



August 26, 2013

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

Re: *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent; 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; Promoting Diversification of Ownership in the Broadcasting Services, MB Docket Nos. 10-71, 09-182, and 07-294: Ex Parte Communication*

Dear Ms. Dortch:

The ongoing CBS/Time Warner Cable dispute and accompanying blackout affecting millions of consumers¹ is the latest compelling evidence that the retransmission consent process is in dire need of reform. The retransmission consent system has been manipulated by broadcasters to create a multi-billion dollar additional revenue stream for programming that is already funded by advertising dollars and has resulted in an environment where broadcasters can flout their public interest obligations by blocking consumers' access to desired programming via MVPD (and now, Internet) platforms and where MVPDs have decreased bargaining leverage despite increased retail competition. This is not the environment Congress intended to create when it passed the 1992 Cable Act.

The Independent Telephone & Telecommunications Alliance ("ITTA") is encouraged by recent indications that the Commission is "ready to consider appropriate action" to address this broken process.² While it is disappointing that the Commission has failed to act to date, ITTA remains hopeful that, under new leadership, it will promptly proceed with much needed reforms that would help restore balance to the video distribution marketplace.³

¹ See, e.g., Jeff Baumgartner, "CBS Blocks TWC Broadband Subs from Accessing Full Episodes Online," *Multichannel News* (Aug. 4, 2013), available at: <http://www.multichannel.com/distribution/cbs-blocks-twc-broadband-subs-accessing-full-episodes-online/144786>.

² Kamala Lane, "Clyburn, Rosenworcel Say FCC Could Act on CBS/TWC Dispute, as Satellite Streamlining Order OK'ed," *Communications Daily*, p. 1 (Aug. 12, 2013).

³ As ITTA has previously stated, blackouts should not be a primary measure by which the Commission determines whether there is a marketplace imbalance that requires regulatory

In the past, the Commission has taken a very limited (and incorrect) view of its authority to take necessary action in the retransmission consent context. In fact, the Commission need not wait for either of the parties in the Time Warner Cable/CBS dispute to file a complaint to move forward with retransmission consent reform. As ITTA and others repeatedly have pointed out, the Commission has ample authority under existing law to adopt modifications that would provide meaningful change in the pending retransmission consent rulemaking proceeding that it initiated in 2011.⁴ The changes described below, each of which would provide some measure of relief, should immediately be adopted by the Commission:

- Suspending the network non-duplication and syndicated exclusivity rules so that MVPDs have the flexibility to offer consumers programming through alternative sources.
- Adopting a standstill provision to prevent signal loss for consumers during retransmission consent negotiation impasses.

intervention. The current state of the video marketplace is a significant reason why more blackouts do not occur, particularly with respect to new entrant MVPDs like ITTA member companies who cannot withstand the subscriber churn accompanying a blackout and must capitulate to unreasonable broadcaster demands to offer a competitive product. *See* Letter from Genevieve Morelli and Micah Caldwell, ITTA, to Marlene Dortch, FCC, MB Docket Nos. 10-71, 09-182, and 07-294 (filed May 30, 2012) (“ITTA *Ex Parte*”).

⁴ *See, e.g.*, Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, the National Telecommunications Cooperative Association, the Independent Telephone & Telecommunications Alliance, the Western Telecommunications Alliance, and the Rural Independent Competitive Alliance, MB Docket No. 10-71 (filed May 27, 2011) (“ITTA, *et al.* Comments”). The Commission also has authority to make certain changes to the retransmission consent rules within the context of its quadrennial media ownership review. *See In the Matter of 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; Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket Nos. 09-182, 07-294, Notice of Proposed Rulemaking, FCC 11-186 (rel. Dec. 22, 2011). ITTA has urged the Commission to conclude in that proceeding that broadcast sharing arrangements that permit coordinated retransmission consent negotiations, multicasting arrangements that effectively permit consolidation of multiple networks in a single market, and network interference that prevents affiliates from engaging in independent negotiations run afoul of the media ownership rules. *See* Comments of the Independent Telephone & Telecommunications Alliance, MB Docket Nos. 09-182, 07-294 (filed Mar. 5, 2012). In the retransmission consent context, such behavior should constitute a *per se* violation of the duty to negotiate in good faith. *See* ITTA, *et al.* Comments at 9-12.

- Strengthening the good faith negotiation standard by clarifying that certain behavior constitutes a *per se* violation of the statutory duty to negotiate in good faith, such as:
 - Attempts by parties to deny customers access to significantly viewed out-of-market signals.
 - Other practices that result in increased prices for consumers, such as forced tying, multicast tying, broadband tying, mandatory non-disclosure provisions, and payments rooted in network reverse compensation formulas.
 - The refusal of either party in a retransmission consent negotiation to agree to non-binding mediation in the event of an impasse.

Implementing such modifications to the Commission's rules would help restore balance to the retransmission consent marketplace, minimize the disruption and harm that occurs when consumers lose access both to desired programming and to the benefits of innovation through broadband investment, and promote competition by new entrants such as ITTA member companies whose provision of video services in addition to their voice and data offerings delivers a huge benefit to consumers in the rural and high-cost areas they serve.⁵

The Commission has delayed too long. To create lower prices for consumers and promote competition, the Commission must immediately reform the current retransmission consent process to reflect today's marketplace realities.

Sincerely,



Genevieve Morelli
President



Micah M. Caldwell
Vice President, Regulatory Affairs

⁵ As ITTA has previously pointed out, the precipitous rise in retransmission consent fees harms consumers not only through service disruptions and price increases, but also in terms of the availability and adoption of robust broadband services. ITTA *Ex Parte* at 4. In a 2009 study, the National Exchange Carrier Association found that members offering Internet along with a video component had broadband adoption rates nearly 24 percent higher than those companies offering Internet without access to subscription video services. See NECA Comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (filed Dec. 7, 2009). Under the current retransmission consent regime, money that MVPDs would put back into their systems by way of increased investment in broadband facilities is instead going to retransmission fees that continue to spiral out of control.