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Barbara S. Esbin
Admitted in the District of Columbia

November 20, 2012

Via ECFS

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

Re: Notice of Ex Parte Presentation of American Cable Association and Time Warner Cable; *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*, MB Docket No. 09-182; and *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71

Dear Ms. Dortch:

On November 16, 2012, Ross J. Lieberman of the American Cable Association ("ACA") and the undersigned counsel to ACA; Cristina Pauze of Time Warner Cable ("TWC") and TWC's counsel Matthew Brill of Latham & Watkins LLP; and Alison Minea and Hadass Kogan of DISH Network met respectively, with William Lake, Michelle Carey, Mary Beth Murphy, Hilary DeNigro, Brendan Holland, and Benjamin Arden of the Media Bureau, and Erin McGrath, Media Legal Advisor to Commissioner McDowell, to discuss the Commission's upcoming quadrennial media ownership order. Specifically, ACA, TWC, and DISH Network urged the Commission to take action under its media ownership authority to address the increasingly prevalent practice of separately owned, same market television stations coordinating their negotiation of retransmission consent with multichannel video programming distributors ("MVPDs"), and the resulting harms to competition and consumers, consistent with the comments they have filed in the quadrennial review docket.[1]

We stressed that coordinated retransmission consent negotiations by non-commonly owned same market television stations is a media ownership issue because it directly implicates local television competition. The Commission's media ownership rules are intended, *inter alia*, to preserve and promote competition among broadcast media outlets that receive free use of valuable public spectrum in exchange for serving local communities. Current local television ownership rules restrict the common ownership of two top four rated stations in a single market. However, local television

[1] *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*, MB Docket No. 09-182, Notice of Proposed Rulemaking (rel. Dec. 22, 2011); ACA Comments, MB Docket No. 09-182 at 13-27; ACA Reply Comments, MB Docket No. 09-182 at 11-31; TWC Comments, MB Docket No. 09-182 at 4-17; TWC Reply Comments, MB Docket No. 09-182 at 2-12; DISH Reply Comments, MB Docket No. 09-182 at 1-3.

stations that cannot lawfully merge under the Commission's local television rules are nonetheless coordinating their retransmission consent negotiations with MVPDs. They are doing so through both a variety of formal agreements and the use of various informal practices, all of which reduce local competition, evidenced by the fact that the participating stations are able to raise prices above levels achievable through individual negotiations.

ACA, TWC, and DISH Network discussed the following concerning coordinated retransmission consent negotiations:

- The Commission should address in its attribution rules practices of separately owned, same market broadcasters that lessen competition.
- The practice of coordinating retransmission consent is widespread and increasing.
    - ACA has documented, using public information, 65 instances of sharing arrangements in 58 designated market areas ("DMAs") between non-commonly owned Big 4 network affiliates (ABC, CBS, NBC, and FOX).
    - Of these, ACA was able to confirm through its last member survey 48 instances in 43 designated market areas ("DMAs") in which non-commonly owned broadcasters used the same negotiator.[2]
- Prices paid by MVPDs negotiating with a single negotiator representing two non-commonly owned stations range from 21.6% to 161% higher than for separately owned or controlled broadcast affiliates.[3]
- This reduction in competition is especially notable as retransmission consent fees have grown exponentially over the past decade from negligible to the second largest single source of station revenues after advertising revenues.[4]
- SNL Kagan recently reported that retransmission consent revenues were $758 million in 2009, have grown to about $1.76 billion today, and are currently projected to rise to over $6 billion by 2018.[5]

ACA, TWC, and DISH Network discussed the Commission's ample authority under its attribution rules to restrict relationships among separately owned, same market stations that permit the exercise of market power and harm local television competition.[6] Consistent with these parties' comments,[7] we urged the Commission to exercise that authority in this quadrennial review by recognizing agreements to coordinate negotiation of retransmission consent as attributable ownership interests, and made the following points:

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[2] ACA Comments at 6-7.
[3] ACA Comments at 9.
[4] ACA Comments at 4.
[5] *See* Robyn Flynn, SNL Kagan, *Retrans Projections Update: $6B by 2018*, at 1 (Oct. 18, 2012); John Eggerton, *Kagan: Retrans to Top $6 Billion by 2018*, BROADCASTING & CABLE (Nov. 5, 2012 11:33:02 AM), http://www.broadcastingcable.com/article/490249-Kagan_Retrans_to_Top_6_Billion_by_2018.php ("SNL Kagan is projecting retransmission consent fees to surpass $6 billion by 2018 (the prediction is $6.05 billion)"); Letter of Stacy Fuller, Vice President, Regulatory Affairs, DIRECTV, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 10-71, 09-182, at 1-2 (filed Nov. 9, 2012). *See also* ACA Comments at 4 (citing earlier Kagan data documenting the rise in levels and importance of retransmission consent revenues).
[6] 47 C.F.R. § 73.3555.
[7] ACA Comments at 13-28; ACA Reply Comments at 11-32; TWC Comments at 4-17; TWC Reply Comments at 2-12.

- The Commission should attribute agreements that replace competition with collusion among separately owned, same market broadcasters.
- The Commission has recognized that attribution is appropriate when the behavior or practice conveys sufficient control or influence over the core operations of a station to be deemed attributable.
    - The Commission has attributed agreements for joint sales of advertising time by radio broadcasters based on the implicit recognition that sale of an important product that contributes to station revenues and is used to fund station operations, including the purchase of programming, is a core operating function and that decisions concerning the sale of this product are core operational decisions.
    - For the same reasons, attribution of agreements that facilitate the coordination of the sale of retransmission consent – a similarly and arguably more important product than advertising time – should be deemed attributable. Conveying the right to negotiate the price for carriage of a station's signal (and to black out that signal if contractual terms are not agreed upon) confers substantial control and influence over the station's finances, programming, and core operations. The facts on the ground today suggest that even if negotiation of retransmission consent has not previously been considered a core function, it should be recognized as one today.
- Beyond the question of potential influence, the Commission has also recognized that attribution may be appropriate in instances where agreements for coordinated activity by separately owned, same market stations could "lead to the exercise of market power" and "raises related competition concerns."[8] Thus, attribution is appropriate for business arrangements that not only involve a delegation of control, but for those involving coordination that would impair economic competition in local markets.
- The harm to competition and the degree of influence over another station conveyed by sharing agreements outweighs the *de minimis* benefit to local broadcasters of agreements that facilitate the coordination of retransmission consent. Indeed, we noted that collusion between or among broadcast stations does not produce any legitimate efficiencies, but rather serves only to aggregate market power in the interest of driving up retransmission consent rates.

Accordingly, consistent with their previous filings,[9] we recommended the following actions:

- To put a decisive end to the competitive and public interest harms engendered by coordinated retransmission consent negotiations on the part of separately owned, same market televisions stations, the Commission should explicitly recognize as creating an attributable interest a broadcaster engaging in any of the following practices:

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[8] See *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, ¶ 15 (2004) ("2004 TV JSA Attribution NPRM") (while "influence or control" might be less obvious in such situations, the Commission has recognized that capturing relationships and business arrangements that go "[b]eyond the issue of potential influence" under its attribution rules is necessary to prevent the lessening of competition through private agreements in local television markets); *see also In the Matter of 2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 319 n. 695 (2003)(discussing decision in 1999 Attribution Order to address the possibility that JSAs "could threaten competition" by retaining the "discretion to review cases involving radio or television JSAs on a case-by-case basis if it appeared that such JSAs pose competition or other concerns."); Shareholders of the Ackerly Group, Inc., (Transferor) and Clear Channel Corp. (Transferee), Memorandum Opinion and Order, 17 FCC Rcd 10828 (2002).
[9] ACA Comments at 26-27; ACA Reply Comments at 11-17; TWC Comments at 15-17; TWC Reply Comments at 10-12; DISH Reply Comments at 2-3

- 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;
- 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.

- Moreover, the Commission should clarify that when one station directly or indirectly gives a third party (whether it be another station, the affiliated network, or some other entity) control over the programming, operations, or carriage negotiations of a station, it constitutes a "transfer of control" that requires Commission approval under Section 310(d) and the Commission's rules and creates an "attributable" interest under Section 73.3555 of the Commission's rules, which may violate the Commission's ownership limits if the control is granted to another separately owned, same market broadcaster.

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 Esbin

Barbara Esbin

cc (via email): William Lake
Michelle Carey
Mary Beth Murphy
Hilary DiNigro
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