



A Professional Limited Liability Company

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

Chicago
307 North Michigan Ave, Ste 1020
Chicago, IL 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

March 19, 2012

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 March 15, 2012, Ross Lieberman, American Cable Association; Andrea Pritchard, Corporate Programming, Knology; Jim Mitchell, Vice President – Regulatory Policy and Interconnection, Armstrong Utilities, Inc. (“Armstrong”); Peter C. Smith, Vice President, Programming, Wide Open West (WOW!); John Strode, Vice President, Ritter Communications (“Ritter”); Danny Jobe, Vice President of Systems Operations, MetroCast; Christopher Cinnamon, Cinnamon Mueller, and the undersigned, met, respectively, with William Lake, Chief, Media Bureau, Michelle Carey, Nancy Murphy, Alison Neplokh, John Norton, Steve Broeckert, Brendan Murray, Diana Sokolow and David Konczal, also of the Media Bureau, to discuss the experiences of ACA member companies in the recently concluded round of retransmission consent negotiations with local broadcast stations. As described below, the ACA member companies and Mr. Cinnamon conveyed the fact that the most recent round of negotiations was particularly difficult for small independent cable operators.

The deals that “got done” included massive retransmission consent fee increases that will lead to consumer rate increases. After the 2011 retransmission consent negotiating season concluded, broadcasters proclaimed that retransmission consent rules and regulations, which were first enacted 20 years ago, did not need modernizing because the majority of broadcast carriage “deals got done.”¹ However, ACA participants in this discussion, each of whom knows the prices,

¹ See Brian Stetler, *In New York and Elsewhere, Disputes Over Television Fees Lead to a Few Blackouts*, NYTimes (Jan. 1, 2012), available at <http://www.nytimes.com/2012/01/02/business/media/cable-tv-fee-disputes-cause-a-few-blackouts.html> (last visited Mar. 19, 2012) (contrasting the views of Dennis Wharton, spokesman, the National Association of Broadcasters, that “These agreements invariably get done because there’s enormous incentive for both sides to do a deal,” according to” with Matthew Polka, CEO, the American Cable Association, “Just because ‘deals got done’ does not mean the market is working or that the market isn’t saturated with anticompetitive conduct by broadcasters”).

terms, and conditions of the deals that their company negotiated and entered into, urged the Commission not to be lulled into a false sense of security by utilizing the “deals got done” metric as the sole means of measuring whether the Commission’s retransmission consent or media ownership rules need review and updating, particularly for smaller cable operators. Instead, they urged the Commission to focus on the impact of massive retransmission consent fee increases on the operators paying them, the rate increases being passed along to consumers, and other equally important factors.

Across-the-board, retransmission consent fees rose substantially higher than those charged in the preceding cycle. Participants explained that their companies, as a result of this latest round of negotiations, will be forced to pass through all or a substantial amount of these cost increases to their customers by raising subscription rates for essentially the same product previously delivered at much lower prices. They anticipated that these price increases will result in some consumers being priced out of the ability to afford subscription television service or to add additional services, such as broadband Internet access. Participants indicated that these rate increases are being phased-in now and over the next few months.

WOW!, according to Mr. Smith, is being forced to implement one of the largest rate increases in the company’s history, due in part to retransmission consent price hikes. Ritter, according to Mr. Strode, and Knology, according to Ms. Pritchard, also have or are implementing retransmission consent-related rate hikes. Ms. Pritchard stated that Knology has posted a website informing customers about why retransmission consent price increases are forcing the operator to raise subscriber rates, and, in one instance, has heard from customers shocked to learn that one station was asking a 120% price increase for continued access to the broadcast signal over their cable service.

Several operators described “massive” retransmission consent fee increases in all markets, with most seeing close to 100% increases over 2011 prices. Mr. Smith reported that WOW!’s retransmission consent costs rose by 88% and 117% during the two most recent three-year cycles, effectively doubling every three years, adversely affecting customers of WOW! and the company’s ability to finance other programming purchases. As a result, according to Mr. Smith, WOW! is no longer offering long carried out-of-market stations that sought payment in this round, and is dropping carriage of independent cable programming networks due to the rising costs of broadcast signal carriage. To place the magnitude of these retransmission consent fee increases in a broader context, Mr. Smith observed that overall programming costs from 2011 to 2012 for WOW! were in the range of 10%, whereas WOW!’s retransmission consent costs increased 88%.

Mr. Strode explained that Ritter also experienced inordinate fee increases to continue to retransmit broadcast signals on two of its Arkansas systems, Marked Tree and Western Grove. Mr. Strode reported that after lengthy and sometimes contentious negotiations, the final 2012 consideration for the Marked Tree system was 100% greater than that paid in 2011, despite the fact that Ritter dropped an out-of-market station from its channel line-up because the station asked for retransmission consent compensation in this round of negotiations. Ritter was forced to drop this station because carrying the station, and paying the retransmission consent fees demanded, would have increased its retransmission consent costs beyond levels that the operator could afford. In other words, as a result of corresponding subscriber rate hikes, this year customers will be paying more but receiving less. For this same system, Mr. Strode reported that consideration will increase by an additional 8% in 2013, and again by an additional 8% in 2014. For Ritter’s Western Grove system, the 2012 consideration is 72% higher than in 2011. Mr. Strode stated that this fee will

increase by 15% in 2013, and again by 15% in 2014. The net result for Ritter's Marked Tree subscribers is that the cost to access broadcast stations electing retransmission consent which represented \$2.16 of their cable subscription rate in 2011, will rise to \$4.33 in 2012; \$4.69 in 2013; and \$5.08 in 2014. Similarly, Ritter's Western Grove subscribers will find that the cost to access broadcast stations electing retransmission consent which represented \$2.28 of their cable subscription rate in 2011, will rise to \$3.93 in 2012; \$4.53 in 2013; and \$5.23 in 2014. According to Mr. Strode, this aggregated pricing information for broadcast stations that elect retransmission consent appears on Ritter's customers' bills.

Similar to Ritter, Ms. Pritchard relayed how Knology, after very difficult negotiations, was only able to limit its average retransmission consent fee increases to about 100% overall, and that its lowest retransmission consent price increase was 40%. These price increases compare unfavorably to its cable programming price increases, which were only about 10% from 2011 to 2012. Ms. Pritchard also described how Knology was forced to accept an "after-acquired" station clause that it could not negotiate out of its agreement if the operator wanted to have the station available on air for its subscribers on January 1, 2012. After-acquired station or market clauses entitle a broadcaster to roll into its agreement with an operator other stations it acquires, manages, or otherwise gets the rights to negotiate retransmission consent.² Ms. Pritchard confirmed that Knology had experienced first-hand the effects of an after-acquired station clause that drove up its fees, simply because one station had agreed to put itself under management of another. Ms. Pritchard explained how this practice is both proliferating and deeply de-stabilizing because it introduces continuing budget uncertainty for operators.

Several operators also remarked that their relatively small footprint within a broadcaster's market is a significant factor in their ability to reach reasonable deals. According to Mr. Smith, a broadcaster's failure to reach an agreement with WOW! for carriage barely puts a dent in the station's bottom line, but a failure on the part of WOW! to carry that station is a greater threat to their companies' sustainability. Unlike larger operators that may serve dozens of markets or more across the country, smaller operators, who may operate in only a few markets, are more financially vulnerable to subscriber losses related to the loss of a Big 4 network in a single market. Mr. Mitchell described how Armstrong experiences a similar dynamic in its systems because they typically cover only about 10% of a broadcaster's designated market area.

Coordinated retransmission consent negotiations by separately owned same-market broadcasters lessen competition in local broadcast markets and drive prices even higher. A common problem described by many operators in the meeting was the fact that separately owned broadcasters in the same designated market area were not competing against one another, but instead coordinating their negotiations which were giving these broadcasters the ability to extract higher retransmission consent fees. ACA discussed this problem 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 and Notice of Proposed Rulemaking in the above captioned media ownership review.³

² These clauses permit a broadcaster to go into any market, simply sign a management contract whereby they take over the daily operations of a station with relatively lower retransmission consent prices (without filing any formal application for transfer of ownership or control), and effectively raise the rates on that station to the higher rates commanded by the managing station.

³ *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*

ACA member companies in the meeting provided examples of instances in which they had to negotiate retransmission consent fees with a single representative for separately owned, same market broadcasters in this last round of negotiations, and explained the details of these negotiations, and described how in these instances, their retransmission consent costs were even higher than they incurred in other instances where broadcasters negotiated retransmission consent separately.

Mr. Smith explained that WOW! faced a 138% year-over-year retransmission consent price increase in its Columbus, OH market where a single broadcaster controls a total of four television signals, including two Big 4 affiliates, Fox and ABC, plus a CW affiliate and also has the MyNetworkTV affiliation. This rate of increase is 28% higher than the year-over-year rate increase that WOW! had experienced in its second highest cost market, and 57% higher than its average rate of increase across other markets, and the deals were presented on essentially take all or carry none terms. Ritter, according to Mr. Strode, had negotiated with a single representative, Shurz Media, for two non-commonly owned Big 4 stations in the Springfield, MO DMA for its smaller system. He stated that when Ritter negotiated with Shurz, the final price for each station was 43% higher than the average for all other stations that elected retransmission consent it carries on the system.

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 July 12, 2010) ("ACA Media Ownership NOI Comments") (urging the Commission to examine how the reduction in local broadcast competition 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); *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 11-27 (filed Mar. 5, 2012) ("ACA Media Ownership NPRM Comments")(urging the Commission to retain its local television duopoly rules and to amend its attribution rules to include formal and informal agreements among separately owned same-market television stations to coordinate their retransmission consent negotiations for purposes of applying its multiple 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).

Mr. Mitchell reported that in Armstrong's Youngstown, OH service area, two of the Big 4 stations are operated by the same affiliate group. While the negotiations for each station were conducted in a way that would appear as if they were done separately, the terms of the deals presented to Armstrong in each case were identical, indicating that the stations were in fact coordinating their negotiations. Ms. Pritchard stated that Knology's experience with coordinated negotiations was similar, with one Big 4 station increasing 82% when negotiations were conducted together with another Big 4 affiliate.

The experiences of these operators illustrate the problems described in ACA's filings with the Commission demonstrating that coordinated retransmission consent negotiations by separately owned same-market broadcasters lessen competition in local broadcast markets permitting these broadcasters to drive up prices beyond levels achievable if each station were to negotiate separately.⁴ In such cases, broadcasters collude, rather than compete against one another for retransmission consent fees, now the second largest single source of station revenues.⁵ With its filings, ACA submitted available empirical evidence drawn from cable operators forced to negotiate with broadcasters that coordinated their retransmission consent negotiations suggesting that common control or ownership of multiple Big 4 affiliates in a single market results in significantly higher retransmission consent fees, ranging from 21.6% to 161% higher than for separately-owned or controlled broadcast affiliates.⁶

To address this collusive practice, ACA has proposed that the Commission declare *per se* violation of its good faith rules a broadcaster engaging in any of the following practices:

- Delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately owned broadcaster in the same DMA;
- 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;

⁴ See ACA Media Ownership NOI Comments at 5-10; *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Comments of the American Cable Association, MB Doc. No. 10-71, at 11-14 (filed May 18, 2010); ACA Comments at 20-22; ACA Reply Comments at 77-85.

⁵ See ACA Media Ownership NPRM Comments at 2 & 5; see also ACA Media Ownership NOI Comments at 5-10, 19-20; ACA Comments at 21-22; ACA Reply Comments at 33-37. An initial economic analysis done by ACA's economic expert, Professor William P. Rogerson, demonstrated that standard economic theory predicts that if two otherwise competing Big 4 broadcasters in the same market are able to collectively negotiate to maximize their joint profit, they will be able to charge higher retransmission consent fees than if the two networks were separately owned or controlled so long as the networks are partial substitutes for one another, as are broadcast networks. ACA Petition Comments at 9-14; Rogerson I at 7-8; ACA Comments at 9; Rogerson II at 6 & 11. Professor Rogerson explained that by operating under coordinated control for the purpose of negotiating retransmission consent, Big 4 affiliates are able to "act as a single entity for purposes of negotiating retransmission consent prices . . . [and] this coordinated activity allows broadcast stations to negotiate higher retransmission consent fees than they would otherwise be able to." Rogerson I at 3.

⁶ ACA Comments at 10-11.

- Any informal or formal agreement pursuant to which one broadcaster would enter into a retransmission consent agreement with an MVPD contingent upon whether another separately owned broadcaster in the same market is able to negotiate a satisfactory retransmission consent agreement with the same MVPD; and
- 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, or the status of negotiations over future retransmission consent agreements.⁷

Access to out-of-market, but nearby signals denied by third party interference with negotiations. Operators also discussed instances of third-party interference with their ability to negotiate retransmission consent with neighboring out-of-market stations, leaving their subscribers unable to access much desired and long carried broadcast signals on their subscription service. In many cases, the out-of-market stations provide more 'local' news, weather, and sports than the in-market, out-of-state stations and that is why the customers want the out-of-market stations. For example, Mr. Strode explained that Ritter was unable to get Arkansas content on one its Arkansas systems due to interference from the station's affiliated network. The out-of-market in-state station was willing to grant retransmission consent, but the network refused to permit out of market carriage. In Ritter's view, "deals got done," but customers were unable to see network programming on the station where they wanted to see it. Dropping the out-of-market station from its systems caused great customer dissatisfaction.

The operator experiences also illustrated the harms described in ACA's filings concerning third-party interference with out-of-market retransmission consent, a practice that denies consumers access to desired broadcast station signals.⁸

The small operator experience across multiple markets. Mr. Cinnamon described his experiences as outside counsel negotiating retransmission consent on behalf of individual independent cable operators involved in over 400 transactions during the recently concluded round of negotiations. Mr. Cinnamon confirmed that deals negotiated in this last retransmission cycle saw sharp increases in retransmission consent fees, with percentage increases ranging from 100% to 300%. He said that aggregate retransmission consent costs now range from \$3 - \$5, and in some cases higher, per subscriber per month, and the affected operators are planning retransmission consent-related rate increases to help offset the costs of the fee increases. As a result, Mr. Cinnamon said basic tier rates are likely to increase \$3 to \$5 per month solely as a result of retransmission consent fee increases.

Mr. Cinnamon also noted a few clear trends that emerged from this last cycle: (i) broadcasters controlling multiple stations in a market through either acquisitions or covert consolidations are able to extract higher fees than those controlling a single station, with one-on-one negotiations between operators and stations now the unusual event; (ii) there is a proliferation of contract clauses entitling a broadcaster to roll into its agreement with an operator other stations it acquires, manages, or otherwise gets the rights to negotiate retransmission consent, with the result that prices can rise over the negotiated price simply because the

⁷ *Id.* at 22-25. In addition, ACA has proposed that the Commission deem these practices to be attributable ownership interests for purposes of applying its local television ownership rules. ACA Media Ownership NPRM Comments at 27.

⁸ ACA Comments at 26-76; ACA Reply Comments at 42-76.

broadcaster acquires the right to manage another station; and (iii) broadcasters and the networks are actively working to reduce out-of-market carriage, thus reducing competition where it had formerly existed that would keep rates lower.

ACA again urges the Commission to expeditiously put an end to these harmful, anti-consumer and anticompetitive practices by prohibiting the coordinated negotiation of retransmission consent by separately owned same-market stations under its good faith rules and its broadcast multiple ownership rules,⁹ and by prohibiting third-party interference under its good faith rules, as proposed in the Retransmission Consent NRPM.¹⁰ 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

cc (*via email*): William Lake
Michelle Carey
Nancy Murphy
Alison Neplokh
John Norton
Steve Broeckaert
Brendan Murray
Diana Sokolow
David Konczal

⁹ See ACA Media Ownership NRPM Comments at 24-26; ACA Comments at 62; ACA Reply Comments at 39-41.

¹⁰ NPRM ¶ 23.