

Matthew A. Brill  
Direct dial: (202) 637-1095  
Email: matthew.brill@lw.com

555 Eleventh Street, N.W., Suite 1000  
Washington, D.C. 20004-1304  
Tel: +1.202.637.2200 Fax: +1.202.637.2201  
www.lw.com

## LATHAM & WATKINS LLP

### FIRM / AFFILIATE OFFICES

Abu Dhabi	Moscow
Barcelona	Munich
Beijing	New Jersey
Boston	New York
Brussels	Orange County
Chicago	Paris
Doha	Riyadh
Dubai	Rome
Frankfurt	San Diego
Hamburg	San Francisco
Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.
Milan	

April 4, 2013

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth St., SW  
Washington, DC 20554

**Re: Notice of Ex Parte Presentation, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71; *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**

Dear Ms. Dortch:

On April 3, 2013, the undersigned, along with Steven Teplitz and Cristina Pauzé of Time Warner Cable Inc. (“TWC”), met with Commissioner Ajit Pai and his Chief of Staff, Matthew Berry, to reiterate previously expressed concerns about collusion by competing broadcast stations in retransmission consent negotiations. We urged the Commission to adopt targeted reforms to curtail this anticompetitive and harmful conduct.

At the meeting, we discussed how broadcasters are misusing local marketing agreements (“LMAs”), shared services agreements (“SSAs”), joint sales agreements (“JSAs”), and similar “sharing” arrangements to collude in negotiating retransmission consent. We argued that a broadcaster’s assignment to another station of core rights to distribute programming should result in attribution under the Commission’s media ownership rules. We further explained that such collusion between and among ostensibly independent broadcast stations enables them to drive up prices without any corresponding benefit to consumers, and thus is starkly anticompetitive,<sup>1</sup> while also running afoul of the Commission’s good-faith negotiation rules.

---

<sup>1</sup> See *United States v. Texas Television, Inc.*, Civil No. C-96-64, Competitive Impact Statement at 8 (S.D. Tex. Feb. 2, 1996), available at <http://www.justice.gov/atr/cases/texast0.htm> (“Although the 1992 Cable Act gave broadcasters the right to seek compensation for retransmission of their television signals,

We noted that the record developed in the above-referenced proceedings is replete with evidence demonstrating the harms to competition and consumers from broadcasters' collusion and *de facto* consolidation. The American Cable Association (“ACA”) has submitted a report showing that, as of April 2012, there were 65 instances of sharing agreements between two or more separately owned “Big Four” stations in 58 DMAs across the country, and that, among these, there were 48 instances in 43 DMAs where retransmission consent negotiations were conducted by a single representative for two or more stations.<sup>2</sup> ACA cited two economic studies, both by Professor William Rogerson of Northwestern University, demonstrating that “coordinated activity allows broadcast stations to negotiate higher retransmission consent rates that they would otherwise be able to [negotiate].”<sup>3</sup> Professor Rogerson’s conclusion was supported by “empirical evidence submitted by cable operators,” which showed 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.”<sup>4</sup>

TWC has submitted additional economic and empirical evidence of the public interest harms stemming from broadcaster collusion and *de facto* consolidation. TWC’s comments pointed to a study by economists Michael Katz, Jonathan Orszag, and Theresa Sullivan finding that “joint negotiations facilitated by sharing agreements eliminate competition and result in higher fees and consumer harm.”<sup>5</sup> TWC also cited a study by Professor Steven Salop showing that the bargaining tactic of brinkmanship—that is, when a station threatens to “go dark” unless its demands for higher carriage fees are met—is more successful in DMAs where stations have executed sharing agreements with one another, because “LMAs and . . . sharing agreements

---

the antitrust laws require that such rights be exercised *individually* and *independently* by broadcasters.”) (emphasis added).

<sup>2</sup> Reply Comments of the American Cable Association, MB Docket Nos. 09-182, 07-294, at 7-8 (filed Apr. 17, 2012); *see also* Comments of the American Cable Association, MB Docket Nos. 09-182, 07-294, at 6-7 (filed Mar. 5, 2012) (“ACA Comments”) (reporting similar figures from earlier survey).

<sup>3</sup> ACA Comments at 9 (citing William P. Rogerson, Professor of Economics, Northwestern University, *Coordinated Negotiation of Retransmission Consent Agreements by Separately-Owned Broadcasters in the Same Market*, May 27, 2011, and William P. Rogerson, Professor of Economics, Northwestern University, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees*, May 18, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> Comments of Time Warner Cable Inc., MB Docket Nos. 09-182, 07-294, at 10 (citing Michael L. Katz *et al.*, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, Nov. 12, 2009) (internal alterations omitted).

strengthen the broadcasters' bargaining position" vis-à-vis MVPDs.<sup>6</sup> In addition, TWC has provided several concrete examples of collusion among independently owned stations in DMAs within its footprint,<sup>7</sup> and noted two particularly egregious instances where an entity had used sharing agreements and multicasting to attain near-monopoly power in local DMAs: (1) Block Communications, which controls all four of the Big Four stations and five of the six broadcast affiliates overall in the Lima, OH DMA; and (2) Granite Broadcasting, which controls three of the four Big Four networks as well as five of the six national networks in the Fort Wayne, IN DMA.<sup>8</sup> Other parties have submitted similar evidence confirming that such activity is increasingly widespread in the industry.<sup>9</sup>

We also stressed that broadcaster collusion is a major contributing factor to the dramatic rise in industry-wide retransmission consent fees in recent years. The latest study from SNL Kagan found that retransmission consent revenues were expected to grow from \$2.36 billion in 2012 to \$3.01 billion in 2013, and projected that such revenues would reach more than \$6 billion by 2018.<sup>10</sup> These figures represent an astonishing increase from the roughly \$215 million in retransmission consent fees paid by distributors and their subscribers in 2006, and only underscore the need for prompt Commission action to curtail broadcasters' anticompetitive conduct.

In response to such harms, we urged the Commission to clarify that a broadcast station's assignment of its right to negotiate retransmission consent to another broadcast station constitutes a "transfer of control" that requires Commission approval under Section 310(d) and

---

<sup>6</sup> *Id.* at 10-11 (citing Steven C. Salop *et al.*, *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, at 53, June 3, 2010).

<sup>7</sup> *Id.* at 4, 7-8, 12-13 (noting collusive activity by Sinclair Broadcast Group, Nexstar Broadcasting, and Cordillera Communications, among others).

<sup>8</sup> *Id.* at 19.

<sup>9</sup> *See, e.g.*, Reply Comments of DISH Network, MB Docket Nos. 09-182, 07-294, at 3 (filed Apr. 17, 2012) (explaining that "60 percent of retransmission consent-related programming blackouts on DISH occurred in instances where DISH was negotiating with an entity engaged in some form of multiple station shared control arrangement, and in all of these instances there were at least 2 separately-owned Big 4 stations negotiating in a coordinated manner"); Comments of Free Press, MB Docket Nos. 09-182, 07-294, at 51-55, 58, 61 (filed Mar. 5, 2012) (confirming that "stations are entering into [sharing agreement] deals with increasing and alarming alacrity," and citing numerous examples of such deals as evidence of "the increasing problem of covert consolidation").

<sup>10</sup> *See* Robyn Flynn, SNL Kagan, *Retrans Projections Update: \$6B by 2018*, at 1, Oct. 18, 2012 (cited in Letter of Barbara Esbin, Cinnamon Mueller, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 09-182, 10-71, at 2 (filed Nov. 21, 2012)).

LATHAM & WATKINS<sup>LLP</sup>

the Commission's rules,<sup>11</sup> and that any station's participation in joint negotiations with another station creates an "attributable interest" under Section 73.3555 of the Commission's rules for purposes of the Commission's ownership limitations.<sup>12</sup> We further recommended that the Commission expressly acknowledge that this conduct is inconsistent with "competitive marketplace considerations,"<sup>13</sup> and make it a *per se* violation of the good-faith negotiation standard to "grant another station or station group the right to negotiate or approve its retransmission consent agreement when the stations are not commonly owned."<sup>14</sup> Such reforms are necessary to prevent broadcasters from sidestepping the Commission's media ownership rules and to restore competitive balance in retransmission consent negotiations.

Please contact the undersigned if you have any questions regarding this notice.

Sincerely,

*/s/ Matthew A. Brill*

Matthew A. Brill  
of LATHAM & WATKINS LLP  
*Counsel to Time Warner Cable Inc.*

---

<sup>11</sup> 47 U.S.C. § 310(d).

<sup>12</sup> 47 C.F.R. § 73.3555.

<sup>13</sup> 47 U.S.C. § 325(b)(3)(C)(ii).

<sup>14</sup> *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 23 (2011).