FOX NETWORKS

October 26, 2010

Mr. William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Fox / Cablevision Retransmission Consent Negotiations

Dear Mr. Lake:

Fox Networks Group, for itself and on behalf of Fox Television Stations, Inc., licensee of WNYW, WWOR-TV, and WTXF-TV, would like to take this opportunity to discuss some of the issues raised by Cablevision Systems Corporation in its submission to you of October 25, 2010. In our submission of the same day, we explained how Fox has at all times during its negotiations with Cablevision conducted itself in full compliance with its obligations to engage in good-faith negotiations. In its submission, Cablevision characterizes certain of Fox's negotiations as violations of those obligations. As we explain in the attachment to this letter, Cablevision is incorrect in all instances.

Sincerely,

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I. <u>Fox Has Met Its Good-Faith Obligations; Cablevision's Charges Are Without Merit.</u>

A. Disagreements over price are not bad-faith negotiating.

From the time Fox presented its first proposal with established fair-market rates in May until today, this has been a dispute about price. A fundamental disagreement between parties about the appropriate value of a broadcaster's signals, or what one party is willing to pay for them, does not constitute a lack of good faith.[1] Even with good faith, impasse is possible.[2]

Programming should be priced in proportion to the value it represents and the ratings it achieves. By any such measure, the true value of the Fox programming, at a minimum, supports the stand-alone rate provided at Cablevision's request, as well as the bundled rate offered to Cablevision as early as May 2010. Based on ratings, Fox could command more than twice the price that it is asking.

In its letter, Cablevision makes a number of claims regarding the value of the various proposals offered by Cablevision and Fox. Suffice it to say that there is literally no basis for Cablevision's assertions regarding their increasing value offered to Fox, or the corresponding claim that Fox did not make concessions in its proposals. By way of example, during the course of the negotiations, Cablevision asked Fox to include rates for another network, Fox News Channel, only to trumpet to the press and complain to the FCC that Fox's proposals were increasing instead of decreasing. Similarly, Cablevision's statement that Fox's proposed carriage fees would have nearly tripled the compensation for the Fox stations that it paid in the prior one-year agreement begs the question: Cablevision has never paid Fox cash compensation for its stations, so of course as a percentage valuation, the increase will be substantial.

In fact, Cablevision's offers typically moved backward in terms of compensation or just moved money around rather than moving the ball forward. For example, in one instance, Cablevision tried to offset the RTC rate Fox proposed with a rate for forced tuning that approached very closely the amount Fox proposed. Cablevision also proposed at one point a credit for advertising on the Fox stations that was HALF of their previous commitment, while at the same time asking for credit against RTC for that advertising that exceeded the actual value of the advertising time by 60%. In other words, their commitment to advertise would have gone down, but they would have gotten 60% more value from that commitment than it was actually worth.

Fox's October 25th submission to the Commission accurately represents the course of the negotiations, and demonstrates that Fox has acted in good faith throughout this process.

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1 *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.* DA 07-03, Memorandum Opinion and Order in CSR-7058-C, released January 4, 2007, ¶ 24.

2 *Id.*

B. MFN provisions are an element of a party's determination of its target price and consideration of MFNs cannot constitute bad faith.

Cablevision's argument that price targets associated with "most-favored-nation" clauses are inherently unreasonable is without legal support. MFN provisions have been standard in this industry for years and, in fact, Cablevision itself has uniformly demanded MFNs from programmers for years. MFN clauses are fundamentally price guarantees within a contract. As such, they are factors that will affect the price a party will demand or be willing to pay. The typical MFN does not prohibit a party from entering into a contract with another party that is inconsistent with the guarantee; it merely requires that if a party chooses to accept less for its content, the cost of making good on the MFN guarantee will be part of the equation. Fox, like other programmers, has the right to use its business judgment in determining an acceptable price for its programming, taking into account all factors, including MFNs. Any statement from the Commission disfavoring MFNs – contractual matters that the Commission generally does not entertain[3] – would destabilize the MVPD industry.

Interestingly, there are some FTC consent decrees in which MFN provisions have been mandated as a means of ensuring that the merging parties provide non-discriminatory terms to rivals.[4] For example, the 2001 AOL/Time Warner consent decree (Paragraph II.C) required the merging parties to offer Cable Broadband ISP Service Agreements on non-discriminatory terms, and the 1997 Turner/Time Warner consent decree (Paragraph VI) required Time Warner to make Turner Video Programming available to competing MVPDs on non-discriminatory terms.

C. A three-word statement cannot, without more, constitute a good-faith violation.

Cablevision claims that Fox made a "take-it-or-leave-it" offer because a Fox negotiator used the words, "this is it." A three-word sentence, if it was indeed uttered, does not constitute the "single unilateral proposal" referenced in the Commission's rules.[5] The Commission must take into account the entire context of any statement and the efforts before and after. Furthermore, the Commission's standard does not, in any way, require a broadcaster to reduce the amount of consideration it desires. It only requires broadcasters to be open to discussion of more than one

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[3] Cablevision's only support for its allegations of problems arising from MFNs is a newly filed complaint, *U.S. v. Blue Cross Blue Shield of Michigan*, and a case that recommends case-by-case treatment for MFNs, *U.S. v. Delta Dental of Rhode Island*, 943 F. Supp. 172 (D.R.I 1996) (denying motion to dismiss Section 1 allegations that MFN clause prevented discounting and inhibited entry by lower cost competitors); *see also, Ocean State Physicians Health Plan v. Blue Cross and Blue Shield of Rhode Island*, 883 F. 2d 1101, 1110 (1st Cir. 1989) (finding that the MFN in question did not violate Section 1 or 2 of the Sherman Act because it "was a bona fide policy to ensure that Blue Cross would not pay more than any competitor paid for the same services"); *Blue Cross & Blue Shield United of Wisconsin and Compcare Health Servs Ins. Corp. v. Marshfield Clinic and Security Health Plan of Wisconsin, Inc.*, 65 F.3d 1406, 1415 (7th Cir. 1995).

[4] Consent Order, *In the Matter of America Online, Inc. and Time Warner, Inc.*, Docket No. C-3989, 131 F.T.C. 829, 2001 WL 36166896 (F.T.C. April 17, 2001);Consent Order, *In the Matter of Time Warner, Inc., et al.*, Docket No. C-3709, 123 F.T.C. 171, 1997 WL 33483295 (F.T.C. February 3, 1997).

[5] 47 CFR § 76.65(b)(1)(iv).

form of consideration.[6] Fox has already demonstrated the multiple serious attempts to negotiate in good faith with Cablevision.

D. The timing of RTC negotiations is irrelevant to the good faith rules.

Cablevision next claims that Fox deliberately structured the timing of its agreements so that expiration would coincide with "must see" programming. Nothing in such a tactic would be a violation of good-faith negotiating, and there is no FCC precedent that would support this assertion. Moreover, Cablevision's convoluted argument that the "sweeps" rule supports the notion that other event programming should be considered "unfair leverage" is inapposite, given that the good faith rule does not cite to any other exception. And in any event, if the FCC were to put "off limits" big-event programming on network television under the good faith rule, there would be very few times in the year in which negotiations could be conducted. Given the wide range of highly rated programming that Fox schedules, it would be difficult to find a time when viewers would not be upset by the loss of the Fox stations.

It is also ironic that Cablevision cites the timing of our negotiations as a violation of the good faith rules given that they admit in their letter (Attachment at p. 2) that they sought an extension until mid-November, 2010, which would have been squarely in the middle of the November "sweeps" period.

E. Fox has not violated the "totality of the circumstances" standard.

Cablevision makes several allegations that various elements of Fox's conduct violated the "totality of the circumstances standard." This charge requires a showing of an absence of a sincere desire to reach an agreement that is acceptable to both parties or of outrageous proposals far removed from competitive marketplace considerations. The standard does not reflect commonplace disagreements encountered by negotiating parties.[7] Fox has at all times demonstrated the desire to reach an agreement with Cablevision and has never made outrageous demands. Cablevision is attempting to expand commonplace disagreements into something more.

F. Cablevision's arguments about licenses, waivers and duopolies are a smoke screen.

Cablevision asserts that because Fox has government-granted licenses and media ownership waivers it should be subject to different standards for good-faith negotiation. There is no support for this theory. The responsibility given to a television licensee is one of serving the public through its over-the-air signal, and Fox has continued to provide its signal in the manner required under its license. Even the Commission has reminded Cablevision subscribers that Fox

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6 *Implementation of the Satellite Home Viewer Improvement Act of 1999.* (FCC 00-99, released March 16, 2000) ("SHVIA Order"), ¶ 43.

7 SHVIA Order, ¶ 32.

programs are available over the air, free from monthly charges, through the use of an antenna.[8] The public interest requirements of the FCC have never been extended to *require* broadcasters to reach deals with all MVPDs for retransmission consent, regardless of the price we are offered.

As Cablevision notes, the retransmission consent regime was enacted to preserve local broadcasting. With the challenges facing broadcasters today, that need is more pressing than ever. Fox has been using the rights granted by Congress for their intended purpose. In no way can this be construed as a violation of good-faith negotiation requirements.

Cablevision also alleges that Fox's duopoly and newspaper-broadcast waivers in New York (one of which is temporary) provides Fox with additional negotiating leverage. If the FCC feels a need to look at the relative negotiating leverage of the two parties in this context, it should also look at the properties owned by Cablevision in the New York metropolitan area. Cablevision, in addition to owning the largest cable system in New York, also owns a local newspaper, *Newsday*, along with a free daily newspaper and a weekly shopper publication, regional sports networks *MSG* and *MSG+*, News 12 (including local News 12 operations titled: Connecticut, New Jersey, The Bronx, Westchester, Long Island), and Rainbow Media Holdings, which includes AMC, IFC, Sundance, WE.tv, Wedding Channel, and VOOM HD Networks. Cablevision also owns high-speed Internet and digital voice services which are offered to its New York customers.

G. Bundling does not violate good-faith negotiation obligations.

As part of its proceedings reviewing wholesale bundling practices in 2008, and in the retransmission consent proceeding this year, the Commission received a wealth of information, from Fox and many others, confirming that neither broadcasters nor pay channel owners engage in take-it-or-leave-it bundling arrangements in connection with the licensing of programming.[9] Fox, in particular, explained that it does not compel any MVPD to purchase any broadcast station or cable programming service that the MVPD does not wish to purchase.[10] Rather, Fox makes all of its programming services available for purchase to all MVPDs – both large and small – on a stand-alone basis, and always offers MVPDs reasonable rates, terms and conditions in exchange for carriage.[11] Fox also offers MVPDs the opportunity to purchase more than one of its programming services as part of an economically efficient package that reduces transaction costs for both parties. This is also true in connection with this negotiation.

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8 *See* http://reboot.fcc.gov/cablevision-fox-dispute

9 *See In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007); *see In re Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, DA 10-474 (filed Mar. 9, 2010).

10 *See* Comments and Reply Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket No. 07-198 (filed Jan. 4 and Feb. 12, 2008) ("Fox Wholesale Bundling Submissions").

11 *See id.*

In particular, as Fox's comments in that proceeding indicated, the marketplace permits both MVPDs and programming vendors to negotiate mutually beneficial carriage arrangements that provide value to both parties. These negotiations often result in MVPDs electing to purchase broadcast and cable programming services in packages of channels sold together. Far from being forced to accept these packages, most MVPDs actually prefer to purchase multiple channels at once, both because they can achieve transaction cost savings and because they have long recognized the benefit of offering their subscribers packages of program channels. Programming vendors seeking to increase distribution of their video services also offer MVPDs economic and other incentives to purchase multiple channels. These incentives, ranging from volume discounts to cash payments in the form of marketing support, foster competition and generate benefits for consumers.[12]

II. The Commission Does Not Have the Authority to Order Interim Carriage or Arbitration.

Cablevision claims that submission to binding arbitration is required for good-faith negotiating. This is simply and clearly not the law. The Commission has itself noted, in several instances, that it does not have the authority to order parties to engage in binding arbitration.[13] Cablevision now suggests that the Commission can change that precedent through a creative use of policy and logic. Clearly, the FCC does not have the latitude to change the law based on Cablevision's "theory" about what the good faith rules SHOULD require.

As to requiring Fox to put its signal back on Cablevision without cash compensation and without an agreement in place, any government action that forces a program supplier to provide its valuable content without its consent and just compensation would constitute both a violation of the First Amendment and a "taking" under the Fifth Amendment. The Commission cannot mandate carriage of a broadcaster's signal without its consent. Cablevision's affiliate, Madison Square Garden, actually made a similar argument earlier this month in defending itself against a program access complaint filed by Dish Network L.L.C. On Oct 12, 2010, Madison Square Garden asserted that it would be a violation of its First Amendment rights for the FCC to require Cablevision to "provide *MSG and MSG+* on a stand alone basis.[14] Furthermore, Section 325(b)(1) of the Act specifies that no MVPD "shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station . . . ."[15] For Cablevision now to argue in favor of the FCC requiring Fox to continue to provide Cablevision its stations is hypocritical at best.

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12 *See generally*, Fox Wholesale Bundling Submissions.

13 *Jorge L. Bauermeister*, 22 FCC Rcd. 4933 (2007) *see also*, 5 USC 575(a)(3) (an administrative agency "may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.").

14 Answer of Madison Square Garden Inc. and Madison Square Garden, L.P. to Dish Network L.L.C. Program Access Complaint, File No. CSR-8367-P, October 12, 2010.

15 47 U.S.C. § 325(b)(1).

Cablevision's reliance on *Southwestern Cable* and *Sky Angel* is misplaced. The Commission itself has recognized, contrary to Cablevision's assertion, that Congress took vastly different approaches to the regulation of pay channels commonly owned with an MVPD and the regulation of broadcast signals under retransmission consent. In particular, in the *Good Faith Order*, the FCC cited to Section 628 of the Act in observing that "when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity."[16] For that reason, the FCC has rejected MVPDs' previous requests for standstill relief in connection with retransmission consent, finding that the constraints of Section 325 of the Act "unambiguous[ly]" foreclose a retransmission standstill requirement.[17] The Commission added that it has "no latitude . . . to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending . . . where the broadcaster has not consented to such retransmission."[18]

In *Southwestern Cable*, a case that preceded the passage of Section 325 of the Act by 25 years, the Supreme Court sanctioned the Commission's use of ancillary authority to order a standstill that preserved the status quo, which in that case served to continue to *prevent* an MVPD from carrying a programming service.[19] The Court did not bless an FCC mandate to affirmatively order carriage, and the Court certainly did not endorse a carriage mandate that would ignore countervailing statutory language (such as Section 325).[20] Moreover, in *Sky Angel*, the FCC made clear that its ability to act on a programming service standstill petition was limited to "program access cases," for which the Commission has Section 628 to use as the hook for its invocation of ancillary authority.[21] Put simply, in light of Section 325 of the Act, neither *Southwestern Cable* nor *Sky Angel* can serve as the basis for a temporary standstill requirement, nor can they support Cablevision's effort to create for the Commission plenary authority to impose standstills when none exists.

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16 *Good Faith Order*, 15 FCC Rcd at 5455.

17 Good Faith Order at 5471. Furthermore, "[d]espite the arguments of the satellite industry and other MVPDs, [there is] nothing supporting a construction of" the Act "that would grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions . . . of the Communications Act." *Id.* at 5455.

18 *Id.* at 5471. Indeed, when it has exercised its limited statutory right to intercede in the video programming marketplace, the Commission has gone out of its way to emphasize the narrow scope of its actions. For example, in imposing the new standstill rule for pay channels in the *2010 Program Access Order*, the FCC said that "[t]he specific procedures adopted herein *only apply to requests for a standstill involving program access complaints* . . . ." *See 2010 Program Access Order*, 25 FCC Rcd at 794 (emphasis supplied).

19 *See Southwestern Cable Co.*, 392 U.S. at 178-179.

20 *See id.*

21 *Sky Angel*, at ¶ 6, n. 31. As the D.C. Circuit has made clear, the "Commission may exercise this 'ancillary' authority only if it demonstrates that its action . . . is 'reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.'" *Comcast Corp. v. FCC*, 600 F. 3d 642, 644, 653 (2010) ("ancillary authority is really incidental to, and contingent upon, *specifically delegated powers under the Act*") (internal citations omitted) (emphasis in original). Section 325 provides no comparable hook on which the FCC could hang ancillary jurisdiction for the imposition of a standstill requirement in retransmission consent negotiations; indeed, a standstill would be flatly inconsistent with Section 325.

Unfortunately, Cablevision has been spending valuable time arguing to Fox, the Commission, Congress, and the press about arbitration rather than sitting down at the table and negotiating. Fox has provided a clear explanation for why it does not wish to participate in arbitration. That explanation, in itself, is a hallmark of good-faith negotiating.[22]

III. Conclusion.

Cablevision's assertions that Fox has been operating in violation of the FCC's good faith rule should be dismissed. Once Cablevision realizes that it has to negotiate with Fox, rather than the government, they will hopefully come back to the table and begin negotiating again in earnest.

[22] 47 CFR § 76.65 (b)(1)(v).