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Barbara S. Esbin
Admitted in the District of Columbia

April 5, 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; *In the Matter of the Basic Service Tier Encryption, Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Doc. No 11-169, PP Doc. No. 00-67

Dear Ms. Dortch:

On April 4, 2012, Ross Lieberman, Vice President of Government Affairs, American Cable Association ("ACA"), and the undersigned, met with Dave Grimaldi, Chief of Staff and Media Legal Advisor to Commissioner Clyburn; Lyle Elder, Acting Legal Advisor, Chairman Genachowski; and Erin McGrath, Acting Legal Advisor, Media, Commissioner McDowell to discuss: (1) the public interest benefits of placing formal or informal agreements between separately owned, same-market broadcasters that facilitate the coordination of retransmission consent in the enhanced online public file of local television stations proposed in the *Enhanced Public File NPRM*; and (2) providing small cable operators a more flexible alternative to the consumer protection measures proposed for cable operators wishing to avail themselves of the basic tier encryption waiver described in the *Basic Tier NPRM* in the above referenced dockets.¹

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, ¶135 (2011) ("Enhanced Public File NPRM"); *In the Matter of the Basic Service Tier Encryption, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Proposed Rulemaking, 26 FCC Rcd 14870 (2011).

Enhanced Public File

To begin the meeting, ACA noted that agreements between separately owned same-market broadcast stations to coordinate their negotiation of retransmission consent with multichannel video programming distributors (“MVPDs”), in addition to other factors, constitute vital facts on the ground that the Commission is obligated to consider in discharging its statutory responsibilities under the Communications Act. In particular, as discussed in ACA’s filings in response to the *Enhanced Public File NPRM*,² these facts are relevant to licensee compliance with the Commission’s existing broadcast ownership rules, and should be taken into account by the Commission when examining, on a case-by-case basis, license renewals, transfer of control applications, and the question whether an unauthorized transfer of control has occurred.³ ACA explained that it is vitally important that the Commission ensure that the materials contained within the broadcasters’ enhanced public files facilitate the ability of the Commission to carry out its statutory obligations.

ACA noted how the data and information important to the Commission’s evaluation of these case-by-case reviews will necessarily change over time because the Commission must take into account how changing marketplace conditions affect the broadcast industry. Constant evaluation of broadcast television marketplace changes is consistent with the Commission’s obligation to periodically evaluate all of its media ownership rules to ensure that they continue to promote its local television competition policy goals.⁴

During the meeting, ACA expressed its view that it is essential that the Commission, based on changes in the broadcast television market, require placement of all agreements between separately owned same-market broadcasters that facilitate the coordination of retransmission consent in each broadcast licensee’s enhanced online public file.

ACA cited the following developments warranting public disclosure of such agreements:

- In the last four to six years, retransmission consent has become an important secondary revenue stream to local broadcast stations, particularly for affiliates of the top four rated

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 Enhanced Public File Comments”); Reply Comments of the American Cable Association MM Docket No. 00-168, MM Docket No. 00-44 (filed Jan. 17, 2012)(“ACA Enhanced Public File Reply Comments”); *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)*, Ex Parte Letter from Barbara S. Esbin, Cinnamon Mueller, to Marlene Dortch, Secretary, Federal Communications Commission (Feb. 28, 2012).

³ ACA Enhanced Public File Comments at 15-17; ACA Enhanced Public File Reply Comments at 6-9.

⁴ 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, 26 FCC Rcd 17489, ¶ 1 (2011).

national broadcast networks (typically ABC, CBS, Fox and NBC), and industry analysts expect this revenue source to become increasingly important in the years ahead.⁵

- During this same period, separately owned same-market broadcasters have been increasingly coordinating their retransmission consent negotiations and it is now a widespread practice.⁶
- Economic theory and available empirical evidence demonstrate that the coordination of negotiations by separately owned same-market stations lessens competition in local broadcast markets by replacing competition with collusion, implicating the Commission's media ownership rules, the retransmission consent rules, and the antitrust statutes.⁷

ACA observed that the Commission has previously taken account of the impact on local advertising prices of certain broadcast station joint sales agreements under its local television ownership and broadcast attribution rules,⁸ and urged that it now take account of the impact of similar agreements among separately owned same-market stations to coordinate negotiations on prices obtained for retransmission consent from MVPDs.⁹ Significantly, the Commission ordered the

⁵ Robin Flynn, SNL Kagan, Broadcast Investor, "Boosting retrans projections as TV station owners succeed in pushing rates" (Nov. 22, 2011) ("Kagan"); see also Staff, TVNewsCheck, *Retrans Revenue To Top \$3.6B Through 2017*, available at <http://www.tvnewscheck.com/article/2011/05/25/51472/retrans-revenue-to-top-36b-through-2017> (last visited Mar. 5, 2012) (reporting that SNL Kagan has projected that total industry retrans fees could increase from \$1.14 billion in 2010 to \$3.61 billion by 2017, with average per-sub fees for cable MSOs potentially more than doubling over time from their levels through 2017).

⁶ ACA Enhanced Public File Comments at 6; ACA Enhanced Public File 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) and Comments of the American Cable Association at 3-8 (filed March 5, 2012) at ii, 5-8 ("ACA reports that there are now 62 instances of these sharing agreements in 55 designated market areas ("DMAs"). The last time that ACA undertook the effort to identify these instances, it found a total of 56 in 50 DMAs. This represents a 10.7% net increase in the number of instances of sharing agreements among Big 4-affiliated stations in particular markets in less than two years. Of the 62 instances where multiple Big 4 affiliates in the same DMA are known to operate under a sharing agreement, ACA had a member that was able to confirm 46 instances, involving 41 DMAs, where retransmission consent negotiations were conducted by a single representative for two stations. When ACA last surveyed its members, it identified 36 instances in 33 markets. Therefore the net increase in the number of instances from 2010 to 2012 was 10 in eight DMAs or 27.8% since the last time ACA reported this information to the FCC.").

⁷ ACA Enhanced Public File Comments at 1, 9-10; ACA Enhanced Public File Reply Comments at 2-4.

⁸ *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).

⁹ ACA Enhanced Public File Comments at 21; ACA Enhanced Public File Reply Comments at 14.

placement of radio joint sales agreements in the participating radio stations' public inspection files even before they were deemed attributable for purposes of the multiple ownership rules, citing the need for disclosure of such agreements to enable monitoring by the public, the Commission and the antitrust authorities.¹⁰

For the reasons stated above, ACA explained 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.¹¹ ACA reiterated that, contrary to the protestations of broadcasters,¹² and regardless of the outcome of the quadrennial review, it is important for regulators and the public to have access to these agreements in the online public file with regard to the Commission's duty to evaluate licensee compliance with existing media ownership rules.¹³

Finally, ACA noted that the *Enhanced Public File 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

¹⁰ ACA Enhanced Public File Comments at 15-18; *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, Report and Order, 14 FCC Rcd 12599 (1999) ¶ 123 ("1999 Attribution Order"); 47 C.F.R. § 73.3526(e)(16). Similar requirements were adopted for disclosure of television time brokerage agreements. See 1999 Attribution Order ¶ 92 (placement of television time brokerage agreements in public inspection files will permit the Commission to monitor the agreements to ensure that licensees retain control of their stations and adhere to the Communications Act, Commission Rules and policies and the antitrust laws); 47 C.F.R. § 73.3526(e)(14).

¹¹ ACA Enhanced Public File Comments at 13-15; ACA Enhanced Public File Reply Comments at 5-6. In particular, ACA stressed that 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.

¹² *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, Comments of the Joint Broadcasters at 20-21 (filed Dec. 22, 2011); *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, Comments of the National Association of Broadcasters at 28-29 (filed Dec. 22, 2011).

¹³ ACA Enhanced Public File Reply Comments at 6-7 ("Agreements that facilitate the coordinated negotiation of retransmission consent the coordinated negotiation of retransmission consent have an impact on local broadcast competition, and under current rules, the Commission is required to take into account agreements that impact local broadcast competition. Specifically, these agreements are relevant: (i) in evaluating whether a station's license renewal would be consistent with the public interest; (ii) when evaluating whether granting an individual license application, transfer or assignment would be consistent with the public interest; and (iii) in determining whether an unauthorized transfer of control in violation of its rules has occurred. In addition, disclosure of these agreements assists the Commission in conducting its periodic media ownership reviews.").

efficiencies.”¹⁴ 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.¹⁵

Should ACA’s proposed definition of “sharing agreements” not be adopted, ACA urged that modifications be made to the Commission’s 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. Such a subjective standard could provide a loophole for broadcasters to avoid including certain agreements in their public files. In addition, ACA 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 suggested the use of a broader term, like “agreements,” which would require broadcasters to document and disclose all relevant agreements, including those that have not yet been reduced to writing.

Finally, 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.

Basic Tier Encryption

Next, ACA reiterated the positions reflected in its filings in the *Basic Tier Encryption NPRM* docket supporting the Commission’s proposal to permit, but not require, cable operators to encrypt their basic tier services on all-digital systems.¹⁶ ACA said that it has many members who operate all-digital systems today, or plan to upgrade to all-digital systems in the near future, and these operators have interest in scrambling their basic tier. To make the option equally useful to both large and small operators, ACA urged the Commission not to adopt a “one-size-fits-all” approach to the consumer protection measures that would be applied to cable operators who seek to scramble their basic service tier. Instead, ACA urged adoption of its proposed

¹⁴ Enhanced Public File NPRM ¶ 35.

¹⁵ ACA Enhanced Public File Comments at 14-15.

¹⁶ See *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, Comments of the American Cable Association, at 1 (filed Nov. 28, 2011) (“ACA Basic Tier Encryption Comments”); *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, Reply Comments of the American Cable Association, PS Docket MB Docket No. 11-169, at 1-2 (filed Dec. 12, 2012) (“ACA Basic Tier Encryption Reply Comments”); *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, Ex Parte Letter from James N. Moskowitz, Cinnamon Mueller, to Marlene Dortch, Secretary, Federal Communications Commission (Jan. 31, 2012) (“ACA Jan. 31 Ex Parte Letter”); *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, Ex Parte Letter from Barbara S. Esbin, Cinnamon Mueller, to Marlene Dortch, Secretary, Federal Communications Commission (Feb. 6, 2012) (“ACA Feb. 6 Ex Parte Letter”).

alternative measures for smaller operators to ensure that the relative burden of providing free set-top boxes to eligible customers for an extended period is no greater than the one imposed on larger ones.

As described in more detail in ACA's Feb. 6 and Jan. 31 Ex Parte Letters, ACA explained how smaller operators are charged higher per-unit fees than larger providers to acquire set-top boxes, and, unlike larger operators, incur recurring monthly per-unit fees when additional set-top boxes are utilized by their customers. Moreover, the cost for the smaller operator who serves less densely populated areas to send an employee out to install a free set-top box at the subscriber's premises is often higher than that incurred by larger operators that typically serve more dense areas.

In support of its assertion concerning the interest of its members in availing themselves of the right to encrypt the basic service tier, and the disproportionate impacts of the proposed consumer protection measures, ACA reported that it had conducted a survey of its membership in December 2011 to help formulate its response to the NPRM. Of the 107 companies that responded to the survey,¹⁷ half (49.5% or 53 in total) indicated that they either operate a QAM-based all digital system, or will be upgrading to all-digital within three years.

Of the 49.5 percent either operating a QAM-based all digital system or planning to upgrade to one within three years:

- 15.1% (8 in total) operate at least one QAM-based system.
- 81.1% (43 in total) plan on upgrading at least one QAM-based system to all digital within 3 years.
- 3.8% (2 in total) operate at least one QAM-based system and plan on upgrading at least one QAM-based system to all digital within 3 years.

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- 66.0% (35 in total¹⁸) said they would be interested in encrypting the basic tier of their current or planned all-digital system.
- 52.8% (28 in total) said that they would not be willing to satisfy the FCC's proposed conditions in order to be able to encrypt the basic tier.

¹⁷ In total there were 116 respondents to the survey, but in order to provide the most accurate survey data, ACA omitted the responses provided by three respondents who failed to identify themselves or their company, and in six instances, in order to avoid double counting, ACA merged the responses when two individuals responded from the same company. When the responses of two respondents from the same company differed with respect to results that are presented in this ex parte, ACA specifically notes how it addressed the matter.

¹⁸ In this total, ACA excluded two responses from individuals from same company in which one respondent said they would be interested in encrypting the basic service tier but the second representative said they would not be interested.

Below is a sampling of comments discussed at the meeting from ACA members that said: (1) they **would be interested** in encrypting the basic tier on an existing or future all-digital system; but (2) **would not be willing** to satisfy the conditions proposed in the NPRM. In other words, the operators quoted below would otherwise want to avail themselves of the benefits of basic tier encryption, benefits which extend to their subscribers, but would forgo doing so because of the burdensome costs associated with the proposed conditions.

- “No small cable company can afford these terms. Just the price in additional digital boxes would make us not encrypt the basic tier.”
- “Offering all existing basic tier customers a CableCard or set-top box at no charge for 2 years would be a financial burden.”
- “The cost of the STB is to [sic] high to offer the customer free STB’s for 1 or 2 years.”
- “We give senior discounts accross [sic] the board on all broadband services. Can not [sic] add additional free services or equipment for Medicaid subscribers.”
- “The question of who qualifies for discounts (Medicaid concept) is burdensome and challenging to implement...”

ACA urged the Commission to take these factors into account and provide smaller and larger providers with an equal incentive to take advantage of the benefits of basic tier encryption by adopting an alternative set of conditions for smaller operators that will reduce the costs of moving to basic tier encryption.¹⁹ This would allow customers of cable operators, regardless of size, to benefit from this proposed relief, which is an action that the Commission should take in a timely manner.²⁰

To this end, ACA encouraged adoption of its proposal to permit smaller operators, defined as operators with 400,000 subscribers or fewer, to purchase and deploy the most inexpensive set-top boxes available on the market, which should include refurbished set-top boxes with integrated security that have previously been deployed in the market, rather than only devices that are permissible under the integration ban. Allowing these boxes to be utilized would lessen the burden the *Basic Tier Encryption NPRM*'s proposed consumer protection measures would otherwise impose on smaller operators. ACA suggested that the impact of its proposal on the development of a marketplace for retail set-top boxes would be *de minimis*,²¹ particularly if the Commission permits the deployment of refurbished integrated set-top boxes solely for the purpose of satisfying the conditions contained in the proposed basic tier encryption waiver. ACA also reiterated its suggestion that in addition to allowing smaller cable operators to deploy refurbished set-top boxes with integrated security, reducing the time frames that free set-top boxes would need to be made available to subscribers under certain circumstances would be another means for smaller providers to have an equal opportunity to benefit from the efficiencies achievable through encrypting the basic service tier.²²

¹⁹ See ACA Jan. 31 Ex Parte Letter at 1-4.

²⁰ In particular, if the Commission cannot complete the instant rulemaking promptly, it should independently consider approval of the Petition for Waiver of the Basic Service Tier Encryption rules filed by RCN Telecom Services, Inc. See, ACA Basic Tier Encryption Comments at 4 (*citing In the Matter of RCN Telecom Services, Inc.'s Petition for Waiver of Section 76.630(a) of the Commission's Rules*, File No. CSR-8525-Z (filed Aug. 12, 2011)).

²¹ See ACA Basic Tier Encryption Reply Comments at 9.

²² See *id.* at 7.

ACA explained how deploying refurbished boxes for the limited purpose of permitting smaller operators to avail themselves of the benefits of basic tier encryption in a manner proportional to larger operators could also directly benefit consumers by enabling them to receive a device with more features than a digital terminal adapter (DTA). ACA noted that the rationale behind the proposal to allow smaller cable operators to deploy refurbished set-top boxes with integrated security as a means of satisfying the Commission's proposed consumer protection measures is clearly explained in the survey response of one ACA member:

[W]e should be able to deploy non-cablecard boxes (built prior to 2007) for those customers that only want to subscribe to basic cable or fall into the [M]edicaid description. There is a big after-market for those type of boxes and if we're going to be required not to charge for two years, we need to be able to have access to cheap set tops with more functionality than DTA's in order to try and make a few bucks back off of PPV or VOD. I hope that makes sense.

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): Dave Grimaldi
Lyle Elder
Erin McGrath