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December 6, 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 December 5, 2011, Ross Lieberman, ACA, and the undersigned, Thomas Cohen of Kelley Drye & Warren LLP, met with Erin McGrath, Legal Advisor, Media, to Commissioner Robert McDowell, to discuss ACA’s positions in the above-referenced docket. Mr. Lieberman first discussed ACA’s position that the CALM Act gives the Commission specific and limited authority to implement the industry standard ATSC A/85.¹ He then reviewed the *ex parte* presentations filed by ACA on November 21, 2011 and November 30, 2011,² wherein ACA set forth mechanisms to ensure that, in implementing the CALM Act, the Commission does not subject smaller multichannel video programming distributors (“MVPDs”)³ to undue burdens. To address this concern and the need of

¹ See e.g., Comments of American Cable Association, MB Docket No. 11-93 at 7-18 (July 5, 2011) (“ACA Comments”); Reply Comments of American Cable Association, MB Docket No. 11-93 at 1-4 (Aug. 1, 2011) (“ACA Reply Comments”); and *Ex Parte* Presentation of American Cable Association, MB Docket No. 11-93 (Oct. 20, 2011).

² See *Ex Parte* Presentation of American Cable Association, MB Docket No. 11-93 (Nov. 21, 2011), and *Ex Parte* Presentation of American Cable Association, MB Docket No. 11-93 (Nov. 30, 2011).

³ 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*

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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.

Finally, in response to an inquiry by Ms. McGrath about the purpose of the statute, Mr. Lieberman discussed the fact that the “Purpose” section in the Committee Reports from the Senate and House of Representatives are virtually identical, and both state that the purpose of the statute is only to incorporate ATSC A/85 and not to generally seek to prohibit loud commercials. He submitted the following “Purpose” section from each Committee Report as support for his contention:⁴

Senate Committee Report

PURPOSE OF THE BILL

The purpose of the Commercial Advertisement Loudness Mitigation Act, S. 2847, as reported, is to require the Federal Communications Commission (FCC) to incorporate into its rules by reference the standard developed by an industry standards-setting body for moderating the loudness of commercials in comparison to accompanying video programming.

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).

⁴ See Senate Commerce, Science, and Transportation Committee Report, Commercial Advertisement Loudness Mitigation Act, S. Rep. 111-340, Sept. 29, 2010; House Energy and Commerce Committee Report, Commercial Advertisement Loudness Mitigation Act, H. Rep. 111-374, Dec. 14, 2009.

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House Committee Report

PURPOSE AND SUMMARY

H.R. 1084, the 'Commercial Advertisement Loudness Mitigation Act' or the 'CALM Act', was introduced by Rep. Anna G. Eshoo (D-CA) on February 13, 2009. The legislation would require the Federal Communications Commission (FCC) to incorporate into its rules by reference the standard developed by an industry standards-setting body for moderating the loudness of commercials in comparison to accompanying video programming.

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

Sincerely,



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cc: Erin McGrath