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LATHAM & WATKINS LLP

January 30, 2014

VIA ECFS

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

Re: Notification of *Ex Parte* Communication of American Cable Association, Charter Communications, DIRECTV, DISH Network, New America Foundation, and Time Warner Cable in 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 January 28, 2014, the following representatives and the undersigned met with Jonathan Sallet, Suzanne Tetreault, Jim Bird, Marilyn Sonn, and Ginny Metallo, all of the Office of General Counsel: Ross Lieberman of American Cable Association (“ACA”), Alex Hoehn-Saric of Charter Communications, Stacy Fuller of DIRECTV, Jeff Blum and Hadass Kogan of DISH Network, Michael Calabrese of New America Foundation, and Cristina Pauzé of Time Warner Cable (“TWC”).

Following up on our recent letter,¹ we discussed the Commission’s broad legal authority to adopt reforms that would address the significant public interest harms arising from the

¹ See Letter from John Bergmayer, Public Knowledge, *et al.*, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (filed Dec. 11, 2013) (“Dec. 11 *Ex Parte*”). In addition, Time Warner Cable and other interested parties have submitted comments and *ex parte* presentations that address in greater detail the Commission’s legal authority to implement a wide range of reforms to the retransmission consent regime. See, e.g., Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 30-32 (filed June 27, 2011); Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 39-41 (filed May 27, 2011); Joint Comments of Mediacom Communications Corporation *et al.*, MB Docket No. 10-71, at 3 n.6 (filed May 27, 2011); Reply Comments of Cablevision

retransmission consent regime, as well as to resolve particular disputes between broadcast stations and multichannel video programming distributors (“MVPDs”). *First*, we explained that Section 325(b)(3)(A) expressly directs the Commission “to govern the exercise by television broadcast stations of the right to grant retransmission consent.”² Congress further specified that, in carrying out the mandate, the Commission “shall consider ... the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations [governing retransmission consent] do not conflict with the Commission’s obligation to ensure that the rates for the basic service tier are reasonable.”³ Although broadcasters have suggested that their right to withhold retransmission consent pursuant to Section 325(b)(1)(A) of the Act somehow deprives the Commission of authority to impose constraints on retransmission consent negotiations and agreements, that contention is contrary to the plain language of Section 325(b)(3)(A).

Second, the Commission’s general mandate to govern the exercise of retransmission consent is supplemented by its obligation to adopt and enforce rules that “prohibit a television broadcast station that provides retransmission consent from ... failing to negotiate in good faith.”⁴ The Commission has recognized that a broadcaster violates its good faith duty when its demands “include[] terms or conditions not based on competitive marketplace considerations.”⁵ Yet much of the conduct occurring in today’s retransmission consent negotiations—including (i) brinkmanship tactics, such as programming blackouts and blackout threats, designed to exploit a network-affiliated broadcast station’s already substantial market power; (ii) anticompetitive collusion between and among local stations that are parties to various “sharing” agreements; and (iii) the increasing use of multicasting arrangements to enable broadcasters to sidestep the Commission’s transfer of control and duopoly rules, among other coercive tactics—cannot be squared with the outcomes that would occur in a genuinely competitive marketplace.

Third, in addition to the specific mandates contained in Section 325, we emphasized that the Commission has independent authority (and, again, an obligation) to ensure that broadcast licensees act in furtherance of “the public interest, convenience, and necessity.”⁶ Broadcast stations were given immensely valuable rights to use the public airwaves at no charge in exchange for their commitment to operate in the public interest. And there is perhaps nothing more central to a broadcast station’s public interest obligation than ensuring that the viewing public in its local license area receives the primary signal either over the air for free or on reasonable terms through an MVPD.

Systems Corporation, MB Docket No. 10-71, at 6-7 (filed June 3, 2010); Comments of Verizon, MB Docket No. 10-71, at 7-10 (filed May 18, 2010).

² 47 U.S.C. § 325(b)(3)(A).

³ *Id.*

⁴ *Id.* § 325(b)(3)(C)(ii).

⁵ *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 32 (2011) (citing 47 U.S.C. § 325(b)(3)(C)).

⁶ 47 U.S.C. § 309(a).

We also discussed the extensive evidence in the record regarding the consumer harms flowing from broadcasters' misuse of the retransmission consent process. For example, broadcasters increasingly are threatening to pull their signals from MVPD systems—and making good on those threats—to maximize bargaining leverage in retransmission consent negotiations. In fact, MVPD subscribers experienced more blackouts in 2013 than ever before—as was true each of the last few years.⁷ Broadcast stations also now routinely use various means to coordinate retransmission consent negotiations for non-commonly owned stations in a single designated market area (“DMA”), including “sharing” agreements and multicasting arrangements, thus compounding the problem of broadcaster blackouts. In particular, by enabling non-commonly owned broadcast stations to aggregate their market power in the same market, arrangements to coordinate negotiations make broadcasters' blackout threats—which increasingly involve two or more “Big Four” network signals—even more harmful to consumers and coercive, and all the more successful at raising the price of retransmission consent.

As ACA, TWC, and others have explained, basic economic principles, MVPDs' experience, and the Commission's own empirical analysis demonstrate that broadcasters' ability to engage in coordinated retransmission consent negotiations, and to “go dark” in the event their demands for higher carriage fees are not met, drives up the price for retransmission consent to unreasonable levels.⁸ And because these broadcaster tactics substantially increase the price that

⁷ See American Television Alliance, *Dear Broadcasters, How About a New Year's Resolution Not to Black Out Viewers in 2014?* (Jan. 1, 2014), <http://www.americantelevisionalliance.org/dear-broadcasters-how-about-new-years-resolution-not-to-black-out-viewers-in-2014/> (explaining that MVPD subscribers experienced “12 blackouts in 2010, 51 in 2011, 91 in 2012, and a record-setting 127” in 2013); Letter from Matthew M. Polka, President and CEO, ACA, to Mignon L. Clyburn, Acting Chairwoman, FCC, at 2 (Aug. 22, 2013), filed as an attachment to ACA *Ex Parte* Letter, MB Docket No. 10-71 (filed Aug. 22, 2013) (documenting the sharp increase in broadcaster blackouts in recent years).

⁸ See, e.g., Letter from Barbara Esbin, Counsel to American Cable Association, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 10-71, 09-182, at 3 (filed June 24, 2013) (explaining that Big Four station “increases of retransmission consent fees due to joint negotiations rang[e] from 21.6% to 161%”); Comments of American Cable Association, MB Docket No. 10-71, at 11-12 (filed May 27, 2011) (“ACA Retrans NPRM Comments”) (explaining that “the logic and findings in th[e] [Comcast-NBCU] order support the conclusion that joint ownership or control of multiple Big Four broadcasters in the same market will result in higher retransmission consent fees and harm consumers” (quoting William P. Rogerson, *Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market*, at 10 (May 27, 2011), filed as an attachment to the ACA Retrans NPRM Comments)); Steven C. Salop *et al.*, *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, at 53 (June 3, 2010), filed as an attachment to the Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71 (filed June 3, 2010) (explaining that broadcaster threats to withhold programming unless their demands for retransmission consent fees are met are more successful in DMAs

MVPDs must pay to carry broadcast programming, and MVPDs must recover their increased costs from consumers, such tactics inevitably result in higher MVPD subscription prices. Indeed, even assuming that MVPDs could absorb a portion of the increased retransmission consent fees paid to broadcasters, it is a “fundamental economic truth that higher input costs lead to higher prices,” other factors held constant.⁹

The staggering growth of retransmission consent fees in recent years confirms this basic economic principle. Although industry analysts initially projected that retransmission consent fees would triple over the course of six years—from approximately \$1.14 billion in 2011 to \$3.6 billion by 2017,¹⁰ more recent projections blow these already-astonishing sums away. Indeed, broadcasters *in 2013* eclipsed the \$3 billion mark, and retransmission consent revenues now are expected to exceed \$6 billion by 2018.¹¹ As we explained, there simply is no scenario in which an MVPD could absorb such a rapid explosion of costs without raising prices, especially given the broader increases in programming costs and the shrinking margins from MVPD offerings. Indeed, the fact that retail prices for MVPD services have continued to increase in recent years (well in excess of the rate of inflation), in the face of robust and increasing competition in the video marketplace, demonstrates the significant economic distortions and consumer harm arising from the current retransmission consent regime.¹²

We therefore urged the Commission to take steps to reform the retransmission consent process to protect consumers from broadcasters’ unreasonable fee demands, programming blackouts, and anticompetitive collusion. And we explained that the statutory authority

where stations have executed sharing agreements with one another, because “sharing agreements strengthen the broadcasters’ bargaining position” vis-à-vis MVPDs); Michael L. Katz *et al.*, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, at 27 (Nov. 12, 2009), filed as an attachment to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269 (filed Dec. 16, 2009) (concluding that “joint negotiations [facilitated by sharing agreements] eliminate competition ... [and] result in higher fees and consumer harm”).

⁹ Steven C. Salop *et al.*, *Video Programming Costs and Cable TV Prices: A Comment on the Analysis of Dr. Jeffrey Eisenach*, at 4 (June 1, 2010), filed by Time Warner Cable Inc., MB Docket No. 10-71 (filed June 1, 2010).

¹⁰ Joe Flint, *Retransmission Consent Fees To Hit \$3.6 Billion in 2017*, LOS ANGELES TIMES (May 25, 2011), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/05/retransmission-consent-fees-to-hit-36-billion-in-2017.html> (citing Robyn Flynn, SNL Kagan, *Updated Retrans Projections: Despite Fewer Projected Multichannel Subs, Higher Fees Boost Totals*, at 2 (May 17, 2011)).

¹¹ 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, FCC, MB Docket Nos. 09-182, 10-71, at 2 (filed Nov. 21, 2012)).

¹² See Paul A. Samuelson and William D. Nordhaus, *Economics* 157 (19th ed. 2010) (explaining the fundamental economic principle that in competitive markets, as entry and supply increase, prices fall).

described above is more than sufficient to justify a wide range of rule changes. For example, without ruling out other reforms, we noted that the Commission has authority to address the harms flowing from coordinated negotiations, territorial exclusivity, and retransmission consent disputes, as follows:

- **Coordinated Negotiations**: As discussed above, broadcasters' rampant practice of collusive coordination in retransmission consent negotiations with MVPDs is a significant contributor to the dysfunction plaguing the current regulatory regime. The Commission therefore should prohibit broadcasters from using any arrangement, whether formal or informal, to coordinate in retransmission consent negotiations with other in-market broadcast stations. Relatedly, the Commission should adopt rules limiting other methods used by broadcasters to control multiple Big Four signals in a single DMA, such as by affiliating with multiple Big Four networks and multicasting those signals. The Commission's good faith rules already require broadcasters to negotiate in a manner reflecting "competitive marketplace considerations,"¹³ and the Commission plainly has authority under Sections 325(b)(3)(A) and 325(b)(3)(C)(ii) to clarify what types of anticompetitive conduct run afoul of that requirement. In addition, the Commission has clear authority to determine what types of sharing agreements will result in attribution under Section 73.3555 of its rules.
- **Territorial Exclusivity Rules**: We also explained that the Commission's network non-duplication and syndicated exclusivity rules impede MVPDs' ability to mitigate the effects of a blackout of network programming, and that the Commission is obviously empowered to repeal or modify those rules (which are not mandated by the Communications Act). We argued that the Commission should not support government-sanctioned monopolies for network and syndicated programming, as the suppression of alternative options for MVPD subscribers in the event of a programming blackout exacerbates the problems associated with the retransmission consent rules.
- **Interim Carriage**: We further discussed the Commission's authority to preclude broadcasters from withdrawing their signals during retransmission consent disputes by requiring interim carriage pending resolution of such disputes. The Commission has determined that it has authority to order interim carriage in the context of program access disputes,¹⁴ consistent with Supreme Court precedent,¹⁵ and there is no reason why

¹³ See *supra* n.5.

¹⁴ *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶¶ 71-72 (2010) (relying on the Commission's ancillary authority to establish standstill rules for program access disputes).

¹⁵ See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-81 (1968) (holding that the Commission's ancillary authority pursuant to Sections 303(r) and 4(i) of the Act authorize it to maintain the status quo when "the public interest demands interim relief").

retransmission consent should be treated differently.¹⁶ To the contrary, the congressional sponsors of the retransmission consent provision made clear that they expected the Commission to intervene in disputes to the extent necessary to safeguard the public interest and to ensure consumers' access to broadcast programming.¹⁷

- **Dispute Resolution Mechanisms**: Finally, we explained that the Commission has authority under Sections 325 and 309 (and ancillary jurisdiction, to the extent necessary) to foster resolution of retransmission consent disputes by adopting appropriate dispute resolution mechanisms, including (i) an established cooling-off period, (ii) a non-binding mediation mechanism, and (iii) procedures for commercial arbitration. Again, such mechanisms are consistent not only with the statutory text but with the legislative history.¹⁸

Please contact the undersigned should you have any questions.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
of LATHAM & WATKINS LLP

cc: Jonathan Sallet
Suzanne Tetreault
Jim Bird
Marilyn Sonn
Ginny Metallo

¹⁶ See Dec. 11 *Ex Parte* at 3-4.

¹⁷ *Id.* at 4 n.18.

¹⁸ *Id.*