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VIA ECFS

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

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

Dear Ms. Dortch:

On August 26, 2015, Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association (“ACA”) and the undersigned, met with Alison Nemeth, acting Media Advisor to Commissioner Pai, to discuss the Commission’s proposal to eliminate the broadcast exclusivity rules in the above-referenced proceeding.¹ During the meeting we urged the Commission to protect consumers against the loss of historically available out-of-market broadcast signals that provide vital access to weather reports, in-state news, and political advertising by accompanying the repeal of the exclusivity rules with a prohibition on interference by broadcast networks with their affiliates’ out-of-market retransmission consent negotiations, consistent with ACA’s previous filings.²

While the broadcast exclusivity rules are viewed primarily as an extra-contractual means for local broadcasters to enforce their privately-negotiated exclusivity rights, we explained that they have also served as a limiting factor on the extent to which exclusivity rights can be enforced by local broadcast stations. For decades, this has allowed for the targeted exportation of significantly viewed stations and other important out-of-market signals to cable subscribers living on the outskirts of adjacent Designated Market Areas (“DMAs”) interested in receiving the content these stations provide.

Should the Commission move forward with repeal of the exclusivity rules, broadcast stations and networks undoubtedly will revisit their affiliation agreements to ensure that local stations’ existing exclusivity rights are protected at least to the same extent that they were under the exclusivity rules. ACA is concerned that the Commission’s repeal of the rules – and the Chairman’s assertion that government

¹ *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (rel. Mar. 31, 2014) (“Further Notice” or “FNPRM”).

² *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Comments of the American Cable Association (filed May 27, 2011) (“ACA NPRM Comments”); Further Notice of Proposed Rulemaking, MB Docket No. 10-71, Comments of the American Cable Association (filed Jun. 26, 2014) (“ACA FNPRM Comments”)

should not have a role in determining the scope of a local broadcaster's exclusivity³ – will embolden broadcast networks, sometimes in coordination with local affiliates, to significantly expand their affiliates' zones of exclusivity and eliminate the availability of out-of-market stations, such as significantly viewed stations and stations that serve “orphan counties” whose continued availability Congress has repeatedly sought to protect.⁴ As a result, broadcast stations that have for decades exported their signals out-of-market to nearby cable operators may be prohibited from doing so in the future, and consumers will lose access to vital weather information, in-state news, and relevant political advertising that they may not receive from their in-market station, simply because such signals are considered “distant” by virtue of artificial DMA boundaries, rather than actual distance or relevance to the affected community.⁵ While the Commission may wish to end the use of its processes to enforce privately-negotiated exclusivity rights, it should preserve to the greatest extent possible the ability of willing broadcasters to negotiate with MVPDs for distant signals that best satisfy consumer needs by preventing network interference with long-standing arrangements between MVPDs and out-of-market stations.⁶

From the inception of this proceeding to improve the functioning of its rules concerning retransmission consent, the Commission has recognized that certain practices involving third-party interference with the exercise of retransmission consent required its attention and remedial action.⁷ In fact, the 2011 NPRM explicitly recognized that because the “good faith rules currently require the Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent and not unreasonably delay negotiations,” a station that “has granted a network a veto power over any retransmission consent agreement with an MVPD . . . has arguably impaired its own ability to designate a representative who can bind the station in negotiations, contrary to our rules.”⁸ ACA and other commenters, including broadcast station group Nexstar, described the deleterious impact of network interference on an affiliated station's ability to negotiate retransmission consent in good faith

³ See Tom Wheeler, FCC Chairman, FCC BLOG, Upgrading Media Rules to Better Serve Consumers in Today's Video Marketplace, Aug. 12, 2015, available at <https://www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace> (“In this item, the Commission takes its thumb off the scales and leaves the scope of such exclusivity to be decided by the parties.”).

⁴ Congress has repeatedly affirmed the importance of the availability of significantly viewed signals to out-of-market viewers. With the Satellite Home Viewer Reauthorization Act of 2004, Congress made clear that out-of-market significantly viewed signals must be made available to satellite subscribers. *The Satellite Home Viewer Extension and Reauthorization Act of 2004*, Pub. L. No. 108-447, § 202, 118 Stat 2809, 3409 (2004) (codified at 47 U.S.C. § 340). More recently, Congress enacted the Satellite Television Extension and Localism Act Reauthorization (“STELA”) Act of 2014, prohibiting broadcast stations from preventing the entry of significantly viewed signals from other DMAs into their local markets, and mandating the establishment of options for DBS subscribers in orphan counties to receive more localized programming. The STELA Reauthorization Act of 2014, Pub. L. No. 113-200, §§ 102, 103, 128 Stat. 2059, 2060-2062 (2014).

⁵ See ACA NPRM Comments at 33-35; ACA FNPRM Comments at 4-9. In larger DMAs, which can extend 55-250 miles beyond a central metropolitan area, consumers in the outer regions of the DMA may very likely live closer to the central metropolitan area of the neighboring DMA. Being able to make a geographically closer metropolitan area's out-of-market signal available to subscribers enables rural MVPDs to better serve their communities. For example, Vast Broadband carries multiple Sioux Falls stations on systems within the Minneapolis, MN DMA because their subscribers consider themselves to be in the Sioux Falls trade area and more news regarding southwest Minnesota comes out of Sioux Falls than Minneapolis. Many of Vast Broadband's subscribers prefer the weather coverage from a broadcast station that is west of their residences.

⁶ ACA FNPRM Comments at 3.

⁷ In the 2011 Notice of Proposed Rulemaking, the Commission sought comment on “whether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.” *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶ 22 (2011).

⁸ NPRM, ¶ 22.

and its inconsistency with the current good faith standards requiring a broadcaster to appoint a negotiating entity with authority to make binding representations and to enter into a binding agreement.⁹ ACA and Joint Cable Commenters urged the Commission to go beyond its proposal to deem it a *per se* violation for a station to give an affiliated network the right to approve or veto a retransmission consent agreement with any MVPD – whether in market or out-of-market – or to comply with such a provision, and to recognize that network interference unarguably violates current good faith rules.¹⁰

In the Further Notice, the Commission acknowledged that contractual arrangements between networks and their affiliates may bar a broadcast station from agreeing to the importation of its signal by an out-of-market cable operator, and asked “[t]o what extent existing network/affiliate agreements prohibit a local broadcaster from allowing its distant signal to be imported by a cable operator without reference to the existence of a Commission prohibition.”¹¹ In its Comments, ACA noted network interference with the exercise of retransmission consent by affiliated stations is a steady and growing problem. There have been many reports recently by cable operators that long-standing out-of-market carriage relationships have been reluctantly ended as a result of restrictions in the stations’ affiliation agreements.¹² Some broadcast networks have a general policy of not permitting their affiliates, even those stations that are significantly viewed, to offer out-of-market carriage.

⁹ *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Reply Comments of the American Cable Association at 47-48 (filed Jun. 28, 2011) (“ACA 2011 NPRM Reply Comments”); Comments of Nexstar at 19-20 (filed May 27, 2011) (noting that “it is a violation of the per se good faith obligation for the negotiating entity to fail to designate a representative who can make binding representations” and arguing therefore that “it is in the best interest of the retransmission consent marketplace for the Commission to make it a per se violation for affiliates to be required to provide a network with veto power over its ability to grant retransmission consent for its station’s signal within its DMA”).

¹⁰ ACA 2011 NPRM Reply Comments at 48-51; *Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc. Comments at 19 (filed May 27, 2011) (“Joint Cable Comments”) (Commission proposal to bar stations from agreeing to give a network the right to veto a particular retransmission consent agreement is a “well-intentioned first step” but meaningful relief requires that the Commission more broadly “prohibit any agreement between a network and its affiliates that has the effect of interfering with or otherwise dictating the terms of an affiliate’s grant of retransmission consent for the carriage of its signal either inside or outside its local market”).

¹¹ FNPRM, ¶ 58 (2014).

¹² ACA members have experienced numerous instances where an adjacent-market broadcast station wants to negotiate for retransmission consent but cannot because its network affiliation agreement expressly prohibits it from granting retransmission consent outside of its DMA. For example, despite a successful 30+ year retransmission consent relationship with out-of-market station WDRB-41, FPB Cable was advised at the beginning of negotiations for the 2011 election cycle that WDRB would require the blackout of all FOX network programming throughout the three-year term of the agreement, and that FPB would be required to insert alternative multicast programming for a minimum of three hours per day. When FPB inquired as to the extraordinary change, they were informed that WDRB’s recent affiliation agreement with FOX denied the station the right to broadcast FOX programming out of market. Because the cost of effectuating the programming blackout was so great, FPB and WDRB failed to come to an agreement on carriage for the first time in 30 years, and FPB subscribers lost what was at the time the only 10 PM newscast in the Louisville market. See ACA NPRM Comments at 55-56 (“ACA members have experienced numerous instances where an adjacent-market broadcast station wishes to grant retransmission consent to a cable operator, but cannot because its network affiliate agreement expressly prohibits the station from granting retransmission consent outside of its DMA, even where the station would be deemed significantly viewed in another community. In many cases, this practice, coordinated by networks, allows stations to effectively enlarge the zone of exclusivity protection beyond the geographic limits set by Congress and the Commission.”). See also ACA NPRM Reply Comments at 59 (citing experience of non-ACA member Suddenlink being forced to drop a significantly viewed station that had previously granted retransmission consent when the station found itself pressured to

We reiterated ACA's position that to protect against the loss of historically available out-of-market broadcast signals that provide access to vital emergency weather reports, in-state news, and political advertising, such as significantly viewed signals and stations that offer in-state news to subscribers in orphan counties, repeal of the network non-duplication and syndicated exclusivity rules must be accompanied by a prohibition on interference by broadcast networks with retransmission consent agreements between MVPDs and out-of-market stations.¹³ We also explained that the Commission can effectuate this prohibition by either adopting a new *per se* violation or by clarifying that existing *per se* violations of the obligation to negotiate for retransmission consent in good faith already extends to such network interference.¹⁴

Ideally, the Commission should adopt a new rule that would prohibit, as a *per se* good faith violation, any agreements – legally-binding or otherwise – that have the effect of limiting the ability of a station to grant retransmission consent to an MVPD, whether through an outright prohibition, a grant of a veto/pre-approval power before the execution of an agreement, or any other means that has the purpose of influencing or disincentivizing the station's grant of retransmission consent out-of-market.¹⁵

Alternatively, consistent with ACA's earlier comments in the docket, the Commission could clarify that interference by broadcast networks with the ability of a station to exercise its right of retransmission consent violates existing good faith standards. Specifically, the Commission could clarify (i) that Section 76.65(b)(i), which prohibits as a violation of the good faith obligation the refusal by a Negotiating Entity to negotiate retransmission consent, includes any circumstances in which a broadcaster has permitted its network affiliate to influence its exercise of retransmission consent for out-of-market carriage; and/or (ii) that Section 76.65(b)(vi), which prohibits execution by a Negotiating Entity of an agreement with any party, a term or condition of which requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or MVPD, includes a prohibition on a Negotiating Entity entering into an agreement with any party – including a third party such as a broadcast network – that prevents or disincentivizes the Negotiating Entity from entering into a retransmission consent agreement with an out-of-market MVPD. At the very least, the Commission, consistent with its observation in the 2011 NPRM, should clarify that Section 76.65(b)(ii), which

withdraw consent by the network with which it was affiliated on the grounds the station's network affiliation agreement did not allow it to permit out-of-market carriage). As was true in 2011, ACA members are not the only cable operators that have experienced this phenomenon in the past few years. For example, Syracuse station WSYR was forced to cease exportation of its signal to Time Warner Cable stations outside of the Syracuse DMA as a result of its affiliation agreement with the ABC broadcast network. See Letter from Barbara Esbin to Marlene Dortch, Secretary at Exhibit A (filed July 24, 2014). Similarly, Comcast subscribers in the Pittsburgh, PA and Buffalo, NY DMAs can no longer receive Erie-based ABC affiliate WJET due to a prohibition contained in the stations' affiliation agreement with ABC. *Id.* at Exhibit B.

¹³ See ACA NPRM Comments at 54-58; ACA FNPRM Comments at 14-15.

¹⁴ *Id.*

¹⁵ The Commission has already given notice and comment on these proposals in this proceeding, and thus has the authority to adopt either in the current rulemaking. See NPRM, ¶ 22 (seeking comment on whether it should be a *per se* violation for a station to agree to give an affiliated network the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision). This proposal is functionally identical to ACA's proposals to clarify Section 76.65(b)(i) or to adopt the *per se* prohibition as a new rule. Although the Commission has not expressly sought comment on ACA's proposal to reinterpret the scope of the prohibition in Section 76.65(b)(vi) to include a prohibition on a Negotiating Entity entering into an agreement with any party – including a third party such as a network affiliate – that requires the Negotiating Entity not enter into a retransmission consent agreement, or that otherwise disincentivizes the station's grant of retransmission consent, it has generally sought comment on whether to interpret that section more broadly than it has previously. *Id.*, ¶ 27. Because the Commission has already sought comment and developed a record on these issues, there is no legal bar to the adoption of either proposal at this time.

prohibits refusals by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent, includes circumstances where a station has granted a network veto or pre-approval power over any retransmission consent agreement with an MVPD, thus impairing its own ability to designate a representative who can bind the station in negotiations.

As the Commission continues its reform of its broadcast signal carriage rules, it should seek to preserve, to the greatest extent possible, the ability of MVPDs to negotiate retransmission consent with willing sellers for out-of-market signals that satisfy consumer needs, particularly regarding those distant signals that historically have been carried by the MVPD. By taking these measured steps to prohibit network interference with a station's exercise of retransmission consent with respect to significantly viewed signals, in instances where carriage of out-of-market stations serves the public interest, and with existing relationships between MVPDs and out-of-market stations as of the date of the repeal of the exclusivity rules, the Commission can repeal rules it no longer believes necessary while protecting the ability of willing buyers and sellers to negotiate retransmission consent in good faith.¹⁶

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Sincerely,

/s/

Mary Lovejoy

cc: Alison Nemeth

¹⁶ ACA recognizes the difference between protecting the carriage of traditionally offered out-of-market stations, and permitting the carriage of out-of-market stations in areas where they have traditionally not been made available, such as within existing zones of exclusivity as defined under the exclusivity rules. In this Order, ACA believes that the Commission can seek to protect traditionally offered out-of-market stations without needing to rule on whether or not network interference should extend any further.