



A Professional Limited Liability Company

1333 New Hampshire Ave., NW, Fl 2
Washington, DC 20036
Telephone: (202) 872-6811
Facsimile: (202) 683-6791

Chicago
307 North Michigan Ave., Suite 1020
Chicago, Illinois 60601
Telephone: (312) 372-3930
Facsimile: (312) 372-3939

St. Louis
1714 Deer Tracks Trail, Ste 215
St. Louis, MO 63131

Barbara S. Esbin
Admitted in the District of Columbia

February 28, 2012

Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: American Cable Association Notice of Ex Parte Communications; *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398)*, MM Docket No. 00-168, MM Docket No. 00-44

Dear Ms. Dortch:

On February 24 2012, Ross Lieberman, Vice President of Government Affairs, American Cable Association ("ACA") and the undersigned, met with William Lake, Chief, Media Bureau, Mary Beth Murphy, Steve Broecker, John Norton, and Holly Sauer, also of the Media Bureau, to discuss the placement of certain forms of agreements in the enhanced online public file of local television stations proposed in the Notice of Proposed Rulemaking ("NPRM") in the above referenced docket.¹ Consistent with its filings in this proceeding,² ACA discussed the following basis for requiring placement of agreements between separately owned same-market broadcast stations that facilitate the coordination of retransmission consent in each broadcast licensee's enhanced online public file:

- In the last four years, retransmission consent has become an increasingly important product for local television stations that provides a secondary revenue stream to local advertising, particularly for affiliates of the top four rated national broadcast networks (typically ABC, CBS, Fox and NBC). As such, it has emerged as another basis for competition among local stations based on the quality and quantity of their programming

¹ *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398)*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 26 FCC Rcd 15788, ¶35 (2011)("NPRM").

² *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398)*, Comments of the American Cable Association, MM Docket No. 00-168, MM Docket No. 00-44 (filed Dec. 22, 2012)("ACA Comments"); Reply Comments of the American Cable Association MM Docket No. 00-168, MM Docket No. 00-44 (filed Jan. 17, 2012)("ACA Reply Comments").

to attract viewers, which in turn allows the stations to secure higher retransmission consent fees from multichannel video programming distributors.³

- The coordination of negotiations by separately owned same-market stations replaces competition among local stations with collusion, thereby lessening competition locally and implicating the Commission's media ownership rules, the retransmission consent rules, and the antitrust statutes.⁴
- It is not premature to require disclosure of sharing agreements that facilitate this practice in the enhanced online public file proceeding while the Commission continues to evaluate whether such agreements should be considered attributable under existing local broadcast ownership limits.⁵
- Sharing agreements that facilitate coordinated retransmission consent negotiations by separately owned same-market stations constitute facts on the ground to be considered by the Commission under the Communications Act and its existing broadcast ownership rules when examining on a case-by-case basis, license renewals, transfer of control applications, and whether an unauthorized transfer of control has occurred.⁶

Participants also discussed whether the Commission has heretofore taken into account the role of retransmission consent under its broadcast ownership rules. ACA highlighted that the Commission is obligated to periodically evaluate its media ownership rules to ensure that they continue to promote its local television competition policy goals and take into account changing market conditions, such as growth in the role of retransmission consent in the financial performance of local television stations.⁷ ACA reiterated that retransmission consent is a broadcast station product for sale no different than advertising, and that local stations coordinating their negotiations for fees rather than competing against one another under agreements to share station-related expenses should be of significant concern to the Commission.⁸ ACA noted that the Commission has previously taken account of the impact of certain broadcast station agreements under its local television

³ ACA Comments at 6; ACA Reply Comments at 6; *see also In the Matter of 2010 Quadrennial 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, MB Docket No. 07-294, Comments of the American Cable Association, at 1,10 (filed July 12, 2010).

⁴ ACA Comments at 1, 9-10; ACA Reply Comments at 2-4.

⁵ ACA Comments at 13-15; ACA Reply Comments at 5-6. In particular, the pendency of the 2010 Quadrennial Review proceeding is not a reason to delay addressing the need for disclosure of these sharing agreements to the Commission, the public and the antitrust authorities by having them placed in stations' enhanced online public files.

⁶ ACA Comments at 15-17; ACA Reply Comments at 6-9.

⁷ *See In the Matter of 2010 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Promoting Diversification of Ownership In the Broadcasting Services*, Notice of Proposed Rulemaking, ¶ 1 (rel. Dec. 22, 2011) ("NPRM").

⁸ ACA Comments at 15-21; ACA Reply Comments at 10.

ownership and broadcast attribution rules,⁹ and urged that it now similarly take account of the impact of agreements on prices obtained through the negotiation of retransmission consent with MVPDs.¹⁰

Finally, participants discussed how best to craft the public file disclosure requirement to capture all relevant agreements. The NPRM had described “sharing agreements” as “contracts between licensees where one licensee provides certain station-related services to another station, including administrative, sales and/or programming support, in order to obtain certain efficiencies.”¹¹ ACA reiterated its position that the Commission must amend the definition of sharing agreements to ensure that the rule adopted requires placement in the enhanced online public file of any agreement, regardless of name or purported effect on “efficiencies” between separately owned same-market broadcast stations, but particularly those that facilitate the coordination of their retransmission consent negotiations.¹²

If the Commission rejects ACA’s proposed definition of “sharing agreements,” ACA urged the Commission to make modifications to its proposed definition. ACA explained how inclusion of the qualifier that the parties to an agreement intended “to obtain efficiencies” would fail to establish a clear, objective standard, instead resting compliance on establishing the subjective intent of the parties to obtain efficiencies before disclosure would be required. ACA discussed how this could provide a loophole for broadcasters to avoid including certain agreements in their public files. Participants also discussed how limiting the agreements to be disclosed to formal “contracts” would fail to capture relevant agreements that were not documented on paper. To remedy this problem, ACA urged the Commission to use a broader term, like “agreements,” which would require that broadcasters to document and disclose all relevant agreements, including those that have not yet been reduced to writing. Moreover, ACA discussed how the inclusion of language specifically identifying the negotiation of retransmission consent as a station-related service would improve the Commission’s proposed language and better ensure placement in the online public file of all agreements that facilitate coordinated retransmission consent negotiations.

⁹ *In the Matter of Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable MDS/Interests*, Report and Order, 14 FCC Rcd 12559 (1999); *In the Matter of the 2002 Biennial Regulatory Review Order -- Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003); and *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238 (2004).

¹⁰ ACA Comments at 21; ACA Reply Comments at 14.

¹¹ NPRM ¶ 35.

¹² ACA Comments at 14-15.

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely



Barbara S. Esbin
Cinnamon Mueller
Counsel to the American Cable Association

cc (*via email*): William Lake
Michelle Carey
Mary Beth Murphy
John Norton
Steve Broeckaert
Holly Sauer
John Gabrysch