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Ex Parte

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

Re: GN Docket No. 16-142; MM Docket Nos. 14-50, 09-182, 07-294, 04-256

Dear Ms. Dortch,

On November 2, 2017, Rick Chessen, Michael Schooler, and Diane Burstein of NCTA — The Internet & Television Association ("NCTA"), met with David Grossman and Holly Saurer of Commissioner Clyburn's office regarding the draft orders circulated by Chairman Pai in the above-captioned proceedings. We met with Mr. Grossman regarding issues in the media ownership proceeding and with Ms. Saurer regarding the ATSC 3.0 proceeding.

Broadcast Ownership

Regarding the broadcast ownership proceeding, we discussed proposed changes to the "top four" prohibition in the Commission's "duopoly rule."[1] We noted that current law and the Commission's rules bar joint retransmission consent negotiations except by stations that are directly or indirectly under common de jure control. Thus, the pending "hybrid" approach to the "top four" prohibition, under which a party could seek approval of a proposed combination of two "top four" stations in the same market,[2] could have the effect of allowing joint

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[1] *See* 47 C.F.R. § 73.3555(1)(i) (restricting an entity's ownership of two television stations licensed in the same Designated Market Area ("DMA") if, *inter alia*, both stations are ranked among the Top Four stations).

[2] *See 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50, Order on Reconsideration and Notice of Proposed Rulemaking, FCC-CIRC1711-06, ¶¶ 66-85 (rel. Oct. 26, 2017) ("*Media Ownership Circulation Order*").

retransmission consent negotiations by two such stations. We pointed out that the Commission has found such joint negotiations to be anticompetitive and harmful to consumers[3] and there is nothing to the contrary in the record of these proceedings. Given this uncontroverted determination of harm, we argued that the Commission may not modify the duopoly rule in a way that permits such joint negotiations without first addressing the reasons for the rule change and providing factual record support to justify a new finding about the effects of joint negotiations.[4]

If the Commission nevertheless decides to adopt the proposed "hybrid" case-by-case approach, it should modify its rule barring joint retransmission consent negotiations to extend that rule to any combination of commonly owned "top four" stations that may be allowed under that approach. Section 325(b) gives the Commission broad authority over the manner in which broadcasters exercise their retransmission consent rights.[5] While Section 325(b)(3)(C) lists regulations that the Commission must ("shall") impose in furtherance of this objective, including the ban on joint negotiations by non-commonly owned stations, it does not prevent the Commission from adopting other restrictions or conditions on the exercise of a station's retransmission consent rights.[6] Congress enacted the ban on joint negotiations by non-commonly owned stations against the backdrop of the existing duopoly rule – assuming that "top four" stations would not become commonly owned, and thus not be eligible to negotiate jointly for retransmission consent. We explained that modifying the duopoly rule without also revising the

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[3] *2014 Retransmission Consent Order*, 29 FCC Rcd 3351, 3357-58 ¶ 10 ("joint negotiation among any two or more separately owned broadcast stations serving the same DMA *will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees*" (emphasis added)); *id.* at 3358 ¶ 10 ("With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers." (footnote omitted)). *See also id*., 29 FCC Rcd at 3362 ¶ 16 & n. 66 (stating that data filed in the record "lends support to our conclusion that joint negotiation between or among separately owned, same market Top Four stations leads to supra-competitive increases in retransmission consent fees," citing evidence showing that joint negotiations increased fees by 20 percent or more (up to 43 percent)).

[4] *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). When an agency reverses a prior action, it is required to acknowledge that it is changing position, show good reasons for the new policy, and provide a reasoned explanation for its action. *Id*. Where, as in this case, an agency's new policy rests upon factual findings that contradict those which underlay its prior policy, the agency "must provide a more detailed justification than would suffice for a new policy created on a blank slate." *Id*. As the Court explained, in such cases "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.*

[5] 47 U.S.C. § 325(b)(3)(C) (granting the Commission the ongoing authority to "revise" its regulations governing "the exercise by television broadcast stations of the right to grant retransmission consent").

[6] Section 325(b)(3)(C) also establishes a clear legislative mandate to adopt rules ensuring the good faith exercise by broadcasters of retransmission consent rights. It was this mandate upon which the Commission relied when it adopted its original ban on joint negotiations. *2014 Retransmission Consent Order*, 29 FCC Rcd at 3371-72 ¶ 31. Only afterward did Congress expand and codify the ban. The Commission retains the authority it had prior to enactment to impose a "revise[d]" ban to address the merger-specific concerns presented by any proposed combination of top four stations. *Id*.

joint retransmission consent negotiation rules would expose consumers to the very harms that both Congress and the Commission sought to prevent.[7]

If the Commission does not expressly extend the ban on joint negotiations to commonly owned "top four" stations, we argued that it should expand the list of criteria in its case-by-case examinations[8] to include the impact of any proposed combination on retransmission consent. We explained that, particularly since the Commission has already recognized the harmful impact of joint negotiations by two "top four" stations, the Commission may not effectively allow such joint negotiations by authorizing "top four" combinations without taking such harm into account. Thus, a complete public interest review of a proposed transaction, as required by statute,[9] cannot be accomplished without detailed information such as the retransmission consent data of the stations proposed to be combined, the number of multicast "top four" signals of the stations proposed to be combined, and the number of low-power television stations owned by the stations proposed to be combined. We also suggested that as part of its case-by-case review, the Commission obtain and consider the impact on retransmission consent fees in markets where a single entity jointly negotiates for two "top four" stations.

Finally, we noted that if the Commission ultimately – and unwisely – approves the common ownership of two "top four" stations and permits joint retransmission consent negotiations, it must adopt safeguards to address the increased likelihood of negotiation abuses resulting from these changed circumstances. We noted that other commenting parties had identified possible safeguards that the Commission might consider in these circumstances. We urged the Commission to adopt safeguards contemporaneously with the adoption of the "hybrid" approach to the duopoly rule, or at a minimum open a rulemaking proceeding to consider safeguards with a commitment to complete action in such proceeding well before the next round of retransmission consent negotiations begins.

ATSC 3.0

Regarding the draft order authorizing permissive use of a new broadcast television standard (*i.e.*, ATSC 3.0), we reiterated our overriding view that the Commission must ensure that the broadcasters' voluntary roll-out of ATSC 3.0 does not disrupt consumers or impose costs and burdens on cable operators and their customers. To that end, we continued to urge that the Commission require robust simulcasting requirements during the transition period – requirements that should not at this time have any arbitrary expiration date and should be maintained until the Commission affirmatively determines in a future proceeding that they should be lifted.

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[7] The bar on joint negotiations should extend to the joint negotiation of retransmission consent for a second network feed via a multicast stream. Although the Commission has not applied the local ownership rules to the multicast of two "top four" network signals as a general matter, allowing a single owner to jointly negotiate retransmission consent for two "top four" network signals creates the same risk of consumer harm regardless of whether the combination arises from dual ownership or dual affiliation.

[8] *See Media Ownership Circulation Order* ¶ 82.

[9] 47 U.S.C. § 310(d).

The simulcasting rules should include a requirement that the broadcaster's ATSC 1.0 signal continue to be transmitted in the same format as before the transmission of the companion ATSC 3.0 signal. Over-the-air viewers should not be required to purchase new TV sets (assuming they are even available) to continue watching HD and other high-quality programming that they enjoy today, and cable operators should not be required to make costly arrangements to obtain for their customers the HD signals currently transmitted over the air.

We also reiterated that the simulcast stream must continue to serve the same coverage area and community of license from a "host" station as it did prior to the launch of the ATSC 3.0 signal on its regularly assigned channel. Broadcasters misleadingly claim that during the transition to digital broadcasting the Commission only required broadcasters to cover their communities of license rather than replicate their analog service areas. NAB neglects to mention some key facts. First, in the DTV transition, the FCC allotted broadcasters second channels for DTV operation that best matched the Grade B contour of the analog station with which it was paired. Broadcasters make no such commitment to match their current coverage areas here. Second, the FCC's decision not to require replication was *temporary*. In 2004, the Commission adopted "use or lose" replication requirements, meaning that to the extent that broadcasters *failed* to replicate their analog service area they would *lose interference protection for unreplicated* areas and other broadcasters could expand into those areas: "By losing such protection, other broadcasters will be free to maximize their service areas, or to expand the service area of existing full or low-power stations, in order to restore any service lost by viewers as a result of the lack of full replication."[10] Neither the broadcasters nor the Commission have proposed any such mechanism for restoring lost ATSC 1.0 service to viewers abandoned by their current stations here.

We also noted our concern regarding statements made during a recent earnings call by Sinclair CEO Chris Ripley on Sinclair's 3.0 patent holdings.[11] During that call, Mr. Ripley stated that the process of determining the value of those patents "has just gotten underway." He went on to say that while MPEG LA has organized some initial meetings regarding a possible ATSC 3.0 patent pool:

> Our patents are still literally getting issued. It seems like every week, one comes through the door. We're newbies to this process. We didn't do the 3.0 work to gain a revenue stream. That's just sort of a happy outcome of pushing a standard that we thought would benefit the access that we hold in the industry at large. [Financially] there will be something that comes out of that and we have hired experts to help us through this process.[12]

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[10] *Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television,* Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 5946, 5956 (2001).

[11] *See* Communications Daily, Thursday, November 2, 2017.

[12] *Id.*

Those are not the words of a patent holder expressing a recognition that any patents bearing on a government-mandated standard must be licensed on a reasonable and non-discriminatory (RAND) basis. Those are the words of a corporate executive looking to maximize a revenue stream. The FCC cannot create a government-mandated monopoly for the intellectual property rights to build next-generation broadcast television products and then allow the patent rights holders to collect supra-competitive rents.

Finally, we stressed that, given the substantial complexity and costs for MVPDs to carry ATSC 3.0 signals (costs ultimately borne by consumers), the Commission should make clear that it will scrutinize efforts by broadcasters to obtain premature carriage of ATSC 3.0 by unreasonably withholding access to ATSC 1.0 signals.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen

cc: David Grossman
Holly Saurer