

January 19, 2021

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: *Ex Parte* Communication in MB Docket Nos. 10-71, 13-236, 14-261, 18-349; GN Docket No. 16-142.

Dear Ms. Dortch:

On January 14, 2021, Ross Lieberman of ACA Connects—America’s Communications Association and outside counsel Michael Nilsson met with Tyler Bridegan of Commissioner Simington’s office to discuss issues related to media consolidation and retransmission consent.

Mr. Lieberman and Mr. Nilsson described the tremendous and growing consolidation in the broadcast industry. This includes both national consolidation (in part because the so-called “UHF discount” to the FCC’s national ownership cap remains on the books) and local consolidation (in part because of loopholes to the FCC rules limiting local broadcast ownership)¹. The result of this consolidation: while locally operated ACA Connects members used to deal with *local* general managers from *local* stations, they now deal almost exclusively with corporate representatives of huge station conglomerates operating out of distant headquarters.

This ongoing transformation of the broadcast television industry from something truly local to something more corporate in nature raises any number of issues for policymakers. Some of these relate to retransmission consent.

- ***High and increasing prices generally.*** The Commission just released a report showing, in 2019, that cable operators paid more than \$5.5 billion dollars in retransmission consent fees.² This represented a 19.2% increase over fees paid the previous year at a time when the general rate of inflation, as measured by the Consumer Price Index, was 2.5%.³ This data comes from 2019. Yet the anecdotal evidence we have received from ACA Connects members who renegotiated their deals last year suggests that broadcasters

¹ Comments of the American Television Alliance, MB Docket No. 18-349, at 2–3, 21–25 (filed Apr. 29, 2019).

² *Communications Marketplace Report*, 2020 Communications Marketplace Report, FCC No. 20-188, GN Docket No. 20-60 (rel. Dec. 31, 2020) (“*2020 Marketplace Report*”).

³ *Id.* ¶ 234.

continue to demand high and increasing prices. This anecdotal evidence corresponds with analyst reports about the market.⁴

- ***Even higher and more quickly increasing prices for small cable operators.*** The report also showed that smaller cable operators were disproportionately harmed financially by retransmission consent. Small cable operators paid on average \$178.13 per subscriber, per year in retransmission consent payments, while large cable operators paid on average \$124.67 per subscriber, per year.⁵ In other words, small cable operators paid on average at least 43% more than larger operators—a number that almost certainly underestimates the true disparity between smaller and larger operators.⁶ And, according to the FCC, the disparity between small and large cable systems is only getting larger.⁷

⁴ Mike Reynolds, *Broadcaster, Cable Providers Face Carriage Deadlines as 2021 Approaches*, S&P Global: Market Intelligence (Dec. 30, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/broadcasters-cable-providers-face-carriage-deadlines-as-2021-approaches-61928697> (“Based on analysis of 12 publicly traded U.S. TV station groups, Kagan, a research unit within S&P Global Market Intelligence, [estimates](#) that retrans fees have grown at a double-digit clip in 2020. Kagan pegged the average third-quarter retrans-per-sub rate as \$2.31 per subscriber on a station/network basis and \$2.96 per sub on a market-level basis. Gauged on a year-to-date basis, retrans-per-sub average rates grew 19.1% to \$2.23 per subscriber on a station/network basis and grew 19.3% to \$2.86 on an owner/market basis.”).

⁵ *2020 Marketplace Report* ¶ 234.

⁶ As ACA Connects has observed previously, the Communications Marketplace Report does not control for the number of retransmission consent stations carried by a particular cable system. Smaller cable systems likely carry fewer retransmission consent stations because there are fewer such stations in rural areas. This means that, if such a small cable system pays the same as a larger cable system *in total*, it pays more *per station*. See Letter from Brian Hurley to Marlene Dortch, MB Docket No. 20-60 (filed June 30, 2020) (containing attachment from Professor William Rogerson of Northwestern University explaining the need for the Communications Marketplace Report to control for the number of retransmission consent stations carried per system).

⁷ An earlier report only presented data on retransmission consent fees broken down by size of the cable *system* but not by size of the *operator*. *Communications Marketplace Report*, Report, FCC No. 18-181, GN Docket No. 18-231, ¶¶ 70–75, (rel. Dec. 26, 2018). In comments on the 2020 Report, ACA explained to the Commission that, since retransmission consent contracts are generally negotiated at the operator level, a more accurate measure of the magnitude of the disparity of fees could be obtained by providing a breakdown of fees paid by size of operator instead of size of system. Comments of ACA Connects—America’s Communications Association, GN Docket No. 20-60, at 9–11 (filed Apr. 27, 2020). The 2020 Report presents data on fees broken down by operator size and this is the data discussed above. The 2020 Report also presents data broken down by system size and this data in the 2020 Report can be compared to the corresponding data in the 2018 Report to determine how the magnitude of the problem has changed since the last report. According to the 2018

- **Increased blackouts.** In 2019, broadcasters blacked out their signal 219 times. In 2020, the figure grew to an astounding 342 times. In other words, on nearly 350 occasions last year, cable and satellite subscribers who had done nothing wrong lost access to local news and network programming, just so the largest broadcasters could serve their bottom line. These blackouts involved not only the largest providers, like Comcast, DIRECTV, Charter, and DISH, but also harmed ACA Connects Members BOYCOM Vision, NNTV, Mediacom, TDS, GCI, Shentel, WOW! Cable One/Sparklight, and others. As of this writing, it will take a while before we learn the results of these blackouts against smaller operators and the ultimate impact on their subscribers.

There were, however, two bits of good news. First, this year marked the first set of retransmission consent negotiations conducted after passage of the Television Viewer Protection Act of 2019 (“TVPA”), which the FCC implemented last year.⁸ The TVPA requires large TV station ownership groups to negotiate retrans in good faith with buying groups like the National Cable Television Cooperative (NCTC). ACA Connects members tell us NCTC was able to conclude retransmission consent deals with most (but not all) of the large broadcast groups that TVPA is supposed to cover. Make no mistake, the broadcasters still have an incredible amount of leverage and the terms and conditions of these deals were not great for the small cable operators opting into them. But those deals involved lower transaction costs than individual negotiations would have had. And, hopefully, they resulted in lower rates than individual negotiations would have produced.

Second, the Commission at long last began to enforce its good-faith negotiation rules in a meaningful way. It proposed nearly \$10 million in fines against Sinclair sidecar stations for failing to negotiate in good faith.⁹ And it required Sinclair itself to pay \$48 million in fines and institute a compliance plan for violations including failing to negotiate in good faith.¹⁰ We hope that this will encourage broadcasters to take their obligations more seriously in the future.

Mr. Lieberman and Mr. Nilsson also discussed a variety of potential steps the Commission can take to help address concerns about broadcast consolidation and retransmission

Report, small cable systems (defined to be those serving fewer than 10,000 subscribers) paid 32% more in retransmission consent fees per subscriber than did large cable systems (defined to be those serving more than 75,000 subscribers). According to the 2020 Report, the magnitude of this disparity has increased to 37%.

⁸ *Implementation of Section 1003 of the Television Protection Act of 2019*, Report & Order, FCC No. 20-63, MB Docket No. 20-31 (rel. May 13, 2020).

⁹ *DIRECTV et al. v Deerfield et al.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, FCC No. 20-122, MB Docket No. 19-168, ¶¶ 61–83 (rel. Sept. 15, 2020).

¹⁰ *Sinclair Broadcast Group*, Order, FCC No. 20-59, File No. EB-IHD-16-00021748, ¶ 1 (rel. May 22, 2020).

consent. Such solutions could, for example, relate to the national ownership cap,¹¹ the local ownership rules,¹² retransmission consent generally,¹³ the “totality of the circumstances” test for good faith negotiation,¹⁴ the ATSC 3.0 television format,¹⁵ or the proceeding seeking to define the term “multichannel video programming distributor.”¹⁶

I will file a copy of this letter in each of the dockets listed above. Should you have any questions regarding it, please contact me.

Respectfully submitted,



Michael Nilsson
Counsel to ACA Connects

Cc: Tyler Bridegan

¹¹ *Amendment of Section 73.3555€ of the Commission’s Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, FCC No. 17-40, MB Docket No. 13-236 (rel. Apr. 21, 2017).

¹² *2018 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, FCC No. 18-179, MB Docket No. 18-349 (rel. Dec. 13, 2018).

¹³ *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, Public Notice, DA No. 10-474, MB Docket No. 10-71 (rel. Mar. 19, 2010).

¹⁴ *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, Notice of Proposed Rulemaking, FCC No. 15-109, MB Docket No. 15-216 (rel. Sept. 2, 2015).

¹⁵ *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report & Order and Further Notice of Proposed Rulemaking, FCC No. 17-158, GN Docket No. 16-142 (rel. Nov. 20, 2017).

¹⁶ *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, FCC No. 14-210, MB Docket No. 14-261 (rel. Dec. 19, 2014).