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November 30, 2011

**Via ECFS**

Marlene Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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 November 29, 2011, Ross Lieberman, ACA, and the undersigned, Thomas Cohen of Kelley Drye & Warren LLP, met with Joshua Cinelli, media advisor to Commissioner Michael J. Copps, to discuss ACA’s positions in the above-referenced docket. As part of this discussion, Mr. Lieberman reviewed the *ex parte* presentation filed by ACA on November 21, 2011, which provides mechanisms to ensure that, in implementing the CALM Act, the Commission does not subject smaller multichannel video programming distributors (“MVPDs”)<sup>1</sup> to undue burdens.

ACA has presented evidence to the Commission showing that: (1) almost 85 percent of its MVPD members do not have a device enabling them to measure the perceived loudness of programming; (2) most ACA members lack the expertise in-house necessary to perform loudness testing, and (3) there is no evidence of any businesses that perform loudness testing on behalf of MVPDs. As a result, there would be a significant burden on smaller MVPDs that seek to avail

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<sup>1</sup> ACA submits that, for purposes of implementing the CALM Act, a smaller MVPD should be defined by the Commission as one with fewer than 400,000 video subscribers. This is significantly below the threshold of 1.5 million contained in the “bargaining agent” condition in this year’s Comcast-NBCU Order. See *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBCU Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order, FCC 11-4, Appendix A, VII.D.1. (rel. Jan. 20, 2011).

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themselves of a safe harbor, which could be more easily used by larger MVPDs, that requires them to test the perceived loudness of programming and commercial advertisements inserted upstream to demonstrate that they are passing through advertisements in compliance with ATSC A/85 (“A/85”). To address this burden and the need of smaller MVPDs to have greater certainty, Mr. Lieberman proposed that the Commission incorporate into its order the following language:

For a smaller MVPD receiving a Letter of Inquiry (“LOI”) from the Commission based on sufficient evidence (complaints) alleging that there is a pattern or practice that the MVPD is transmitting commercial advertisements at audio levels in violation of the regulations, in addition to the safe harbors and defenses available to all MVPDs, for advertisements inserted by a cable programming network or a third party vendor, the Commission would accept as a valid defense that (1) prior to receipt of the LOI, the smaller MVPD had already corrected the problem that was the basis of the LOI, or (2) the smaller MVPD had not been found liable for a pattern or practice of violations of the statute or regulations regarding the CALM Act in the previous three years, that it had a good faith belief that the cable programming network or third party vendor was inserting advertisements in compliance with ATSC A/85, and, within 30 days of receipt of the LOI, it corrected the problem that was the basis of the LOI.

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

Sincerely,



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*Counsel for the American Cable Association*

cc: Joshua Cinelli