

June 2, 2015

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

Re: Notice of Written Ex Parte Communication, MB Docket No. 15-53

Dear Ms. Dortch:

On Friday, May 29, 2015, the undersigned of the National Association of Broadcasters sent the attached written ex parte communication to Commissioner Mignon Clyburn's Chief of Staff, Chanelle Hardy, concerning the Commission's implementation of Section 111 of the STELA Reauthorization Act of 2014 (STELAR).<sup>1</sup>

Respectfully submitted,



Erin L. Dozier  
Senior Vice President and Deputy General Counsel  
Legal and Regulatory Affairs

Enc.

cc: Chanelle Hardy

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<sup>1</sup> *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, Notice of Proposed Rulemaking, MB Docket No. 15-53, FCC No. 15-30 (Mar. 16, 2015).*

Dear Chanelle,

I am following up on our conversation of May 28, 2015 regarding the Commission's proposal to reverse the presumption of effective competition nationwide in favor of cable operators.

The cable industry's claim that consumers will not be harmed in any way by the proposed change in presumption has no basis in fact. In particular, the cable industry has claimed that it lacks the incentive or ability to seek placement of broadcast stations on the basic tier.

While it is NAB's view that broadcast stations must remain on the basic tier following a finding of effective competition, cable operators have publicly demonstrated their strong interest in removing broadcast stations from the basic tier through substantial advocacy on the issue before both the Commission and Congress over several years. Some examples include, but are not limited to:

- A cable operator's request that the Commission, "take this opportunity to reaffirm that the Act's tier placement requirements are *inapplicable in areas where a cable operator faces effective competition...*"<sup>1</sup>
- Cable's contention that, "[w]hile some broadcasters appear to take the position that Section 623 entitles them to automatic basic tier placement, it does not . . . the Commission should reaffirm that tier-placement obligations do not apply in areas subject to effective competition."<sup>2</sup>
- A request urging the Commission to "definitively clarify that there is no statutory requirement to place [retransmission consent] stations in a cable operator's basic tier."<sup>3</sup>
- During STELAR deliberations, ACA urged Congress to "provide that all small operators and systems are not only relieved of basic service tier rate regulation, but all rules and regulations that are eliminated when a cable system is deemed to face 'effective competition.'"<sup>4</sup> The various requirements ACA sought to have eliminated include: "basic service tier carriage of broadcast stations electing must carry or compensation in exchange for carriage under retransmission consent as well as public, education and governmental (PEG) channels required by local franchising authorities;" local franchise authority regulation of "basic tier rates, charges for equipment such as set-

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<sup>1</sup> Comments of Time Warner Cable, Inc. in MB Docket No. 10-71 (Jun. 26, 2014) at 18-19 (emphasis added).

<sup>2</sup> Reply Comments of Time Warner Cable, Inc. in MB Docket No. 10-71 (Jun. 27, 2011) at 20 (emphasis added).

<sup>3</sup> Comments of SureWest Communications in MB Docket No. 10-71 (May 27, 2011) at 18-19.

<sup>4</sup> Response of the American Cable Association to Congressional Letter Regarding STELA Reauthorization (Mar. 17, 2014) at 14, available at: <http://www.americancable.org/files/140317%20STELA%20Questions%20Answers%20FINAL.pdf>.

top boxes and remote controls, and installation and hourly service charges;” uniform rate structure rules; the prohibition on negative option billing; and the tier buy-through prohibition.<sup>5</sup>

- A recent news article stated that: “Without the basic tier requirement, cable companies would be able to place big-four stations that charge for retransmission on a higher cable tier, and thus be able to charge customers more to see them, [Matt] Polka [of the American Cable Association] said.”<sup>6</sup>
- News reports further stated that: “If all of cable is declared to be facing effective competition, most cable companies would press the point about broadcast carriage on the basic tier, [cable attorney Mark] Palchick and [Matt] Polka [of the American Cable Association] said.”<sup>7</sup>

These comments also belie cable operators’ new claim that copyright royalty fees are a significant deterrent to exiling broadcast stations to a higher-priced service tier.<sup>8</sup> It simply makes no sense for the cable industry to push so hard to get out from under basic tier requirements if it did not aim to go ahead and move stations off of the basic tier.

Moreover, copyright royalty fees are small relative to overall cable system economics.<sup>9</sup> For example, if a cable operator were able to shift even a few subscribers from the basic tier (average price of \$22.78) to the expanded basic tier (average price of \$66.61)<sup>10</sup> as a result of re-tiering broadcast stations,<sup>11</sup> the operator is likely to easily recover any increased costs associated with copyright royalty payments.

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<sup>5</sup> *Id.* at 12.

<sup>6</sup> *Effective Competition Change Could Improve Cable Retrans Leverage*, Communications Daily (Mar. 31, 2015).

<sup>7</sup> *Id.*

<sup>8</sup> See, ACA Reply Comments in MB Docket No. 15-53 (Apr. 20, 2015) at iv, 11; NCTA Reply Comments in MB Docket No. 15-53 (Apr. 20, 2015) at 11.

<sup>9</sup> Satellite Home Viewer Extension and Reauthorization Act 109 Report: A Report of the Register of Copyrights (June 2008) at 70 (recommending the elimination of compulsory licenses for carriage of distant signals on grounds that record evidence shows that “the distant signal licenses set royalties at below-market levels. That is one of the principal reasons why the cable and satellite industries have supported their retention.”).

<sup>10</sup> *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 29 FCC Rcd 14895 ¶ 15 (2014).

<sup>11</sup> See also Letter to Marlene H. Dortch, Secretary, FCC from James L. Winston, President, National Association of Black Owned Broadcasters (NABOB) in MB Docket No. 15-53 (May 6, 2015) (“as broadcasters, we are concerned that elimination of local franchise rate authority will enable cable operators to manipulate their tiers of service so that essential local programming cannot be accessed without paying for more expensive cable network programming first. If cable customers are required to pay for cable networks before they can access local stations - a reversal of the existing basic tier requirements - broadcast stations, especially those serving minority audiences, will likely

Additionally, cable operator claims that broadcasters can unequivocally demand particular terms and conditions in retransmission consent negotiations are specious. First, broadcasters generally negotiate retransmission consent with pay TV parties that are larger by any measure.<sup>12</sup> The annual revenue of Time Warner Cable, Inc. was \$22.1 billion in 2013.<sup>13</sup> Even the *combined total* annual advertising revenue for the *top thirty* broadcasters that year does not approach this figure (\$16.2 billion in 2013).<sup>14</sup> Second, while the cable industry has grown overwhelmingly consolidated at the local, regional, and national levels over time,<sup>15</sup> the broadcast industry remains comparatively unconcentrated.<sup>16</sup> Third, NAB has shown in other contexts that broadcasters' business model, which is still driven largely by advertising, depends upon being able to reach as many over-the-air viewers and pay television subscribers as possible. The mythological broadcaster making demands that the cable industry cannot meet is a fiction created by the cable industry—to benefit the cable industry.

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suffer, ultimately resulting in diminished local service”). See also Letter to Marlene H. Dortch, Secretary, FCC from Michael Scurato, Policy Director, National Hispanic Media Coalition (NHMC) in MB Docket No. 15-53 (May 12, 2015) (“of particular concern to NHMC is the potential for Latinos to lose access to Latino programming currently available on the basic tier. Longer term, we fear that a potential unintended consequence could be an overall reduction in the availability of Latino programming on cable television. If cable operators are allowed to move Latino programming to more expensive cable tiers, it is very likely that viewership and revenues of Latino networks would drop, making it more difficult to finance and produce programming that serves Latino audiences.”).

<sup>12</sup> See, e.g., Comments of NAB in MB Docket No. 14-16 (Mar. 21, 2014) at 16-17, *citing* 2013 SNL Kagan MediaCensus, Estimates—3rd Quarter 2013 (In many markets, a single cable operator dominates with a 50% or greater share of the entire multichannel video programming distribution (MVPD) market—which accounts for consumers subscribing to DBS and other pay TV services. Examples include: TWC, which has a 60% or greater share of the MVPD market in nine DMAs, including Honolulu, HI (90.2%) and Rochester, NY (76.2%); CableOne, Inc., which controls 64.1% of the Biloxi, MS DMA; and Suddenlink, which controls 61.6% of the Victoria, TX DMA).

<sup>13</sup> Time Warner Cable Annual Report for 2013, available at: [http://ir.timewarnercable.com/files/doc\\_financials/Annual%20Reports/twc%20ar%202013.pdf](http://ir.timewarnercable.com/files/doc_financials/Annual%20Reports/twc%20ar%202013.pdf).

<sup>14</sup> Mark K. Miller, *Big Deals Equals Big Changes in Station Groups*, TVNewsCheck, May 22, 2014, available at: <http://www.tvnewscheck.com/article/76469/big-deals-big-changes-in-station-groups/page/1>. The FCC has stated that advertising represents approximately 85% of television station revenues.

<sup>15</sup> The top ten cable operators served 91.5% of cable subscribers by the end of 2013. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Sixteenth Report, MB Docket No. 14-16, FCC No. 15-41, ¶ 25 (rel. Apr. 2, 2015). The Commission has not yet published (or requested) data for 2014. Regional concentration data is not provided as the Commission no longer studies the issue.

<sup>16</sup> For example, it was recently estimated by BIA/Kelsey that there are 630 separate owners of the 1,785 full power and 405 Class A television stations in the country—3.5 television stations per owner. Letter to Marlene H. Dortch, Secretary, FCC from Kathleen A. Kirby and Jack N. Goodman of the FCBA Mass Media Practice Committee in MB Docket No. 12-268 (May 14, 2015) at 2.

Finally, as discussed in a joint letter recently filed by multiple organizations (including NAB), many operators have sufficient resources to file petitions for determinations of effective competition, and that the decision not to file such petitions or withdraw petitions may reflect a careful “self-selection” not to seek a determination where a finding of effective competition could not be made on the merits.<sup>17</sup>

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<sup>17</sup> Letter to Marlene H. Dortch, Secretary, FCC from Alliance for Community Media, American Community Television, Common Cause, Free Press, The Greenlining Institute, Media Alliance, National Association of Broadcasters, National Association of Black Owned Broadcasters, National Association of Telecommunications Officers and Advisors, National Black Religious Broadcasters, National Hispanic Media Coalition, Native Public Media, Public Knowledge in MB Docket No. 15-53 (May 27, 2015).