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September 19, 2011

Via ECFS

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

Re: American Cable Association (“ACA”) Notice of Ex Parte Presentation; *In the Matter of Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, MB Docket No. 11-93*

Dear Ms. Dortch:

On September 15, 2011, Bob Gessner, Massillon Cable, Gary Nillson, WOW!, Matt Polka and Ross Lieberman, ACA, and the undersigned, Thomas Cohen of Kelley Drye & Warren LLP, met with the following staff of the Media Bureau: Michelle Carey, Alison Neplokh, Evan Baranoff, Shabnam Javid, Eloise Gore, Mary Beth Murphy, and Lyle Elder. The purpose of the meeting was to discuss ACA’s position on the Commission’s implementation of the CALM Act and to respond to inquiries of the staff about the practices and capabilities of mid-sized and small cable operators to address issues of loud commercial advertisements.

At the outset of the meeting, Matt Polka emphasized four points. First, ACA is eager to work with the Commission as it adopts rules to implement the new statute. Second, there are technical, engineering, and operational realities that should shape the rules. Third, the capabilities and business relationships of small cable operators differ substantially from larger multichannel video programming distributors (“MVPDs”) and should be accounted for by the Commission. Fourth, ACA strongly believes the requirements of the ATSC A/85 place definite but limited requirements on MVPDs. The statute’s purpose is only to implement and make mandatory ATSC A/85 and does not give the Commission broad authority to limit the loudness of commercial advertisements.

Accordingly, ACA in its comments asserted that in adopting rules the Commission is legally constrained to adopt the following interpretation of the CALM Act insofar as obligations are placed on MVPDs:

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- It does not apply to analog transmissions by MVPDs;
- It places only a limited obligation on MVPDs to pass through the dialnorm metadata in commercial advertisements inserted upstream by programmers and create awareness with the content supplier if the audio produces “loud” advertisements; and,
- At most, it only requires that MVPDs comply with ATSC A/85’s mandates when they insert, either directly or by using a third party, commercial advertisements.

An MVPD thus should be found to be in compliance if:

- With respect to passing through commercial advertisements inserted upstream by a programmer –
 - For local television broadcast programming, it has deployed equipment that passes through the dialnorm metadata in digital transmissions from the programmer to customer premise equipment using the AC-3 system; and,
 - For other programming networks, it has deployed equipment that passes through the dialnorm metadata in digital transmissions from the programmer to customer premise equipment using the AC-3 system and informs programmers of audio issues.
- With respect to the insertion of commercial advertisements on its system –
 - It uses a third-party vendor to insert commercials on its behalf and has a good faith expectation that the vendor is inserting commercial advertisements in conformance with ATSC A/85; or,
 - It installs, utilizes, and maintains equipment in a commercially reasonable manner that would ensure that the commercial advertisements inserted include the appropriate dialnorm metadata.

At the meeting, ACA in response to a series of inquiries from the staff provided the following information:

- ACA Members receive few, if any, complaints from customers about loud commercials.

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- Programmers provide a single feed that is received by all MVPDs that distribute their programming. Thus, getting a programmer to comply with ATSC A/85 when it inserts commercial advertisements is a much more efficient and cost-effective way to address audio issues than for each of the approximately 7,500 downstream MVPDs to engage in a variety of monitoring, decoding and encoding activities.
- Of the over 100,000 commercial advertisements shown each day, over 95% of them are inserted by programmers upstream from MVPDs.
- Even if the audio level of an individual programming feed is consistent, the audio levels of different programming feeds are often not the same and may in fact differ significantly, which means consumers receive different programming feeds at different loudness levels.
- ACA Member MVPDs do not monitor, either in real time or even occasionally, the audio levels of programming feeds. Rather, assuming they insert their own commercial advertisements, they initially evaluate the audio level of programming feeds to calibrate the audio level for purposes of inserting their own advertisements. In inserting ads, either directly or by using a third party, these MVPDs then match the audio level of the advertisement to the audio level of the programming feed to ensure a consistent (or equalized) level. As a rule, only upon receiving a sufficient number of complaints about a certain programmer will these MVPDs re-evaluate audio levels of programming feeds and, if necessary, re-calibrate the audio level.
- Not only do ACA Member MVPDs not monitor the audio level of programming, but they have no capability to monitor and distinguish between the audio levels in long form and short form content (such as commercial advertisements).
- In contracts between ACA Members or the National Cable Television Cooperative and programmers, there is no provision today requiring compliance with ATSC A/85. Moreover, unlike the largest MVPDs, individual ACA Members have little leverage to obtain new rights from or otherwise leverage programmers. If the largest MVPDs obtained these new rights, ACA members would receive these same rights because programmers distribute the same feed to all MVPDs that carry their programming.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

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Sincerely,



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