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January 30, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Notification of Ex Parte Presentation of Time Warner Cable, et al., MB
Docket No. 09-182**

Dear Ms. Dortch:

On January 28, 2014, the undersigned and Stacy Fuller of DIRECTV, Alex Hoehn-Saric of Charter Communications, Hadass Kogan of Dish Network and Ross Lieberman of the American Cable Association had separate meetings with Courtney Reinhard of Commissioner O’Rielly’s office and with Adonis Hoffman and Stefanie Frank of Commissioner Clyburn’s office to discuss how broadcasters undermine competition in local broadcast markets by coordinating their retransmission consent negotiations, often pursuant to formal “sharing” or “sidecar” arrangements. The following day, the undersigned, Hadass Kogan, Michael Nilsson of Wiltshire & Grannis (on behalf of DIRECTV) and Barbara Esbin of Cinnamon Mueller (on behalf of the American Cable Association) met with Clint Odom of Commissioner Rosenworcel’s office to discuss the same issue.

At the meetings, we argued that a broadcaster’s assignment to another entity of core rights to negotiate retransmission consent should result in a transfer of control under the Commission’s media ownership rules. This form of retransmission consent coordination results in one broadcaster having control over a significant and growing source of revenue for another station as well as the ability to determine whether and under what conditions the programming of the station is made available to an MVPD. Such assignments along with other ways in which broadcasters coordinate their retransmission consent negotiations should also be deemed to create an attributable ownership interest.

Agreements to coordinate retransmission consent often are found in local marketing agreements (LMAs), joint sales agreements (JSAs), and shared services agreements (SSAs), but also may happen through unwritten informal pacts. Regardless of the form it takes, such coordination results in numerous public interest harms.

To begin with, the coordination of retransmission consent negotiations among separately owned broadcast stations in the same market is starkly anticompetitive and harmful to consumers. ACA's studies show that retransmission consent fees can be up to 161 percent higher when separately owned stations in the same market conduct their negotiations using a single representative, providing evidence of how this conduct reduces competition. Moreover, broadcasters that coordinate their negotiations will pull two or more stations from an MVPD when their retransmission consent demands are not met, which increases the harm to consumers.

Permitting such behavior also disserves the purpose of the Commission's media ownership rules to promote competition, diversity and localism. Coordination stifles competition within local markets, as the parties to coordination arrangements do not truly compete. Also, when one station uses these arrangements to exceed the number of stations they may own or control under the local and national ownership rules, the number of stations available for new entrants is unfairly diminished. This, of course, undermines the Commission's longstanding goal of encouraging diverse voices to participate in local broadcasting. Finally, when broadcasters use sham arrangements to evade the ownership rules, the effectiveness of *all* Commission rules is called into question.

Retransmission consent coordination has always been problematic. Now, however, it has become an epidemic. ACA submitted studies identifying 48 instances of separately owned "Big Four" network affiliated broadcast stations in the same market using a single negotiator to conduct retransmission consent negotiations. In all 48 instances, the broadcasters were involved in some form of sharing arrangement. DIRECTV submitted a study showing that in 93 DMAs—nearly half of all DMAs in which it carries local signals—DIRECTV must negotiate with a party controlling multiple affiliates of the "Big Four" networks, often through arrangements that circumvent the Commission's ownership rules.

We thus urged the Commission to update its regulations to better reflect market conditions and to protect consumers. Specifically, we asked the FCC 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 the Commission's rules. Moreover, the Commission should deem that practices by which ostensibly separately owned stations coordinate their retransmission consent negotiations create an "attributable interest" under Section 73.3555 of the Commission's rules for purposes of the Commission's ownership limitations.¹ It is well-established that beyond traditional

¹ Specifically, the Commission should explicitly recognize as creating an attributable ownership interest any of the following practices:

- 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.

demonstrations of influence or control over core station functions, the Commission has the authority to restrict other relationships between non-commonly owned stations that permit the exercise of market power and harm local competition under its attribution rules.

The FCC's authority to determine policies for media ownership limitations is clear under the statutory provisions governing the quadrennial review. Section 309(a) also empowers the Commission to ensure that broadcast station licensees act in accordance with "the public interest, convenience, and necessity."

The record in the media ownership proceeding is also fully developed on these issues. In the 2011 Media Ownership NPRM, the FCC sought comment as follows: "Instead of focusing on attributing certain named agreements (e.g., JSAs, LMAs, SSAs, LNS agreements) as we have in the past, should we adopt a broader regulatory scheme that encompasses all agreements, however styled, that relate to the programming and/or operation of broadcast stations? . . . Should we consider the impact of these agreements on other matters of Commission interest, such as retransmission consent negotiations?"² Several parties, including DIRECTV, Dish, ACA, TWC and Charter submitted filings, studies and data in response to the NPRM.

We also noted that broadcasters have begun to negotiate retransmission consent for other stations *across* DMAs to circumvent national ownership restrictions, resulting in similar harms to the public interest. Treating joint retransmission consent negotiations as creating an attributable interest should thus apply both to the Commission's local television ownership rule and its national television ownership rule. 47 C.F.R. §§ 73.3555(a) and (e).

Lastly, we explained that broadcasters in many local markets are aggregating market power by affiliating with two or more of the "Big Four" networks and then multicasting those signals. Multicasting enables a single entity to control retransmission consent negotiations and local content production for multiple broadcast signals in the same local market, and thus presents many of the same problems posed by sharing agreements. The FCC should make clear that one station affiliating with two or more of the "Big Four" networks and multicasting those two signals is equivalent to owning two stations under the rule.

Please contact the undersigned should you have any questions.

Sincerely,

/s/ Cristina C. Pauzé

Cristina C. Pauzé

cc: Courtney Reinhard
Adonis Hoffman
Clint Odom
Stefanie Frank

² 2010 *Quadrennial Regulatory Review -- Review of the Commissions Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 Promoting Diversification of Ownership in the Broad. Servs.*, 26 FCC Rcd. 17489, ¶ 207 (2011).