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August 22, 2013

**Via ECFS**

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

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

Dear Ms. Dortch:

Please include in the above-captioned docket the attached letter sent today from Matthew M. Polka, President and CEO, American Cable Association to Acting Chairwoman Mignon L. Clyburn urging Commission action in the retransmission consent proceeding to ensure that the retransmission consent impasse between Time Warner Cable and CBS Corp. is the last dispute of its kind where consumers are left without access to local broadcast signals.

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

Attachment (1)



*Independent Companies. One Voice.*

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August 22, 2013

The Honorable Mignon L. Clyburn  
Acting Chairwoman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Dear Acting Chairwoman Clyburn:

The recent retransmission consent impasse between Time Warner Cable (“TWC”) and CBS Corp. (“CBS”) is the latest and most visible sign of serious flaws in the rules governing the retransmission consent market. The dispute highlights these problems, particularly the lack of a reliable safety net for consumers when broadcasters and multichannel video programming distributors (“MVPDs”) cannot reach mutual agreement. As of the date of this letter, more than three million TWC and Bright House Networks (“BHN”) subscribers have been without access to CBS network programming, and local news and weather from their local CBS stations, for 21 days because of a dispute over prices, terms and conditions of retransmission consent in eight large television markets. Even more customers who subscribe to TWC and BHN broadband service have been denied access to the online video content found on CBS.com, regardless of whether their local CBS station has been blacked out. For many affected pay TV subscribers, the inconvenience of the blackout will substantially increase if TWC and CBS cannot reach agreement before the first Sunday of the NFL season.<sup>1</sup>

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<sup>1</sup> See Bill Carter, *CBS Blackout on Time Warner Cable May Last Until N.F.L. Season*, N.Y. Times, Aug.15, 2013 (predicting that there would be “vociferous protests from customers missing games” if the blackout continues into the NFL season).

Unfortunately, this is hardly an isolated incident. In 2012, millions of pay TV subscribers went without access to local broadcast signals from their cable or satellite TV provider because of 91 retransmission consent disputes, a 78% increase over blackouts experienced in 2011, and an even greater increase over the number of blackouts in 2010.<sup>2</sup> In 2013, following the CBS-TWC blackout, subscribers of four different pay TV providers in 52 markets will have lost signals of 75 separate TV stations.<sup>3</sup> Without action by policymakers to change the laws governing these negotiations there will undoubtedly be many more blackouts.

The time has come for the Commission to act.<sup>4</sup> ACA believes fundamental reform is necessary; however, broad changes to the rules governing retransmission consent need not stand in the way of the Commission taking some more limited regulatory action now to ensure that consumers are never again left without access to local broadcast signals when disputes arise. Moreover, in light of the CBS/TWC dispute, it is glaringly inconsistent and unreasonable for the Commission to have explicit rules that prohibit blackouts when they would harm broadcasters, but have no rules to prohibit such outages when they would harm consumers. Specifically, the Commission's rules protect TV station owners by prohibiting cable operators from dropping a broadcast signal during periods of time financially important to broadcasters – the all-important broadcast ratings “sweeps period.”<sup>5</sup> Yet there are no comparable rules that protect consumers from losing access to broadcast signals during periods of time particularly important to them, such as immediately before and during marquee broadcast events. Indeed, significant consumer disruption could have been avoided in some of the most notorious retransmission consent disputes had there been a rule in place prohibiting blackouts during retransmission consent impasses.<sup>6</sup>

I outline below a narrowly tailored solution that would protect consumers and is within the Commission's authority. I urge the Commission to adopt this proposal and ensure that the

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<sup>2</sup> American Television Alliance, *Blackouts By The Numbers*, [http://www.americantelevisionalliance.org/wp-content/uploads/2013/06/4\\_Blackouts\\_Handout.pdf](http://www.americantelevisionalliance.org/wp-content/uploads/2013/06/4_Blackouts_Handout.pdf); American Television Alliance; *Broadcast Retrans Blackouts 2010-2013*, [http://www.americantelevisionalliance.org/wp-content/uploads/2013/08/MASTER\\_2010-2013\\_Broadcaster\\_Blackouts.docx](http://www.americantelevisionalliance.org/wp-content/uploads/2013/08/MASTER_2010-2013_Broadcaster_Blackouts.docx).

<sup>3</sup> American Television Alliance, *TV Viewers Blacked Out from Coast to Coast*, Aug. 2, 2013, <http://www.americantelevisionalliance.org/tv-viewers-blacked-out-from-coast-to-coast/>.

<sup>4</sup> The Commission released its Retransmission Consent Reform Notice of Proposed Rulemaking on March 3, 2011, nearly 30 months ago, and has taken no action in this proceeding since then. See *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, 26 FCC Rcd 2718 (2011) (“Retrans Reform NPRM”)

<sup>5</sup> 47 U.S.C. § 534(b)(9) (“No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations.”); 47 C.F.R. § 76.58(a) (cable operators must provide 30-day written notice to the broadcaster when deleting or repositioning the broadcaster's signal; a note to the section prohibits deletions during sweeps periods).

<sup>6</sup> See, e.g., *Cablevision May Lose ABC*, N.Y. Times, Mar. 2, 2010 (dispute between ABC and Cablevision could result in Cablevision being unable to watch the Academy Awards); *Fox-Cablevision feud makes NYC area miss baseball playoff*, NBCNews.com, Oct. 17, 2010.

CBS/TWC dispute is the last of its kind where consumers end up as the collateral damage of broken down retransmission consent negotiations.<sup>7</sup>

ACA proposes that the Commission adopt a rule mandating that broadcasters and MVPDs continue to offer a broadcast station's signal to consumers after an existing retransmission consent agreement expires and while the terms of a new agreement are pending resolution of a dispute. Under this proposed rule, the parties' existing retransmission consent agreement would automatically be extended past its expiration date, and an MVPD would continue to pay the broadcaster for retransmission consent rights per such contract. At the time that the dispute is resolved and a new agreement is signed, the prices and terms of the new agreement would retroactively apply to begin immediately after the previous agreement's expiration date and any required true-up of prices would be applied.

This proposal does not call for the Commission to side with a broadcaster or MVPD on the appropriate prices, terms, and conditions of carriage for the broadcaster's signal. Instead, it focuses on the narrow need to ensure consumers have continued access to broadcast stations while parties continue to negotiate.<sup>8</sup> The Commission has adopted this type of standstill relief on numerous occasions,<sup>9</sup> and it has worked.

ACA submits that the Commission has adequate authority to adopt these modest procedural remedial measures and that it should use it in this important instance to protect the public interest.<sup>10</sup> The Commission's authority to "govern the exercise" of retransmission consent rights by broadcasters plainly includes the power to adopt whatever remedial measures may be necessary to protect the public from harm, including dispute resolution procedures and interim carriage requirements. Although the Commission has expressed misgivings about the extent of its authority over the exercise of retransmission consent,<sup>11</sup> there is nothing in Section 325(b) that expressly prohibits regulatory action to require preservation of the status quo under

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<sup>7</sup> The American Cable Association ("ACA") submits this letter, consistent with its previously filed comments, to supplement the record in the above referenced rulemaking. *See* Comments of the American Cable Association (filed May 27, 2011) ("ACA Comments"); Reply Comments of American Cable Association, MB Docket No. 10-71 (filed June 27, 2011) ("ACA Reply Comments").

<sup>8</sup> MVPDs should not be permitted to indefinitely carry broadcast signals pursuant to an expired agreement. It is therefore appropriate for parties, unable to reach agreement on their own within a reasonable cooling off period, to engage in non-binding mediation to help facilitate resolution. If the parties continue to be unable to reach an agreement, even with the assistance of non-binding mediation, as a last resort, one of the parties should be permitted to request binding baseball-style commercial arbitration where the dispute would be heard by an experienced arbitrator agreed upon by both parties.

<sup>9</sup> *See* ACA Comments at 74-75 (the Commission has imposed standstill requirements to permit continued carriage of programming pending resolution of disputes in several contexts and its ability to establish such requirements is well established).

<sup>10</sup> *See* 47 U.S.C. § 325(b)(3)(A) (Commission granted the unqualified authority to "govern the exercise by television broadcast stations of the right to grant retransmission consent").

<sup>11</sup> *See, e.g.,* Retrans Reform NPRM, ¶¶ 18-19 (the Commission does not believe it has the authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations because it interprets Section 325(b) of the Act to prevent the Commission from ordering carriage of signals on a cable system over the objection of the broadcaster).

an expiring agreement.<sup>12</sup> Congress has expressly delegated to the Commission the regulatory authority to govern the exercise of rights granted its licensees under the Act; an interpretation of that authority as permitting the Commission to dictate when and how the right may be exercised would be viewed as reasonable, and therefore entitled to deference by the courts.<sup>13</sup>

Adoption of this limited, straightforward, and consumer-friendly reform of the Commission's retransmission consent rules will not solve all of the problems associated with this market. It would, however, help to protect viewers from the deleterious results of outdated rules which are awaiting long overdue and more comprehensive reform. The Commission has a vehicle with its pending retransmission consent rulemaking to implement regulatory changes right away, and we urge the Commission to act now.

If you have any questions, or require further information, please do not hesitate to contact me. With best regards, I remain

Most respectfully yours,



Matthew M. Polka

Cc: The Honorable Jessica Rosenworcel, Commissioner  
The Honorable Ajit Pai, Commissioner

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<sup>12</sup> ACA Comments at 73. *See also* Comments of Time Warner Cable at 11-13 (filed May 18, 2010); Letter from Matthew A. Brill, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC (Aug. 2, 2013) at 5-6.

<sup>13</sup> *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874-75 (2013) (courts will defer to the FCC's permissible interpretation of the statute it administers where Congress has unambiguously vested the FCC with rulemaking authority over the particular matter at issue and its interpretation of an ambiguous provision of the statute is permissible). ACA submits that Section 325(b) clearly and unambiguously delegates regulatory authority over the exercise of retransmission consent to the Commission; even if the matter is ambiguous, a permissible interpretation of this delegation is that the Commission can adopt interim carriage and commercial arbitration as means of governing retransmission consent negotiating disputes.