

September 28, 2016

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

Re: Notice of Communication During Sunshine Period
MB Docket No. 16-42, CS Docket No. 97-80

Dear Ms. Dortch:

This letter is being filed in compliance with 47 CFR Sections 1.1203(a)(1) and 1.1204(a)(10)(iv).

On September 28, 2016, Kyle Dixon of Time Warner Inc., Susan Fox and Richard Bates of The Walt Disney Company, Kim Hulsey of Scripps Networks Interactive, Anne Lucey of CBS Corporation, Keith Murphy of Viacom Inc., and Jared Sher of 21st Century Fox, Inc., had a conversation via telephone with Marc Paul, Legal Advisor to Commissioner Jessica Rosenworcel. Mr. Paul reached out to arrange the call, in order to ask for clarification about an ex parte filed by the programmer representatives on September 22, as provided for in 47 CFR Section 1.1204(a)(10).

During the call, Mr. Paul asked the programmer representatives to clarify the extent to which they previously had represented their legal concerns with a regulatory construct by which the Commission would assert the ability to review and/or alter the provisions contained in the third-party license that is anticipated to be created as part of the proposal currently being considered by the Commission. The programmer representatives reiterated their statement contained in their September 22 ex parte that the Commission should refrain from exercising any and all form of oversight or review over the terms and conditions of any license that results in the distribution of content, including any license with device manufacturers and online platforms. We added that such legal concerns extend to Commission or Bureau-level review of third-party license terms for any reason, to any adjudication or complaint processes governing the third-party license, and to any advance proscriptions by the FCC, including any general standard of review applicable to the terms of the third-party license or any advance proscriptions of the terms that would be permitted to be included in the license negotiated by MVPDs and programmers.

In short, the programmer representatives emphasized that any involvement of any type by the FCC or any party other than MVPDs and programmers that would affect

(through oversight, review, enforcement, or other action) the terms and conditions of the license is legally and practically untenable. The programmer representatives explained their earlier-stated legal position that any other alternative would create an end result in which programmers would be forced to distribute content on terms or conditions to which programmers do not agree and that would be tantamount to a compulsory copyright license, which the Commission lacks authority to impose.

The programmer representatives also responded to questions from Mr. Paul about the two-year period discussed in their September 22 ex parte. The programmer representatives explained that, as stated in their earlier ex parte, to the extent that the Commission has any residual concern about the development of the app marketplace absent FCC oversight over the terms and conditions of licenses, the FCC could consider establishing a period of time (i.e., two years) after any required app launch deadline to conduct a reevaluation of the marketplace, i.e., 2020. This would allow the app market to develop and function and, if necessary at the conclusion of that period, enable the Commission to assess whether any additional steps – consistent with its authority – should be taken. During that period, we again discussed that the FCC would otherwise expressly decline to entertain complaints regarding the terms and conditions of license.

This letter is being submitted electronically in the above-referenced dockets, as stated above in compliance with 47 CFR Sections 1.1203(a)(1) and 1.1204(a)(10)(iv). Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,



Susan Fox

cc: Marc Paul