November 15, 2013

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

Re: Written Ex Parte Communication in MB Docket No. 10-71

Dear Ms. Dortch:

NAB read with interest Time Warner Cable Inc.'s most recent denunciation of the congressionally established retransmission consent process.[1] TWC's latest missive merely rehashes stale arguments TWC has made in a collection of filings in this proceeding. These arguments have been expressly rejected time and again by the FCC. In several instances, moreover, TWC urges the FCC to adopt rules for broadcasters that TWC would vehemently oppose if such rules were applied to it. TWC's hypocritical, meritless arguments have not improved with time or repetition.

I. TWC's Shopworn Arguments Do Not Change the Simple Fact that the FCC Lacks "Broad Authority" to Regulate Retransmission Consent

- Remarkably, TWC continues to urge the Commission to adopt rules that the FCC has said it lacks the authority to adopt.[2] The FCC's notice in this very proceeding stated that "[w]e do not believe that the Commission has authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations."[3]

[1] Marc Lawrence-Apfelbaum of Time Warner Cable Inc. ("TWC") to Marlene H. Dortch, FCC Secretary (filed Oct. 17, 2013 in MB Docket No. 10-71)("TWC Ex Parte").

[2] TWC Ex Parte at 3, 10-11.

[3] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 27 FCC Rcd 2727-28 ¶ 18 (2011) ("Notice"). In at least four rounds of comment in this proceeding, NAB has discussed the FCC's lack of statutory authority to mandate "interim" carriage, arbitration, mediation, or adjudication. *See, e.g.,* Opposition of the Broadcaster Associations in MB Docket No. 10-71 (filed May 18, 2010) at 63-74 ("Opposition"); Reply Comments of the Broadcaster Associations in MB Docket No. 10-71 (Jun. 3, 2010) ("2010 Reply Comments") at 2-7; Comments of NAB in MB Docket No. 10-71 (May 18, 2011) ("NAB 2011 Comments") at 17-19; Reply Comments of NAB in MB Docket No. 10-71 (Jun. 27, 2011) ("NAB 2011 Reply Comments") at 24-29 (discussing

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- TWC's repetitive calls for imposition of mandatory interim carriage and arbitration/adjudication in the retransmission consent context are highly hypocritical, given that it has stridently opposed both when applied to TWC in other program carriage contexts. For example, while actively urging the Commission to impose mandatory interim carriage requirements on broadcasters, TWC has waged a court battle opposing FCC rules requiring carriage of cable network programming pending the outcome of program carriage complaints.[4] Similarly, in response to an NFL proposal for arbitration in connection with negotiations for carriage of the NFL Network, TWC CEO Glenn Britt stated that, "[w]e continue to believe that the best way to achieve results is to privately seek a resolution and not attempt to negotiate through the press or elected officials."[5]

- The TWC Ex Parte raises only one new argument, which is to urge the Commission to adopt a new regulation singling out television station owners and limiting their ability to fully control their video content on their websites.[6] It is particularly incredible that a party that has devoted hundreds of pages of comments to ensuring that the Commission does not over-regulate the Internet[7] would call for such regulations. It seems once again that TWC supports regulation so long as a similar regulatory "shoe" is not placed on TWC's "foot."

- The availability of video content on websites operated by video content providers is not—and should not be—regulated by the Commission or any other entity. Video content may—or may not—be available via the Internet under a wide range of prices, terms and conditions. It is the general rule that video content providers set the terms for access to their content. Thus, most video content is only made available: (i) during select limited windows; (ii) through a subscription to an Internet-based or application-based service; (iii) on a pay-per-view basis; and/or (iv) in connection with a subscription to a multichannel video programming distribution ("MVPD") service. TWC argues that the Commission should find broadcasters in violation of their duty to

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interim carriage); Opposition at 74-78; 2010 Reply Comments at 1-3, 34-36; NAB 2011 Comments at 19-22, 35-39; NAB 2011 Reply Comments at 24-33 (discussing arbitration and mediation).

[4] *Time Warner Cable Inc., v. FCC,* 729 F.3d 137 (2d Cir. 2013). The rule was vacated on notice grounds. *Id.* TWC will undoubtedly lead an aggressive charge against any Commission effort to re-impose such a requirement on remand.

[5] Jon Lafayette, *NFL Suggests Arbitration in Dispute With Time Warner Cable*, TV WEEK (Dec. 2007).

[6] TWC Ex Parte at 12.

[7] *See, e.g.,* Comments of TWC in GN Docket No. 09-191 (Preserving the Open Internet) and WC Docket No. 07-52 (Broadband Industry Practices) (Jan. 14, 2010); Reply Comments of TWC in GN Docket No. 09-191 (Preserving the Open Internet) and WC Docket No. 07-52 (Broadband Industry Practices) (Apr. 26, 2010).

negotiate retransmission of their signals in "good faith," if they limit access to online video content. Of course, broadcasters are not under any legal or regulatory obligation to provide online content. For many broadcasters, it serves a promotional function. The argument that broadcasters – and only broadcasters – should be penalized for seeking to control their digital rights is simply wrong on its face.

- Contrary to TWC's claims,[8] Section 325(b)(3)(C) is not a basis for regulating the prices, terms, or conditions of retransmission consent. As NAB has previously discussed, this section is: (i) not a basis for regulating retransmission consent under basic principles of statutory construction;[9] (ii) irrelevant with regard to most MVPDs, which either are not subject to basic tier rate regulation in the first place (e.g., direct broadcast satellite) or have now been found to be subject to effective competition;[10] (iii) irrelevant as a practical matter unless the Commission starts regulating the rates actually charged by MVPDs to consumers, because reducing the prices MVPDs pay for retransmission consent would not require MVPDs to reduce consumer rates;[11] and (iv) a red herring because so few MVPD dollars go towards retransmission consent when comparing retransmission fees to MVPD operating revenues or amounts paid for other programming.[12]

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[8] TWC Ex Parte at 2-3.

[9] Opposition at 69-71; Letter from Erin L. Dozier of NAB to Marlene H. Dortch, FCC Secretary (filed Aug. 26, 2010 in MB Docket No. 10-71)("NAB Aug. 26, 2010 Ex Parte") at 3; NAB 2011 Reply Comments at 20-23.

[10] Opposition at 30-32; NAB Aug. 26, 2010 Ex Parte at 3; Supplemental Comments of NAB in MB Docket No. 10-71 (May 29, 2013) ("NAB Supplemental Comments") at 5 ("with increasingly rare exceptions, retail cable rates are not regulated by the Commission or by local authorities").

[11] NAB Aug. 26, 2010 Ex Parte at 3; NAB 2011 Comments at 41-42 ("only regulation of MVPD retail rates would ensure a reduction in subscriber rates"); NAB 2011 Reply Comments at 45-47; NAB Supplemental Comments at 5 ("[i]n the absence of some binding requirements, there is no assurance that any savings would be passed on to consumers").

[12] NAB Supplemental Comments at 4-5 (2013 SNL Kagan estimates show that retransmission consent fees are equivalent to only 2.7 percent of cable industry's *video-only* revenues, and would be a considerably smaller percentage of total revenues; 2011 Multichannel News analysis estimated that only *two cents* of every dollar of cable revenue go to broadcast retransmission consent fees, while *20 cents* of every dollar go to cable programming fees); NAB 2011 Reply Comments at 22; NAB 2011 Comments at 41-47; Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 6 (May 27, 2011) ("Declaration"), attached to NAB 2011 Comments as Attachment A at 11-24 (retransmission consent fees represent a tiny fraction of MVPD costs, an even smaller percentage of MVPD revenues, and are not responsible for increasing consumer prices); Opposition at 45-50; NAB Aug. 26, 2010 Ex Parte at 2 ("the record reflects that MVPD revenues and profits are increasing at a rate that outpaces all of their programming costs, and that retransmission consent fees represent only a small fraction of programming costs"); Jeffrey A. Eisenach and Kevin W. Caves, Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon (Apr. 2010) ("Navigant Report") at 21-22 (programming costs

- TWC is wrong to suggest that the FCC has been "unwilling to enforce" good faith requirements.[13] In over twenty years and thousands upon thousands of retransmission consent negotiations, a very small number of complaints have been filed. Indeed, in spite of TWC's generalized allegations against nobody in particular, NAB is unable to identify even a single good faith negotiation complaint ever filed by TWC. If the "boogeyman" of broadcaster failure to negotiate in good faith were real, the evidence would be found in the filing of complaints about actual, specific broadcaster conduct. But as TWC is well aware, the only instance in which any party has been found to have violated the duty to exercise good faith was where a cable operator failed to do so, and this despite the fact that for many years, the good faith obligation applied only to broadcasters.[14] This is to say nothing of those instances in which MVPDs have flagrantly violated the statutory retransmission consent obligation and simply illegally used a broadcaster's signal without consent.[15] TWC has no basis for its claim that the Commission is failing to enforce its rules.

- TWC also, again, contends that joint negotiations involving more than one broadcaster should be prohibited by the FCC,[16] even while cable operators face no limitations on their ownership or subscribership and no limits on their ability to negotiate across multiple systems or markets. As NAB has repeatedly explained: (i) joint retransmission consent negotiations are optional – broadcasters offer to negotiate deals either separately or together; (ii) cable

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are rising slower than MVPD revenues, slower than other components of MVPD costs, and slower than MVPD profits, while retransmission fees make up a small fraction of programming costs, and an even smaller percentage of MVPD revenues); Jeffrey A. Eisenach, Video Programming Costs and Cable TV Prices, at 5-15 filed by The Walt Disney Company in MB Docket Nos. 10-71 et al. (Apr. 23, 2010) (conducting similar analysis with similar results).

[13] TWC Ex Parte at 3, 10.

[14] Opposition at 7, citing *Letter from Steven F. Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable TV*, 22 FCC Rcd 4933 (2007) (cable operator failed to meet good faith standard); *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc*., 22 FCC Rcd 47 (2007) (broadcaster met good faith standard); *EchoStar Satellite Corp. v. Young Broadcasting, Inc*., 16 FCC Rcd 15070 (2001) (broadcaster met good faith standard while complaining MVPD was admonished for abuse of Commission processes and lack of candor).

[15] *See, e.g*., *TV Max, Inc. and Broadband Ventures Six, LLC*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 9470 (2013)(finding that a cable operator willfully and repeatedly violated Section 325 by retransmitting the signals of six television broadcast stations without their consent and imposing a $2.25 million forfeiture*); Bailey Cable TV, Inc.*, Forfeiture Order, 27 FCC Rcd 7470 (2012)(finding that a cable operator willfully and repeatedly violated Section 325 by retransmitting the signal of Station WGMB-TV and imposing a $15,000 forfeiture); *Bailey Cable TV, Inc.*, Forfeiture Order, 27 FCC Rcd 7473 (2012)(finding that a cable operator willfully and repeatedly violated Section 325 by retransmitting the signal of Station WVLA-TV and imposing a $15,000 forfeiture).

[16] TWC Ex Parte at 11-12.

operators sometimes *affirmatively request* joint negotiations, likely for reasons of efficiency and transaction cost savings; and (iii) the pay television industry has identified no public interest harms associated with such joint negotiations.[17]

II. Retransmission Consent is a Market-Driven Process that Pay TV Wants to Skew for Its Own Economic Gain

- Retransmission consent is not an "artificial construct" as alleged by TWC.[18] Congress fundamentally disagreed with TWC's apparent view that it is somehow "natural" for cable operators to take broadcasters' signals without consent and resell them to subscribers at great profit.[19] Rather, Congress enacted the retransmission consent to "address what had become an artificial, dysfunctional, and asymmetrical regulatory framework that had impaired the natural, competitive local market for the distribution of local television programming."[20]

- Contrary to TWC's claims,[21] territorial exclusivity is not created by any legislative or regulatory body, but by private, market-based negotiations between broadcasters and programmers. The FCC's enforcement process in no way serves to "insulate" retransmission consent negotiations from the marketplace.[22] The hypocrisy of TWC's position on this issue should be lost on no one. Cable and other MVPD interests decry broadcasters' privately negotiated programming contracts, but wish to continue enjoying their own privately negotiated exclusive programming deals.[23]

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[17] *See, e.g.,* 2010 Reply Comments at 18-24; NAB 2011 Comments at iv, 23-33; NAB 2011 Reply Comments at 47-53; NAB Supplemental Comments at 12-18.

[18] TWC Ex Parte at 4.

[19] NAB Supplemental Comments at 6, quoting S. Rep. No. 92, 102d Cong., 1st Sess. 35 (1991) (concluding that cable's appropriation of broadcast signals "created a distortion in the video marketplace" and that "public policy" should not "support[] a system under which broadcasters" effectively "subsidize" their "chief competitors"). *See also* Opposition at 14 and NAB 2011 Reply Comments at 5 (quoting same legislative history).

[20] Opposition at 11. *See also* Opposition at 11-22; NAB 2011 Reply Comments at 7-11; NAB Supplemental Comments at 6.

[21] TWC Ex Parte at 4-5.

[22] Opposition at 22-26 and Appendix B; 2010 Reply Comments at 10-11; NAB 2011 Comments at 55-62; NAB 2011 Reply Comments at 53-61.

[23] *See* Opposition at 26; Letter from Erin L. Dozier of NAB to Marlene H. Dortch, FCC Secretary (filed Feb. 3, 2011 in MB Docket No. 10-71) at Attachment p. 2 (discussing DIRECTV's NFL Sunday Ticket); NAB 2011 Reply Comments at 55 ("Ironically and without justification, MVPDs only want intervention with regard to broadcast programming relationships, not other programming relationships, including their own exclusive ones.").

- Although TWC apparently believes it has uncovered new information in its two-page discussion of compulsory copyright licenses,[24] its argument is entirely disingenuous. Broadcasters are not "negat[ing]" the copyright regime when they seek fair compensation for MVPDs' carriage of their signals. Congress was well aware of the copyright regime in place when it established retransmission consent, and it specifically established retransmission consent as a right separate and apart from copyright. Indeed, even as TWC laments having to pay retransmission consent fees for valuable broadcast signals, it and other MVPDs benefit from a "royalty-free" copyright regime in local markets, which does not provide broadcasters with *any* copyright compensation for distribution of local market signals. Neither retransmission consent itself, nor current negotiations, nor any FCC activity has modified the distinction between the copyright and retransmission consent regimes.

III. Changes to the Marketplace Do Not Undermine the Need for a Market-Based System of Negotiations for Retransmission Consent

- The TWC Ex Parte devotes roughly two pages to discussing the familiar refrain that "the marketplace has changed."[25] TWC laments that it is disadvantaged only recently by a phenomenon called competition. Broadcasters wish to welcome TWC into the fold. We have innovated to survive in a marketplace of robust competition from other stations, cable programming networks, cable and satellite operators, and myriad online competitors. After enjoying monopolies or near-monopolies in local markets for so long, the cable industry apparently believes that only government intervention can protect it from the brave new world of competition. Changes to the marketplace in no way undercut the need for a market-based mechanism for negotiation of retransmission consent.[26] Moreover, in spite of this competition, the MVPD industry is even more highly concentrated at the national, regional and local levels than in the past.[27] As the

[24] TWC Ex Parte at 4-6.

[25] TWC Ex Parte at 6-8.

[26] *See, e.g.*, NAB Supplemental Comments at 6-7 (explaining why rationales for retransmission consent are valid and important today).

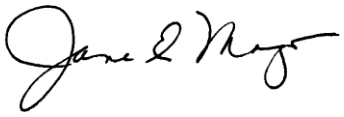
[27] *See, e.g.*, NAB Supplemental Comments at 8-11 (discussing broadcaster incentives to negotiate in light of MVPDs' significant shares of local markets and other leverage); 2011 Reply Comments at 12-15 (discussing how the emergence of some competition among MVPDs has not resulted in decreased leverage for MVPDs in retransmission consent negotiations); NAB 2011 Comments at 28-32 and Declaration at 5-7; 2010 Reply Comments at 19 ("With the unfettered rise of cable clustering, broadcasters are often faced with the possibility that a failed negotiation with a particular cable company will cause it to lose MVPD access to large percentages of households in a given market…Such circumstances clearly tip the balance of bargaining power towards an MVPD"); Opposition at 39-44 (discussing how MVPDs retain market leverage).

U.S. Court of Appeals for the Second Circuit recently observed, the cable industry remains characterized by significant levels of horizontal concentration and vertical integration,[28] particularly in certain geographic areas where cable may exercise market power due to rising consolidation and clustering.[29]

NAB urges the Commission to reject TWC's repetitious and hypocritical arguments, which remain as unmeritorious as they were the first several times they were brought to the Commission's attention.

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,



Jane E. Mago
Executive Vice President and General Counsel
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cc: Chairman Wheeler, Commissioner Clyburn, Commissioner Rosenworcel, Commissioner Pai, Commissioner O'Rielly, Maria Kirby, Sarah Whitesell, Holly Saurer, Matthew Berry

[28] *Time Warner Cable Inc., v. FCC,* 729 F.3d 137, 161-163 (2d Cir. 2013).

[29] *Id.* at 162*, quoting Cablevision Sys. Corp. v. FCC*, 695, 712 (D.C. Cir. 2011) ("[C]lustering and consolidation in the industry bolsters the market power of cable operators because a single geographic area can be highly susceptible to near-monopoly control by a cable company.").