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April 3, 2017

***Via ECFS***

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: American Cable Association Notice of Ex Parte Presentation; Implementation of Section 103 of the STELA Reauthorization Act; Totality of the Circumstances Test, MB Docket No. 15-216; Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard, GN Docket No. 16-142; Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41**

Dear Ms. Dortch:

On March 30, 2017, Ross Lieberman, Senior Vice President, Government Affairs, American Cable Association ("ACA"), Mary C. Lovejoy, Vice President of Regulatory Affairs, ACA, Elizabeth Cuttner, Cinnamon Mueller, the undersigned, and representatives from five ACA member companies met with the following members of the Media Bureau: Michelle Carey, Acting Bureau Chief, Mary Beth Murphy, Deputy Chief, Martha Heller, Chief, Policy Division, Brendan Holland, Chief, Industry Analysis Division, and Brendan Murray, Assistant Policy Division Chief. Later, they met with Alison Nemeth, Acting Media Advisor to Chairman Pai.

The ACA members in attendance were:

- Susan Daniel, Vice President, Horizon Cable
- John Higginbotham, Assistant General Manager – Cable/Telecom, Frankfort Plant Board
- Leslie Brown, Sr. Vice President and General Counsel, Atlantic Broadband
- Sara Cole, Regulatory Counsel, TDS Telecom[1]
- John Conrad, Vice President, General Counsel, Liberty Puerto Rico

During the meetings, ACA member companies provided data and information about the practices of broadcasters and cable programmers to force them to carry broadcast signals and cable networks that they do not wish to carry and their customers do not wish to receive, including low-rated primary and multicast broadcast signals and cable programming networks. They explained how forced bundling and related negotiating practices cause substantial problems in various ways for operators, particularly for capacity-constrained systems and resource-constrained operators. It prevents many from carrying independent and diverse programming and inhibits them from providing higher speed broadband to their customers and to deploy these services into unserved areas. Moreover, it forces operators to sell expensive video

[1] Ms. Cole did not participate in the meeting with Alison Nemeth.

programming packages that are bloated with unwanted programming to many customers looking for lower priced options.

**Broadcasters and Cable Programmers Force Bundle**

Each ACA member company affirmed that broadcasters, particularly large broadcast station groups, have forced them to carry undesired primary and multicast broadcast signals and other cable programming networks in retransmission consent negotiations. They also conveyed how the nine largest programming conglomerates force carriage of unwanted cable programming networks. These broadcasters and cable programmers are able to force carriage of their low-rated programming by making carriage of such programming a condition of an MVPD's ability to carry their higher-rated programming. Broadcasters and cable programmers are particularly successful in forcing carriage against smaller MVPDs because these broadcasters and programmers are not materially impacted by not reaching a carriage deal, whereas smaller MVPDs are significantly harmed.

Mr. Higginbotham, for example, described how Frankfort Plant Board ("FPB"), a municipally owned provider with 14,000 video subscribers located around the Kentucky state capital area, faces forced bundling. In one instance Mr. Higginbotham described, FPB was forced to agree to carriage of a yet-to-be launched channel in a retransmission consent agreement that was "to be determined." Later, FPB received notice that the channel requiring carriage was actually named "TBD," confounding FPB and its subscribers alike. Atlantic Broadband owns cable systems in both rural and urban areas, including the northeast and in the Miami, Florida area, serving approximately 240,000 video and broadband subscribers. Ms. Brown affirmed that like FPB, Atlantic Broadband has been forced to carry prospective programming channels – that is, programming networks or stations that are either unlaunched, unidentified, or after-acquired or managed. Ms. Cole likewise explained how broadcasters require TDS Telecom, which operates cable systems in the southwest and Oregon serving approximately 99,000 video subscribers, to take additional channels to obtain retransmission consent for a Big Four network affiliate, including agreeing to carry an unknown station to be named later as a condition of retransmission consent.

Ms. Daniel and her husband own and operate Horizon Cable, a small cable and broadband provider in the San Francisco television market, serving coastal communities just north of the city with just under 1,000 video subscribers. Ms. Daniel noted that the tenor of retransmission consent negotiations has changed greatly since the first cycle in the mid-1990s, when local station general managers did the negotiations and treated cable operators more like partners, even when the station owner was a far larger entity than the cable operator. Today, Horizon does none of its negotiations with local station general managers.[2] In the San Francisco television market, each major television network owns a Big Four station and a "Little Two" station and demands carriage of the lesser stations as a condition of retransmission consent for the Big Four station. Although the parties have back-and-forth discussions about the network's demands, Horizon must accept them because the vast size difference between the networks and Horizon means the networks can survive without a deal whereas Horizon cannot. In one case, it was forced to not only launch new channels, but also accept an 85 percent increase in rates over the three-year term of the agreement and rearrange channel line-up and tiers.

[2] Other ACA members, including Mr. Higginbotham and Mr. Conrad, of Liberty Puerto Rico, also expressed frustration with having to negotiate with remote and disconnected representatives of corporate conglomerates, who do not take the needs of the local communities operators serve into consideration when making carriage demands.

ACA members reported that cable programmers also routinely bundle "must have" with less desired programming networks. For instance, Ms. Brown described how Atlantic Broadband is routinely required to carry programming networks that subscribers do not want, generally presented from the outset as non-negotiable requirements, in order to maintain carriage of "must have" programming.[3]

**The Impact of Forced Bundling**

ACA representatives stressed that for most ACA members, forced bundling eats up scarce bandwidth and limited budgets that could be put toward better purposes, like carrying independent and diverse programming and upgrading existing broadband networks and deploying broadband into unserved areas. These problems are particularly troublesome for capacity constrained systems for which several members shared their experience.

Mr. Higginbotham explained that FPB had undertaken system upgrades to expand capacity several years ago, but is again facing severe capacity constraints, leaving the operator with only six remaining QAM channels. He said vast amounts of FPB's available capacity is eaten up by carriage of unpopular broadcast HD and SD channels and multicasts that were forced upon him. To accommodate the demands of one large affiliate group, FPB had to collapse two local origination channels down to one to make room for broadcasters' multicast carriage demands. These demands have also eaten into FPB's financial resources, such that Mr. Higginbotham has less capital to invest in its broadband offering, which customers are actively demanding, or to carry more independent programming.

Ms. Brown explained how Atlantic Broadband serves different geographic markets with different demographics,[4] and that forced bundling prevents the company from carrying programming of interest to each of its demographics. She explained that in order to secure carriage of a broadcast network they considered "must have" for their Miami system, for example, Atlantic Broadband was required to agree to relaunch the network in its Connecticut market, where it had been previously carried and later dropped without any negative customer feedback, and to launch a less popular network owned by the programmer in all of its markets. In addition, Atlantic Broadband was saddled with a minimum penetration obligation that required Atlantic Broadband to pay per subscriber carriage fees for the majority of its customers who are unlikely ever to watch the programming. Ms. Brown noted that most of Atlantic Broadband markets are rural, so Atlantic Broadband would have preferred to use its constrained channel capacity and programming budget for better-suited channels, such as RFD TV, MAV TV or Outside Television, which appeal more strongly to the demographics in those markets, or to increase the total number of HD channels offered, which currently sits below competitive standards of 150 HD channel offerings or more.

Ms. Brown also described how capacity constraints compound the problem of forced bundling. More than half of Atlantic Broadband's systems are at 750 MHz of capacity or less, which inherently limits the number of networks they can carry. She explained that Atlantic Broadband does not impose data caps and needs to continuously expand bandwidth allocated to high speed data to keep pace with increased data usage and customer demands for increased speeds. Primarily to meet their broadband customers' demands, Atlantic Broadband

[3] In 2017 alone, Atlantic Broadband will have to add five new bundled networks, which will cost nearly $3 million in increased license fees over the next five years.
[4] Atlantic Broadband has systems located in rural parts of Pennsylvania, the northeast, and South Carolina, in addition to its Maryland, Delaware, Connecticut, and Miami Beach systems.

has been investing in upgrading its lower bandwidth systems to make more bandwidth capacity available.[5] Existing and increasing forced bundling demands interfere with these efforts.

Ms. Cole highlighted the situation TDS Telecom is facing with its Bend, Oregon system. In 2009, when the system went from analog to digital, the focus was on growing its HD offerings to compete with the direct broadcast satellite providers. Now, however, the system's capacity is fully utilized while broadband demand continues to grow. To grow capacity, the system would need to reduce its channel line-up. Alternatively, she explained the system can grow capacity by upgrading from an 870 MHz system to a 1G system, which is cost-prohibitive, or make the transition from MPEG2 to MPEG4, which is a time consuming (a multi-year process) and extremely expensive as it requires deployment of numerous set-top boxes as well as headend changes.

Mr. Conrad explained that Liberty Puerto Rico has adequate capacity in its systems, but forced bundling eats up its limited programming budget and thrusts unwanted costs upon its low-income customers.[6] For Liberty, bundling is primarily a budgetary and customer satisfaction problem. Mr. Conrad stated that Liberty knows what residents of Puerto Rico want in terms of programming choices, but faces an uphill battle to give it to them due to bundling demands by large programming conglomerates. Liberty's efforts to create alternative, more economical programming tiers composed of core and diverse programming, with optional genre, add-on, mini-packages for customers to choose from have been thwarted by the lack of flexibility on the part of large programmers with respect to the placement of their bundled services. Strict minimum carriage requirements for most of the bundled services also have hindered Liberty's ability to market this alternate tier. Mr. Conrad noted that at a time when consumers have a growing array of online video choices, continued inflexibility on the part of programmers will make it impossible for smaller operators to stay in the video business. Liberty and several of the other operators affirmed that although their video service is under great pressure, the traditional, linear multichannel video service remains an important offering for many small operators, particularly those serving an older and fixed-income demographic.

* * *

These and other ACA members continue to invest in high-performance communications networks in order to provide advanced services that are responsive to community needs and consumer desires in a cost-effective, consumer friendly manner, while having to contend with sharply escalating retransmission consent costs and threats of blackouts, unreasonable bargaining demands, and decreasing demand for traditional multichannel video service. Despite facing a very broken video programming marketplace and severe video margin compression, video continues to form an essential component of most ACA members' triple-play offerings and ability to attract subscribers in a competitive marketplace.

Action by the Commission in the problem areas discussed at the meeting can greatly improve the negotiating environment in which they operate and improve outcomes for operators

[5] Even without speed increases, Ms. Brown explained its broadband service is taking seven times more capacity now than in the past due to increased customer streaming, gaming and on-line usage.
[6] In response to questions from Media Bureau staff, some ACA members, such as FPB, which as a municipally-owned provider is subject to rate hearings, indicated they pass broadcast programming prices through in their entirety to their subscribers, while others, such as Horizon, absorb whatever portion of the increases they can out of whatever small cash flow is generated by their video service, while some of the inevitable rate increases may be cross-subsidized by subscribers to their broadband service.

and consumers alike.[7] In closing, in response to a question by Ms. Nemeth, Mr. Lieberman explained that the Commission should take account of the extent to which broadcasters and programmers force bundle in the market today, and should the Commission permit broadcasters to transition to the new ATSC 3.0 transmission standard, it should require separate retransmission consent negotiations for a station's ATSC 1.0 and 3.0 signals so that negotiations for ATSC 3.0 signals are based upon the value that carrying such ATSC 3.0 signal brings to operators and their subscribers rather than the importance of the continued carriage of ATSC 1.0.[8] Moreover, the Commission should address forced bundling as part of its examination into impediments to carriage of diverse and independent programming.[9]

If you have any questions, or require further information, please do not hesitate to contact me directly.

Sincerely,

Barbara Esbin

Barbara Esbin
*Counsel to the American Cable Association*

cc: Michelle Carey
Mary Beth Murphy
Martha Heller
Brendan Holland
Brendan Murray
Alison Nemeth

[7] ACA has proposed specific reforms the Commission can make to improve the negotiating environment in several pending proceedings. *See Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the American Cable Association (filed Dec. 1, 2015); Reply Comments of the American Cable Association (filed Jan. 14, 2016); *Media Bureau Seeks Comment on Joint Petition for Rulemaking of America's Public Television Stations, the AWARN Alliance, the Consumer Technology Association, and the National Association of Broadcasters Seeking to Authorize Permissive Use of the "Next Generation TV" Broadcast Television Standard*, Public Notice, Comments of the American Cable Association (filed May 26, 2016); *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Comments of the American Cable Association (filed Jan. 26, 2017) ("ACA Independent Programming Comments); Reply Comments of the American Cable Association (filed Feb. 22, 2017) ("ACA Independent Programming Reply Comments).

[8] *See* Letter from Mike Chappell, Executive Director, American Television Alliance, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142 (filed Mar. 20, 2017).

[9] *See* ACA Independent Programming Comments at 2-10; ACA Independent Programming Reply Comments at 3-6.