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February 24, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notification of Ex Parte Presentation of Time Warner Cable Inc., MB Docket No. 10-71

Dear Ms. Dortch:

On February 22, 2011, Cristina Pauzé of Time Warner Cable Inc. ("TWC") and the undersigned met with the following personnel regarding the forthcoming Notice of Proposed Rulemaking addressing potential changes to the Commission's retransmission consent rules: Commissioner McDowell and his Legal Advisor, Rosemary Harold; Marilyn Sonn, Acting Legal Advisor to Chairman Genachowski; and Jennifer Tatel, Legal Advisor to Commissioner Baker. At these meetings, we urged the Commission to seek comment on a broad range of reforms, including new dispute-resolution procedures and interim carriage requirements, to address the consumer harms arising under the existing rules. We explained that the Commission has ample authority to adopt such remedies and that it would be counterproductive to foreclose debate on these important issues.

Consistent with TWC's previous pleadings in support of the Petition for Rulemaking in MB Docket No. 10-71, we noted that the Commission has uncommonly broad authority under Section 325 "to govern the exercise by television broadcast stations of the right to grant retransmission consent." 47 U.S.C. § 325(b)(3)(A). We further stated that, together with the Commission's broad public interest authority over broadcast licensees under Section 309 of the Act and the Commission's ancillary authority under Sections 4(i) and 303(r), this Section 325 mandate empowers the Commission to take whatever remedial actions are necessary to protect consumers from abuses of the retransmission consent process, including by establishing arbitration or other dispute-resolution processes and interim carriage obligations.[1]

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[1] As TWC has explained in its pleadings, any arbitration mechanism or other dispute-resolution process should ensure implementation of the core principles in Section 325 (such as the need to prevent retransmission consent fees from adversely affecting basic

We further explained that Commission precedent, legislative history, and judicial decisions confirm the Commission's authority to require interim carriage while dispute-resolution proceedings are underway. Examples of such authority include:

- The Commission's recent order approving the Comcast-NBCU transaction requires the NBC owned-and-operated stations to submit to arbitration and to authorize interim carriage in the event of retransmission consent disputes,[2] just as the Commission required of News Corp. when it acquired control of DIRECTV. If the Communications Act foreclosed such requirements, as some broadcasters have asserted, then it would have been improper for the Commission to impose them as merger conditions.

- In the closely related context of program access disputes, the Commission authorized complainants to seek "a temporary standstill of the price, terms, and other conditions of an existing programming contract."[3] The Commission concluded that the benefits of interim carriage—including "minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint; limiting the ability of vertically integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal negotiations); [and] encouraging settlement"—trumped the programmers' asserted right to withhold consent to carry their programming.[4] Just as MVPDs generally may not carry broadcast stations that elect retransmission consent without their express approval,[5] MVPDs

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cable rates). Because retransmission consent is a legislative construct and because many Commission rules (including network non-duplication and syndex provisions and the general obligation to carry broadcast stations on a compulsory basic tier) give preferences to broadcasters, retransmission consent negotiations do not occur in a genuine marketplace, and there is, therefore, no meaningful way for an arbitrator or regulator to determine "market" rates for retransmission consent.

2 *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, FCC 11-4, MB Docket No. 10-56, ¶¶ 49-59 (rel. Jan. 20, 2011).

3 *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, First Report and Order*, 25 FCC Rcd 746 ¶ 75 (2010) ("*2010 Program Access Order*").

4 *Id.*

5 *See* 47 U.S.C. 325(b)(1)(A). As TWC has previously explained, while Section 325(b)(1)(A)'s "consent" provision limits the unilateral ability of *MVPDs* to carry broadcast stations without express approval, that provision does not speak to—and thus in no way diminishes—the *Commission's* authority under Section 325(b)(3)(A) or Sections 303(r) and 4(i). Courts have confirmed that such statutory silence does not divest the agency of its authority under the Act. *Alliance for Community Media v. FCC*,

may not carry cable networks without a copyright license,[6] yet the Commission nevertheless determined that it may temporarily override the need for consent pursuant to the Copyright Act to protect the public interest. There is no sound reason to construe the Commission's authority over broadcast stations as more limited than its authority over cable programming services; to the contrary, Section 309 of the Act gives the Commission far more extensive authority over broadcast licensees.

- Even before the interim carriage provisions of the *2010 Program Access Order* took effect, the Media Bureau found that it had "statutory authority to act on a standstill petition in program access cases pursuant to the authority granted to the Commission under Section 4(i) of the Act."[7]

- The Supreme Court also has long held that the Commission has authority to issue an order maintaining the *status quo* in cable carriage disputes when "the public interest demands interim relief."[8]

- During the congressional debates surrounding the enactment of Section 325, sponsors of the legislation made clear that cable operators would be able to petition the Commission to require interim carriage in the event of retransmission consent disputes. For example, Senator Lautenberg stated: "[I]f a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights. Instead, cable operators will have an opportunity to seek relief at the FCC."[9] In response to arguments claiming that the Commission's authority was more limited, Senators Inouye and Stevens wrote to confirm the Commission's broad authority to resolve disputes, noting: "At a minimum, Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution]."[10]

In short, we explained that the Communications Act and relevant precedent demonstrate the Commission's authority to require interim carriage in the event of retransmission consent

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529 F.3d 763, 774 (6th Cir. 2008). In any event, there is no reason to conclude that a dispute-resolution process would entail overriding any party's consent; rather, the Commission or an arbitrator might establish a retransmission consent rate that would determine what stations may charge, but not obligate carriage.

6 *See* 17 U.S.C. §§ 106, 111(c)(3).

7 *Sky Angel U.S., LLC*, Order, DA 10-679, ¶ 6 n.31 (rel. Apr. 21, 2010).

8 *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180 (1968).

9 138 Cong. Rec. S14615-16 (Sen. Lautenberg).

10 Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30, 2007).

disputes, and at a bare minimum create an issue worthy of further exploration in the upcoming NPRM. We cautioned that reaching premature conclusions about potential limits on the Commission's authority would prevent development of a complete record and could hamper the Commission's ability to adopt appropriate remedies in this proceeding and beyond.

In addition, we encouraged the Commission to seek comment on other reforms, including measures to permit MVPDs to carry broadcast stations on an optional tier or á la carte basis, rather than on a mandatory tier. We explained that, as long as consumers are forced to subscribe to (and pay for) broadcast programming, there would be no market-based mechanism to discipline rising retransmission consent fees. We noted that in areas subject to effective competition, the "must buy" requirements relating to broadcast signals do not apply. *See Carriage of Digital Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶ 102 (2001) (observing that "if a cable system faces effective competition under one of the four statutory tests, and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital service tier"); *Time Warner Entertainment v. FCC*, 56 F.3d 151, 192 (D.C. Cir. 1994) (holding that sections 623(b)(7) and (b)(8) do not apply in areas subject to effective competition). Although the Commission has recognized this consequence of the Act's effective-competition provisions, we suggested that it would be beneficial if the Commission were to confirm that cable operators are free to make subscription to the basic tier optional—or alternatively to carry broadcast stations that elect retransmission consent on a separate tier or an á la carte basis—in such circumstances and amend the good faith rules to prevent (or otherwise prohibit) broadcasters from conditioning carriage of their signals on such tier placement or "must buy" status. For similar reasons, we suggested that the Commission seek comment on whether it has authority to permit the carriage of retransmission consent stations in areas *not* subject to effective competition, as well as must-carry stations, outside a mandatory tier. We recommended that the Commission seek comment on whether it should revisit the analysis undertaken in the *Viewability Order* to the extent necessary to permit increased flexibility in tier placement and buy-through requirements.[11]

To facilitate the Commission's consideration of these issues, TWC submits the attached list of suggested questions for the NPRM. TWC further supports inclusion of the questions proposed by the American Television Alliance (ATVA), of which TWC is a member.

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[11] *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 (2007).

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
Counsel for Time Warner Cable

cc: Rosemary Harold
Marilyn Sonn
Jennifer Tatel