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July 24, 2015

VIA ECFS

William Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Communication of the American Cable Association; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71.

Dear Mr. Lake:

At our July 2, 2015, meeting, the American Cable Association (“ACA”) urged that the Commission in its upcoming review of the “totality of the circumstances” standard seek comment on the types of bargaining offers and negotiating conduct that should be considered “sufficiently outrageous” so as to violate the requirement that parties negotiate retransmission consent in good faith, and on the types of bargaining offers that are presumptively not consistent with competitive marketplace considerations.¹ As a follow-up, ACA suggests that comment be sought on the specific proposals below designed to address objectionable offers and behavior ACA members have received and experienced during retransmission consent negotiations. ACA believes these offers and behaviors should be considered a violation of the good faith rules as either *per se* violations, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations under the totality of the circumstances standard.

Refusal to Provide Information Substantiating Reasons for Bargaining Positions Taken

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace conditions for a negotiating party to refuse to provide information substantiating reasons for positions taken when requested to in the course of bargaining.

¹ See Letter from Mary Lovejoy, Vice President of Regulatory Affairs, American Cable Association to Marlene H. Dortch, Secretary (filed July 7, 2015).

Blackouts During or Within One Week of Marquee Events

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for a broadcaster to withhold or threaten to withhold its retransmission consent during or one week prior to a marquee event.

Online Blackouts of Broadband Subscribers

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for a broadcast station to directly or indirectly block, impair or degrade access to its or an affiliated network’s otherwise free online content to an MVPD’s broadband Internet access subscribers during or after a negotiating impasse.

Surface Bargaining

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for a negotiating party to engage in “surface bargaining” – conduct designed to delay negotiations, but that does not necessarily constitute an outright refusal to bargain.

In analyzing whether a negotiating entity is “merely going through the motions” with no intention of reaching an agreement in the near term, the Commission shall consider the following factors that signal such conduct is ongoing:

- delaying tactics;
- unreasonable bargaining demands;
- unilateral changes in mandatory subjects of bargaining;
- failure to designate an agent with sufficient bargaining authority;
- withdrawal of already agreed-upon provisions; and
- arbitrary scheduling of meetings.

Setting Prices, Terms, or Conditions for After-Acquired Stations or Unlaunched Programming Networks

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for a broadcaster to set prices, terms, or conditions for broadcast stations it may later acquire or for programming networks it may launch in the future as part of current retransmission consent negotiations.

Requiring Concurrent Negotiations for Retransmission Consent and Carriage of Other “Must Have” Programming

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for a broadcaster to require that retransmission consent negotiations take place concurrently with its or an attributable entity’s carriage negotiations for other “must have” programming (e.g. regional sports networks, multicast or lower power stations that are top four rated in market, or bundle of national programming networks) that is distributed in some or all of the same market.

Coordinated Blackouts or Threats of Coordinated Blackouts

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for a broadcaster to withhold or threaten to withhold its retransmission consent from an MVPD at the same time that it or an affiliated-entity withholds or threatens to withhold carriage rights for any other “must-have” programming or bundle of programming from the same MVPD that would affect the same customers.

Refusal to Grant Online Rights to an MVPD That Are Offered to Another MVPD

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for a broadcaster to refuse to negotiate with an MVPD for the right to provide the broadcaster’s primary stream to their customers over the Internet when the broadcaster has offered such a right to another MVPD in the same market.

Refusal to Grant Rights to an MVPD That Are Offered to Another Internet-Based Distributor of Video Programming

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for a broadcast station that is delivering its primary stream to consumers over the Internet on its own or through a third party to refuse to grant an MVPD the right to make the primary stream available to its MVPD subscribers under the same terms and conditions.

Discriminatory Offers by MVPD-Affiliated Broadcasters Based on Vertical Competitive Effects

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for a broadcaster in which an MVPD has an attributable interest to discriminate in the prices, terms and conditions of sale of retransmission consent among or between MVPDs based on vertical competitive effects.

Demanding or Negotiating Based Upon Most Favored Nation Provisions

- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for an entity to seek or receive a most favored nations clause as consideration in exchange for retransmission consent rights.
- It shall be deemed a *per se* violation, “sufficiently outrageous,” or inconsistent with competitive marketplace considerations for an entity not to accept a price, term, or condition due to the existence of a most favored nation clause.

Mr. William Lake
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If you have any questions, or require further information, please do not hesitate to contact me. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "Ross J. Lieberman". The signature is fluid and cursive, with a large initial "R" and "L".

Ross J. Lieberman

Cc: Michelle Carey
Mary Beth Murphy
Diana Sokolow
Nancy Murphy
Raelynn Remy