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November 16, 2011

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

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Re: **Notification of *Ex Parte* Presentation of Time Warner Cable Inc. in 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, MB Docket No. 09-182; and Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71**

Dear Ms. Dortch:

On November 14, 2011, Cristina Pauzé of Time Warner Cable Inc. ("TWC"), along with Amanda E. Potter and the undersigned, both of Latham & Watkins LLP, met with the following Commission personnel regarding the anticipated Notice of Proposed Rulemaking to review the Commission's media ownership rules: Bill Lake, Sarah Whitesell, Hillary DeNigro, and Sarah Bamford, all of the Media Bureau. In a separate meeting that day, we met with Dave Grimaldi and Loree Stark of Commissioner Clyburn's office. At these meetings, we discussed the increasing prevalence of broadcast stations' coordination in the negotiation of retransmission consent with MVPDs and the resulting harms to consumers. We explained that, in addition to warranting remedial action in the retransmission consent rulemaking, these and related developments require clarification of the media ownership rules. We accordingly urged the Commission to seek comment on ways to ensure that the media ownership rules more effectively promote competition, localism, and diversity, including by prohibiting broadcasters from colluding with stations that are ostensibly independent competitors in the negotiation of retransmission consent.

We began by noting the existing evidence regarding broadcasters' misuse of sharing agreements, including local marketing agreements ("LMAs"), joint sales agreements ("JSAs"), and shared services agreements ("SSAs"). Each type of agreement can enable multiple competing broadcast stations in a single designated market area ("DMA") to collude in the negotiation of retransmission consent. We cited evidence gathered by the American Cable Association ("ACA") in the Commission's ongoing retransmission consent reform proceeding of

at least 56 instances in which Big Four affiliates are operating under some form of sharing arrangement.¹ Of those 56 instances, at least 36 pairs of broadcast stations (in 33 different markets) are engaging in coordinated carriage negotiations through the use of a single bargaining representative.²

We also discussed broadcasters' increasing use of multicasting arrangements, in which a local broadcast station affiliates with two or more national networks to multicast multiple streams of network programming in a single DMA. ACA, among its members alone, has documented at least 25 instances of common ownership of multiple Big Four affiliates in the same market using multicasting or some other arrangement.³ Moreover, we provided examples of broadcasters' using a combination of sharing and multicasting arrangements concurrently to obtain control over multiple Big Four stations, including Granite Broadcasting Corp. ("Granite"), which currently controls three of the Big Four stations and five of six national networks in the Fort Wayne, IN DMA.⁴

We further discussed how such arrangements and coordinated conduct are undermining the Commission's interest in promoting competition, localism, and diversity. For example, under an LMA or similar sharing arrangement that allows a single broadcaster to negotiate retransmission consent for multiple stations in a single DMA, the owners essentially agree not to compete with one another. As TWC has explained in previous filings with the Commission, the Department of Justice has alleged that such conduct by broadcasters constitutes illegal price-fixing, and it reached a consent decree memorializing that conclusion.⁵ Similarly, when a single

¹ See Comments of American Cable Association, MB Docket No. 10-71, at 7 (filed May 27, 2011).

² See *id.*

³ See Comments of American Cable Association, MB Docket No. 10-71, at App. C (filed May 18, 2010). In addition, a news report identified 68 instances of local dual affiliation involving at least one Big Four affiliate—35 instances involving Fox, 20 for ABC, 7 for NBC, and 6 for CBS. See Price Coleman, *D2 Offers A1 Opportunity for Big Four Nets*, TVNewsCheck (Apr. 20, 2011), available at <http://www.tvnewscheck.com/article/2011/04/20/50699/d2-offers-a1-opportunity-for-big-four-nets>.

⁴ As TWC explained in an *ex parte* letter, Granite's affiliation this summer with Fox—when the network dropped Nexstar-owned WFFT—prompted Nexstar to file a federal antitrust lawsuit against Granite that alleges similar anticompetitive harms previously acknowledged only by MVPDs. See Letter from Matthew A. Brill, Counsel to Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, at 2-3 (filed Aug. 3, 2011) (citing Complaint, *Nexstar Broadcasting, Inc. v. Granite Broadcasting Corp.*, No. 11-cv-249 (N.D. Ind. Jul. 25, 2011), attached to *Ex Parte* Letter of Elizabeth Ryder, Vice President and General Counsel, Nexstar Broadcasting, to Marlene Dortch, Secretary, FCC, MB Docket No. 10-71 (filed Jul. 27, 2011)).

⁵ See, e.g., Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 29 (filed June 27, 2011); Comments of Time Warner Cable Inc., MB Docket No. 10-71, at

broadcast station affiliates with two or more Big Four networks to multicast multiple streams of programming, that station owns the equivalent of multiple stations within a DMA. Moreover, sharing and/or multicasting arrangements often are accompanied by a reduction in the production of local, diverse content, as news and community-related programming operations are consolidated.

We also addressed the Big Four networks' continued interference with the retransmission consent negotiations of their independent affiliates. We explained that the Big Four networks continue to utilize veto, or approval, rights in their affiliation agreements with independently owned affiliates as a means of exerting control over (and extracting a cut of the proceeds from) the affiliates' carriage agreements with MVPDs.⁶ Thus, much like sharing and multicasting arrangements, network interference harms localism by usurping a local station's control over the retransmission consent process.

Consistent with TWC's comments in response to the pending Notice of Inquiry regarding media ownership, we urged the Commission to consider ways to address these and other harms through its upcoming review of the broadcast ownership rules.⁷ In particular, the Commission should make clear that the use of LMAs, JSA, SSAs, or other similar sharing arrangements—formal or informal—that enable joint negotiation of retransmission consent confers an attributable interest upon the negotiating broadcaster. Likewise, the Commission should clarify that the local television ownership rule prohibits the ownership, operation, or control of multiple television signals in a single DMA unless a valid exception exists.⁸ The Commission also should find that a network's veto or approval right over an independent affiliate's retransmission consent agreements amounts to a *de facto* transfer of control of the station's license in violation of Section 310(d) of the Act and the station's public interest obligations under Section 309.⁹

35-36 (filed May 27, 2011); *United States v. Texas Television, Inc.*, Civil No. C-96-64, Competitive Impact Statement at 8 (S.D. Tex. Feb. 2, 1996), *available at* <http://www.justice.gov/atr/cases/texast0.htm> (“Although the 1992 Cable Act gave broadcasters the right to seek compensation for retransmission of their television signals, the antitrust laws require that such rights be exercised *individually* and *independently* by broadcasters.”) (emphasis added).

⁶ TWC submitted detailed comments in Mediacom Communications Corporation's retransmission consent complaint proceeding against Sinclair Broadcast Group, Inc. that explained how network interference has negatively affected TWC's negotiations with Sinclair-owned stations. *See Ex Parte* Comments of Time Warner Cable Inc. in Support of Mediacom Communications Corporation's Retransmission Consent Complaint, CSR Nos. 8233-C, 8234-M (filed Dec. 8, 2009).

⁷ *See generally* Comments of Time Warner Cable Inc., MB Docket No. 09-182 (filed July 12, 2010).

⁸ *See* 47 C.F.R. § 73.3555(b).

⁹ 47 U.S.C. §§ 310(d), 309.

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

Sincerely,

/s/ Matthew A. Brill

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cc: Bill Lake
Sarah Whitesell
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