



CONNECTING HOMETOWN AMERICA

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, D.C. 20007

rlieberman@americancable.org
(202) 494-5661

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Via ECFS

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

Re: ***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 February 20, 2014, the Antitrust Division of the U.S. Department of Justice (“DOJ”) filed an ex parte letter in the above-referenced 2010 Quadrennial Regulatory Review docket. ACA wishes to bring to the Commission’s attention DOJ’s unequivocal view that coordination of retransmission consent negotiations by separately owned broadcasters in the same market should be deemed *per se* illegal unless reasonably necessary for some other efficiency-enhancing combination of the station’s operations. Specifically, DOJ stated the following:

[T]o avoid being deemed *per se* illegal, activities such as joint advertising sales or *joint retransmission negotiations* would have to be shown to be reasonably necessary to some other efficiency-enhancing combination of the operations of the stations.¹

Moreover, DOJ expressed great skepticism that these types of joint pricing agreements would ever be necessary for stations to achieve other efficiency-enhancing combinations of their operations. For example, it considered a situation where two broadcasters entered into an advertising agreement and also entered into an efficiency-enhancing arrangement where they shared the use of a helicopter. DOJ concluded that “the advertising agreement would likely be

¹ Ex Parte Submission of the United States Department of Justice, at 15 (filed Feb. 20, 2014 in MB Docket Nos. 09-182, 07-294, 04-256) (“DOJ Ex Parte”) (emphasis added).

deemed *per se* illegal because joint pricing is not reasonably necessary to realize the benefits of sharing the helicopter.”²

DOJ’s position is consistent with the position expressed by ACA in previous filings. ACA has made clear that agreements among separately owned broadcast stations to coordinate retransmission consent negotiations are anticompetitive and not necessary for broadcasters to achieve any of the efficiencies that allegedly arise from other aspects of their coordination agreements.³ This is evidenced by the fact that agreements to coordinate retransmission consent negotiations can be painlessly severed from their existing sharing agreements without any disruption to the underlying arrangement.⁴ The broadcasters have never refuted ACA’s assertion on this point.

Given the DOJ’s view on coordinated retransmission consent negotiations, and the Commission’s charge to ensure that its broadcast ownership rules promote competition, it is appropriate for the FCC to deem the coordination of retransmission consent negotiations as *per se* attributable under the media ownership rules.⁵

² *Id.*

³ *See, e.g.*, Comments of the American Cable Association, MB Docket No. 10-71, at 8 & 24 n.46 (filed May 27, 2011) (“ACA Retransmission Consent Comments”); Comments of the American Cable Association, MB Docket No. 09-182, at 23-24 (filed Mar. 5, 2012) (“ACA Media Ownership Comments”).

⁴ DOJ does not suggest that a finding of efficiencies directly tied to coordinated negotiations could avoid a conclusion that the conduct is *per se* illegal. Even if it had, ACA notes that agreements to coordinate retransmission consent itself provide limited efficiencies, and this point too has not been refuted by the broadcasters. *See* ACA Retransmission Consent Comments at 8 & 24 n.46; ACA Media Ownership Comments at 23-24.

⁵ In particular, the Commission should conclude that an attributable interest exists whenever a one television station:

- Delegates the responsibility to negotiate or approve retransmission consent agreements to another separately owned broadcast station;
- Delegates the responsibility to negotiate or approve retransmission consent agreements for multiple stations to a common third party;
- Enters into or enforces any informal or formal agreement with an MVPD contingent on another separately owned broadcast station negotiating a satisfactory retransmission consent agreement with the same MVPD; or
- Engages in any discussions or exchanges of information with one or more separately owned broadcast stations (or their representatives) regarding the terms of existing retransmission consent agreements, or the status of negotiations over future retransmission consent agreements.

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,

A handwritten signature in black ink, appearing to read "Ross J. Lieberman". The signature is fluid and cursive, with a large initial "R" and "L".

Ross J. Lieberman

cc (via email): Gigi Sohn
Maria Kirby
Bill Lake
Jonathan Sallet
Adonis Hoffman
Clint Odom
Matthew Berry
Courtney Reinhard
Jonathan Levy
Raelynn Remy