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VIA ECFS

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

Re: *Ex Parte* Communication in: MB Docket No. 15-216 (Good Faith Negotiation); MB Docket No. 10-71 (Retransmission Consent); MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Local Media Ownership); MB Docket No. 17-318 (National Ownership Cap); GN Docket No. 16-142 (ATSC 3.0); MB Docket No. 17-179 (Sinclair-Tribune)

Dear Ms. Dortch:

On March 22, 2018, representatives of the American Cable Association ("ACA") and executives of four member companies – Chris Kyle of Shentel, Sara Cole of TDS Telecom, Andrew Davis of Fidelity Communications, and Elaine Partridge of Vast Broadband – met with the Media Bureau and media advisors for Chairman Pai and each of the Commissioners to discuss retransmission consent, media ownership, and the *Sinclair-Tribune* proceeding.

To begin with, each ACA member company executive described their experiences during their most recent round of retransmission consent negotiations. The result of those negotiations was a significant increase in retransmission consent fees across the board. Because each company's video margins are so thin already, each company determined that it had no choice but to pass the fee increases on to consumers, such that subscribers' bills, in some cases, have increased by four dollars per month or more.

ACA representatives asked the Commission to consider the experiences of these ACA members as it moves forward with certain ongoing proceedings and to avoid taking any steps that might inadvertently lead to higher prices and consumer harm. In particular, ACA and its members asked that the Commission consider that, based on both anecdotal and empirical evidence:

- Multichannel video programming distributors ("MVPDs") pay much more to broadcasters that control more than one "Big Four" network affiliate in a market than those that do not. The Commission should weigh this harm against the alleged benefits of top-four duopolies, including in the pending *Sinclair Tribune* proceeding.

- MVPDs pay much more to larger broadcasters than to smaller ones – in one case, nearly ***50 percent more***. Here again, the Commission should weigh this harm against the alleged benefits of consolidation, including in the pending *National Cap NPRM*.

ACA representatives also discussed the impact of local and national consolidation in the *Sinclair-Tribune* proceeding and explained why applicants have yet to provide the information necessary for the Commission to engage in a public interest analysis of that transaction.[1]

I. ACA Member Company Participants.

Executives from four ACA member companies attended the meetings:

- Chris Kyle, Vice President – Industry Affairs and Regulatory, **Shentel**. Shentel provides broadband, video, and voice services to subscribers in rural Virginia and southern West Virginia. Shentel's territories include some of the poorest counties in the United States.

- Sara Cole, Regulatory Counsel, **TDS Telecom**. TDS Telecom provides video services both as a cable and IPTV provider. As a cable provider, TDS offers services primarily in Colorado, New Mexico, Texas, and Oregon, where it does business as Bend Broadband. The IPTV operation is considerably smaller than the cable operation and provides video service to rural and suburban communities in Georgia, Indiana, Minnesota, New Hampshire, Tennessee, and Wisconsin.

- Andrew Davis, Vice President Programming & Vendor Contracts, **Fidelity Communications**. Fidelity is a third-generation, family-owned former rural ILEC. It offers services to mostly rural locations in five Midwest states.

- Elaine Partridge, Vice President of Special Projects, **Vast Broadband**.[2] Vast Broadband provides services to roughly 50,000 subscribers in South Dakota and southwestern Minnesota.

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1 The member company executives each noted that their agreements with broadcasters contain confidentiality provisions limiting the extent to which they could disclose information. They each stated that they would not challenge a Commission instruction to submit such agreements for review, subject to appropriate protective orders. *See, e.g.*, *CBS Corp. v. F.C.C.*, 785 F.3d 699 (D.C. Cir. 2015) (resolving concerns by broadcasters about the disclosure of their carriage agreements).

2 Ms. Partridge attended only the meeting with Media Bureau staff. A complete list of meeting attendees can be found in Appendix 1, attached.

II. The Retransmission Consent Marketplace Continues to Grow More Dysfunctional.

Each of the ACA member companies represented at the meetings negotiates or is familiar with their companies' retransmission consent agreements. Retransmission consent negotiations typically correspond with each "election cycle," the most recent of which ended last December 31. Each of the executives stated unequivocally that the most recent set of negotiations was by far the worst he or she had ever seen. Each characterized the "marketplace" for retransmission consent negotiations as entirely dysfunctional.

Price. Each of the executives reported that broadcasters imposed enormous price increases during the most recent set of negotiations.[3]

- One executive reported passing through price increases of $4 or even higher per month, depending on the community. The other executives reported similar increases.[4] The executives described these price increases as "entirely pass-through" of retransmission consent fees. That is, the rate increases solely reflected increases in rates negotiated in retransmission consent agreements – and included *no* markup from the cable operator.

- One executive reported a 61 percent increase in the rates paid to "Big Four" network affiliates in the most recent round of agreements. Another reported "Big Four" affiliate increases as high as 45 percent.

- The executives referred to these rate increases as "pure cost." That is, they did not reflect payments for more or better programming (such as more local news).

Tying. Each of the executives noted that the price increases described above actually *underestimate* the harm caused by the most recent set of retransmission consent agreements. They explained that, in addition to rate increases, broadcasters insisted that they carry *and pay for* additional, undesired programming as part of the "price" of carrying "Big Four" network affiliates.

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3 These increases correspond with those generally reported by numerous ACA member companies in a recent survey. Press Release, American Cable Association, Corporate Broadcasters Force Exorbitant Rate Increases on Cable Customers (Feb. 16, 2017), http://www.americancable.org/corporate-broadcasters-force-exorbitant-rate-increases-on-cable-customers/ ("ACA members reported that they will be forced to pay corporate broadcasters an average of 88% more in 'retrans' fees by 2020. Based on ACA's calculations, members were paying $11.00 on average per subscriber per month in 2017, which will increase to an average of $19.00 per subscriber per month by 2020. Nearly a quarter of those surveyed will see a drastic jump of at least 100% in fee increases in the next three years, and in one case that jump is expected to be 302%.").

4 Again, this reflects the industry-wide responses provided by ACA member companies earlier this year. *See id.* ("Retrans fees are the fastest growing part of customers' cable bills. For example, in some cases, cable subscribers across the country could see up to $15.00 in retrans fees in their monthly cable bills by 2020.").

- The executives reported that broadcasters required them to carry *and* pay significant sums for affiliates of the CW, MyNetwork, or other networks in order to receive "Big Four" network affiliates. They each stated that they assigned little or no value to what one characterized as "tag-along" channels. Nonetheless, the companies had no choice but to carry these low-value stations as a condition of carrying must-have "Big Four" stations.

- Several executives also reported that broadcasters required them to carry, and pay significant sums for, multicast channels with even more obscure (and less valuable) network affiliations. Indeed, several reported that broadcasters often change the affiliation of these multicast channels at random, with no notice to them or their subscribers. One described a "merry-go-round" of changes to multicast channels every three months or so. This executive noted that customers have not complained about these changes – suggesting that broadcaster claims to be serving the goal of localism through their multicast offerings may be exaggerated.

- The executives also reported having to carry, and pay for, affiliated *national cable* channels. For example, several of them described having to launch and pay for the Tennis Channel, WGN America, or both as the "price" of reaching an agreement with Sinclair. They described these channels as having little independent value to them. Indeed, one described having dropped the Tennis Channel previously because of demonstrated subscriber disinterest. Now, however, this member company has had to reinstate the Tennis Channel. The company would have preferred to instead add a regional sports network with programming of much more interest to its subscribers.

- The executives emphasized that the "price" of this most recent set of tying cannot be measured merely in dollars – or even in the "opportunity cost" of not carrying more popular or preferable alternate programming. As one executive explained, devoting capacity to unwanted *video programming* invariably comes at the expense of *broadband*. Thus, broadcasters' demands limited the total capacity that could be devoted to broadband, particularly in channel locked systems, such as those that have not yet transitioned fully to digital technology.

ATSC 3.0. Each executive stated that broadcasters asked for, or even demanded as a condition, provisions regarding ATSC 3.0 carriage. The executives also noted that, because we remain in the early stages of the ATSC 3.0 transition, they cannot yet know precisely what will be required of them, or how much they will have to spend to comply with ATSC 3.0-related provisions in their contracts.

Localism. Each of the executives noted that the most recent round of retransmission consent negotiations had a distinctly "corporate" flavor. As one put it, gone are the days in which the company would negotiate with local station general managers about issues of importance to the local community. This time around, the executive observed, the individual negotiating on behalf of a local station sometimes did not even know the call signs of the station he or she was representing.

III. The Commission Should Avoid Inadvertently Exacerbating Problems in the Retransmission Consent Market.

In light of their experiences during the last round of retransmission consent negotiations, ACA member company executives expressed concern that the Commission might inadvertently exacerbate problems through proposed actions in several ongoing proceedings. In particular, and as discussed below, the executives expressed concerns about local media ownership,[5] the national ownership cap,[6] and the *Sinclair-Tribune* proceeding.[7]

1. Local Media Ownership.

ACA representatives urged the Commission to account for retransmission consent-related harms in considering requests to create new "top-four" duopolies.[8] They first noted that the Commission, in adopting a rule to prohibit joint negotiation between two or more non-commonly owned "top-four" stations in the same market, has already found that permitting such joint negotiation will "invariably tend to yield" higher retransmission consent fees.[9] It also has found

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[5] *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802 (2017) ("*Local Ownership Reconsideration*").

[6] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 32 FCC Rcd 10785 (2017) ("*National Cap NPRM*").

[7] *Media Bureau Establishes Pleading Cycle for Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc. and Permit-But-Disclose Ex Parte Status for the Proceeding*, Public Notice, 32 FCC Rcd 5481 (MB 2017); March 2018 Amendment to June Comprehensive Exhibit, (filed Mar. 6, 2018) ("March Amendment"). The March Amendment replaced an earlier "February 2018 Amendment to June Comprehensive Exhibit" (filed Feb. 20, 2018) ("Feb. Amendment"). Applicants now suggest that they will replace the March Amendment with a new formulation. *See* Letter from Miles Mason, Counsel to Sinclair Broadcasting Group, Inc., to Marlene Dortch, Secretary, FCC, MB Docket No. 17-179 (filed Mar. 19, 2018).

[8] By "top-four duopolies," we refer to ownership of two or more top-four, full power, overlapping stations specifically prohibited by the Commission's local ownership rules. 47 C.F.R. § 73.3555. More broadly, we refer to combinations of the "Big Four" networks within a single market – whether or not they fall within the specific prohibition – as "Big Four combinations." The Commission's rules permit broadcasters to obtain "Big Four" combinations through acquisition of low power stations or through multicast arrangements.

[9] *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, ¶ 10 (2014) ("*Joint Negotiation Order*") ("[J]oint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees.").

that such increases may create "pressure for retail price increases."[10] Furthermore, it has found that the harms caused thereby "outstrip any efficiency benefits" from joint negotiation.[11] The Commission's prohibition on joint negotiation was later codified and expanded by Congress.[12] The Department of Justice then relied on similar conclusions in requiring divestitures in the Nexstar-Media General merger.[13]

Several of the ACA member company executives negotiate with station groups controlling more than one of the "Big Four" (CBS, ABC, NBC, and FOX) affiliates in a single market.[14] Each company's experience reflects the Commission's prior findings. As one executive put it, an MVPD might be able to survive the loss of one "Big Four" network in a local market, but losing more than one would be "unbearable." Another referred to such an outcome as "self-destruction."

The executives specifically confirmed that they pay substantially more for broadcasters with "Big Four" combinations in a single market than they pay for broadcasters without such combinations. One noted that the station group with a "Big Four" combination commands substantially higher fees than any other broadcaster in the markets in question. The other executives reported similar disparities between rates paid to broadcasters with duopolies and rates paid to those without. These executives reported that duopolies also invariably demand – and obtain – more onerous non-price terms, including tying, after-acquired station clauses, and ATSC 3.0 carriage.

The Commission recently changed its local ownership rules to allow broadcasters to demonstrate that particular "top-four" duopolies in a market serve the public interest.[15] The Commission will soon consider the first such application in the form of Sinclair's proposed purchase of Tribune's stations.[16] The ACA member company executives each stressed how important it is for the Commission to account for retransmission consent-related harms in any

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10 *Id.*, ¶ 17.

11 *Id.*, ¶ 10 ("With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers.").

12 STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2060, § 103(a); 47 U.S.C. § 325(b)(3)(C)(iv) (subsequent legislation requiring the Commission to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent under this section to a[n MVPD], unless such stations are directly or indirectly under common *de jure* control permitted under the regulations of the Commission…").

13 *See United States v. Nexstar Broad. Grp.*, Competitive Impact Statement at 8 (D.D.C. Sept. 2, 2016) (No. 1:16-cv-01772-JDB), *available at* https://www.justice.gov/atr/case-document/file/910661/download.

14 Despite the fact that the Commission's rules generally prohibit ownership of more than one top-four station in a single market, 47 C.F.R. § 73.3555, broadcasters have been able to obtain duopolies through waivers, ownership of low-power stations, or through multicast carriage.

15 *Local Ownership Reconsideration*, ¶¶ 78-82.

16 *See* March Amendment.

such analysis. In ACA's view, the Commission cannot rationally (or lawfully) conclude that requests for local duopolies serve the public interest without both quantifying the harms it has already identified related to retransmission consent and determining that the claimed benefits of the duopoly outweigh these and other harms.[17]

2. National Media Ownership.

ACA representatives also urged the Commission to account for retransmission consent-related harms in considering whether to increase or eliminate the national ownership cap. The national cap limits entities from owning television stations that, in the aggregate, reach more than 39 percent of the television households in the country, subject to a 50 percent UHF discount.[18]

ACA member company executives reported that their own experiences reflect empirical evidence previously submitted to the Commission showing that an increase in the existing national cap will invariably lead to higher prices. One executive stated that the member company pays 47 percent more for stations owned by large broadcast groups than for smaller, independent station groups. Each of the other executives concurred – reporting that their member companies pay more for stations owned by larger broadcast groups than independent stations and those owned by smaller groups. The executives also stated that larger broadcast groups also obtain more onerous non-price terms. They stated that larger broadcast groups invariably have *less* connection with their local communities, offer less truly local news and other programming, and generally seem to care less about the success of negotiations with smaller cable operators.

Thus, each of the ACA member company executives emphasized the importance of accounting for retransmission consent-related harms in any consideration of the national ownership cap. If their individual experiences hold true industry-wide, as the executives believe they do, relaxing the cap will cause significant consumer harm – harm that would have to be outweighed by corresponding consumer benefits.

The experience of these ACA member company executives corresponds with the evidence already in the record on the relationship between broadcast group size and retransmission consent pricing. Both economic theory and the best empirical evidence available to the Commission – in the form of two econometric studies submitted by DISH in the *Sinclair-*

[17] The Commission must take its earlier findings into account or explain why they are no longer valid or otherwise should not apply, in order to meet its obligations under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545–49 (1978); *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In addition, the Commission cannot ignore evidence and arguments placed in the record in individual proceedings considering duopolies. *State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.").

[18] 47 C.F.R. § 73.3555(e).

Tribune proceeding[19] – suggest that increasing the national cap beyond its current level will lead to higher retransmission consent rates.[20] ACA has suggested that the Commission's new Office of Economics and Analytics should conduct an econometric analysis based at least in part on DISH's *Sinclair-Tribune* analysis to help the Commission balance the harms and benefits of relaxing the national cap. ACA also suggested that broadcasters, as the parties seeking to make the case for the rule change, should bear the burden of providing the data necessary for such an analysis.[21]

3. *Sinclair-Tribune* Proceeding.

ACA representatives noted that the pending *Sinclair-Tribune* proceeding raises all of the local and national ownership issues discussed above. With respect to local ownership, Sinclair has submitted the very first request for the Commission to approve top-four duopolies under recent revisions to its rules.[22] Yet Sinclair and Tribune fail to even acknowledge retransmission consent issues in their public interest showing.[23] ACA representatives urged the Commission not to likewise ignore these issues. They also urged the Commission not to ignore the evidence in the record suggesting that the *national* consolidation resulting from the proposed transaction will harm the public.

ACA representatives also discussed procedural concerns first raised in a letter filed on March 12.[24] As set forth in more detail in that letter, Sinclair's most recent proposal – to replace divestiture trusts with temporary waivers in certain markets – could result in automatic and, in some cases, permanent price increases. In that letter, ACA described how such "laundering" would work and the substantive concerns it would raise.[25] Here, ACA representatives emphasized the procedural aspects of this problem: *ACA member companies cannot evaluate the potential harm the "laundering" described above will cause unless they at least know: (1) which stations Sinclair proposes to divest; (2) the parties to whom it proposes to divest; and (3) the terms under which it proposes to divest*. Yet this is precisely the information that Sinclair

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19 *See Media Bureau Establishes Pleading Cycle for Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc. and Permit-But-Disclose Ex Parte Status for the Proceeding,* MB Docket No. 17-179, Petition to Deny of DISH Network L.L.C., Exh. D, Declaration of Janusz Ordover (filed Aug. 7, 2017) ("Ordover Decl."); Reply Comments of DISH Network, L.L.C., Exh. C, Reply Declaration of Janusz Ordover (filed Aug. 29, 2017) ("Ordover Reply Decl.").

20 *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318, Comments of the American Cable Association (filed Mar. 19, 2018) ("ACA National Cap Comments").

21 *Id.* at 7.

22 March Amendment at 9.

23 Indeed, Applicants only *mention* retransmission consent in relation to revenue estimates. *See* March Amendment at 2, n.4 (describing *Media Ownership Reconsideration Order*); 13 (revenue data in Greensboro); 13, n.33 (same); 13, n.34 (same); 13, n.35 (same); 21, n.54 (revenue data in Indianapolis).

24 Letter from Ross Lieberman, Senior Vice President of Government Affairs, American Cable Association, to Marlene Dortch, Secretary, FCC, MB Docket No. 17-179 (filed Mar. 12, 2018).

25 *Id.* at 2.

refuses to provide to the Commission. ACA representatives thus urged the Commission not to place Sinclair's amendment on public notice unless and until this information becomes available.

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

Sincerely,

Mary C. Lovejoy

cc: Meeting participants (see Appendix 1)

Appendix 1: Meeting Participants

Representing ACA:

Sara Cole, TDS Telecom; Andrew Davis, Fidelity Communications; Chris Kyle, Shentel; Elaine Partridge, Vast Broadband (Media Bureau meeting only); Ross Lieberman, ACA (Nemeth, Ericson, and Swarztrauber meetings only); Mary Lovejoy, ACA; Elizabeth Cuttner, Cinnamon Mueller, counsel to ACA; Michael Nilsson, Harris, Wiltshire & Grannis LLP, counsel to ACA.

Media Bureau Staff:

Michelle Carey, Mary Beth Murphy, Sarah Whitesell, Martha Heller, Brendan Holland, Diana Sokolow, Ty Bream, Eugene Kiselev, Jamile Kadre, Kim Makuch, Barbara Kreisman, Kim Matthews, Andrew Wise, Steve Broeckaert, Dave Roberts, Varsha Mangal, Chad Guo.

From Chairman Pai's Office:

Alison Nemeth
Alison Cheperdak

From Commissioner Clyburn's Office:

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From Commissioner O'Rielly's Office:

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