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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 October 24, 2011, Ross Lieberman, ACA, and the undersigned, Thomas Cohen of Kelley Drye & Warren LLP, met with the following Commission staff from the Media Bureau – Michelle Carey, Alison Neplokh, Shabnam Javid, Nancy Murphy, and Lyle Elder – and Enforcement Bureau – Eloise Gore. The purpose of the meeting was to discuss the Commission's implementation of the CALM Act as it affects smaller multichannel video programming distributors ("MVPDs"), who are ACA members. These smaller MVPDs may be unduly harmed if the Commission adopts regulations that do not take into account their unique capabilities and business relationships. The discussion focused specifically on compliance and enforcement (complaint) issues, including how to address use of third party vendors by smaller MVPDs to insert commercial advertisements on their behalf.

At the outset of the meeting, Mr. Lieberman discussed the recent proposal by the National Cable & Telecommunications Association ("NCTA") regarding "Network-Provided" commercials.[1] ACA supports this proposal and believes it accurately reflects the directives in, and intent of, ATSC A/85 ("A/85").[2] Under the NCTA proposal, all MVPDs must ensure their equipment passes through dialnorm metadata pursuant to A/85 in the transmission of digital program networks, including the transmission of commercial advertisements inserted by the programmer. By meeting this

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1 *See Ex Parte* of the National Cable & Telecommunications Association, MB Docket No. 11-93 (Oct. 18,2011).

2 "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," Document A/85:2011.

requirement, MVPDs with fewer than two million total subscribers would be protected by the safe harbor provision. For MVPDs with more than two million total subscribers, to be protected by the safe harbor provision, they would need to perform additional testing and meet other requirements. The proposal also enables an MVPD to meet the safe harbor provision by relying on a certification from a program network that it is in compliance with A/85. Finally, NCTA proposes that the Commission only forward complaints to MVPDs when they evidence a potential pattern of non-compliance and that the MVPD will forward the complaints to the relevant programmer if it is relying on certification from that programmer.

Mr. Lieberman next discussed the requirements that should be placed on smaller MVPDs when they insert a commercial advertisement. He noted that ACA agrees that when an MVPD inserts, either directly or through a third-party vendor, a commercial advertisement, A/85 places a greater burden on it to ensure the advertisement is not loud.[3] The question then becomes how does a smaller MVPD meet this directive, particularly for commercials inserted by a third party vendor. To that end, Mr. Lieberman proposed the following framework, which is based on the same concept in the NCTA proposal that smaller MVPDs would be able to rely on actions of larger MVPDs to ensure compliance:

<u>Background on the Capabilities and Business Practices of Smaller MVPDs</u>

- MVPDs insert approximately five percent of commercial advertisements, and smaller MVPDs insert even fewer, with many not inserting any.

- Smaller MVPDs generally do not have the volume of subscribers to attract advertisers on their own. Moreover, the process of inserting advertisements is costly for smaller MVPDs to do on their own.

- Consequently, smaller MVPDs tend to engage third party vendors to insert advertisements. These vendors aggregate subscribers from a number of MVPDs regionally or locally to attract advertisers and decrease costs of inserting advertisements. For many smaller MVPDs, the third party vendor installs, maintains, and, through remote access, utilizes the equipment that inserts commercials on these MVPDs' systems.

- Similar to the way national programming networks distribute the same signal to all MVPDs in the market, third party vendors insert the same advertisements to all MVPDs in a region or locality.

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[3] *See e.g.*, Comments of American Cable Association, MB Docket No. 11-93 (July 5, 2011).

- The use of third party vendors by smaller MVPDs is an efficient business model that benefits all players in the ecosystems, including smaller MVPDs, their customers, advertisers, and businesses and other entities seeking to advertise.

Background on Third Party Vendors Inserting Commercial Advertisements

- There are various third party vendors inserting commercial advertisements. Some are affiliated with the largest MVPD in the regional or local market and provide services to both large and small MVPDs in the market. Others (*e.g*. Via Media) are unaffiliated and work with mid-sized and smaller MVPDs.[4]

- Larger MVPDs have leverage with third party vendors to obtain indemnification or affect the practices of the vendor. Just as smaller MVPDs do not have the leverage to obtain indemnification from national programming networks, these MVPDs similarly do not have leverage with third party vendors.

ACA Proposal for Smaller MVPDs

- Smaller MVPDs that insert their own advertisements without use of a third party vendor would be subject to the Act's safe harbor provision (*i.e.* to be protected by the safe harbor, they must install, maintain, and utilize in a commercially reasonable manner equipment compliant with the Commission's regulations).[5]

- For smaller MVPDs that use a third party vendor, a safe harbor would be available to avoid forfeiture for non-compliance if they obtain a certificate from the vendor that its equipment and processes comply with A/85.

In sum, under the ACA proposal, smaller MVPDs would be subject to more appropriate requirements to limit their liability when third party vendors insert commercial advertisements on their behalf. Yet, consumers would be protected from loud advertisements because larger MVPDs who use these third parties as vendors would bear the greater burden, similar to the role they play in the NCTA proposal for commercials inserted by programmers and passed through by MVPDs.

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[4] Some MVPDs have long term contracts with third party vendors that do not contemplate that MVPDs would be mandated to comply with A/85 standards.

[5] ACA has urged the Commission to provide waivers for smaller MVPDs to give them time to come into compliance and continues to support that proposal.

Finally, Mr. Lieberman discussed how the Commission should enforce its regulations for smaller MVPDs. First, he agreed with the NCTA proposal that the Commission should not formally forward complaints to MVPDs unless there are numerous complaints that evidence a potential pattern or practice of non-compliance with A/85. Second, he submitted that for a complaint to be considered it must be sufficiently specific, identifying the channel and time when the advertisement was shown and the content of the advertisement. Third, if complaints are received about the same advertisement shown on numerous systems, large and small, the formal complaint should be sent to only the largest MVPDs. Finally, if a smaller MVPD receives a notice of potential non-compliance based on numerous complaints evidencing a pattern or practice, it may file a short form response attesting to the following which would relieve it of liability:

- The advertisement was shown on an analog channel (which is not subject to the directives of A/85).
- The advertisement aired on a broadcast channel (which is directly liable for violations of A/85).
- The MVPD does not insert advertisements on the specific network and passes through programming in compliance with A/85.
- The MVPD does not insert advertisements of the type described and passes through programming in compliance with A/85.
- The advertisement was inserted by a third party vendor and the MVPD qualifies under a safe harbor.

In closing the meeting, Mr. Lieberman noted that ACA appreciates the Commission's continued consideration of its proposals to ensure that smaller MVPDs are not unduly burdened by the implementation of the CALM Act. ACA intends to reflect further on the proposals it discussed with the staff and will provide further refinements as appropriate.

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

Sincerely,

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