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**Barbara S. Esbin**  
Admitted in the District of Columbia

June 11, 2012

**Via ECFS**

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

**Re: American Cable Association Notice of Ex Parte Communications; *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120; *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 June 7, 2012, Ross Lieberman, Vice President of Government Affairs, American Cable Association ("ACA") and the undersigned, met via teleconference with Erin McGrath, Legal Advisor, Media, to Commissioner McDowell to discuss the Notice of Proposed Rulemaking ("NPRM") in the above referenced docket.<sup>1</sup>

Consistent with its comments in this proceeding, ACA expressed support for Commission retention of the rule exempting qualifying small cable systems<sup>2</sup> from the requirement that they deliver must-carry broadcast signals in high definition (HD) format.<sup>3</sup> ACA explained that the HD carriage exemption has worked as intended by providing many eligible small cable systems with the additional time they needed to provide must-carry broadcast signals in HD. ACA also made clear that despite the success of the HD carriage exemption, there remain a number of smaller cable systems that

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<sup>1</sup> *In the Matter of Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, 27 FCC Rcd 1713 (2012) ("NPRM").

<sup>2</sup> The HD exemption applies to systems that have less than 553 MHz of activated channel capacity, or fewer than 2,501 subscribers that are not owned by a very large multichannel video programming distributor ("MVPD").

<sup>3</sup> See *NPRM* at ¶ 20 (Commission tentatively concludes that it is in the public interest to extend the small-system HD exemption.); *In the Matter of Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Doc. No. 98-120, Comments of the American Cable Association, 1-4 (filed Mar. 13, 2012) ("ACA Comments") (setting forth ACA's position with regard to extension of the HD must-carry exemption).

continue to rely upon it, and these systems need the exemption for all the same reasons that the Commission adopted it originally.<sup>4</sup> ACA also urged the Commission to reject the NAB's proposal that the HD exemption be narrowed to exclude cable systems that offer some HD programming in line with ACA's Reply Comments in this proceeding.<sup>5</sup>

In response to a question concerning the Commission's statutory authority to provide the HD exemption, ACA stated that the Commission's legal authority stems from Section 614(B)(4)(A) of the Communications Act, which provides that the Commission ensure that any "carriage standards" for must-carry local television station signals, including high definition signals, be "technically feasible." Smaller systems that are bandwidth constrained (typically systems with less than 553 MHz of capacity) are technically incapable of adding additional HD channels, even if they offer some programming in HD. Moreover, smaller systems that are financially constrained (typically systems with fewer than 2,501 subscribers) lack the ability to purchase equipment necessary to offer the signals of must carry stations in HD, and thus are effectively technically incapable of providing HD broadcast signals in HD. ACA noted that it has provided data in the record demonstrating the extent to which cable systems with less than 553 MHz of capacity are bandwidth constrained and those with fewer than 2,501 subscribers are financially constrained and lack the necessary equipment to offer must carry signals in HD. By previously instituting a blanket exemption for these two classes of smaller systems rather than requiring covered systems each to seek relief through the Commission's standard waiver process by providing evidence that it is not technically feasible for the system to carry additional HD channels, the Commission has ensured the process for smaller entities to obtain relief is not itself burdensome. Ending the HD exemption, in contrast, would require the most vulnerable cable systems to expend scarce financial resources on administrative proceedings rather than network or service improvements. Accordingly, ACA maintained that the Commission should continue this policy in reaching a decision in the pending proceeding.<sup>6</sup>

ACA also expressed its support for allowing the current viewability rule to expire, and noted its opposition to the National Association of Broadcasters' ("NAB") suggestion that the Commission retain the current viewability rules but permit cable operators to provide *free* set-top boxes that enable access to digital broadcast signals to subscribers in analog-only households.<sup>7</sup> ACA explained that many of its members, like larger cable operators, have an interest in freeing up valuable channel capacity so that they may offer subscribers new and improved services, such as faster broadband

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<sup>4</sup> *In the Matter of Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Doc. No. 98-120, Reply Comments of the American Cable Association, 8-9 (filed March 13, 2012) ("ACA Reply Comments"); *In the Matter of Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Doc. No. 98-120, Comments of National Cable and Telecommunications Association, 23-24 (filed Mar. 12, 2012).

<sup>5</sup> ACA Reply Comments at 23-24.

<sup>6</sup> Reliance by the Commission on its authority under Section 614 to retain the exemption also should be informed by the Regulatory Flexibility Act, which directs the Commission to consider the impact of its regulations on small business entities.

<sup>7</sup> Letter from Jane Mago, Executive Vice President & General Counsel, National Association of Broadcasters, to Marlene Dortch, Secretary, Federal Communications Commission, CS Doc. No. 98-120, 4 (filed May 23, 2012).

and additional programming, and how permitting the viewability rule to sunset would enable many of its members to do so. However, consistent with its position in the Basic Tier Encryption proceeding,<sup>8</sup> ACA explained that requiring small cable operators to offer *free* set-top boxes in order to take advantage of this opportunity places a disproportionate burden on them compared to larger operators. ACA made clear that 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 subscribers utilize additional set-top boxes.<sup>9</sup>

Participants also discussed the obligation of cable operators to make available to their subscribers the equipment necessary to ensure viewability of digital must carry signals following the sunset of the current viewability rule. In particular, participants discussed whether the obligation to make available low cost set top boxes for this purpose could vary depending on the size of the operator. ACA expressed support for an affordability standard that takes account of the fact that small cable operators incur higher per-unit fees to acquire boxes than larger providers and also incur recurring monthly per-unit fees when subscribers utilize additional set-top boxes. Accordingly, ACA believes the Commission should take these facts into account when assessing whether a small cable operator is making available a low cost set-top box, particularly in comparison to the information that larger cable operators have entered into the record regarding the fees that they commonly charge for similar devices.

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  
Counsel to the American Cable Association

cc (via email): Erin McGrath

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<sup>8</sup> *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, Reply Comments of the American Cable Association (filed Dec. 12, 2011) (urging the Commission not to adopt a "one-size-fits all" approach to the consumer protections measures that would be applied to cable operators who seek to avail themselves of the basic tier encryption waiver, but instead adopt a more flexible alternative for smaller cable operators that permit them to acquire 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).

<sup>9</sup> ACA Reply Comments at 5-7 (explaining that set-top boxes are more expensive on a per-unit basis for small operators than for larger operators).