March 4, 2016

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

Re: Ex Parte Communication, MB Docket Nos. 15-216 and 10-71

Dear Ms. Dortch:

If you haven't yet had the chance to read the American Television Alliance's (ATVA) February 18 ex parte filing,[1] NAB can save you some valuable time with this simply summary:

Trust us. We're pay TV. Never mind our track record with consumers,[2] *because this time, if the FCC will step into the marketplace to give us a leg up in our negotiations with local broadcasters, we'll reduce our rates. No, really.*

This message is hardly a surprise coming from ATVA, an organization representing the nation's largest pay TV operators and one created and dedicated solely to the purpose of changing the retransmission consent rules in pay TV's favor. ATVA does not claim to represent any customer. Nor does it guarantee that pay TV savings from artificially reducing retransmission consent prices through new regulations will be passed on to consumers. ATVA only claims that its economic theory suggests it would. Not only is ATVA's economic theory shaky at best, but the industry's track record alone makes even the soundest theory stand on its head.

Consider, for example, the Commission's recent recognition that the cost of cable set-top boxes, which has increased significantly for consumers in the last 20 years, failed to drop despite a concurrent decrease in the cost of computing technology.[3] Or that since the Commission first started tracking cable rates in 1995, the cost of expanded basic packages has *never fallen* and, in fact, has *always risen more than the rate of inflation* in any given year.[4] ATVA's letter includes a highly suspect chart purporting to show that the increase in

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[1] *Ex Parte* Communication of ATVA, MB Docket No. 15-216 (Feb. 18, 2016) (ATVA Letter).

[2] Or *see* "Cable-TV and Internet subscribers remain unhappy customers, new Consumer Reports survey says," Consumer Reports (May 29, 2015), available at: http://www.consumerreports.org/cro/news/2015/05/cable-tv-customer-dissatisfaction/index.htm (noting that "[a]long with death and taxes, lousy cable service seems to be one of life's certainties").

[3] *See* Statement of Chairman Tom Wheeler, *Notice of Proposed Rulemaking,* MB Docket No. 16-42, at 57 (rel. Feb. 18, 2016).

[4] *See* 2014 Cable Price Report at ¶17 (Table 3: Historical Averages).

cable rates in the last decade closely matches rising retransmission consent rates,[5] but it naturally fails to establish a cause and effect relationship, or to address the fact that pay TV rates rose at a similar pace in the decade prior, before broadcasters even began to negotiate for cash retransmission consent payments. It also never claims – as it cannot do so credibly – that the fees paid to local broadcasters are artificially inflated, especially when compared to all other programming shown on pay TV systems.

ATVA relies on weak, inapposite "evidence" that borders on deception to support its arguments. It carefully clips quotes from the Commission's AT&T/DirecTV Merger Order to suggest that the Commission has already determined that pay TV companies will pass through retransmission consent cost savings to customers.[6] This merger-specific finding – one line in a 406-paragraph order – certainly cannot serve as the Commission's analysis of the ability and incentive for pay TV operators to pass on to consumers savings resulting from changes to the good faith negotiation rules. Indeed, in the retransmission consent context, the Commission has already suggested just the opposite.[7] Moreover, in the merger order cited by ATVA, the Commission observed that "to the extent a change in video programming costs . . . is a transfer of surplus between video programmers and video distributors, it is generally not a public interest benefit."[8]

In this proceeding, pay TV distributors are asking for retransmission consent rule changes that would significantly and negatively affect broadcasters' ability to negotiate for the fair market value of their signals, which would ultimately reduce broadcaster investment in programming, especially local programming. There is little question this would qualify as a significant public harm. Accordingly, there is no rational connection between the Commission's very limited finding with respect to the potential efficiencies gained in the AT&T/DirecTV merger[9] and what ATVA and big pay TV companies like the newly merged AT&T/DirecTV are requesting here.

Apparently failing to see the irony in asking the government to help pay TV companies by relying on the order that *created the largest pay TV company in history*, ATVA doubles down by including more "evidence" from advocacy papers submitted on behalf of AT&T and DirecTV.[10] The connection between these citations and the arguments made by ATVA is

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[5] ATVA Letter at 4.

[6] *Id.* at 2, fn. 6.

[7] *See Notice of Proposed Rulemaking*, MB Docket No. 15-216, at ¶ 3 fn. 21 (rel. Sept. 2, 2015) (acknowledging that any reductions in retransmission consent fees may not translate to lower consumer prices for video programming service).

[8] *AT&T, Inc. and DirecTV,* Memorandum Opinion and Order, MB Docket No. 14-90, at ¶291 (rel. July 28, 2015) (AT&T/DirecTV Merger Order).

[9] *See id.* at ¶102 (finding that the merged entity would save on programming costs because DirecTV generally paid lower license fees for programming than AT&T).

[10] ATVA Letter at 2-3 (citing Joint Opposition of AT&T Inc. and DIRECTV to Petitions to Deny and Condition and Reply to Comments, *AT&T Inc. and DIRECTV*, MB Docket No. 14-90, An Economic Assessment of AT&T's Proposed Acquisition of DIRECTV: Reply Declaration of Michael L. Katz (filed Oct. 16, 2014)); *Id.* at 3 (citing AT&T Inc. and DIRECTV, Content Cost Savings Will Result in Both Improved Profitability and Pass Through to

tenuous at best. The relevant discussion in each of these citations is merger-specific and includes no analysis of the economic impact or the potential public interest harms of retransmission consent rule changes. ATVA quotes one of the pay TV economist's papers saying "that even a monopolist . . . has incentives to pass through marginal decreases in whole or in part."[11] Again, this quote is merger-specific, responding to claims from opponents of the merger that the market lacked sufficient competition to incent pass-through of marginal cost savings by the merged entity. Whether or not a hypothetical monopolist would have an incentive to pass through firm-specific marginal cost savings is completely irrelevant to the question of whether major pay TV companies would collectively pass through lower retransmission consent costs, especially given the industry's historically high profit margins and investor expectations. And these references certainly cannot replace the sophisticated analysis needed to determine whether the *mere possibility* of pay TV operators passing through marginal cost savings derived from artificially lowered retransmission consent fees would offset the almost certain consumer harm of reduced local programming. In any event, the Commission's sole stated goal in this proceeding is to benefit viewers by reducing service disruptions, and none of ATVA's proposals (at least the ones consistent with the Communications Act) are rationally connected to that goal.

The more ATVA objects to criticisms that pay TV providers' primary goal in this proceeding is to lower their programming costs, the more glaringly apparent that goal becomes. Pay TV providers want the Commission to hold down broadcasters so that pay TV companies can pick their pockets. They can claim that they are doing this for the benefit of consumers, but given their track record, these pleas ring hollow. We can think of no instance in which the Commission, of its own volition, has injected itself into the marketplace in the manner that ATVA and pay TV providers desire; namely, to purposefully reduce the ability of one industry to compete in the marketplace in a manner that will serve the profit-minded interests of another industry.

Indeed, if the purpose of this proceeding were to lower the input costs of pay TV providers, the Commission and public should ask: why stop with broadcasters? After all, retransmission consent fees represent just a tiny fraction of pay TV bills. Why not take measures to reduce the costs of all programming or all manner of pay TV costs? The Commission might, for example, require set-top box manufacturers to sell their equipment to pay TV companies at cost, or, if it is willing to ignore the requirements of the Communications Act, prevent local communities from charging right-of-way access fees. Taking ATVA's argument to the logical extreme, the government should make every effort to reduce the pay TV industry's cost of doing business. Gas, electricity, labor, they should all be regulated for the benefit of pay TV providers.

Naturally, the Commission or the government generally would never take these steps. Even Economics 101 tells us that forcibly suppressing one industry to benefit another ultimately

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Consumers, White Paper, 11-12, attached to Letter from Maureen R. Jeffreys to Marlene H. Dortch, MB Docket No. 14-90 (filed Nov. 12, 2014)).

[11] *Id.* at 2-3 (citing Joint Opposition of AT&T Inc. and DIRECTV to Petitions to Deny and Condition and Reply to Comments, *AT&T Inc. and DIRECTV*, MB Docket No. 14-90, An Economic Assessment of AT&T's Proposed Acquisition of DIRECTV: Reply Declaration of Michael L. Katz, ¶21 (filed Oct. 16, 2014)).

will harm consumers.[12] In this case, that harm is clear – a reduction in local programming and diminished ability of broadcasters to secure the best programming for the widest possible distribution. And unless one blindly trusts the pay TV industry to put consumers above all else, the consumer benefits of ATVA's proposals are nonexistent.

Respectfully submitted,

Rick Kaplan
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[12] *See* Jeffrey A. Eisenach, Ph.D., and Kevin W Caves, Ph.D., *Retransmission Consent and Economic Welfare: A Reply to Compass Lexicon* at 1-2, Appendix A to Opposition of Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010).