



May 30, 2012

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent; 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; Promoting Diversification of Ownership in the Broadcasting Services, MB Docket Nos. 10-71, 09-182, and 07-294: Ex Parte Communication***

Dear Ms. Dortch:

The Independent Telephone & Telecommunications Alliance (“ITTA”)<sup>1</sup> is encouraged that the Commission is conducting a careful examination of the retransmission consent marketplace to determine whether further Commission action is necessary.<sup>2</sup> However, ITTA is disheartened that the Commission continues to view the occurrence or non-occurrence of blackouts as a primary indicator of whether the marketplace is functioning properly.<sup>3</sup> Blackouts should not be a primary measure by which the Commission determines whether there is a

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<sup>1</sup> ITTA’s membership includes CenturyLink, Cincinnati Bell, Comporium Communications, Consolidated Communications, FairPoint Communications, Hargray Communications, HickoryTech Communications, SureWest Communications, and TDS Telecom.

<sup>2</sup> Prepared Remarks of FCC Chairman Julius Genachowski, Federal Communications Commission, NAB Show 2012, Las Vegas, Nevada, Apr. 16, 2012, p. 2, *available at*: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0417/DOC-313605A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0417/DOC-313605A1.pdf) (“Genachowski Remarks”) (the FCC “continue[s] to watch the [retransmission consent] marketplace carefully to determine whether further Commission action is warranted”). *See also* John Eggerton, “Lake: FCC Still Has Eye on Retrans: Been More Than a Year Since They Were First Proposed,” *Broadcasting & Cable*, Apr. 25, 2012, *available at*: [http://www.broadcastingcable.com/article/483648-Lake\\_FCC\\_Still\\_Has\\_Eye\\_On\\_Retrans.php](http://www.broadcastingcable.com/article/483648-Lake_FCC_Still_Has_Eye_On_Retrans.php).

<sup>3</sup> *See* Mike Reynolds, “Genachowski: Open to Helping Smaller Cable Ops With Retrans Issues,” *Multichannel News*, Mar. 14, 2012, *available at*: [http://www.multichannel.com/article/481853-Genachowski\\_Open\\_to\\_Helping\\_Smaller\\_Cable\\_Ops\\_With\\_Retrans\\_Issues.php](http://www.multichannel.com/article/481853-Genachowski_Open_to_Helping_Smaller_Cable_Ops_With_Retrans_Issues.php).

marketplace imbalance that requires regulatory intervention.<sup>4</sup> The current state of the video marketplace is a significant reason why more blackouts do not occur, particularly with respect to smaller multichannel video programming distributors (“MVPDs”) who must capitulate to unreasonable broadcaster demands to offer a competitive product in response to consumer demand.<sup>5</sup>

ITTA member companies’ provision of video services in addition to their voice and data offerings delivers a huge benefit to consumers in the rural and high-cost areas they serve and furthers the Commission’s policy preference for robust competition in the video marketplace. However, ITTA members are often the newest entrant in the areas where they provide video service to subscribers, and they therefore have a disproportionately limited amount of bargaining power in comparison to both their competitors and the local television station representatives on the other side of the negotiating table. Consumers have come to expect access to voice, data, and video services from their choice of provider, and ITTA member companies must do what is necessary to provide such offerings, even if that means agreeing to astronomical retransmission

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<sup>4</sup> The Commission also appears to evaluate the market based on the purported fact that thousands of retransmission consent agreements have been concluded “successfully” as well as the dearth of retransmission consent complaints. *Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, FCC 11-13 (rel. Mar. 3, 2011). As explained below, neither factor is a reliable indicator of the current state of the retransmission consent marketplace. *See In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, the National Telecommunications Cooperative Association, the Independent Telephone & Telecommunications Alliance, the Western Telecommunications Alliance, and the Rural Independent Competitive Alliance, MB Docket No. 10-71 (filed May 27, 2011) (“ITTA, *et al.* Comments”), at 7-9.

<sup>5</sup> ITTA, *et al.* Comments at 7. The Commission also should be careful to avoid trivializing the impact of signal loss on consumers when it does occur, regardless of the size of the market involved or the duration of the disruption. Although the Chairman has stated his pleasure “that the number of blackouts and serious instances of consumer disruption were minimal” in the previous retransmission consent cycle, 40 markets experienced blackouts in 2011 and at least 45 markets have been affected by blackouts in the first four months of this year. Mike Reynolds, “Genachowski: Open to Helping Smaller Cable Ops With Retrans Issues,” *Multichannel News*, Mar. 14, 2012, available at: [http://www.multichannel.com/article/481853-Genachowski\\_Open\\_to\\_Helping\\_Smaller\\_Cable\\_Ops\\_With\\_Retrans\\_Issues.php](http://www.multichannel.com/article/481853-Genachowski_Open_to_Helping_Smaller_Cable_Ops_With_Retrans_Issues.php); *Communications Daily*, Mass Media Notes, May 4, 2012, p. 14. *See also* Mike White and Glenn Britt, “Outdated Rules Hurt TV Viewers,” *Politico*, Apr. 23, 2012, available at: <http://dyn.politico.com/printstory.cfm?uuid=7FFBDA0C-0123-4471-B985-6825BC0B2AAB>. These figures are not insignificant, and the disruption and harm caused by losing access to broadcast programming certainly could not have been inconsequential to the hundreds of thousands of viewers who were affected.

fee increases and absorbing the excessive costs that would be unfair and not feasible from a competitive standpoint to pass through to consumers.

The Commission must update the retransmission consent regime to take into account the landscape that now exists in the video distribution marketplace. For ITTA member companies that face competition from several different providers in the markets they serve, there is simply no incentive for broadcasters to reach an agreement for carriage because ITTA member companies offer minimal additional viewership. However, ITTA member companies that cannot offer a competitive video product face the prospect of losing subscribers to competitors. When a customer switches to another provider, it is difficult (if not impossible) to get them back. Consequently, ITTA member companies frequently have no choice but to absorb the cost of rising retransmission consent fees in order to remain a viable competitor.

Smaller and new entrant MVPDs cannot afford the prolonged blackouts that larger and incumbent providers often experience. Last year, DISH Network subscribers went without their local ABC, CBS, and Fox affiliates in Casper and Cheyenne, Wyoming for four months before DISH reached an agreement to retransmit the affected stations.<sup>6</sup> As a result of Time Warner Cable's dispute with Cordillera Communications over carriage of certain stations in Corpus Christi, Texas, the cable operator's viewers were without access to the local NBC affiliate and three other stations since December of last year.<sup>7</sup> After nearly six months with the stations dark, the parties finally reached an agreement earlier this week.<sup>8</sup> ITTA member companies could not withstand the subscriber defections and other harms that accompany these kinds of protracted disputes.<sup>9</sup>

Moreover, the Commission's retransmission consent complaint process is cost-prohibitive for smaller MVPDs, and the likelihood of timely Commission action on complaints that are filed is non-existent.<sup>10</sup> Even if a smaller or new entrant MVPD could afford the

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<sup>6</sup> *Communications Daily*, Mass Media Notes, May 4, 2012, p. 14.

<sup>7</sup> See Steve Donohue, "Genachowski: FCC Watching Marketplace to Determine If Retransmission Reform Was Warranted," *FierceCable*, Apr. 17, 2012, available at: <http://www.fiercecable.com/story/genachowski-fcc-watching-marketplace-determine-if-retransmission-reform-war/2012-04-17>.

<sup>8</sup> John Eggerton, "Cordillera, TWC Strike Retrans Deal in Corpus Christi," *Broadcasting & Cable*, May 26, 2012, available at: [http://www.broadcastingcable.com/article/485169-Cordillera\\_TWC\\_Strike\\_Retrans\\_Deal\\_in\\_Corpus\\_Christi.php](http://www.broadcastingcable.com/article/485169-Cordillera_TWC_Strike_Retrans_Deal_in_Corpus_Christi.php).

<sup>9</sup> When blackouts that affect smaller MVPDs do occur, they typically go unnoticed in comparison to larger MVPD blackouts because the relatively small number of viewers impacted by such occurrences does not generate national media attention. See ITTA, *et al.* Comments at 7.

<sup>10</sup> *Id.* at 8.

significant costs associated with this process, it could not expect to retain subscribers while its complaint remains pending.

The ability to pursue regulatory relief is further hampered by mandatory non-disclosure provisions typically found in retransmission consent agreements. These provisions prohibit MVPDs from revealing the contract rates, terms and conditions that are subject to dispute. This lack of transparency has become a tool in the broadcaster's arsenal to silence smaller MVPDs through the threat of litigation.

The Commission must bear in mind that the precipitous rise in retransmission consent fees harms consumers not only through service disruptions and price increases, but also in terms of the availability and adoption of advanced services, including robust broadband. In a 2009 study, the National Exchange Carrier Association found that members offering Internet along with a video component had broadband adoption rates nearly 24 percent higher than those companies offering Internet without access to subscription video services.<sup>11</sup> Under the current retransmission consent regime, money that MVPDs would put back into their systems by way of increased investment in broadband facilities is instead going to retransmission fees that continue to spiral out of control.<sup>12</sup>

In order to restore an environment that facilitates fair and balanced negotiations between MVPDs and broadcasters, the Commission should immediately reform the broken retransmission consent process. As part of this undertaking, the Commission should identify and utilize criteria that are appropriate marketplace considerations rather than relying on factors like the number of blackouts, complaints, or executed retransmission consent agreements as reliable marketplace indicators.

One approach the Commission should give serious consideration to would have the FCC gather retransmission consent fee data from broadcasters to determine the levels of each market's retransmission fees.<sup>13</sup> For those markets determined to have non-competitive retransmission fees among providers based on such factors as market size, station size and availability of content over other platforms,<sup>14</sup> the FCC would allow all MVPDs to obtain the same

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<sup>11</sup> See NECA comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (filed Dec. 7, 2009).

<sup>12</sup> See ITTA, *et al.* Comments at 9.

<sup>13</sup> See Letter from Melissa E. Newman, Vice President – Federal Regulatory Affairs, CenturyLink, to Marlene Dortch, Secretary, FCC, MB Docket No. 10-71 (filed Apr. 20, 2012).

<sup>14</sup> There is substantial evidence that the per subscriber retransmission consent rates paid by large MVPDs are significantly lower than for other MVPDs in the market. See ITTA, *et al.* Comments at 25. In comparison to small and new entrant MVPDs, large MVPDs are able to negotiate more favorable rates because they have greater viewership, which generates additional advertising revenue and gives them increased leverage in negotiations. See *id.*

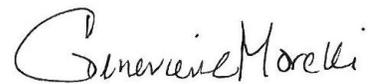
retransmission consent fees at the same rate as the dominant MVPD in the market. Such an approach, based on reliable and objective marketplace criteria, would ensure non-discriminatory rates, thereby promoting competition.

Further, the FCC should protect consumer access to video content by suspending the non-duplication and syndicated exclusivity rules during unresolved or unsuccessful retransmission consent negotiations by permitting MVPDs temporary access to national duplicate programming. Under the Commission's existing rules, a broadcaster can prevent an MVPD from carrying the duplicative programming of another station in the same local market or from importing duplicative programming of another station outside of the local market, which gives broadcasters an unfair advantage over MVPDs when retransmission consent discussions are underway and not progressing well. To facilitate fair and balanced negotiations, the Commission should permit all MVPDs to enter into arrangements for carriage of duplicative programming of another station in the event of unresolved or unsuccessful retransmission consent negotiations with a local broadcast station. And, the Commission should act to ensure that broadcast licensees, neither singularly nor in concert, create restrictions on such private arrangements.

Implementing such modifications to the Commission's rules will potentially increase the effectiveness of the Commission's retransmission consent negotiation good faith standard. And, modifying the Commission's rules in this manner should also preclude the unnecessary interruption of access to important programming, such as news and weather, and minimize the need for consumers to suffer the inconvenience of switching video programming providers to retain desired programming.

The current retransmission consent marketplace is having an increasingly significant negative impact on smaller MVPDs' ability to compete for video customers which, in turn, is impacting their ability to continue to deploy broadband facilities and to offer expanded broadband services to consumers. The Commission has delayed too long. It should immediately reform the current retransmission consent process to restore fair and balanced negotiations between MVPDs and broadcasters.

Sincerely,



Genevieve Morelli  
President



Micah M. Caldwell  
Vice President, Regulatory Affairs