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April 26, 2016

BY ELECTRONIC FILING

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

Re: Notice of *Ex Parte* Communication in MB Docket Nos. 16-41, 15-216, and 10-71

Dear Ms. Dortch:

On April 25, 2016, representatives of the American Cable Association met with Commissioner Clyburn and her Chief of Staff, David Grossman. Present on behalf of ACA were: Matthew Polka and Ross Lieberman of ACA; Judy Meyka and Jeff Nourse of the National Cable Television Cooperative; Heather McCallion of Atlantic Broadband; Chris Kyle of Shentel, and Michael Nilsson of Harris, Wiltshire & Grannis LLP.

We began by thanking Commissioner Clyburn for her work in helping launch both the diversity *Notice of Inquiry* and the public workshops on the state of the video marketplace. We told her how much we appreciated the opportunity to describe the marketplace from our perspective—a perspective that, it seems to us, sometimes gets drowned out by larger and better-financed players in the industry.

We also described how the business imperatives of smaller MVPDs align with the Commission's programming diversity interests. As explained in more detail in our comments and reply comments filed in MB Docket No. 16-41, smaller cable operators generally want to offer subscribers the most attractive programming they can at affordable prices.[1] Many of them also want to emphasize their broadband business even at the expense of their traditional cable offerings—and broadband video holds tremendous potential for diversity. Both of these imperatives can benefit the truly "independent" programmers unaffiliated with any large media conglomerate.

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[1] *See* Comments of the American Cable Association, MB Docket No. 16-41 at 5-8 (filed Mar. 20, 2016); Reply Comments of the American Cable Association, MB Docket No. 16-41 at 2 (filed Apr. 19, 2016).

Unfortunately, however, the largest players engage in a number of practices that hinder smaller cable operators and their subscribers from accessing independent programming.

- Large programmers impose bundling requirements that make smaller cable operators carry dozens of unwanted networks. This takes up limited capacity that could instead be used to carry independent programmers or increase broadband performance. It also eats up programming budgets to the point where small cable operators have no discretionary funds left for independent programmers.

- Large programmers impose penetration requirements that make smaller cable operators carry dozens of networks in a bloated "super expanded basic" tier. This makes it more expensive for subscribers to purchase independent channels (which, lacking the extra leverage bundling provides, are generally found on more expensive specialty tiers). It also makes it impossible for smaller cable operators to offer "skinny bundles" that consumers increasingly want as a complement to broadband video.

- Large MVPDs enter into most favored nation ("MFN") clauses with independent programmers. While *some* such clauses do not materially hinder independent programmers from reaching deals with smaller cable operators, others do—such as "cherry-picker" MFNs.

- Large programmers have sought business models that would result in their *video* fees (for both traditional and online-only programming) being paid through smaller cable operators' *broadband Internet access service* charges. Such practices, were they to spread, would make it harder and more expensive for smaller cable operators' customers to access diverse and independent programming online.

We urged the Commission to proceed from the diversity *Notice of Inquiry* to a rulemaking. We also, however, urged the Commission to act *now* in several pending proceedings where the record relating to some of these issues is complete.

Most immediately, the Commission should adopt the proposals of ACA and of the American Television Alliance (of which ACA is a member) in the good-faith proceeding, MB Docket Nos. 15-216 and 10-71. We discussed at some length the various proposals in that proceeding related to bundling, including ACA's proposal to prohibit a top-four rated broadcaster's insistence of bundling its retransmission consent with another set of "must-have" programming, such as a regional sports network.[2]

We also urged the Commission to finally act on ACA's longstanding proposal to amend the FCC's program access rules to allow buying groups, like NCTC—the most widely used buying group in this space—to file program access complaints as Congress intended. This would provide

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[2] *See* Comments of the American Cable Association, MB Docket No. 15-216 at 3, 32 (filed Dec. 1, 2016).

small cable operators (through NCTC) an opportunity to address through enforcement action some of the activities described in this proceeding.

Again, we would like to express our thanks to Commissioner Clyburn—and to the entire Commission—for giving organizations like NCTC, Atlantic Broadband, and Shentel the opportunity to offer their perspective on these vitally important issues. Pursuant to the Commission's rules, I am filing one copy of this letter in each of the dockets listed above. Should you have any questions, please contact me.

Sincerely,

Ross J. Lieberman

cc: Mignon Clyburn
David Grossman