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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 to the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71

Dear Ms. Dortch:

Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association (“ACA”), and the undersigned, along with Barbara Esbin, Cinnamon Mueller, Counsel to ACA, met with Valery Galasso, Policy Advisor to Commissioner Rosenworcel, on September 9, 2015, and with Chanelle Hardy, Chief of Staff and Media Legal Advisor to Commissioner Clyburn, on September 10, 2015, to discuss the Commission’s proposal to eliminate the broadcast exclusivity rules in the above-referenced proceeding.¹ During the meeting we explained that to avoid harm to the public interest of such a repeal, the Commission should adopt rules to ensure that broadcast stations that have historically granted retransmission consent to cable operators in certain communities outside their Designated Market Area (“DMA”) (such as orphan counties and counties where a signal is deemed “significantly viewed”) can continue to freely enter into such agreements. We suggested that the Commission can accomplish this goal by accompanying any repeal of its exclusivity rules with a prohibition on interference by broadcast networks with their affiliates’ out-of-market retransmission consent negotiations, consistent with ACA’s previous filings.²

While the broadcast exclusivity rules are viewed primarily as an extra-contractual means for local broadcasters to enforce their privately-negotiated exclusivity rights, we explained that they have also served as a limiting factor on the extent to which exclusivity rights can be enforced by local broadcast stations. Specifically, the rules prohibit broadcasters from invoking exclusivity beyond 35 miles (or 55 miles in smaller markets) of the stations’ community of license and the communities designated by the FCC as being part of the same television market. It also prohibits broadcasters from demanding that cable

¹ *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (rel. Mar. 31, 2014) (“Further Notice” or “FNPRM”).

² *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Comments of the American Cable Association (filed May 27, 2011) (“ACA NPRM Comments”); Further Notice of Proposed Rulemaking, MB Docket No. 10-71, Comments of the American Cable Association (filed Jun. 26, 2014) (“ACA FNPRM Comments”).

operators black out imported signals in areas where the distant signal is deemed “significantly viewed.” For decades, this has allowed for the targeted exportation of significantly viewed stations and other important out-of-market signals to cable subscribers living on the outskirts of adjacent Designated Market Areas interested in receiving the content these stations provide.

If the exclusivity rules are repealed, broadcast stations and networks undoubtedly will revisit their affiliation agreements to ensure that local stations’ existing exclusivity rights are protected at least to the same extent that they were under the exclusivity rules. ACA is concerned that the Commission’s repeal of the rules – and the Chairman’s assertion that government should not have a role in determining the scope of a local broadcaster’s exclusivity³ – will embolden broadcast networks, sometimes in coordination with local affiliates, to significantly expand their affiliates’ zones of exclusivity and entirely eliminate access to out-of-market stations, such as significantly viewed stations and stations that serve “orphan counties” whose continued availability Congress has repeatedly sought to protect.⁴ As a result, broadcast stations that have for decades exported their signals out-of-market to nearby cable operators may be prohibited from doing so in the future, and consumers will lose access to vital weather information, in-state news, and relevant political advertising that they may not receive from their in-market station, simply because such signals are considered “distant” by virtue of artificial DMA boundaries, rather than actual distance or relevance to the affected community.⁵ While the Commission

³ See Tom Wheeler, FCC Chairman, FCC BLOG, *Upgrading Media Rules to Better Serve Consumers in Today’s Video Marketplace*, Aug. 12, 2015, available at <https://www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace> (“In this item, the Commission takes its thumb off the scales and leaves the scope of such exclusivity to be decided by the parties.”).

⁴ Congress has repeatedly affirmed the importance of the availability of significantly viewed signals to out-of-market viewers. With the *Satellite Home Viewer Reauthorization Act of 2004*, Congress made clear that out-of-market significantly viewed signals must be made available to satellite subscribers. *The Satellite Home Viewer Extension and Reauthorization Act of 2004*, Pub. L. No. 108-447, § 202, 118 Stat 2809, 3409 (2004) (codified at 47 U.S.C. § 340). More recently, Congress enacted the *Satellite Television Extension and Localism Act Reauthorization (“STELA”) Act of 2014*, prohibiting broadcast stations from preventing the entry of significantly viewed signals from other DMAs into their local markets, and mandating the establishment of options for DBS subscribers in orphan counties to receive more localized programming. The *STELA Reauthorization Act of 2014*, Pub. L. No. 113-200, §§ 102, 103, 128 Stat. 2059, 2060-2062 (2014); see also Letter from Congressmen Mike D. Rogers and Robert Aderholt to The Honorable Thomas Wheeler, Chairman, Federal Communications Commission in MB Docket No. 15-71 (filed May 12, 2015) (explaining that “it is paramount for public safety and fairness reasons that [orphan] counties have access to in-state broadcast television stations); Letter from Senators Michael F. Bennet and Cory Gardner, and Congressman Scott Tipton to The Honorable Thomas Wheeler, Chairman, Federal Communications Commission in MB Docket No. 15-71 (filed Apr. 15, 2015) (“Coloradans in two orphan counties, La Plata and Montezuma, have long been trying to access their in-state news, weather, and sports over their satellite pay TV services.”); Letter from Congressman Tom Rice to The Honorable Julius Genachowski, Chairman, Federal Communications Commission in MB Docket 13-65 (filed May 16, 2013) (“[C]itizens of Georgetown County, South Carolina ... are forced to view local programming from network affiliates far away from their hometowns, and these affiliates may not correctly serve their needs for community information, news, and weather.”); Letter from Senator Rand Paul to The Honorable Julius Genachowski, Chairman, Federal Communications Commission in OLA Correspondence Congressional Docket No. 12-2 (filed Jan. 5, 2012) (explaining that many of his constituents in Leslie County, Kentucky, could not receive local news, weather, and educational programming from in-state affiliates).

⁵ See ACA NPRM Comments at 33-35; ACA FNPRM Comments at 4-9. In larger DMAs, which can extend 55-250 miles beyond a central metropolitan area, consumers in the outer regions of the DMA may very likely live closer to the central metropolitan area of the neighboring DMA. Being able to make a geographically closer metropolitan area’s out-of-market signal available to subscribers enables rural MVPDs to better serve their communities. For example, Vast Broadband carries multiple Sioux Falls stations on systems within the Minneapolis, MN DMA because their subscribers consider themselves to be in the Sioux Falls trade area and more news regarding southwest

may wish to end the use of its processes to enforce privately-negotiated exclusivity rights, it should preserve to the greatest extent possible the ability of willing broadcasters to negotiate with MVPDs for distant signals that best satisfy consumer needs by preventing network interference with long-standing arrangements between MVPDs and out-of-market stations.⁶

From the inception of this proceeding to improve the functioning of its rules concerning retransmission consent, the Commission has recognized that certain practices involving third-party interference with the exercise of retransmission consent required its attention and remedial action.⁷ In fact, the 2011 NPRM explicitly recognized that because the “good faith rules currently require the Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent and not unreasonably delay negotiations,” a station that “has granted a network a veto power over any retransmission consent agreement with an MVPD . . . has arguably impaired its own ability to designate a representative who can bind the station in negotiations, contrary to our rules.”⁸ ACA and other commenters, including broadcast station group Nexstar, described the deleterious impact of network interference on an affiliated station’s ability to negotiate retransmission consent in good faith and its inconsistency with the current good faith standards requiring a broadcaster to appoint a negotiating entity with authority to make binding representations and to enter into a binding agreement.⁹ ACA and Joint Cable Commenters urged the Commission to go beyond its proposal to deem it a *per se* violation for a station to give an affiliated network the right to approve or veto a retransmission consent agreement with any MVPD – whether in market or out-of-market – or to comply with such a provision, and to recognize that network interference of any kind unarguably violates current good faith rules.¹⁰

In the Further Notice seeking additional comment on elimination of the exclusivity rules, the Commission acknowledged that contractual arrangements between networks and their affiliates may bar a broadcast station from agreeing to the importation of its signal by an out-of-market cable operator, and asked “[t]o what extent existing network/affiliate agreements prohibit a local broadcaster from allowing its distant signal to be imported by a cable operator without reference to the existence of a Commission

Minnesota comes out of Sioux Falls than Minneapolis. Many of Vast Broadband’s subscribers prefer the weather coverage from a broadcast station that is west of their residences.

⁶ ACA FNPRM Comments at 3.

⁷ In the 2011 Notice of Proposed Rulemaking, the Commission sought comment on “whether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.” *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶ 22 (2011).

⁸ NPRM, ¶ 22.

⁹ *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Reply Comments of the American Cable Association at 47-48 (filed Jun. 28, 2011) (“ACA 2011 NPRM Reply Comments”); Comments of Nexstar at 19-20 (filed May 27, 2011) (noting that “it is a violation of the *per se* good faith obligation for the negotiating entity to fail to designate a representative who can make binding representations” and arguing therefore that “it is in the best interest of the retransmission consent marketplace for the Commission to make it a *per se* violation for affiliates to be required to provide a network with veto power over its ability to grant retransmission consent for its station’s signal within its DMA”).

¹⁰ ACA 2011 NPRM Reply Comments at 48-51; *Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc. Comments at 19 (filed May 27, 2011) (“Joint Cable Comments”) (Commission proposal to bar stations from agreeing to give a network the right to veto a particular retransmission consent agreement is a “well-intentioned first step” but meaningful relief requires that the Commission more broadly “prohibit any agreement between a network and its affiliates that has the effect of interfering with or otherwise dictating the terms of an affiliate’s grant of retransmission consent for the carriage of its signal either inside or outside its local market”).

prohibition.”¹¹ In its Comments, ACA noted network interference with the exercise of retransmission consent by affiliated stations is a steady and growing problem. There have been many reports recently by cable operators that long-standing out-of-market carriage relationships have been reluctantly ended as a result of restrictions in the stations’ affiliation agreements.¹² Some broadcast networks have a general policy of not permitting their affiliates, even those stations that are significantly viewed, to offer out-of-market carriage. ACA is concerned that, should the Commission move forward with the repeal of the exclusivity rules, this trend, if left unchecked, will spread farther.

To avoid harm to the public interest of a repeal of the exclusivity rule, we urged the Commission to take steps necessary to protect consumers against the loss of historically available out-of-market broadcast signals that provide access to vital emergency weather reports, in-state news, and political advertising, such as significantly viewed signals and stations that offer in-state news to subscribers in orphan counties. To achieve this aim, the Commission must adopt rules prohibiting interference by broadcast networks with retransmission consent agreements between MVPDs and out-of-market stations.¹³ We explained that the Commission can effectuate this prohibition by either adopting a new *per se* violation or by clarifying that existing *per se* violations of the obligation to negotiate for retransmission consent in good faith already extends to such network interference.¹⁴

In its recently adopted Notice of Proposed Rulemaking on the totality of the circumstances test, the Commission cited ACA’s comments in the still-pending proceeding on the Amendment of the Commission’s Rules Related to Retransmission Consent and its more recent *ex parte* letter on this subject, asking whether “Section 325(b)(3)(C)(v) of the [Communications] Act, as added by Section 103(b) of

¹¹ FNPRM, ¶ 58 (2014).

¹² ACA members have experienced numerous instances where an adjacent-market broadcast station wants to negotiate for retransmission consent but cannot because its network affiliation agreement expressly prohibits it from granting retransmission consent outside of its DMA. For example, despite a successful 30+ year retransmission consent relationship with out-of-market station WDRB-41, FPB Cable was advised at the beginning of negotiations for the 2011 election cycle that WDRB would require the blackout of all FOX network programming throughout the three-year term of the agreement, and that FPB would be required to insert alternative multicast programming for a minimum of three hours per day. When FPB inquired as to the extraordinary change, they were informed that WDRB’s recent affiliation agreement with FOX denied the station the right to broadcast FOX programming out of market. Because the cost of effectuating the programming blackout was so great, FPB and WDRB failed to come to an agreement on carriage for the first time in 30 years, and FPB subscribers lost what was at the time the only 10 PM newscast in the Louisville market. *See* ACA NPRM Comments at 55-56 (“ACA members have experienced numerous instances where an adjacent-market broadcast station wishes to grant retransmission consent to a cable operator, but cannot because its network affiliate agreement expressly prohibits the station from granting retransmission consent outside of its DMA, even where the station would be deemed significantly viewed in another community. In many cases, this practice, coordinated by networks, allows stations to effectively enlarge the zone of exclusivity protection beyond the geographic limits set by Congress and the Commission.”). *See* also ACA NPRM Reply Comments at 59 (citing experience of non-ACA member Suddenlink being forced to drop a significantly viewed station that had previously granted retransmission consent when the station found itself pressured to withdraw consent by the network with which it was affiliated on the grounds the station’s network affiliation agreement did not allow it to permit out-of-market carriage). As was true in 2011, ACA members are not the only cable operators that have experienced this phenomenon in the past few years. For example, Syracuse station WSYR was forced to cease exportation of its signal to Time Warner Cable stations outside of the Syracuse DMA as a result of its affiliation agreement with the ABC broadcast network. *See* Letter from Barbara Esbin to Marlene Dortch, Secretary at Exhibit A (filed July 24, 2014). Similarly, Comcast subscribers in the Pittsburgh, PA and Buffalo, NY DMAs can no longer receive Erie-based ABC affiliate WJET due to a prohibition contained in the stations’ affiliation agreement with ABC. *Id.* at Exhibit B.

¹³ *See* ACA NPRM Comments at 54-58; ACA FNPRM Comments at 14-15.

¹⁴ *Id.*

STELAR ... require(s) the significantly viewed station to consent to carriage of its signal by the MVPD in retransmission consent negotiations.”¹⁵ ACA believes this new section is properly interpreted in this manner, but this interpretation alone is not sufficient to protect carriage of other historically carried out-of-market stations. The Commission should not, and as discussed below, need not rely on this section to address this matter. Moreover, this matter is more appropriately addressed now as an accompaniment to any repeal of the Commission’s exclusivity rules, rather than in the recent NPRM as the problem of network interference is likely to get worse after elimination of the exclusivity rules.

Ideally, the Commission should adopt a new rule that would prohibit, as a *per se* good faith violation, any agreements – legally-binding or otherwise – that have the effect of limiting the ability of a station to grant retransmission consent to an MVPD, whether through an outright prohibition, a grant of a veto/pre-approval power before the execution of an agreement, or any other means that has the purpose of influencing or disincentivizing the station’s grant of retransmission consent out-of-market.¹⁶ Alternatively, consistent with ACA’s earlier comments in this docket, the Commission could clarify that that Section 76.65(b)(i), which prohibits as a violation of the good faith obligation the refusal by a Negotiating Entity to negotiate retransmission consent, includes any circumstances in which a broadcaster has permitted its network affiliate to influence its exercise of retransmission consent for out-of-market carriage. Unlike the proposal in the Commission’s most recent NPRM, either of these approaches would ensure cable operators can enter into retransmission consent agreements with significantly viewed stations, stations that serve orphan counties, and other broadcast stations that have historically granted carriage to cable systems in adjacent DMAs without network interference.

As the Commission continues its reform of its broadcast signal carriage rules, it should seek to preserve, to the greatest extent possible, the ability of MVPDs to negotiate retransmission consent with willing sellers for out-of-market signals that satisfy consumer needs, particularly regarding those distant signals that historically have been carried by the MVPD. By taking these measured steps to prohibit network interference with a station’s exercise of retransmission consent with respect to significantly viewed signals, in instances where carriage of out-of-market stations serves the public interest, and with existing relationships between MVPDs and out-of-market stations as of the date of the repeal of the exclusivity rules, the Commission can repeal rules it no longer believes necessary while protecting the ability of willing buyers and sellers to negotiate retransmission consent in good faith.

ACA recognizes the difference between protecting the carriage of traditionally offered out-of-market stations, and permitting the carriage of out-of-market stations in areas where they have

¹⁵ *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216 (rel. Sep. 2, 2015) ¶ 17, *citing* Comments of the ACA on *Amendment to the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Comments of the ACA at 51-58 (filed May 27, 2011); ACA Ex Parte Letter in MB Docket No 10-71 at 4 (filed Aug. 28, 2015).

¹⁶ The Commission has already given notice and comment on these proposals in this proceeding, and thus has the authority to adopt either in the current rulemaking. *See* NPRM, ¶ 22 (seeking comment on whether it should be a *per se* violation for a station to agree to give an affiliated network the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision). This proposal is functionally identical to ACA’s proposals to clarify Section 76.65(b)(i) or to adopt the *per se* prohibition as a new rule. Although the Commission has not expressly sought comment on ACA’s proposal to reinterpret the scope of the prohibition in Section 76.65(b)(vi) to include a prohibition on a Negotiating Entity entering into an agreement with any party – including a third party such as a network affiliate – that requires the Negotiating Entity not enter into a retransmission consent agreement, or that otherwise disincentivizes the station’s grant of retransmission consent, it has generally sought comment on whether to interpret that section more broadly than it has previously. *Id.*, ¶ 27. Because the Commission has already sought comment and developed a record on these issues, there is no legal bar to the adoption of either proposal at this time.

traditionally not been made available, such as within existing zones of exclusivity as defined under the exclusivity rules. In this Order, ACA believes that the Commission can seek to protect traditionally offered out-of-market stations without needing to rule on whether or not network interference should extend any further.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary C. Lovejoy". The signature is fluid and cursive, with the first name "Mary" being the most prominent.

Mary C. Lovejoy

cc: Valery Galasso
Chanelle Hardy