



May 4, 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 Communication;
Implementation of Section 103 of the STELA Reauthorization Act, MB
Docket No. 15-216; Amendment to the Commission's Rules Related to
Retransmission Consent, MB Docket No. 10-71**

Dear Ms. Dortch:

On May 2, 2016, Ross Lieberman, Senior Vice President, Government Affairs, American Cable Association ("ACA"), Mary C. Lovejoy, Vice President of Regulatory Affairs, ACA, Professor Michael Riordan, the Laurans A. and Arlene Mendelson Professor of Economics at Columbia University, and the undersigned met with the following officials of the Media Bureau, Office of General Counsel, Office of Special Plans and Policy, and Wireless Telecommunications Bureau:

Media Bureau

William Lake, Bureau Chief
Michelle Carey, Deputy Bureau Chief of the Media Bureau
Nancy Murphy, Associate Bureau Chief
Susan Singer, Chief Economist
Martha Heller, Policy Division
Steve Broeckaert, Policy Division
Diana Sokolow, Policy Division

Office of General Counsel

Marilyn Sonn (via teleconference)
Susan Aaron

Office of Strategic Planning & Policy Analysis

Jonathan Levy, Acting Chief Economist
Paul LaFontaine
Omar Nayeem

Wireless Telecommunications Bureau

Patrick Sun

During the meeting ACA discussed its proposal that bundling of a top four-rated broadcast stations with a regional sports network (“RSN”) or other “must have” programming assets be deemed a *per se* violation of the obligation to negotiate retransmission consent in good faith, consistent with ACA’s prior filings in these dockets and the presentation attached to this letter.¹ As reflected in the attached presentation, ACA and Professor Riordan again rebutted the arguments presented by the National Association of Broadcasters (“NAB”) in its February 16, 2016 *ex parte* communication, which was presented together with an economic report prepared on behalf of NAB by Dr. Kevin W. Caves of Economists Incorporated and Professor Bruce M. Owen of Stanford University.² ACA explained that NAB’s arguments do not provide an adequate basis for the Commission to reject ACA’s request that the Commission (i) abandon its presumption that proposals for carriage conditioned on carriage of any other programming are consistent with competitive marketplace considerations and thus meet the standard for good faith negotiation, and (ii) deem the bundling of top four-rated broadcast stations with RSN (or other “must have” programming assets) to be a *per se* violation of the good faith obligation.

Meeting participants discussed how the Commission could implement ACA’s proposed prohibition by adopting a rule deeming it a *per se* violation of the duty to negotiate retransmission consent in good faith for a common owner of a top-four rated broadcast station and a RSN (or other “must have” programming asset) to refuse an MVPD’s request to sequentially negotiate their carriage contracts by granting an MVPD a temporary extension of the retransmission consent agreement. The extension would begin at the termination date of the existing retransmission consent agreement and last until 45 days after either an agreement is reached for the other “must have” programming or the “must have” programming is withheld from the MVPD. This change would be an important step toward improving the overall environment for retransmission consent negotiations and protecting consumer interest.

Participants also discussed how overly restrictive confidentiality or non-disclosure provisions in retransmission consent agreements hamper the ability of parties in this proceeding to provide empirical evidence to the Commission demonstrating the prevalence of bad faith negotiating tactics and proposals. ACA also noted how broad non-disclosure agreements can effectively prevent an MVPD that finds it must acquiesce to a broadcaster’s demands in order to avoid a blackout from subsequently filing a good faith complaint. Such confidentiality provisions can prohibit MVPDs from disclosing – even to the Commission – relevant data and information about both the final agreement and the broadcaster’s conduct and offers during negotiations,

¹ See *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 at 15-33 (filed Dec. 1, 2015) (“ACA Totality Comments”); Michael H. Riordan, *Higher Prices from Bundling of “Must Have” Programming are not Based on Competitive Marketplace Considerations* (attached to ACA Totality Comments as Attachment A) (“Riordan Paper”); Reply Comments of the American Cable Association at 40-53 (filed Jan. 14, 2016); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test, Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket Nos. 15-216, 10-71, Letter to Marlene H. Dortch, from Barbara Esbin, Cinnamon Mueller (filed Apr. 28, 2016) (“ACA Apr. 28 Ex Parte”); Attachment A, Michael H. Riordan, *Bundling in Retransmission Consent Negotiations: Response to Caves and Owen*.

² *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test, Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket Nos. 15-216, 10-71, Letter to Marlene H. Dortch, Esq., from Rick Kaplan, NAB (filed Feb. 16, 2016), attaching Kevin W. Caves and Bruce M. Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, February 2016.

thus thwarting the protections Congress intended MVPDs to enjoy under the good faith rules.³ ACA urged the Commission to deem a broadcaster's request to include non-disclosure agreements that would have this effect as a *per se* violation of the good faith rules. Along the same lines, ACA recommends that the Commission deem it a violation of the good faith rules for a broadcast station to require that an MVPD relinquish its right to file a good faith complaint with the Commission as a condition of granting retransmission consent.⁴ ACA is not alone in raising concerns about non-disclosure agreements.⁵ Such negotiating demands undermine the entire

³ To the extent that the Commission does not believe it has the authority to grant interim carriage, it is vitally important that MVPDs are not restricted in their ability to sign retransmission consent agreements in order to maintain signal carriage for their subscribers while reserving the right to file complaints regarding conduct and/or proposals of the broadcaster with whom they made the deal. Moreover, the Commission should make clear that it will not take account of the fact that an MVPD, that has filed a good faith complaint, signed a retransmission consent agreement in considering whether or not a broadcaster acted in bad faith preceding the agreement's signing.

⁴ In its just-released Business Data Services Tariff Investigation Order and Further Notice of Proposed Rulemaking, the Commission seeks comment on affording similar relief by adopting a rule prohibiting the use of NDAs or their functional equivalents in business data service commercial agreements that restrict providers' and purchasers' ability to disclose information to the Commission or other government entities with oversight responsibilities. See *Business Data Services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, ¶¶ 313-32 (rel. May 2, 2016). The Commission specifically seeks comment also on prohibiting NDAs that effectively require the Commission's legal compulsion before parties are able to produce information from a business data service commercial agreement. *Id.*, ¶ 317. ACA supports such actions, at a minimum, in the context of the Commission's retransmission consent good faith rules.

⁵ Numerous MVPDs and MVPD groups, particularly those representing smaller providers, have brought to the Commission's attention the problem of overly restrictive non-disclosure agreements in retransmission consent agreements. See, e.g., *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of NTCA – The Rural Broadband Association at 12-14 (filed Dec. 1, 2015) (overly restrictive Non-Disclosure Agreements should be considered to be a violation of good faith negotiation, or at a minimum a presumptive violation the totality of the circumstances test); Comments of ITTA – the Voice of Mid-Sized Communications Companies at 9-11 (filed Dec. 1, 2015) (non-disclosure provisions restrict MVPDs from disclosing relevant information to regulators when pursuing available legal or regulatory remedies, preventing them from seeking relief from bad faith conduct for themselves and their subscribers, and interfere with the ability of the FCC to carry out its statutory responsibilities; the FCC should deem it a *per se* failure to negotiate in good faith to prevent an MVPD from disclosing the rates, terms, and conditions of a contract proposal or agreement to the FCC, court of competent jurisdiction, and/or other state or federal governmental entity in connection with a formal retransmission consent complaint or other legal or administrative proceeding); Comments of the United States Telecom Association at 21 (filed Dec. 1, 2015) (non-disclosure provisions can prevent MVPDs from pursuing legal or regulatory remedies due to their inability to disclose to regulators the prices, terms, and conditions offered, even under appropriate confidentiality conditions and may prevent FCC from being in a position to enforce retransmission rules if relevant evidence is withheld; the FCC should deem it a *per se* violation of the good faith rules for a broadcaster to prevent an MVPD from disclosing information on rates, terms and conditions of a contract proposal or agreement to the Commission or court of competent jurisdiction during a dispute concerning retransmission consent); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, et al.; Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket Nos. 15-216, 10-71, Letter to Marlene H. Dortch, from Christopher L. Shipley, INCOMPAS, on behalf of Networks for Competition and Choice Coalition – INCOMPAS, ITTA, NTCA, and Public Knowledge – and the Open Technology Institute at New America at 1-2 (filed Mar. 28, 2016) (the FCC should limit or restrict use of non-disclosure agreements so that terms can be shared with courts, regulatory entities, legislative bodies, and

purpose of the good faith rules and the Commission's ability to carry out its statutory obligation to govern the exercise of retransmission consent and ensure that negotiations are conducted in good faith.

This letter is being filed pursuant to Section 1.1202(b) of the Commission's rules, 47 C.F.R. § 1.1202(b).

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

Enclosure

cc (*via email*): William Lake
Mary Beth Murphy
Nancy Murphy
Susan Singer
Martha Heller
Michelle Carey
Steve Broeckert
Diana Sokolow
Marilyn Sonn
Susan Aaron
Jonathan Levy
Paul LaFontaine
Omar Nayeem
Patrick Sun

membership-based associations or organizations that represent these companies' interests for advocacy purposes; decision makers and advocates of such providers must have access to all relevant information in order to effectively carry out their duties).

Attachment A

Bundling a Top Four Rated Broadcast Station with a
Regional Sports Network
(or other “Must Have” Programming)
Must Be Deemed a *Per Se* Good Faith Rule Violation

Presentation of the American Cable Association
May 2, 2016

Media Bureau Docket Nos. 15-216 and 10-71

Overview of ACA Position

- Bundling of a top-four rated broadcast station and a “must have” programming asset, such as an RSN, harms competition and consumers.
 - “Must have” bundling increases market power and bargaining leverage with the effect of raising prices.
 - These higher prices cannot be said to be “based on competitive marketplace considerations,” as FCC found true for other forms of bundling in its 2000 Good Faith Order.
 - Consumers are harmed by higher retail prices, diminished MVPD competition, and impasses (or threats of impasses) in carriage negotiations involving bundled “must have” programming assets (with common contract expiration dates) because the disruption is greater.
- The FCC has the statutory authority to address the problems resulting from the bundling of “must have” programming, such as RSNs, with top-four rated broadcast stations.

Overview: What The FCC Should Do to Address the Problem

- First, the FCC must eliminate its presumption that all bundled proposals are based on competitive marketplace considerations.
 - The FCC should no longer presume that proposals for carriage conditioned on carriage of any other programming meet the standard for good faith negotiation because such proposals are not always based on competitive marketplace considerations.
- Second, and more specifically, the FCC must deem a top four broadcasters' refusal to negotiate retransmission consent after the conclusion of negotiations for a commonly owned Regional Sports Network ("RSN") (or other "must have" programming) in the same market to be a *per se violation*.
 - The FCC should adopt a rule deeming it a *per se* violation of the duty to negotiate retransmission consent in good faith for a common owner to refuse an MVPD's request to sequentially negotiate carriage contracts for top-four broadcast stations and one or more other "must have" programming assets such as RSNs that serve the same market and have expiration dates around the same time by granting a temporary extension of the retransmission consent agreement.
 - The temporary extension would begin at the end of the existing retransmission consent agreement and last until 45 days after either an agreement is reached for the other "must have" programming or the "must have" programming is withheld from the MVPD.

FCC Precedent Supports Action on this Form of Bundling

- The FCC has repeatedly recognized that top four-rated stations and RSNs are “must have” programming for MVPDs.
- The FCC has recognized that coordinated or bundled negotiations for “must have” programming can increase market power and bargaining leverage, allowing the owner to charge higher prices that harm competition and consumers.
 - It has done so in the merger context in the Comcast-NBCU Order.
 - It has done so in the rulemaking context – finding it to be a *per se* violation of the good faith obligation for two non-commonly owned top four stations in the same market to jointly negotiate retransmission consent in the 2014 Joint Negotiation Order.
- Economic analysis relied upon in past is similar to economic analysis supporting ACA’s proposal concerning bundled negotiation of retransmission consent and other “must have” programming assets.

“Must Have” Bundling is a Growing Problem

- Smaller MVPDs have reported instances of bundled negotiations for “must have” programming assets, such as top four-rated broadcast stations and RSNs, and more instances are expected to occur in the future.
 - Fox has bundled and is actively aligning contract expiration dates of its O&O stations, RSNs, and national programming networks with smaller MVPDs to force bundled negotiations in the future.
 - Comcast-NBCU is effectively prohibited from engaging in bundled negotiations as a result of merger conditions, but these conditions expire in 2018.
- There are 23 DMAs in which Fox or Comcast-NBCU own an O&O and RSN serving the same market, putting 79 different MVPDs (large and small) at risk of facing forced bundled negotiations.

Summary of Analysis and Proposal in ACA Comments

- In responding to the Totality of the Circumstances NPRM, ACA relied upon an economic analysis by Prof. Michael H. Riordan of Columbia University, attached to its Dec. 1st Comments. The Riordan Paper advanced three main points:
 1. Higher prices resulting from bundled negotiations for a “must have” local broadcast station and a “must have” RSN are not based on competitive marketplace considerations.
 2. A broadcaster that can bundle negotiations for a “must have” local broadcast station and a “must have” RSN can increase its market power and bargaining leverage with the effect of raising prices (fees plus other consideration).
 3. Separate negotiations for “must have” local broadcast stations and “must have” RSNs remedy the problem of higher prices when these programming assets are under common ownership, and sequential negotiations would accomplish that.

NAB Feb. 16 Response and ACA Apr. 28 Rebuttal

- On Feb. 16th, NAB made a filing challenging ACA’s request, and supported its challenge with an economic analysis prepared on behalf of NAB by Dr. Kevin W. Caves of Economists Incorporated and Prof. Bruce M. Owen of Stanford University. They argue:
 - The FCC cannot, because it lacks authority, and should not, because it would undermine antitrust laws, adopt the relief ACA has requested.
 - The Riordan Paper cannot be relied upon by FCC because it
 - mischaracterizes competition in the market for programming;
 - is lacking in empirical support and has no basis in economics or antitrust principles; and
 - proposals based upon its conclusions would likely harm economic welfare.
- ACA’s Apr. 28 Ex Parte contains a rebuttal to the Caves-Owen Paper by Riordan (“Riordan Response”) demonstrating that neither the arguments of NAB nor its economic experts undermine ACA’s case.

Riordan Presentation of Economic Analysis Supporting ACA Proposals

Overview of Economic Analysis

1. Price differences resulting from a broadcaster's ability to bundle negotiations for a "must have" local broadcast station and a "must have" RSN are not based on competitive marketplace considerations.
2. A broadcaster's ability to bundle negotiations for a "must have" local broadcast station and a "must have" RSN increases market power and bargaining leverage with the effect of raising prices (fees plus other consideration).
3. Sequential negotiations for "must have" local broadcast stations and "must have" RSNs remedy the problem of higher prices when these programming assets are under common ownership and the previous agreements terminate at or around the same time.

Economic Analysis: Higher prices resulting from a broadcasters ability to bundle negotiations for a “must have” local broadcast station and a “must have” RSN are not based on competitive marketplace considerations.

- The supply of must-have programming is by definition monopolistic.
 - Consistent with past FCC descriptions, “must have” programming lacks close substitutes and achieves full or almost full market coverage.
 - Contrary to the suggestion of Caves-Owen, concentration measures for a broad upstream content market are irrelevant.
- Competitive marketplace considerations do sensibly refer to differences in the demand for programming determined by the structure of (downstream) MVPD markets.
 - Contrary to the suggestion of Caves-Owen, the concentration of MVPD markets, while relevant for the demand for programming, does not contradict that the supply of must-have programming is monopolistic.
- Common rather than separate ownership of “must have” television stations and a must-have RSN is a monopolistic marketplace consideration.

Economic Analysis: A broadcaster's ability to bundle negotiations for a "must have" local broadcast station and a "must have" RSN increases market power and bargaining leverage with the effect of raising prices (fees plus other consideration) and harming consumers.

- Two standard economic models support the conclusion that monopoly bundling of "must have" goods raises prices.
 - Monopoly pricing model: Imperfectly informed seller makes price offers that a buyer with private knowledge about valuations accepts or rejects.
 - Nash bargaining model: Symmetrically informed buyer and seller divide the net value from a transaction based on differences in bargaining power and outside options.
- The two models reach the same conclusion.

Monopoly pricing: Bundling increases market power.

**Separate pricing: Charge \$7.00 for the RSN and \$2.50 for the TV station.
 Bundle pricing: Charge \$10.00 for the package.**

Marginal cost is 0	Two equally probably types of buyer	
	A	B
Value of must-have programming	RSN	\$8.00
	TV station	\$2.50
		\$7.00
		\$3.00

Based on George Stigler, *United States v. Loew's Inc.: A Note on Block-Booking*, 1963.

Monopoly pricing: Contrary to the suggestion of Caves-Owen, higher prices from bundling of must-have programming does not depend on “a particular reversal of valuations.”

Baseline assumptions:	Single product monopoly		Two product monopoly		Welfare effects of bundling		
	Correlation of buyer values	Price	Market coverage	Stand-alone price	Package price	Change in Profit	Change in Consumer Welfare
1. Buyer values for each of two products are uniformly distributed between 4.00 and 9.00. 2. Marginal cost is 0.	Negative				10.56	1.64	-1.56
	Zero	4.50	90%	> 9.00	10.21	1.11	-1.19
	Positive				9.68	0.71	-0.67

Source: Yongmin Chen and Michael H, Riordan, *Profitability of Product Bundling*, INTERNATIONAL ECONOMIC REVIEW, 2013 (Table A.1).

Nash bargaining: Bundling increases leverage.

<p>Separate negotiations: Charge \$3.25 for the RSN and \$1.50 for TV station.</p> <p>Bundle pricing: Charge \$5.00 for the package.</p>		
Marginal cost is 0.		Single buyer type
Value of must-have programming	Only RSN	\$7.00
	Only TV station	\$3.50
	Both RSN and TV station	\$10.00

Consumer harm: Higher wholesale prices for must-have programming raises consumer prices, distorts consumer choice, and discourages new entry into MVPD markets.

- Consistent with standard economic theory, MVPDs pass through higher programming costs to retail subscription prices.
- Higher subscription prices resulting from pass through of higher programming costs causes price sensitive consumers to “cut the cord.”
- To the extent satellite MVPDs have greater bargaining power than local cable operators, or engage in national pricing, bundled negotiations for “must have” broadcast stations and RSNs may have a disproportionate impact on the prices of small cable operators, and consequently distort consumer choice between MVPD alternatives.
- Lower retail price-cost margins discourage new entry into local retail markets.
- Additionally, to the extent that these are partial substitutes, impasses in carriage negotiations involving bundled “must have” programming assets (with common contract expiration dates) would cause greater disruption than isolated impasses.

Sequential negotiations for “must have” local broadcast stations and “must have” RSNs remedy the problem of higher prices when these programming assets are under common ownership and previous agreements terminate at or around the same time.

- A common owner has an incentive to make agreements for “must have” programming co-terminus in order to facilitate bundled negotiations.
- A requirement of good faith separate but concurrent negotiations encounters problems of detecting sham offers and tacit linkage.
- Good faith sequential negotiations achieve the same outcomes as separate good faith negotiations.
- Tacit linkage is more difficult (or more obvious) with sequential negotiations than with concurrent separate negotiations.

Separate negotiations: Contrary to Caves-Owen, separate good-faith negotiations for must-have broadcast stations and RSNs is not analogous to à la carte pricing in MVPD markets.

- Since retail MVPD markets are not comparable to wholesale programming markets, normative conclusions about retail bundling cannot be extrapolated to wholesale bundling.
- Contrary to the suggestion of Caves-Owen, the Crawford-Yurukoglu analysis of retail MVPD bundling does not undercut the case for separate negotiations for must-have programming.
 - Crawford-Yurukoglu interpret à la carte pricing as a multipart tariff, which is different from independent pricing.
 - With just two goods under consideration, a multipart tariff is equivalent to mixed bundle pricing.
 - The Crawford-Yurukoglu analysis does not show that bundling is likely to reduce consumer welfare.

Economic Analysis: Conclusions

- A common owner’s insistence on bundled negotiations for a “must have” broadcast station and a “must have” RSN is likely to result in higher prices and harm consumers.
- The higher prices resulting from bundled negotiations for “must have” programming are not, from a sensible economic perspective, based on competitive marketplace considerations.
- Obliging a common owner of a must-have broadcast station and a “must have” RSN to offer sequential renegotiations of agreements is likely to improve MVPD market performance and benefit consumers.

Implementation

- ACA’s proposal can be implemented by deeming it a *per se* violation of the good faith obligation for a common owner of a top four-rated station and an RSN (or another “must have” programming asset) to refuse an MVPD’s request to sequentially negotiate their carriage contracts by granting the MVPD a temporary extension of the retransmission consent agreement.
- The extension would begin at the termination date of the existing retransmission consent agreement, and last until 45 days after either an agreement is reached for the other “must have” programming or the “must have” programming is withheld from an MVPD.

The FCC Has Legal Authority to Address Bundling of Retransmission Consent and Other “Must Have” Programming

- The FCC has legal authority to prohibit bundled negotiations for retransmission consent and other “must have” programming through its good faith rules.
- The FCC should no longer presume that bundled negotiations for retransmission consent are based on competitive marketplace considerations.
 - Because it is not based on competitive marketplace considerations, bundling of retransmission consent and other “must have” programming should not presumptively constitute good faith negotiation under the FCC’s rules.
 - Bad faith arises not from the act of bundling itself, but the refusal to permit sequential negotiations when an MVPD is at risk of forced bundling of “must have” programming assets.

FCC Has Legal Authority to Address Bundling of Retransmission Consent and Other “Must Have” Programming, cont.

- NAB and Caves-Owen are wrong that FCC’s role is limited to filing in gaps in antitrust enforcement and FCC action would improperly undermine antitrust enforcement.
- The FCC has both adequate legal authority and a constructive role to play through the good faith rules that is complementary to the antitrust laws.
 - The FCC’s statutory authority is broad enough to permit it to address broadcaster behavior under the good faith rules even if that behavior would not violate the antitrust laws.
 - A prohibition on forced bundling two or more “must have” programming assets in retransmission consent negotiations will protect the public interest against the exercise of bargaining power resulting in MVPDs paying higher prices for those assets than could be obtained through separate, sequential negotiations and passing those supra-competitive prices through to consumers in the form of higher rates.
- The FCC rejected similar broadcaster arguments that joint retransmission consent negotiations were better left to the antitrust authorities in its 2014 Joint Negotiation Order.

FCC Has Legal Authority to Address Bundling of Retransmission Consent and Other “Must Have” Programming, cont.

- There is no statutory bar to adopting ACA’s proposal.
 - NAB is wrong to characterize this as interim carriage; the proposal does not force carriage of the broadcast signal.
 - It is a procedural rule aimed at preventing a broadcaster from refusing to extend an existing agreement for a limited period as a remedy to bad faith conduct.
 - FCC has the authority to identify instances of bad faith and to impose remedies in response to them.
- This addition to the good faith rules would be an important step toward improving the overall environment for retransmission consent negotiations and protecting consumer interest.