

LATHAM & WATKINS LLP

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EX PARTE – VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

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Re: *Amendment of the Commission’s Rules Relating to Retransmission Consent, MB Docket No. 10-71*

Dear Ms. Dortch,

Time Warner Cable Inc. (“TWC”) hereby responds to the recent “Supplemental Comments” filed by the National Association of Broadcasters (“NAB”), in which NAB attempts to defend the increasingly prevalent practice of competing broadcast stations’ jointly negotiating retransmission consent agreements with multichannel video programming distributors (“MVPDs”).¹ Despite the length and shrill tone of NAB’s pleading, the narrow question of whether a broadcast station should be permitted to negotiate retransmission consent not only for itself but for one or more separately owned stations in the same DMA—*i.e.*, for its direct competitors—in fact has a crystal clear answer: there simply is no legal or policy justification for such collusive negotiations. This anticompetitive practice drives up retransmission consent fees and increases the risks and incidence of programming blackouts, thus imposing significant harms on consumers. Indeed, while such harms are amply documented in the record, horizontal collusion of this type is so obviously contrary to the public interest that it is *per se* unlawful.

Rather than attempting to grapple head-on with the arguments and evidence in this proceeding, NAB’s Supplemental Comments rely on straw-man arguments and mischaracterizations of the law and the facts. Indeed, NAB distorts the position of TWC and other MVPDs, ignores the leading precedent while invoking inapposite cases, and misconstrues the record evidence. Stripped of its rhetoric, the NAB filing has no persuasive response to the

¹ See Supplemental Comments of the National Association of Broadcasters, *Amendment of the Commission’s Rules Relating to Retransmission Consent*, MB Docket No. 10-71 (filed May 29, 2013) (“NAB Supplemental Comments”).

clear-cut point that coordinated negotiations involving competing broadcast stations are contrary to law and harm the public interest.²

As an initial matter, NAB badly mischaracterizes the relevant competition law principles in suggesting that joint negotiations involving direct competitors are generally considered neutral, or even procompetitive, unless proven otherwise. While NAB brazenly asserts that “cable interests” could not possibly establish “that joint negotiation of retransmission consent is somehow contrary to antitrust law,”³ it is of course a core tenet of antitrust law that collusion by competitors in selling goods or services is *per se* unlawful, because there are effectively no circumstances in which such conduct could promote competition or benefit consumers.⁴ Remarkably, NAB ignores the most relevant precedent, in which the Department of Justice prosecuted competing broadcasters under the antitrust laws precisely for engaging in coordinated retransmission consent negotiations.⁵ The Competitive Impact Statement submitted by DOJ in that case explained, in no uncertain terms, that “[w]hen competitors in a market coordinate their negotiations so as to strengthen their negotiating positions against third parties and so obtain better deals ... their conduct violates the Sherman Act.”⁶ The Competitive Impact Statement further explained that, “[a]lthough the 1992 Cable Act gave broadcasters the right to seek compensation for retransmission of their television signals, the antitrust laws require that such rights be exercised *individually* and *independently* by broadcasters.”⁷ Despite the clarity of this

² The Commission repeatedly has recognized that competition law principles undergird its “good faith” negotiation rules and media ownership rules. *See e.g., Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 58 (2000); *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*, Notice of Proposed Rulemaking, MB Docket Nos. 09-182, 07-204, FCC 11-186 (rel. Dec. 22, 2011). Competition law therefore is directly relevant to the Commission’s evaluation of collusion by broadcasters in negotiating retransmission consent fees.

³ NAB Supplemental Comments at 15.

⁴ *See, e.g., Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (certain practices are *per se* unlawful “because of their pernicious effect on competition and lack of any redeeming value”); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (“A horizontal agreement to fix prices is the archetypal example of such a [*per se* unlawful] practice.”).

⁵ *See United States v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.*, Competitive Impact Statement (S.D. Tex. Feb. 2, 1996), available at: <http://www.justice.gov/atr/cases/texast0.htm>.

⁶ *Id.* at 8.

⁷ *Id.* (emphasis added).

prohibition and TWC's extensive references to this seminal precedent in its comments and *ex parte* submissions, NAB's purported rebuttal tellingly does not even mention the case.

NAB instead relies on a case that is wholly inapposite, and it mischaracterizes the court's holding to boot. Specifically, NAB asserts that *Brantley v. NBC Universal, Inc., et al.*, 675 F.3d 1192 (9th Cir. 2012), supports joint negotiations by competing broadcasters,⁸ but the *Brantley* court expressly stated that it was *not* addressing horizontal restraints of trade because the "complaint [did] not allege the existence of any horizontal agreements."⁹ Rather, the conduct at issue in *Brantley* involved alleged tying arrangements by individual programmers,¹⁰ and the court rejected the claims on the ground that the plaintiff did not adequately plead foreclosure.¹¹ Thus, *Brantley* does not remotely provide a shield for horizontal collusion by competing broadcasters; to the contrary, the court specifically noted that the relevant allegations against programmers entailed separate conduct by "each Programmer," and that there was no allegation that the discrete tying arrangements facilitated "horizontal collusion."¹² Here, by contrast, competing broadcasters are engaged in precisely the horizontal collusion that *Brantley* indicates *would* constitute harm to competition. NAB similarly mischaracterizes the Commission's precedent, which, again, did not discuss, let alone endorse, price-fixing by direct competitors.¹³

NAB also makes the unfounded claim that "MVPDs do not regard broadcast stations as substitutes," and that collusion by broadcasters accordingly cannot harm competition.¹⁴ That is flat wrong. Broadcasters compete along many dimensions, not only in vying for advertising revenue and audience share but in seeking compensation from MVPDs for retransmission consent. That Big Four broadcast stations are not *perfect* substitutes for one another misses the point, as does the fact that MVPDs generally would prefer to carry each such station, because stations in a single DMA nevertheless compete to maximize their share of an MVPD's budget for acquiring programming.¹⁵ Indeed, NAB concedes the existence of such competition in arguing that higher fees charged by one set of colluding stations might simply reflect "the

⁸ See NAB Supplemental Comments at 16.

⁹ *Brantley*, 675 F.3d at 1198.

¹⁰ *Id.*

¹¹ *Id.* at 1200-1204.

¹² *Id.* at 1201.

¹³ See NAB Supplemental Comments at 15, citing *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000).

¹⁴ See NAB Supplemental Comments at 15, n.38.

¹⁵ See *Texas Television*, Competitive Impact Statement at 8 (recognizing that broadcast stations operating in the same market were "rivals" in the retransmission consent context and that their collusion "had the purpose and effect of raising the price of retransmission consent rights").

relative attractiveness of the stations involved in that one negotiation.”¹⁶ NAB is right that broadcast stations should compete for retransmission consent compensation by making carriage of their signals more attractive to MVPDs and their subscribers, but it overlooks the important corollary that it is *not* legitimate for stations to seek to bolster their competitive position through collusive negotiations intended to magnify the coercive impact of their blackout threats. Notably, when broadcast stations themselves have been affected by competing broadcasters’ collusive conduct, they have been quick to recognize the degree to which such collusion harms competition and consumers and that it is unlawful for competing stations to engage in joint selling.¹⁷

In addition to mischaracterizing the relevant legal principles, NAB resorts to distorting the record regarding the significant public interest harms that result from collusion by broadcast stations, while ironically accusing cable operators of misleading the Commission.¹⁸ NAB baldly asserts that “cable cannot explain how joint broadcaster negotiations harm the public interest,”¹⁹ but that assertion ignores the extensive evidence—including multiple analyses by independent teams of leading economists and a report compiled by the Congressional Research Service—that higher retransmission consent fees result in increased consumer charges and more blackouts,²⁰

¹⁶ NAB Supplemental Comments at 2.

¹⁷ See Letter of Matthew A. Brill to Marlene Dortch, MB Docket Nos. 10-71 and 09-182 (filed Aug. 3, 2011) (describing Nexstar Broadcasting, Inc.’s antitrust lawsuit against Granite Broadcasting Group, in which Nexstar alleged that Granite’s sharing agreements enabled it to aggregate market power to the detriment of competing sellers of advertising, and explaining how Nexstar’s concerns are no different from those of MVPDs that are forced to negotiate retransmission consent with competing broadcast stations that should be acting independently).

¹⁸ NAB Supplemental Comments at 2-8.

¹⁹ *Id.* at 12.

²⁰ See, e.g., William P. Rogerson, *Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market*, at 22 (May 27, 2011), filed as an attachment to the Comments of the American Cable Association, MB Docket No. 10-71, at 22 (filed May 27, 2011) (explaining how joint negotiations for retransmission consent fees inevitably lead to higher rates for MVPDs and their subscribers); Steven C. Salop, Tasneem Chipty, Martino DeStefano, Serge X. Moresi, and John R. Woodbury, *Economic Analysis of Broadcasters’ Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, at 11-20 (June 3, 2010) (establishing that the bargaining tactic of brinkmanship—in which stations threaten to “go dark” unless their demands for higher fees are met—is more successful in DMAs where stations have executed sharing agreements with one another), filed as an attachment to the Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71 (filed June 3, 2010); Michael L. Katz *et al.*, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime* (Nov. 12, 2009), filed as an attachment to the Comments of the National Cable & Telecommunications Association, MB Docket

consistent with DOJ's findings in the *Texas Television* case.²¹ ACA recently updated the record to highlight the flood of recent deals that facilitate joint retransmission consent negotiations and the harms flowing from such collusion.²² NAB's counterargument includes meritless objections such as the complaint that ACA has described the price increase attributable to joint negotiations "in percentage terms, rather than actual dollar amounts," as if a 22 percent or greater premium from collusion has diminished significance where the per-subscriber dollar increment appears more modest.²³ That is nonsense, of course, as the percentage increase resulting from collusion is plainly the relevant criterion for assessing economic effects. NAB cites stale data in a similar effort to downplay the scope of the burdens on consumers, arguing that retransmission consent fees are a small part of cable operators' overall costs.²⁴ But that claim ignores the dramatic recent spikes in fees, which grew from roughly \$215 million in 2006 to \$2.36 billion in 2012, an estimated \$3.01 billion in 2013, and a projection of over \$6 billion by 2018.²⁵ And while NAB declares that there is no evidence that reducing retransmission consent fees would lower consumers' bills, that again ignores the record evidence that fees are passed through to consumers and are a direct cause of the higher bills about which consumers have been complaining.²⁶ In short, NAB's efforts to brush aside the significant consumer harms at issue are unavailing.

No. 07-269, at 27 (filed Dec. 16, 2009) (concluding that "joint negotiations [facilitated by sharing agreements] eliminate competition ... [and] result in higher fees and consumer harm"); CRS Report for Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, at CRS-70 (July 9, 2007) (noting that "it was striking how often the broadcaster involved in a [retransmission consent] dispute owned or controlled more than one broadcast station," and explaining that such conduct places MVPDs "in a very weak negotiating position since it would be extremely risky to lose carriage of both signals"), available at <http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf>.

²¹ See *supra* at 3 n.15 (quoting portion of Competitive Impact Statement finding that broadcasters' collusive negotiations had the effect of "raising the price of retransmission rights").

²² Letter of Ross J. Lieberman to Marlene H. Dortch, MB Docket No. 10-71 (filed June 3, 2013).

²³ NAB Supplemental Comments at 2-3.

²⁴ *Id.* at 4.

²⁵ 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)).

²⁶ See, e.g., Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 17 (filed May 27, 2011); *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*

Perhaps because the prohibition on collusion by competitors is so well-established and the harms are so clear, the NAB Supplemental Comments raise a flurry of diversions that are either incorrect or irrelevant (or both). For example, NAB asserts that, because TWC “routinely negotiates retransmission consent rights jointly on behalf of itself and Bright House Networks, another sizable cable operator,” it is being “hypocritical.”²⁷ NAB ignores the fact that the Bright House Networks systems are held in a partnership with TWC. But even if one were to assume that TWC’s purchase of programming for Bright House Networks systems amounts to “joint” purchasing by separate entities, NAB still overlooks several dispositive distinctions. For one thing, TWC and Bright House Networks would be joint purchasers, not sellers, of retransmission consent. The antitrust laws have long recognized that joint purchasing arrangements—in stark contrast to joint sales by competitors—are procompetitive in most circumstances.²⁸ Indeed, the Commission has expressly recognized the value of joint MVPD buying groups and accords them various protections under the program access rules.²⁹ Any joint purchasing by TWC and Bright House Networks is further distinguishable from the broadcaster collusion at issue because TWC and Bright House Networks systems do not operate in overlapping franchise areas and so cannot in any event be viewed as competitors with one another. The competition laws generally prohibit agreements on price *by competitors*, and accordingly there is a decisive difference between joint negotiations involving non-competing cable companies, on the one hand, and joint negotiations involving broadcast stations that are head-to-head competitors in a DMA, on the other.

NAB also makes a number of misleading arguments regarding the competitiveness of the video distribution marketplace. NAB asserts that the “top ten MVPDs” collectively have a large share of “the MVPD market nationally,”³⁰ but as Judge Kavanaugh of the D.C. Circuit recently

Broadcasting Services, MB Docket Nos. 09-182 and 07-294, Notice of Proposed Rulemaking, FCC 11-186, ¶ 200 (rel. Dec. 22, 2011); Steven C. Salop, Tasneem Chipty, Martino DeStefano, Serge X. Moresi, and John R. Woodbury, *Video Programming Costs and Cable TV Prices: A Comment on the Analysis of Dr. Jeffrey Eisenach*, at 4-13 (June 1, 2010), filed by Time Warner Cable Inc., MB Docket No. 10- 71 (filed June 1, 2010);

²⁷ NAB Supplemental Comments at 14.

²⁸ See, e.g., FED. TRADE COMM’N AND U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000) (explaining that joint purchasing arrangements, even as between direct competitors, usually “do not raise antitrust concerns and indeed may be pro-competitive,” because they “enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies.”); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (“Wholesale purchasing cooperatives ... are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects.”).

²⁹ See 47 C.F.R. § 76.1000(c); 47 U.S.C. § 548(c)(2)(B); *Revision of the Commission’s Program Access Rules*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 12-68, ¶ 83 (Oct. 5, 2012).

³⁰ NAB Supplemental Comments at 8.

explained, even the nation's largest cable operator "does not possess market power" in any national market.³¹ Indeed, whether the focus is an MVPD's nationwide "share" or competitive dynamics in local service areas, it has been clear for years that "[c]able operators ... no longer have the bottleneck power of programming that concerned the Congress in 1992."³² NAB grudgingly acknowledges the recent growth of competing MVPDs, such as DBS providers and telco video providers, but somehow reaches the counterintuitive (and incorrect) conclusion that the dramatic increase in MVPD competition "does not imply that the relative market power of cable operators vis-à-vis broadcasters has diminished."³³ That is, in fact, exactly what has occurred: now that broadcasters have so many distribution outlets, they play MVPDs against one another in an effort to drive up retransmission consent fees, threatening to encourage customers to switch to another provider merely to retain access to broadcast programming that is supposed to be delivered in accordance with the public interest. Making matters worse, the regulatory framework exacerbates, rather than curbs, Big Four broadcast stations' market power by guaranteeing carriage on the basic tier in rate-regulated systems, forcing consumers to purchase the basic tier as a prerequisite to accessing any other programming services, and enforcing anticompetitive territorial-exclusivity agreements through the network non-duplication and syndicated exclusivity rules, among other preferences.³⁴

In the end, NAB complains that TWC's arguments would undermine broadcasters' "statutory retransmission consent negotiation rights,"³⁵ but the relevant statutory provisions plainly do not include a right to collude with a direct competitor in negotiating against MVPDs.³⁶ The Commission accordingly should adopt a bright-line rule that prohibits any coordination or collusion between or among competing broadcasters in negotiating retransmission consent fees.

Sincerely,

/s/ Matthew A. Brill

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³¹ See *Comcast Cable Communications, LLC v. FCC*, Slip Op., No. 12-1337 (D.C. Cir. May 28, 2013) (Kavanaugh, J., concurring, at 10).

³² *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

³³ NAB Supplemental Comments at 11.

³⁴ See 47 U.S.C. § 543(b)(7); 47 C.F.R. §§ 76.92, 76.101.

³⁵ NAB Supplemental Comments at v.

³⁶ *Texas Television*, Competitive Impact Statement at 8.