownership rules); 47 C.F.R. § 73.658(g) (dual network rule).

[20] If the Commission were ever to examine such issues, it also should consider whether there is any impact on retransmission consent arising from: local and regional MVPD clustering; escalating local, regional, and national MVPD subscriber shares; and/or other forms of horizontal concentration and vertical integration in the MVPD industry.

and baseless claims that the existing retransmission consent rules need to be modified to provide MVPDs an advantage in the retransmission consent process.

Respectfully submitted,

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Certificate of Service

I, Erin L. Dozier of the National Association of Broadcasters, hereby certify that on this 7th day of January, 2010, the foregoing Reply Comments were served by first-class mail, postage paid, on the following:

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