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VIA ECFS

Marlene H. Dortch
Secretary
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 Ms. Dortch:

On July 24, the American Cable Association (“ACA”) filed a letter urging the Commission to seek comment on certain types of negotiating behaviors and bargaining offers that ACA believes should be considered a violation of the good faith rules as either *per se* violations, or “sufficiently outrageous” or inconsistent with competitive marketplace considerations under the totality of the circumstances test.¹ By providing more guidance to negotiating parties about specific bargaining proposals and conduct that violate the good faith negotiation requirement, the Commission will be helping to ensure that parties reach mutually agreeable deals and thus avoid programming blackouts that harm consumers.

Given the disturbing trend of skyrocketing retransmission consent fees,² and unrelenting onerous demands by broadcast stations,³ the Commission’s consideration of a broad variety of reforms to the rules governing retransmission consent is appropriate. Broadcasters’ unreasonable demands harm consumers by driving video subscription rates higher. Moreover, because they pressure the margins of cable

¹ See Letter from Ross Lieberman, Sr. Vice President of Government Affairs, American Cable Association to William Lake, Chief, Media Bureau (filed July 24, 2015).

² As the American Television Alliance explained in their recent *ex parte* meeting with members of Chairman Wheeler’s staff, retransmission consent fees rose 8,600% between 2005 and 2012 and analysts project that fees will continue to grow to roughly \$10.3 billion by 2021, up from the projected \$6.3 billion in 2015. See Letter from Mike Chappell, American Television Alliance, to Marlene H. Dortch, Secretary (filed July 22, 2015), *citing* Broadcast Investor Deals & Finance: Retrans projections update: \$10.3B by 2021, SNL Kagan, June 30, 2015.

³ For example, broadcasters often demand that MVPDs carry unpopular, unwanted, and in some cases yet-to-be-developed, content as a condition of retransmission consent for the primary broadcast stream.

operators' video distribution businesses and tie up valuable bandwidth, these demands adversely impact the ability of those operators to invest in or offer high-performance broadband infrastructure.⁴

For these reasons, ACA now also urges the Commission to reexamine its existing presumptions that certain types of conduct are consistent with competitive marketplace conditions,⁵ and to consider whether their use continues to make sense in today's marketplace. To fully carry out Congress's directive in STELAR, the Commission should seek comment on whether these presumptions, which were adopted in 2000 and have never been revisited, are contributing to current market dysfunctions and thus should be modified or eliminated.

Moreover, the Commission should seek comment on whether, in addition to examining whether specific conduct is "sufficiently outrageous" or inconsistent with competitive marketplace considerations, the totality of the circumstances standard should take into account *harms to the public interest*. The Commission should consider whether the retransmission consent regime would better serve consumers and promote competition if proposals that are harmful to the public interest could be found to violate the obligation to negotiate in good faith under a totality of the circumstances standard.

⁴ Earlier this year, ACA submitted to the Commission a white paper detailing the effects of rising programming costs on cable operators' ability to invest in broadband infrastructure. As programming costs continue to escalate, the margins for traditional pay-TV services will continue to shrink, inhibiting broadband investment, particularly among small- and medium-sized cable operators, many of whom serve rural areas. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, Reply Comments of the American Cable Association, Appendix (filed Apr. 6, 2015).

⁵ In its implementation of the good faith requirement, *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 65 FCC Rcd 15559, 15569 (2000) ("Good Faith Order"), the Commission, to provide "the parties with as much initial guidance as possible," determined that the following proposals are considered presumptively consistent with competitive marketplace considerations and the good faith negotiation requirement:

1. Proposals for compensation above that agreed to with other MVPDs in the same market;
2. Proposals for compensation that are different from the compensation offered by other broadcasters in the same market;
3. Proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market;
4. Proposals for carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights;
5. Proposals for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media; and
6. Proposals that allow termination of retransmission consent agreement based on the occurrence of a specific event, such as implementation of SHVIA's satellite must carry requirements.

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,

/s/

Mary C. Lovejoy

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