CINNAMON MUELLER

BARBARA S. ESBIN
Admitted in the District of Columbia
besbin@CinnamonMueller.com

WASHINGTON, DC
1875 Eye Street, NW
Suite 700
Washington, D.C. 20006

direct: 202-872-6811
fax: 202-683-6791

ST. LOUIS
1714 Deer Tracks Trail
Suite 215
St. Louis, MO 63131

CHICAGO
307 N. Michigan Ave
Suite 1020
Chicago, IL 60601

phone: 312-372-3930

June 27, 2016

Via ECFS

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

Re: American Cable Association Ex Parte Communication; *Implementation of Section 103 of the STELA Reauthorization Act*, MB Docket No. 15-216; *Amendment to the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71; *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41.

Dear Ms. Dortch:

On June 16, 2016, The Walt Disney Company ("Disney") filed an ex parte letter memorializing discussions held by the company with FCC staff on June 14, 2016 in which it urged the Commission to retain its current presumption that bundling of retransmission consent and other programming is consistent with the Commission's good faith negotiation standard.[1] In support, Disney representatives took issue with the economic analysis of Professor Michael Riordan, of Columbia University ("Riordan analysis"), submitted in various filings by ACA in support of its request that the Commission deem a broadcasters insistence on bundling a local broadcast signal with regional sports networks ("RSNs") (or other "must have" programming) as a per se violation of the good faith obligation.[2] ACA's advocacy and analysis demonstrated the harms to multichannel video programming distributors ("MVPDs") and their subscribers when a common owner of a top four-rated broadcast station and an RSN or other "must have" programming asset engages in bundled negotiations for these "must have" programming assets. As discussed below, Disney proffers several arguments in support of the status quo, none of which are new and each of which has already been addressed by ACA.

---

[1] *See Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*; *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket Nos. 15-216 and 16-41, Letter from Susan L. Fox, The Walt Disney Company, to Marlene H. Dortch (filed June 16, 2016) ("Disney June 16 Ex Parte").

[2] *Id*. at 2. 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 at 15-33 (filed Dec. 1, 2015) ("ACA Totality Comments"); Michael H. Riordan, *Higher Prices from Bundling of "Must Have" Programming are not Based on Competitive Marketplace Considerations* (attached to ACA Totality Comments as Attachment A) ("Riordan Paper"); Reply Comments of the American Cable Association at 40-53 (filed Jan. 14, 2016); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket Nos. 15-216, 10-71, Letter from Barbara Esbin, Cinnamon Mueller to Marlene H. Dortch (filed Apr. 28, 2016) ("ACA Apr. 28 Ex Parte"); Attachment A, Michael H. Riordan, *Bundling in Retransmission Consent Negotiations: Response to Caves and Owen* ("Riordan Response to Caves-Owen"); Letter from Barbara Esbin, Cinnamon Mueller to Marlene H. Dortch (filed May 4, 2016).

First, Disney maintains that antitrust policy regards bundling as generally a pro-competitive and pro-consumer practice.[3] To the contrary, antitrust law and competition policy *does not* support a blanket presumption that bundling is procompetitive. Under current U.S. case law, bundling or tying is analyzed under a modified *per se* analysis, that has similarities to a rule-of-reason analysis. Courts typically require the following elements for an antitrust violation: "(1) two separate products or services are involved, (2) the sale or agreement to sell one is conditioned on the purchase of the other, (3) the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product, and (4) a not insubstantial amount of interstate commerce in the tied product is affected."[4] Interpreting retransmission consent as the tying product, these conditions appear satisfied.

Second, Disney argues that conclusions drawn from the Riordan analysis depend on the assumed valuations and the conclusions change with plausible changes in those valuations.[5] Professor Riordan's conclusion that bundling raises prices depends on assumed valuations that result in full or almost full market coverage under separate monopoly pricing, which is the case for "must have" programming.[6] Disney has presented no alternative assumptions that would lead to different conclusions.

Third, Disney claims that the Riordan analysis predicts the outcome of programming negotiations using a model in which a seller sets a single price for multiple buyers.[7] This is simply false. The monopoly-pricing model used in the Riordan analysis assumes that a single seller sets a price for a single buyer, but is uncertain about how much the buyer is willing to pay.[8] As he has explained, from the seller's perspectives, there are different "types" of buyers, who value the programming differently, and the seller does not know the type of buyer with whom he is dealing.[9] To set a monopoly price, the seller must form beliefs about the probability distribution over the different types of buyer with different valuations. This is different from setting a single price for multiple buyers. If a different buyer has different observable characteristics, leading the seller to form different beliefs about the buyer's valuations, then the monopoly seller will set a different price.

Fourth, Disney argues that the Riordan analysis depends on the assertion that programmers are monopolists or have market power.[10] This is true, but it does not in the least undermine ACA's case. As discussed in the Riordan Response to Caves-Owen, the purpose of market definition in a competitive analysis is to identify a set of products that are close substitutes for consumers.[11] "Must

---

[3] Disney June 16 Ex Parte at 2.
[4] *See* Department of Justice, *Antitrust Issues in the Tying and Bundling of Intellectual Property Rights, Chapter 5*, *available at* https://www.justice.gov/atr/chapter-5-antitrust-issues-tying-and-bundling-intellectual-property-rights (citing *Antitrust Law Developments*).
[5] Disney June 16 Ex Parte at 2.
[6] *See* Riordan Response to Caves-Owen at 7-8 (The Chen-Riordan analysis "demonstrates that profit-maximizing bundling lowers prices only under specific market conditions, and in fact supports the proposition monopoly bundling of two must-have goods is likely to raise prices and reduce consumer welfare, consistent with the conclusion of the Riordan Paper.").
[7] Disney June 16 Ex Parte at 2.
[8] ACA Totality Comments at 29 ("Professor Riordan illustrates this result as follows: In one case, the two-product monopolist is offering two "must have" programming assets – a top four broadcast station and an RSN – to two types of buyers. The seller has a general notion of the price that the market can sustain, but nevertheless remains uncertain about the exact price each buyer is willing to pay for carriage rights.").
[9] Riordan Paper at 11-14.
[10] Disney June 16 Ex Parte at 2.
[11] Riordan Response to Caves-Owen at 4.

have" goods by definition have no close substitutes. Therefore, markets for these goods are monopolistic. As ACA and Professor Riordan have previously explained, the issue is not whether myriad content vies for the attention of distributors, but rather whether, from a distributor's perspective, any of this myriad content is a good substitute for "must have programming."[12] The Commission's repeated findings that top four-rated broadcast stations and regional sports programming, for example, constitute "must have" programming for which there are no good substitutes strongly suggests that distributors do not think there are good substitutes for such programming assets.[13]

This letter is being filed pursuant to Section 1. 1202(b) of the Commission's rules, 47 C.F.R. § 1.1202(b). 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 *(via email)*: Commissioner Ajit Pai
Commissioner Jessica Rosenworcel
Marc Paul
Matthew Berry
William Lake
Mary Beth Murphy
Nancy Murphy
Susan Singer
Martha Heller
Steve Broeckaert
Diana Sokolow
Raelynn Remy
Susan Aaron
Jonathan Levy
Paul LaFontaine
Omar Nayeem
Patrick Sun

[12] ACA Totality Comments at 27-28; Riordan Paper at 4.
[13] *See*, *e.g.*, ACA Apr. 28 Ex Parte at 12, n.44 (listing Commission proceedings dating back to 2002 that recognize regional sports programming and top four-rated broadcast stations as must have programming).