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Barbara S. Esbin
Admitted in the District of Columbia

November 3, 2011

Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: American Cable Association (“ACA”) Notice of Ex Parte Presentation; *In the Matter of Rulemaking to Amend The Commission’s Rules Governing Retransmission Consent; MB Docket No. 10-71; In the Matter of 2010 Quadrennial Regulatory Review, Review of the Commission’s Broadcast Ownership and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182.*

Dear Ms. Dortch:

On November 2, 2011, Matt Polka and Ross Lieberman, American Cable Association; William Rogerson, Northwestern University; and the undersigned met with William Lake, Nancy Murphy, Steve Broecker, and Diana Sokolow, Media Bureau, and Jonathan Levy, Office of Strategic Policy.

During the meeting, ACA focused its comments primarily on the issue of coordinated retransmission consent negotiations among separately owned broadcasters in a single market raised in its comments and reply comments filed in response to the Notice of Proposed Rulemaking in the above captioned rulemaking and its comments filed in response to the Notice of Inquiry in the above captioned media ownership review.¹ As part of the discussion, Professor Rogerson presented his

¹ *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011) (“NPRM”); *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Comments of the American Cable Association, MB Docket No. 10-71, at 2-41 (filed May 27, 2011) (“ACA Comments”); *id.* at Appendix A, William P. Rogerson, Professor of Economics, Northwestern University, “Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market” (“Rogerson I”); *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Reply Comments of the American Cable Association, MB Docket No. 10-71, at 2-41 (filed June 27, 2011) (“ACA Reply Comments”); *In the Matter of 2010 Quadrennial Regulatory Review, Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 25 FCC Rcd 6086 (2010); *In the Matter of 2010 Quadrennial Regulatory Review, Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Comments of the American Cable Association, MB Docket No. 09-182, at 3-2 (filed June 22, 2010) (“ACA Media Ownership Comments”) (urging the Commission to examine how the reduction in local broadcast competition

economic analysis of these problems and proposed solutions contained in Attachment A to this letter.² Professor Rogerson noted that the Commission appears to have accepted the economic underpinning of ACA's coordinated negotiation analysis in its rulemaking by proposing to adopt a rule prohibiting, as *per se* violation of the duty to negotiate in good faith, a broadcast station granting "another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned."³ Participants discussed how the proposed rule, by targeting only legally binding agreements for coordinated negotiations, would miss several common forms of collusion among competitors in a market that are recognized by the antitrust authorities as unlawful, including the sharing of pricing information among competing sellers and nominally separate negotiations that are nonetheless coordinated through non-legally binding agreement to prevent striking a deal until both sellers are satisfied.⁴

ACA reiterated its call for the Commission to provide effective relief from such collusive behavior by prohibiting both legally binding and non-legally binding coordination of retransmission consent negotiations.⁵ Professor Rogerson explained how adequate relief could be provided to MVPDs if the Commission amended its proposed rule to specify that the four coordinated negotiating practices identified in ACA's filings in this docket⁶ would constitute *per se* violations of the duty to

achieved through the combined ownership or control of multiple stations (via actual or "virtual" duopolies by a single entity would be harmful to the overall policy objectives of its local television ownership rules)). See also American Cable Association, Suggestions for Additional Studies in Media Ownership Proceeding at 2-5, MB Docket No. 09-182, (filed Jul. 7, 2010), in response to *Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding*, Public Notice, 25 FCC Rcd 7514 (2010) (recommending that the Commission include in its comprehensive assessment of the efficacy of its media ownership rules to achieve core goals of competition, diversity and localism, the effect of the reduction in competition in local broadcast markets when separately owned broadcast stations in a local market coordinate their negotiation of retransmission consent on the quality and quantity of local programming and the fees charged to cable and satellite television for retransmit broadcast signals to consumers).

² William P. Rogerson, Professor of Economics, Northwestern University, "Two Problems with the Current Retransmission Consent Regime," Presentation to the FCC, "Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market," American Cable Association, Nov. 2, 2011 ("Rogerson Presentation").

³ NPRM ¶ 23; Appendix B.

⁴ ACA Comments at 22-24 & Rogerson I at 11-16; ACA Reply Comments at 39-41.

⁵ ACA Comments at 22-24; ACA Reply Comments at 39-41; Rogerson Presentation at 9.

⁶ The four practices to be prohibited under the good faith rules are: (i) delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately owned broadcaster in the same DMA; (ii) delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately owned broadcasters in the same DMA to a common third party; (iii) any informal or formal agreement by one of the broadcasters to enter into a retransmission consent agreement with an MVPD would be contingent upon whether the other broadcaster was able to negotiate a satisfactory retransmission consent agreement with the MVPD; and (iv) any discussions or exchanges of information between separately owned broadcasters in the same DMA or their representatives regarding the terms of existing retransmission consent agreements, the potential terms of future retransmission consent agreements, or the status of negotiations over future retransmission consent agreements. See ACA Comments at 23-24; ACA Reply Comments at 40.

negotiate in good faith, thus better ensuring that retransmission consent negotiations are conducted consistent with competitive marketplace considerations, which do not include price fixing.⁷ ACA also noted that the Commission could provide similar relief through changes to its local broadcast television ownership rules.⁸

Finally, ACA discussed the need identified in its filings in this docket for the Commission to conduct a confidential examination of retransmission consent agreements to determine the extent of price discrimination ACA has identified against smaller MVPDs and their subscribers and to consider how best to address the rampant and undue discrimination that ACA believes will be fully revealed by such an examination.⁹

Please contact me if you should have questions or concerns about these matters.

In accordance with Section 1.1206 of the Commission's rules, one copy of this letter is being filed electronically via ECFS, and one delivered to via email to each of the meeting participants, listed below.

Sincerely,



Barbara S. Esbin

Enclosure

cc (via email): William Lake
Nancy Murphy
Steve Broeckaert
Diana Sokolow
Jonathan Levy

⁷ Rogerson Presentation at 9.

⁸ See ACA Media Ownership Comments at 3-10.

⁹ ACA Comments at 76-91; ACA Reply Comments at 77-87.

ATTACHMENT “A”

**Coordinated Negotiation of Retransmission Consent
Agreements by Separately Owned Broadcasters in the Same
Market**

Presentation to the FCC

American Cable Association

November 2, 2011

**PROBLEM IDENTIFIED BY ACA
IN COMMENTS RESPONDING TO PETITION FOR
RULEMAKING**

1. Separately owned Big 4 broadcast stations in the same DMA sometimes engage in coordinated negotiation of their retransmission consent agreements with MVPDs
 - Such arrangements are often part of more comprehensive agreements that transfer control of all or part of the operations of one station to the management of another station
 - Terms used to describe such agreements include:
 - Shared Services Agreements (SSAs)
 - Local Marketing Agreements (LMAs)
 - Joint Marketing Agreements (JMAs)
 - Station to which control is transferred negotiates retransmission consent deals for both stations
 - This puts them in the same bargaining position they would be in if they were jointly owned
 - i.e., the two stations can jointly threaten to simultaneously withdraw retransmission consent unless they both receive a deal they are both satisfied with.

2. This increases their bargaining power and allows them to negotiate higher retransmission consent fees, which in turn are passed through to MVPD subscribers in the form of higher subscription prices.

POLICY CHANGE SUGGESTED BY COMMISSION IN ITS NPRM

1. General Approach

- Prohibit practices that allow coordinated negotiation of retransmission consent agreements by separately owned broadcast stations in the same DMA
- Do so by adding to the list of practices that are *per se* violations of the duty to negotiate in good faith

2. Specific wording used to describe the new practices that would be included in the list of practices that are *per se* violations of the duty to negotiate in good faith:

“Agreement by a broadcast television station Negotiating Entity to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned.”

EVALUATION OF THE PROPOSED CHANGE

1. General approach of prohibiting practices that allow coordinated negotiation of retransmission consent deals by separately owned broadcasters in the same DMA is sound.
2. The specific wording used to describe the new practices that would be included in the list of *per se* violations of the duty to negotiate in good faith is too restrictive and there is a danger that the current wording would not be interpreted as necessarily applying to the full range of practices that separately owned broadcasters in the same DMA can use to coordinate their negotiations on retransmission consent deals.

EXAMPLES OF COORDINATED NEGOTIATIONS IN THE SAME MARKET

1. There is a shared services agreement between the two broadcasters that explicitly transfers control for negotiating and final authority for approving retransmission consent agreements from one station to the other station.
2. There is a shared services agreement between the two broadcasters.
 - The shared services agreement does not explicitly transfer control for negotiating retransmission consent agreements or final authority for approving retransmission consent agreements.
 - The stations informally agree that the controlling station will represent them both in retransmission consent negotiations and they follow this practice. However, as a purely legal issue, the station delegating this authority could change its mind at any time and retains final approval authority.
3. Two broadcasters engage in nominally separate retransmission consent negotiations. However:
 - they agree in advance to only accept a deal once both of them are satisfied and to fully share all information regarding their retransmission consent negotiations to coordinate their decisions
 - the agreement is informal, i.e. it is not legally binding
 - they could even explicitly tell the MVPD about their agreement as part of their negotiating strategy

EXAMPLES OF COORDINATED NEGOTIATIONS IN THE SAME MARKET (CONT'D)

4. Two separately owned broadcasters engage in nominally separate retransmission consent negotiations.
 - It is known that they meet regularly and exchange information on the progress of one another's negotiations
 - Nothing is known about the nature of the informal agreements or understanding that the two broadcasters may have reached.

5. Two separately owned broadcasters engage in nominally separate retransmission consent negotiations.
 - They hire the same bargaining agent to represent them.
 - Nothing else is known about whether the two broadcasters have exchanged any information on retransmission consent agreements or reached any informal understanding or agreement on coordinating their retransmission consent negotiations.

DIFFERENT TYPES OF COORDINATED PRICE SETTING

1. Legally Binding
 - a legally binding agreement is signed under which a single actor has the authority to negotiate and approve retransmission consent agreements for both broadcasters

2. Non Legally Binding
 - the two broadcasters meet and explicitly agree with one another that neither of them will agree to a retransmission consent deal until both of them are satisfied.
 - the agreement is “enforced” by each broadcaster’s understanding that, although either of them might be able to earn a higher one-time profit by defecting from the agreement, over the long run both of them will earn higher profits by sticking to the agreement
 - they share information on the progress of negotiations to manage their agreement
 - possibilities for how negotiations are conducted
 - negotiations are nominally separate
 - both parties hire the same bargaining agent
 - both parties informally agree that one of the two parties will represent both of them in negotiations. However the agreement is not legally binding and either party could change its mind at any time.

REGULATING COORDINATED PRICE SETTING

1. Both legally binding and non legally binding coordination agreements allow separately owned Big 4 broadcasters in the same DMA to collusively set retransmission consent fees.
2. Both should be prohibited as *per se* violations of the duty to negotiate in good faith.
3. It is often difficult to directly determine if an informal agreement to jointly negotiate retransmission consent fees has been reached. Therefore observable practices that facilitate the operation of informal agreements should also be prohibited. These include
 - sharing any information on the status of retransmission consent negotiations or retransmission consent prices
 - one broadcaster delegating responsibility to negotiate retransmission consent agreements to the other broadcaster
 - both broadcasters delegating responsibility to negotiate retransmission consent agreements to a third party
4. This is essentially the same approach that anti-trust authorities take to preventing collusive behavior between competing sellers in most markets.

PRACTICES THAT SHOULD BE PROHIBITED AS *PER SE* VIOLATIONS OF THE DUTY TO NEGOTIATE IN GOOD FAITH

1. Delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately owned broadcaster in the same DMA;
2. Delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately owned broadcasters in the same DMA to a common third party;
3. Any informal or formal agreement between separately owned broadcasters in the same DMA or their representatives that agreement by one of the broadcasters to enter into a retransmission consent agreement with an MVPD would be contingent upon whether the other broadcaster was able to negotiate a satisfactory retransmission consent agreement with the MVPD;
4. Any discussions or exchanges of information between separately owned broadcasters in the same DMA or their representatives regarding the terms of existing retransmission consent agreements, the potential terms of future retransmission consent agreements, or the status of negotiations over future retransmission consent agreements.

OTHER ISSUES RAISED BY BROADCASTERS

1. Deferring to Antitrust Enforcement
2. Efficiency Benefits of Shared Services Agreements
3. Counterbalancing the Bargaining Power of Large MVPDs

DEFERRING TO ANTITRUST AUTHORITIES

1. Broadcasters have suggested that Commission should simply defer to antitrust authorities and allow them to prosecute individual cases to the extent that they determine that any specific behavior is anti-competitive.
2. The rationale for a regulatory agency to pass a general rule instead of relying on case-by-case enforcement by antitrust authorities
 - When it is possible to easily describe in objective terms a set of practices that are clearly anticompetitive, then it would be more efficient to have the regulatory agency simply analyze the situation once, determine that this practice is anticompetitive, and then to pass a rule prohibiting it, rather than to expect antitrust agencies to litigate a series of cases.
 - This approach would instantly create a simple “bright line.”
 - Especially when the affected markets are small, DOJ’s limited resources may mean that enforcement through individual prosecutions would not occur quickly or reliably.
3. This rationale applies to this case.

DEFERRING TO ANTITRUST AUTHORITIES (CONT'D)

4. Other cases where the Commission has implemented rules to regulate potentially anti-competitive behavior instead of simply relying on case-by-case enforcement by antitrust authorities.
 - Program access rules
 - Spectrum caps
 - Open Internet rules
 - Carterphone device attachment rules

EFFICIENCY BENEFITS FROM SHARING AGREEMENTS

1. Broadcasters have suggested that allowing service sharing agreements can be desirable in some smaller DMAs because the resulting efficiencies due to joint operations may allow more broadcast signals to be provided in the DMA than would otherwise be possible.
2. The policy change the Commission is considering of not allowing separately owned broadcasters in the same DMA to jointly negotiate retransmission consent agreements would not prevent broadcasters from entering into agreements where one broadcaster transfers control of other aspects of operations to the management of another station.
 - main efficiencies likely come from combining various marketing and programming functions.
 - specific efficiencies related to conducting one retrans negotiation instead of two are likely to be trivially small.
3. Since it would be particularly easy for broadcasters participating in a shared services agreement to informally collude over retransmission consent pricing, it would be important to enforce safeguards such as requiring two completely separate negotiation teams and preventing communication between the broadcasters related to retransmission consent pricing and negotiations.

COUNTERBALANCING THE BARGAINING POWER OF LARGE MVPDS

1. Broadcasters have argued that:
 - individual MVPDs have very large market shares in some DMAs
 - these MVPDs likely have relatively high levels of bargaining power in retransmission consent negotiations
 - allowing broadcasters to coordinate their retransmission consent negotiations would help counteract the bargaining power of these large MVPDs and thus be desirable.

2. Problems with this argument:
 - What about DMAs that do not have a dominant MVPD?
 - What about small MVPDs in DMAs that have a dominant MVPD?
 - Bad public policy to solve a monopsony problem by creating monopolies.
 - Even if a cable operator serves 100% of a DMA its market power in retrans negotiations is still limited by competition with satellite operators.
 - if the cable operator does not show a particular network, customers may switch to satellite.

CONCLUSION

1. In an effort to allow broadcasters in small markets to capture some extra economies of scale, the Commission has historically allowed broadcasters in small markets to enter into agreements that combine some of their operations related to marketing and programming.
2. Without attracting much attention, broadcasters in many cases have begun to coordinate their negotiation of retransmission consent fees as part of these arrangements.
3. This is anti-competitive and likely increases retransmission consent fees and ultimately harms MVPD subscribers by increasing their subscription fees.
4. The Commission should take advantage of its current review of retransmission consent rules to clearly indicate that this is an undesirable practice that broadcasters should not engage in.

APPENDIX
REVIEW OF THE PROBLEM WITH COORDINATED
NEGOTIATIONS

1. Theory: Why Does Joint Control or Ownership Increase Retransmission Consent Fees?
2. Evidence on the Extent of Coordinated Negotiations
3. Evidence that Joint Control or Ownership Increases Retransmission Consent Fees

THEORY: WHY DOES JOINT CONTROL OR OWNERSHIP INCREASE RETRANSMISSION CONSENT FEES?

1. Retransmission consent fees are determined by bilateral bargaining.
2. Standard economic theory of bilateral bargaining shows that the negotiated prices for two networks will be higher if the networks are sold together instead of separately so long as the networks are “partial substitutes” in the sense that the marginal value of either of the networks to the MVPD is lower conditional on already carrying the other network.
3. Example:
 - MVPD can carry two networks
 - profit from carrying one network = \$1.00 per sub
 - profit from carrying both networks = \$1.50 per sub
 - note that the networks are partial substitutes
 - marginal value of first network = \$1.00
 - marginal value of second network = \$.50
 - assume MVPD and programmer have equal bargaining strength (i.e., they split the joint surplus from any agreement.)

THEORY: WHY DOES JOINT CONTROL OR OWNERSHIP INCREASE RETRANSMISSION CONSENT FEES? (CONT'D)

4. Case #1: A different programmer owns each network
 - total surplus from adding a network = \$.50
 - negotiated fee for a network = \$.25
 - total cost of purchasing both networks = \$.50

5. Case #2: One programmer owns both networks
 - total surplus from adding a bundle of both networks = \$1.50
 - negotiated fee for bundle of both networks = \$.75
 - total cost of purchasing both networks = \$.75

6. In its analysis of the Comcast-NBCU transaction, the Commission accepted this analysis as being theoretically correct
 - concluded that ownership of a Big 4 broadcast network and an RSN in the same region was likely to result in higher programming fees because the networks are partial substitutes
 - degree of substitutability between two Big 4 broadcast networks likely to be at least as high as degree of substitutability between a Big 4 broadcast network and an RSN

EVIDENCE ON THE EXTENT OF COORDINATED NEGOTIATIONS

1. ACA looked for instances of coordinated negotiations where
 - broadcasters enter into a shared services agreement
 - ACA members report that retransmission consent negotiations for both broadcasters were conducted simultaneously with a single representative for both broadcasters.

2. Results:
 - 56 instances where separately owned Big 4 stations in the same DMA operate under some type of shared services agreement.
 - 48 instances where responses from ACA members on the nature of negotiations were received.
 - 36 instances where ACA members reported that retransmission consent negotiations were conducted simultaneously with a single representative for both broadcasters.

3. Remarks:
 - not clear if authority to conduct negotiations and approve retransmission consent deals was formally transferred as part of the shared services agreement or not
 - coordinated negotiations could be occurring in many more cases than those identified by ACA

EVIDENCE THAT JOINT CONTROL OR OWNERSHIP INCREASES RETRANSMISSION CONSENT FEES

1. ideal evidence
 - compare retransmission consent fees charged by jointly owned or controlled stations with separately owned and separately controlled stations.
 - universal use of non-disclosure clauses severely limits publicly available information

2. Some individual MPVPs have performed their own analysis of their own private data and reported the results to the Commission
 - Suddenlink reports that joint ownership/control causes retransmission consent fees to increase by 21.16%
 - three additional MPVDs report that joint ownership/control causes retransmission consent fees to increase by: 161%, 133%, and 30%.

3. Commission Analysis in the Comcast-NBC transaction
 - issue in the Comcast-NBCU transaction was whether joint control of an RSN and Big 4 local broadcast station in the same DMA would result in higher fees
 - Commission analysis showed there was evidence for such an effect
 - it is even more likely that the partial substitutes condition will be satisfied by two Big 4 broadcast networks

**EVIDENCE THAT JOINT CONTROL OR OWNERSHIP
INCREASES RETRANSMISSION CONSENT FEES
(CONT'D)**

4. DOJ Has Determined That Joint Control of Retransmission Consent Fees Can Be Anticompetitive
 - In 1996, DOJ filed a complaint against three Big 4 broadcast stations in Corpus Christi DMA alleging that they had illegally colluded to raise retransmission consent fees by entering into an agreement to jointly negotiate these fees.
 - the three broadcast stations signed a consent decree agreeing to halt this practice