



March 7, 2016

Via ECFS

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

**Re: American Cable Association Notice of Ex Parte Presentation;
Implementation of Section 103 of the STELA Reauthorization Act, MB
Docket No. 15-216; Expanding Consumers' Video Navigation Choices,
Commercial Availability of Navigation Devices, MB Docket No. 16-42 and
CS Docket No. 97-80**

Dear Ms. Dortch:

On March 3, 2016, Ross Lieberman, Senior Vice President, Government Affairs, American Cable Association ("ACA"), Mary C. Lovejoy, Vice President of Regulatory Affairs, ACA, the undersigned, and representatives from five ACA member companies met with Michelle Carey, Deputy Bureau Chief of the Media Bureau, Associate Bureau Chief Nancy Murphy, Martha Heller, Policy Division Chief, Steve Broeckert, Senior Deputy Policy Division Chief, and Brendan Murray, Assistant Policy Division Chief. The ACA members in attendance were:

- Chad Winters, Vice President, Manager of Cable TV Services, Cass Cable
- Chris Kyle, Vice President of Industry Relations and Regulatory Affairs, Shentel
- John Higginbotham, Assistant General Manager – Cable/Telecommunications, Frankfort Plant Board
- Leslie Brown, Sr. Vice President and General Counsel, Atlantic Broadband
- John Conrad, Vice President, General Counsel, Liberty Puerto Rico

During the meeting, the ACA member companies discussed changes in the marketplace, their experiences negotiating retransmission consent, and their concerns about the impact of the Commission's proposed approach to ensuring the commercial availability of navigation devices. Their remarks were consistent with ACA's filed comments concerning reform of the Commission's retransmission consent good faith rules and concerning adoption of competitive navigation device requirements based on device proposals discussed in the Downloadable Security Technical Advisory Committee ("DSTAC") Final Report.¹

¹ See, generally, *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the American Cable Association (filed Dec. 1, 2015) ("ACA Totality Comments"); Reply Comments of the American Cable Association (filed Jan. 14, 2016) ("ACA Totality Reply Comments"); *Media Bureau Seeks Comment on DSTAC Report*, MB Docket No. 15-64, Comments of the American Cable Association (filed Oct. 8, 2015) ("ACA Comments"); Reply Comments of the American Cable Association (filed Nov. 9, 2015); Letter to Marlene Dortch from Ross J. Lieberman, American Cable Association, MB Docket No. 15-64 (filed Feb. 11, 2016). See also

During the meeting, the ACA member companies described how they continue to invest in their high-performance communications networks in order to provide advanced services that are responsive to community needs and consumer desires in a cost-effective, consumer friendly manner, even as they face sharply escalating retransmission consent costs and blackouts, unreasonable bargaining demands, and decreasing demand for traditional linear multichannel video programming distributor (“MVPD”) services.

Retransmission Consent

ACA member companies conveyed how broadcast stations, particularly large broadcast stations groups, regularly engage in a variety of the bad faith bargaining practices and proposals in their retransmission consent negotiations that were outlined in ACA’s filings in this proceeding. However, during the meeting, they focused on two specific proposals and conduct:

- Broadcast stations allowing their affiliated networks to interfere with their right to grant of out-of-market retransmission consent to cable operators that have historically offered their signal; and
- Broadcaster demands for carriage of prospective programming.

Mr. Higginbotham described how the Frankfort Plant Board (“FPB”), a municipally owned provider with 14,000 video subscribers in Lexington, KY, had been carrying an out-of-market Fox affiliate from Louisville into its Lexington market for more than 35 years. Despite the fact that the station is significantly viewed, FPB was recently forced to drop it when the station’s affiliation agreement was changed to prohibit out-of-market carriage. FPB decided against carriage of the station without the network programming because FPB has only two employees who would be able to perform the required program deletions, and reluctantly concluded that the best option was to drop the station rather than risk liability based on a failure to properly delete network programming. Consumers were harmed when FPB was forced to drop the signal. For instance, at that time, the Louisville Fox station was the only affiliate airing Fox’s 10 p.m. news programming. Moreover, he explained that local news from Louisville is of great interest to Frankfort residents, who are now deprived of that of that programming.

Cass Cable TV, with 14,500 subscribers, 10,134 of which are video subscribers, operates systems in three designated market areas in Illinois – Springfield-Decatur-Champaign, Peoria-Bloomington, and Quincy-Hannibal-Keokuk. Cass Cable had a similar experience with network interference when it was forced to drop two historically carried significantly viewed stations valued by its customers. One of its systems is located in Pike County, Illinois, close to the Missouri border and the St. Louis market. Mr. Winters explained that Cass Cable had been providing two sets of out-of-market network-affiliated stations to its subscribers, including three significantly viewed stations from St. Louis – CW, Fox and NBC affiliates. In-market, Cass Cable has only three full power broadcast stations to carry – one religious, an affiliate of NBC, and an affiliate of CBS. On January 1, 2012, Cass Cable was forced to drop the Fox and CW significantly viewed stations after those stations entered into affiliation agreements with their networks that prohibited out-of-market carriage. Cass Cable consumers in Pike County, who were deprived of the St. Louis station they had long enjoyed, complained. Many Pike County residents work in St. Louis and want to get local news from there.

Expanding Consumers’ Video Navigation Choices, Commercial Availability of Navigation Devices, Notice of Proposed Rulemaking, MB Docket No. 16-42 and CS Docket No. 97-80 (rel. Feb. 18, 2016) (“Competitive Navigation Device NPRM”).

Several of the operators described being forced to negotiate for what the Commission has called “prospective programming channels” – that is, programming networks or stations that are either unlaunched, unidentified, or after-acquired or managed.² Cass Cable, Shentel, and Atlantic Broadband reported being forced to negotiate for a bundle of retransmission consent and carriage of an unlaunched programming network on set terms, prices, and conditions in the last retransmission consent cycle.

Cass Cable’s three markets contain broadcast stations owned by Sinclair Broadcasting. Together, they amount to 50% of the stations the operator carries. In its most recent negotiation with Sinclair, Mr. Winters stated that Cass Cable was forced to negotiate for retransmission consent bundled with an unlaunched cable network on set prices, terms, and conditions, including where on the channel line-up the network would appear upon launch. The only information it could get was what the channel would *not* be: home shopping, religious, or pay-per-view programming. Mr. Winters noted how unfair it is to be asked to agree to carriage under these circumstances for what is essentially a “black box.” Depending on the eventual identity of the channel, it may disrupt current channel line-ups due to clauses in other programming agreements that require carriage on a lower tier if the operator launches a network that airs programming of a similar genre on a lower tier. Mr. Kyle affirmed that Shentel had faced the same situation with respect to bundled carriage of an unlaunched programming network in its retransmission consent agreement with Sinclair.

In addition, both Shentel and Atlantic Broadband reported that they and their subscribers had felt the ill effects of being forced to acquiesce to after-acquired or subsequently-managed station clauses as a condition of obtaining retransmission consent from large station group owners. Mr. Kyle explained that Shentel serves 1500 subscribers in one rural market – Oakland, MD – and had agreed to a relatively high retransmission consent fee in that market for a Nexstar-owned station. The Oakland agreement contained an after-acquired or subsequently-managed station clause applying that rate to any additional television station that Sinclair may acquire in a television market where Shentel owns and operators a system. Nexstar has subsequently obtained or is obtaining other stations in Shentel markets (including WFXR, WV Media Holdings, and its proposed acquisition of Media General), which will have the effect of automatically replacing the rate Shentel had previously negotiated, in good faith, for those stations with the higher rate it had agreed to pay for one station in one small market (where it had no negotiating leverage). Shentel has had similar experiences with Sinclair acquisitions because its retransmission consent agreements with Sinclair have similar contractual language.

All of the operators in the meeting, in answer to a question from staff, stated that they passed through retransmission consent fees to subscribers, with the majority passing through 100 percent of the fees. Mr. Kyle stated that the rate increases due to after acquired or subsequently managed provisions, which in some cases have doubled his company’s fee per station from their previous contract to their new controlling contract, often go into effect after only two weeks-notice. Mr. Lieberman stressed how debilitating it is to operators’ and their subscribers’ finances to be faced with such sudden and unpredictable uncertainty as to rates. Mr. Kyle also noted that while Shentel passes these retransmission consent costs through to its subscribers, because it must give customers 30 or 60 days-notice before raising rates, the operator must absorb that portion of the higher costs. He also noted that due to unexpected price increases as a result of triggered after-acquired or subsequently-managed contractual provisions, his company and its customers experienced two price increases in a single year.

² *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶15 (2015).

Mr. Kyle confirmed that this type of clause is commonly insisted upon in retransmission consent agreements by large station groups, that they cannot be negotiated out of the agreements, and that they have become a financial arbitrage tool by New York-based media consolidators to roll-up rural television stations for the sole purpose of raising their retransmission consent rates above levels previously negotiated by the station owners and MVPDs. In response to a question from staff, Mr. Kyle stated that rates negotiated in good faith between a broadcast station and an MVPD system should remain in place for the duration of that agreement.

Ms. Brown explained that Atlantic Broadband faces the same problem with after-acquired or subsequently-managed station clauses forced upon them by large station groups that can result in sudden and dramatic rate increases. For example, because Atlantic Broadband has had to agree to such a clause in its retransmission consent agreements, Atlantic Broadband could see an annual price hike of nearly \$450,000 once a pending transaction closes for stations previously owned by another broadcaster that had negotiated lower rates with Atlantic Broadband. Ms. Brown noted that these clauses are typically structured so that whichever agreement is most favorable to the broadcaster will control.

To address these abusive practices, ACA has proposed that the Commission find the following to be either *per se* violations of the good faith rules, or at the very least, evidence of bad faith under the totality of the circumstances test:

- Third-party interference in retransmission consent negotiations for historically carried out-of-market stations.³
- Conditioning retransmission consent on set prices, terms, and conditions for after-acquired or subsequently-managed broadcast stations or unlaunched programming networks.⁴

Elimination of these practices or proposals from the broadcaster negotiating toolkit, along with the other proposals outlined by ACA in its filings, would significantly improve both the negotiating environment for retransmission consent and the potential for the parties to arrive at an agreement in good faith that is mutually satisfactory to both sides.

Navigation Devices

ACA and its member companies discussed the variety of approaches being taken to offer consumers more choices for accessing video programming – both linear and “over-the-top” (“OTT”) – in an operating environment that is both rapidly changing and increasingly challenging for cable operators. They expressed concern that the navigation device rules under consideration by the Commission, if adopted, would require all MVPDs to undertake significant capital expenditures either in the headend to convert to all Internet Protocol (“IP”) delivery, or by placing a gateway device in a subscriber’s home to convert the cable signal from QAM to IP to enable delivery of the “Navigable Service” and its three “information streams” described in the Competitive Navigation Device NPRM to a navigation device or application purchased at retail by its subscribers.⁵

Ms. Brown described the significant investment Atlantic Broadband has already made in bringing advanced and innovative devices to its markets. Atlantic Broadband operates systems

³ See ACA Totality Comments at 60-70; ACA Totality Reply Comments at 70-80.

⁴ See ACA Totality Comments at 71-76; ACA Totality Reply Comments at 80-82.

⁵ See Competitive Navigation Device NPRM, ¶¶ 25-34.

in Pennsylvania, Maryland/Delaware, Connecticut, Aiken, SC and Miami Beach, FL and serves approximately 250,000 video subscribers. Atlantic Broadband struck a direct deal with TiVo and has already deployed nearly 80,000 TiVo devices to its subscribers. The operator invested \$25 million in TiVo boxes, as well as headend upgrades and provisioning to make TiVo boxes available to its customers. These boxes use TiVo's user interface, which is very consumer friendly, and allows customers to access the content of OTT providers, like Netflix and Hulu (expected to launch this Spring) through the TiVo box and/or apps.

Mr. Higginbotham stated that FPB wants what Atlantic Broadband has, but can not afford to spend \$25 million. FPB operates an Arris headend and uses its digital controller for conditional access. Only half of its subscribers use STBs, with the rest accessing the clear QAM signal FPB sends directly via digital tuners in their television sets. After being told that it would cost well over \$100,000 to integrate FPB's technology with TiVo's, the operator decided to band together with about a dozen other small cable operators via their buying cooperative, the National Cable Television Cooperative, to confederate a TiVo offering that would replicate to some extent what Atlantic Broadband had done in integrating its linear video and OTT.⁶ Mr. Higginbotham hopes to FPB will be offering TiVo boxes to its customers within the next year.

Mr. Lieberman noted that ACA members have embraced OTT in a variety of ways, but have faced difficulties in getting OTT video providers' attention, particularly with regard to integrating their services into MVPD-provided set top boxes and providing caching services in their headends which would improve ISP customers' viewing experience.⁷ Mr. Kyle related how Shentel had tried for a year to get Netflix to authenticate its app on Shentel's Arris boxes, to no avail. He has been told that software development is holding things up. Ms. Brown noted that in many cases, OTT providers refuse Atlantic Broadband's requests for access to their video services' metadata, which causes or will cause Atlantic Broadband's customers' experience with their operator's existing and planned portal and apps to be less seamless.⁸

Mr. Conrad described how Liberty Puerto Rico ("Liberty") faces a particularly challenging operating environment in Puerto Rico, an economically challenged market where the median household income has been, and remains, significantly below that of the poorest state in the United States.⁹ Liberty serves over 250,000 video subscribers, many of whom use more than one set-top

⁶ See Press Release, TiVo and NCTC Partner to Deliver Members a Best-in-Class Pay-TV Choice (Sept. 15, 2015), available at <https://www.nctconline.org/index.php/news/press-releases/item/547-tivo-and-nctc-partner-to-deliver-members-a-best-in-class-pay-tv-choice>.

⁷ See *Protecting and Promoting the Open Internet; Framework for Broadband Internet Service*, GN Docket Nos. 14-28, 10-127; Letter to Marlene H. Dortch from Barbara Esbin at 4 (filed Feb. 2, 2015) (describing how small ACA member companies have to work hard to even get the attention of OTT video distributors for the purpose of enabling a better consumer experience; "Ms. Zeman [Cedar Falls Utilities] stated that CFU had to 'beat down the door' to get the attention of Netflix. Mr. Lovins [Jackson Energy Authority] reported that JEA struggled to get Netflix to pay attention when the network as at 2 gigabits, and is still unsuccessfully trying to negotiate a Netflix app for its set-top box").

⁸ Ms. Brown also expressed concern that the Commission's proposal to require MVPDs to provide their programming services' metadata to set-top box manufacturers, if adopted, could put Atlantic Broadband and other MVPDs at a competitive disadvantage in the marketplace. Ms. Brown explained that the Commission's proposal would require Atlantic Broadband to provide metadata to all retail set-top box manufacturers, including those affiliated with OTT video providers, but that these affiliated OTT video providers, would not have any comparable obligation to provide their OTT services' metadata to MVPDs.

⁹ In 2008, Liberty received a waiver of the integration ban based in part on financial hard hardship. *Liberty Cablevision of Puerto Rico, Ltd. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion & Order, 23 FCC Rcd 16651 (2008). Liberty put evidence in the record that as of the 2000 census, the median household income in Puerto Rico was \$13,000 (compared to U.S. median household income of \$41,994). *Id.*, ¶ 5.

box. Its network is 100% digital, and it offers QAM-based video service which runs on top of its hybrid fiber-coax network. Despite challenging economics, Liberty to date has strongly invested in broadband capacity in Puerto Rico, and has increased the number of homes passed, as well as anchor institutions such as hospitals. Liberty has no current plans to go to Internet Protocol delivery for video. Mr. Conrad explained that Liberty is concerned that the Commission will apply “one-size-fits-all” navigation device requirements that will strand its investment in its QAM-based video service to date while requiring it to make additional investments in its video service that would be hard, if not impossible, to recover in a challenged market like Puerto Rico due to lack of demand.

In closing, Mr. Lieberman suggested that the best course of action for the Commission is to set aside consideration of the competitive navigation device proceeding for the time being and let the dynamic marketplace, which is providing consumers with increasing choices, continue to develop. Alternatively, the Commission should not bring smaller operators under the ambit of its proposed navigation device rules. The proposals are complicated, the standards development process is likely to be lengthy, and the product development and roll out processes likely to be costly, resulting in burdens smaller providers are ill-equipped to bear. Mr. Lieberman reiterated that adopting rules that do not cover MVPDs with 1,000,000 or fewer subscribers will still leave two open standards device choices for all consumers via the direct broadcast satellite (“DBS”) operators, and will leave 93 percent of all MVPD subscribers with three or more choices (two DBS providers and a larger cable/IPTV MVPD). Nonetheless, if successful, consumer demand for these navigation devices will eventually drive ACA members to adopt the proposed open standards themselves when the economics may be more favorable. In contrast to a voluntary compliance approach, premature mandates are almost certain to cause significant system shutdowns, depriving rural and hard-to-serve areas of these networks and the services they provide.

If you have any questions, or require further information, please do not hesitate to contact me directly.

Sincerely,



Barbara Esbin

Counsel to the American Cable Association

cc: Michelle Carey
Nancy Murphy
Martha Heller
Steve Broeckaert
Brendan Murray