September 30, 2015

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

Re: Notice of Ex Parte Communication, MB Docket No. 10-71

Dear Ms. Dortch:

Throughout the Commission’s proceeding examining its broadcast television network non-duplication and syndicated exclusivity rules (“exclusivity rules”), the American Cable Association (ACA) has advocated for the Commission to significantly limit, if not altogether prohibit, the ability of local stations to contract for exclusivity with television networks and syndicators. Indeed, ACA has championed this position since at least 2005. In a written public statement released just last week, however, ACA reversed its longstanding position seeking to prohibit broadcasters from entering into exclusive arrangements. The National Association of Broadcasters (“NAB”) herein submits ACA’s written statement for the record in this proceeding, and requests that the FCC no longer entertain ACA’s request to limit in some way broadcasters’ ability to contract for exclusivity.

In March 2014, the FCC issued a Further Notice of Proposed Rulemaking, seeking comment whether to maintain its local exclusivity rules. In response, ACA reiterated its long-held position¹ that, should the Commission eliminate the exclusivity rules, it must also “prohibit all forms of television network and local station interference with the exercise of retransmission consent by stations otherwise willing to grant out-of-market carriage and with the ability of MVPDs to carry out-of-market stations under such circumstances.”² ACA has similarly claimed that eliminating the exclusivity rules would be an “empty gesture with respect to improving the retransmission consent negotiating environment unless the Commission also prohibits network interference with a station’s grant of out-of-market retransmission consent.”³

¹ See Petition for Rulemaking to Amend 47 C.F.R. 76.64, 76.93, and 76.103, American Cable Association, RM-11203 (filed March 2, 2005).
³ Id. at 18.
In an ex parte letter earlier this month, ACA banged its contractual limitation drum yet again to call for a bar on the right to engage in exclusive contracts:

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.*  

ACA’s interventionist view is particularly alarming because it would put the FCC in the position of editing the terms of lawfully negotiated private contracts. Specifically, ACA has been asking the FCC to prevent networks and syndicators from contracting to preserve stations’ local exclusivity. If a content owner cannot prohibit stations from simply granting retransmission consent to whomever they please, that necessarily threatens other local broadcasters’ ability to preserve the integrity of their local markets. It’s impossible to read ACA’s repeated requests any other way.

Fortunately, ACA publicly revised its position just last week. In a statement released to the press on September 24, 2015, ACA President Matt Polka declared that ACA no longer seeks to cabin privately negotiated exclusivity protections beyond one narrow exception. Mr. Polka announced that “ACA’s position has always been that should the FCC repeal the exclusivity rules, it should seek to protect traditionally offered out-of-market stations, like significantly viewed stations, at the same time, and *does not need to limit other types of exclusivity arrangements.*”

In other words, ACA now supports broadcasters negotiating for exclusivity with networks and syndicators except in the limited circumstance where a historically significantly viewed station has been carried under the FCC’s longstanding exclusivity rules. While NAB doesn’t believe that the FCC should be writing affiliation and syndication agreements in any respect, NAB is relieved that ACA has adopted a less extreme position in its sustained efforts to limit payments to the content owners that drive consumers to its pay service.

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4 See Ex Parte Letter from Mary C. Lovejoy, Vice President of Regulatory Affairs, American Cable Association in MB Docket No. 10-71 (filed Sept. 1, 2015) (emphasis added)]

Finally, it is worth noting that ACA’s concern that some stations may seek to take advantage of the exclusivity rules’ elimination by expanding their zone of exclusivity through affiliation agreements can be better addressed by simply maintaining the rules, and the various exceptions to the rules, as they now exist. In its statement, ACA identified one of many possible unintended consequences should the Commission eliminates the rules. Rather than throw the entire well-established regime of local signals/local carriage into flux and hope for the best, there is no better option than to keep these effective rules in place.

Respectfully submitted,

Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs

Enclosure
ACA Fires Back at NAB Over Exclusivity
Says it is not against contractual exclusivity

9/24/2015 03:27:00 PM Eastern

By: John Eggerton

The war of words between cable operators and broadcasters (and the government) over carriage and exclusivity issues continued apace Thursday, with the American Cable Association responding to the National Association of Broadcasters, which invoked ACA in its response to an FCC blog on exclusivity rules.

Following FCC Media Bureau chief Bill Lake's blog calling for an end to the syndicated exclusivity and network nonduplication rules, which FCC chairman Tom Wheeler has proposed, the National Association of Broadcasters fired back Wednesday in a blog by NAB executive Rick Kaplan. He said Lake was trying to rewrite history with a fatally flawed attempt to defend the chairman and reverse "the palpable lack of enthusiasm for the Chairman’s plan."

He also, almost as a throwaway line at the end, said that "even the American Cable Association (ACA) only supports the change insofar as it leads to the Commission outlawing exclusive broadcaster arrangements altogether."

ACA begged to differ, and said so in a statement Thursday.

“ACA believes is it important to point out that NAB mistakes ACA's position in its blog -- namely, that the FCC should outlaw exclusivity arrangements entered into through private contract altogether," said ACA president Matthew Polka. "ACA’s position has always been that should the FCC repeal the exclusivity rules, it should seek to protect traditionally offered out-of-market stations, like significantly viewed stations, at the same time, and does not need to limit other types of exclusivity arrangements."
Polka took his criticism a step further. "Such a blatant mistake warrants policymakers who read the NAB blog to fact-check all of NAB’s claims in the blog to make sure they are not also mischaracterized."

“Facts are stubborn things,” said NAB spokesperson Dennis Wharton. "Instead of engaging in doublespeak, if ACA simply reviewed the record it would realize that it or its lawyers absolutely have asked the Commission to bar all forms of exclusivity contracts. ACA is either suffering from short-term memory loss or presenting disingenuous arguments to the Commission.”