



December 5, 2013

**FILED VIA ECFS**

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

Re: MB Docket No. 10-71

Dear Ms. Dortch:

Cable television interests continue to offer the Commission misleading, inapposite and erroneous arguments related to retransmission consent.<sup>1</sup> The Commission should not be swayed by this misinformation campaign. As the National Association of Broadcasters ("NAB") has pointed out in previously submitted supplemental comments, the repeated assertions made by cable and multichannel video program distributor ("MVPD") interests are not only unsupported by the record, but directly contradicted by facts before the Commission.<sup>2</sup>

Rather than grapple with the facts presented by NAB, cable interests have distorted NAB's arguments and largely reiterated discredited claims and calls for government intervention into the retransmission consent market, even where the Commission has no authority to act. Most recently, Mediacom, under the guise of concern for consumers, made conclusory claims attacking broadcasters, with no supporting data or citations.

---

<sup>1</sup> See, e.g., Letter from Joseph Young, Senior Vice President & General Counsel, Mediacom, to Ruth Milkman, Chief of Staff, FCC, MB Docket Nos. 10-71, 09-182 and 07-294 (Dec. 2, 2013)("Mediacom December *Ex Parte*"); Letter from Marc Lawrence-Apfelbaum, Time Warner Cable, Inc. ("TWC") to Marlene H. Dortch, FCC Secretary, MB Docket No. 10-71 (Oct. 17, 2013)("TWC October *Ex Parte*"); Letter from Matthew Polka, President and CEO, American Cable Ass'n ("ACA"), to Acting Chairwoman Clyburn, FCC, MB Docket No. 10-71 (Aug. 22, 2013)("Polka Letter"); Letter from Joseph Young, Senior Vice President, General Counsel & Secretary, Mediacom, to P. Michelle Ellison, Chief of Staff, FCC, MB Docket No. 10-71 (Aug. 12, 2013)("Mediacom *Ex Parte*"); Letter from Barbara Esbin, Counsel to ACA, to Marlene H. Dortch, FCC Secretary, MB Docket Nos. 10-71, 09-192 (June 24, 2013)("ACA *Ex Parte*"); Letter from Matthew A. Brill, Counsel to TWC, to Marlene H. Dortch, FCC Secretary, MB Docket No. 10-71 (June 7, 2013)("TWC *Ex Parte*").

<sup>2</sup> Supplemental Comments of NAB, MB Docket No. 10-71 (May 29, 2013) ("NAB Supplement").

1771 N Street NW  
Washington DC 20036 2800  
Phone 202 429 5300

Cable companies are especially ill-suited to pose as consumer protectors, and their complaints about sharing arrangements among broadcast stations are empty at best, given cable operators' large, dominant shares in many local markets and their routine participation in joint arrangements, including advertising interconnects. While NAB will not respond to every one of the repetitive and unmeritorious claims made in these various cable industry submissions, below we address themes common to several cable filings.

## **I. The FCC Has Properly Recognized that It Lacks Authority to Adopt the Biased Rules that Cable Wants**

ACA and TWC continue to urge the Commission to enact rules that the FCC has said on more than one occasion it lacks the statutory authority to adopt<sup>3</sup> – namely, mandating that a broadcaster's signal be carried on an MVPD after a retransmission consent agreement expires and while the terms of a new agreement are being negotiated.<sup>4</sup> Even beyond the clear lack of statutory authority, ACA's and TWC's proposals are bad public policy. If an MVPD could continue carrying a local station's signal under the terms of an expired retransmission consent agreement, that MVPD would have no incentive whatsoever to negotiate in good faith for a new agreement. This proposal is simply another attempt by cable interests to use the FCC to tilt the retransmission consent marketplace in their favor.

Calls for mandatory arbitration or adjudication of retransmission disputes are similarly flawed.<sup>5</sup> Nearly three years of repetition do not provide the Commission with the authority to impose "mandatory bidding dispute resolution procedures" that it explicitly said it lacked when initiating this proceeding in early 2011.<sup>6</sup>

---

<sup>3</sup> See *Notice of Proposed Rulemaking*, 26 FCC Rcd 2718, 2727-28 ¶ 18 (2011) ("Notice") ("We do not believe that the Commission has authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations."); *First Report and Order*, 15 FCC Rcd 5445, 5471 ¶ 60 (2000) (in its order implementing good faith negotiation requirement, the FCC stated "we see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission.").

<sup>4</sup> Polka Letter at 3. See also TWC October *Ex Parte* at 10 (FCC "can and should" prevent "broadcasters from pulling their signals during retransmission consent disputes").

<sup>5</sup> See TWC October *Ex Parte* at 10-11. See also Mediacom *Ex Parte* at 3 (claiming without substantive explanation that FCC has authority to act and urging FCC to act in "the retransmission consent marketplace," but failing to specify precisely what actions the agency should take).

<sup>6</sup> Notice at ¶ 18. See also *id.* at n.6 ("The Commission does not have the power to force broadcasters to consent to MVPD carriage of their signals nor can the Commission order binding arbitration.").

## II. **Despite Cable Arguments, Evidence that Joint Negotiation of Retransmission Agreements Actually Harms Consumers is Lacking**

Cable interests repeatedly claim that stations participating in shared services and similar agreements that permit them to negotiate together for retransmission consent obtain higher prices from MVPDs than those stations would if they negotiated separately. NAB has not only pointed out the paucity of evidence showing that the rates obtained by stations negotiating together are higher, but also that cable's economic expert admitted that his theory "does not prove that we would necessarily expect to find such a result."<sup>7</sup> We also have submitted an economic analysis, which found that "neither economic theory nor the available evidence provide a persuasive basis for concluding that joint negotiation of retransmission consent by stations in the same market has a positive effect on retransmission consent compensation."<sup>8</sup>

Rather than trying to fill this crucial gap in its evidentiary case, the cable industry has instead "doubled down" on its existing arguments. ACA continues to argue that stations negotiating jointly obtain higher retransmission fees, again relying on its economist's theoretical construct and ignoring his concession noted above that the theory may not prove anything.<sup>9</sup> ACA concedes that it has, at best, limited data concerning retransmission rates, but claims that "all of the available evidence suggests" that joint negotiations result in higher fees.<sup>10</sup> NAB pointed out, however, that the ACA "evidence" commingled must carry and retransmission consent stations, making it impossible to determine whether the stations negotiating jointly were paid any more than another station negotiating for itself alone.<sup>11</sup> ACA simply ignores this fatal defect in favor of reiterating its baseless conclusion. Repetition, however, does not establish the truth of cable's claim that joint negotiation forces MVPDs to "pay a premium,"<sup>12</sup> and the Commission can only act on the basis of facts established in the record.<sup>13</sup>

---

<sup>7</sup> NAB Supplement at 2-4, quoting Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees* (May 18, 2010), App. B to the Comments of ACA, MB Docket No. 10-71 (May 18, 2010) at 11.

<sup>8</sup> Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves (June 27, 2011) at ¶ 19, Attached to NAB Reply Comments, MB Docket No. 10-71 (June 27, 2011).

<sup>9</sup> ACA *Ex Parte* at 2.

<sup>10</sup> *Id.* at 2-3.

<sup>11</sup> NAB Supplement at 3-4.

<sup>12</sup> Mediacom December *Ex Parte* at 2 (asserting that empirical evidence supports its calls for FCC to revise its retransmission consent rules, but failing to cite any or to explain statutory basis for FCC action).

<sup>13</sup> TWC additionally claims that the *overall* increase in retransmission consent payments is evidence of increases due to joint negotiation. TWC *Ex Parte* at 5. TWC offers no proof for this assertion, however, and it is certainly not true that the increased retransmission consent payments flow all or even in substantial part to the limited number of stations participating in shared services and similar agreements. It is much more logical to recognize that increasing retransmission consent fees reflect the value of broadcast signals to pay TV subscribers and the fact that these fees were artificially low or non-existent for many years.

It is readily apparent that the cable complaints about joint arrangements amount to no more than a desire to increase their own market power by “dividing and conquering” local television stations. This objective is shown quite clearly by Mediacom’s most recent retransmission consent missive to the Commission, which vociferously objects to any kind of broadcaster joint arrangements, including common ownership, and even complains about “acquisitions that do not create new duopolies.”<sup>14</sup> The private desire of cable operators to have the upper hand in negotiations, however, is not synonymous with the public interest.<sup>15</sup> The absence of evidence that stations participating in shared services and similar agreements in fact are paid more because of undue market power resulting from those agreements remains a key failing in the cable arguments.

Finally, NAB notes that cable’s arguments suffer from another key failing. Even assuming, as cable repetitively claims, that joint negotiation of retransmission consent leads to both higher retransmission fees paid to broadcasters and higher rates for cable customers, there is still no basis for concluding that prohibiting the joint negotiation of retransmission consent would result in lower prices for consumers. After all, if a cable operator’s costs were to decline for any reason, there is no requirement that this savings be passed on to consumers in whole or in part. A cable operator could instead retain any savings to increase its profit margins.<sup>16</sup>

Indeed, as NAB has previously explained, cable’s long record of increasing subscriber fees well beyond the rate of inflation pre-dates by many years the emergence of cash compensation for operators’ retransmission of broadcast signals.<sup>17</sup> The repeated protestations by cable operators that they want the Commission to intervene in the retransmission consent marketplace to protect consumers – rather than their own pocketbooks – thus ring hollow.<sup>18</sup>

### **III. The Commission Cannot Ignore Cable Market Power**

NAB has shown that cable operators and other MVPDs have market power that dwarfs the competitive position of most local broadcasters. Notably, shared services and similar agreements among broadcasters most often occur in small and medium

---

<sup>14</sup> Mediacom December *Ex Parte* at 2.

<sup>15</sup> See NAB Supplement at 14.

<sup>16</sup> See NAB Supplement at 7-8 (explaining that there is no public interest justification for suppressing the wholesale retransmission rates MVPDs pay without at the same time ensuring that the retail rates consumers pay reflect those reductions).

<sup>17</sup> NAB Supplement at iii-iv, 18-19 & n. 50. According to the FCC’s most recent report on cable prices, the average price of expanded basic service grew at a compound annual rate of 6.1 percent over the 17-year period from 1995-2012, compared to a 2.4 percent annual increase in general inflation as measured by the Consumer Price Index over the same period. *Report on Cable Industry Prices*, DA 13-1319 (MB June 7, 2013) at ¶ 16.

<sup>18</sup> See, e.g., Mediacom *Ex Parte* at 1; Mediacom December *Ex Parte* at 1 (calling for FCC action to protect consumers).

television markets, where the stations' lack of market power compared to large cable operators and MVPDs is most acute. In a number of markets in which ACA again asserts that two separately owned broadcasters jointly negotiate retransmission consent,<sup>19</sup> a single cable operator enjoys a dominant position, controlling as much as two-thirds of the households served by MVPDs of all types.<sup>20</sup>

Not only has the share of the total MVPD market controlled by the ten largest MVPDs dramatically increased in the past decade, NAB demonstrated that local clustering has increased cable market power in many local markets.<sup>21</sup> Even separately owned cable systems, moreover, typically reach agreements to sell advertising across all of their systems in a television market.<sup>22</sup> And, unlike broadcasters, there are no FCC rules limiting the size or ownership of cable systems and other MVPDs locally, regionally or nationally.<sup>23</sup> This high degree of concentration of ownership and control in the cable industry makes cable claims to be "victims" of joint negotiations among far smaller television stations, at best, incredible.

Alternatively, TWC argues that cable operators do "not possess market power," citing the concurring opinion of Judge Kavanaugh in *Comcast Cable Communications, LLC v. FCC*.<sup>24</sup> But what Judge Kavanaugh concluded is that no single cable operator possesses *national* market power. Even he agreed that, "[i]n some local geographic markets around the country, a video programming distributor may have market power."<sup>25</sup> And NAB's arguments in this proceeding have focused primarily on the market power that cable and other MVPDs have in the local markets for retransmission consent.<sup>26</sup> It is particularly ludicrous for TWC to assert it lacks market power, given it

---

<sup>19</sup> ACA *Ex Parte* at 2.

<sup>20</sup> NAB Supplement at 9 & n. 25.

<sup>21</sup> See, e.g., NAB Supplement at 8-10; Comments of NAB, MB Docket No. 12-203 (Sept. 10, 2012) at 13-19; Reply Comments of NAB, MB Docket No. 10-71 (June 27, 2011) at 13-14; Comments of NAB, MB Docket No. 10-71 (May 27, 2011) at 28-30.

<sup>22</sup> See NAB Supplement at 10 and n.28 (explaining how cable systems in the same Designated Market Areas, including those separately owned, commonly agree to sell advertising and, in some cases, these agreements include their other MVPD "competitors"). See also Cabletelevision Advertising Bureau, *Local Cable* page, available at <http://thecab.tv/main/cablenetworks/> (visited Dec. 2, 2013) ("Interconnects, which combine two or more local cable systems and distribute a program or commercial signal simultaneously, allow the advertiser to reach their target with only one buy, one commercial and one invoice. This section lists the main interconnects in the Top 50 DMAs.") (emphasis added).

<sup>23</sup> NAB Supplement at 10-11.

<sup>24</sup> TWC *Ex Parte* at 6-7, citing *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013)(Kavanaugh, J., concurring).

<sup>25</sup> *Comcast Cable*, 717 F.3d at 992 n.3.

<sup>26</sup> See NAB Supplement at 9-11 (discussing local clustering and the power cable operators have vis-à-vis local stations in retransmission negotiations); Comments of NAB, MB Docket No. 10-71 (May 27, 2011) at 28-32 (same). See also Decl. of J.A. Eisenach and K.W. Caves, at ¶¶ 9-19, attached to Comments of NAB, MB Docket No. 10-71 (May 27, 2011) (discussing several marketplace developments, including

has a 66 percent or greater share of the *entire MVPD market* in eight Designated Market Areas (“DMAs”) and a 50 percent or greater share in 27 DMAs – as well as a whopping 90.9 percent of the video market in one DMA (Honolulu).<sup>27</sup> Numerous press accounts moreover indicate that concentration in the cable industry will only keep growing<sup>28</sup> and that the combination of existing large cable operators will further increase their market power, including regionally and locally.<sup>29</sup>

The Second Circuit Court of Appeals recently confirmed the continuing economic power of cable operators. In *Time Warner Cable Inc. v. FCC*, the Court rejected arguments that cable operators do not possess market power. The Court found “cable operators continue to hold more than 55% of the national MVPD market *and to enjoy still higher shares in a number of local MVPD markets.*”<sup>30</sup> The Court went on to point out “substantial record evidence” that “cable operators maintain significant shares in various local markets and that vertical integration remains pervasive in the video programming industry.”<sup>31</sup> The Second Circuit simply could not “overlook record evidence that cable operators maintain a more than 60% market share in certain MVPD markets . . . and that the video programming industry has a long history of economic dysfunction.”<sup>32</sup>

Cable claims that the Commission should ignore the growing consolidation of the MVPD industry, and instead conclude that agreements among some small and medium market television stations give those stations undue economic power, are clearly nonsense. The fact that cable operators such as Mediacom are now reduced to arguing in a retransmission consent proceeding that “broadcast consolidation” causes a range of implausible harms ranging from “enhanced station market power over advertisers and syndicators” to “potential risk to the success of the spectrum auction” only shows their desperation and their cynicism.<sup>33</sup>

---

cable system clustering, that “have likely *reduced* broadcasters’ [retransmission consent] bargaining power relative to MVPDs”) (emphasis in original).

<sup>27</sup> NAB Supplement at 9 & n. 26; Comments of NAB, MB Docket No. 12-203 (Sept. 10, 2012) at 15-16.

<sup>28</sup> See, e.g., Edmund Lee, *Cox Said to Be Mulling Time Warner Cable Deal, Joining Fray*, Bloomberg (Nov. 27, 2013) (stating that cable industry is “increasingly keen on consolidation”); Dana Mattioli, Amol Sharma and Martin Peers, *Cox Explores Bidding for Time Warner Cable*, Wall Street Journal (Nov. 26, 2013) (observing the “frenzy of deal interest” as “cable companies are trying to get bigger,” and noting John Malone’s suggestion “that a smaller group of big industry players could collaborate better to tackle common problems”); Alex Sherman & Edmund Lee, *Comcast, Charter Said to Weigh Time Warner Cable Breakup*, Bloomberg (Nov. 23, 2013) (explaining that Comcast’s and Charter’s coverage areas could be enhanced by adding parts of Time Warner Cable’s network).

<sup>29</sup> See, e.g., Alex Sherman, Edmund Lee & David McLaughlin, *Time Warner Cable Breakup May Help Sidestep Deal Scrutiny*, Bloomberg (Nov. 25, 2013) (“Splitting up Time Warner Cable would let Comcast and Charter add users near markets they already serve, making regional advertising more effective”).

<sup>30</sup> *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 161 (2d Cir. 2013) (emphasis added).

<sup>31</sup> *Id.* at 162.

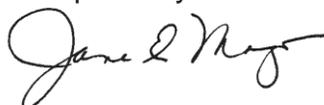
<sup>32</sup> *Id.* at 163.

<sup>33</sup> Mediacom December *Ex Parte* at 2.

\* \* \* \*

NAB filed its supplemental comments and this submission to address widespread and persistent efforts by the cable industry to misinform the Commission and the public about retransmission consent. The Commission should decline to consider changing its retransmission consent rules in the biased ways that would favor the increasingly concentrated cable industry.

Respectfully submitted,



Jane E. Mago  
Executive Vice President and General Counsel  
Legal and Regulatory Affairs

cc: Chairman Wheeler  
Commissioner Clyburn  
Commissioner Rosenworcel  
Commissioner Pai  
Commissioner O'Rielly  
Maria Kirby  
Adonis Hoffman  
Clint Odom  
Matthew Berry  
Erin McGrath