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August 2, 2013

EX PARTE – VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Re: ***Amendment of the Commission's Rules Relating to Retransmission Consent,* MB Docket No. 10-71**

Dear Ms. Dortch:

Time Warner Cable Inc. ("TWC") hereby submits this *ex parte* letter to provide the Commission with additional evidence regarding the harms caused by the broken retransmission consent regime and the urgent need for reform. As has been widely reported in the press, TWC and CBS Corp. ("CBS") were unable to reach a new retransmission consent agreement for CBS's owned-and-operated ("O&O") stations in TWC's service areas before the expiration of the parties' prior agreement on August 2, 2013. CBS now has withdrawn retransmission consent for those O&O stations, leaving TWC subscribers without access to CBS programming in major markets such as New York, Los Angeles, and Dallas/Fort Worth. Like so many other retransmission consent disputes in recent years, this impasse stems from the broadcaster's efforts to leverage the must-have nature of its broadcast network programming to force a multichannel video programming distributor ("MVPD") to accept massive and unwarranted fee increases and oppressive carriage terms. CBS's aggressive tactics not only are causing significant harm to TWC's subscribers, but also powerfully underscore the flaws of the retransmission consent regime.

Remarkably, CBS not only has subjected TWC's *video* subscribers to programming blackouts but also is blocking TWC's *broadband Internet access* subscribers from accessing programming on CBS.com. Indeed, a CBS spokesperson acknowledged that CBS is engaging in such blocking because TWC did not capitulate to CBS's demands for dramatically increased retransmission consent payments and indicated that online access to CBS programs will remain "suspended" until TWC pays CBS's ransom. Such blocking represents the antithesis of acting in the public interest and flies in the face of Congress's goals in enacting the retransmission consent regime. Indeed, CBS's anti-consumer conduct is subjecting TWC's broadband subscribers to online blackouts even if they purchase MVPD service from another provider or access CBS's

programming over the air, and even in geographic markets where no CBS station went dark. In addition to accelerating work on the reforms described below, the Commission should make clear that such abusive conduct will not be tolerated by broadcast licensees and their affiliates.

Broadcasters' Coercive Bundling Demands Subvert Congressional Intent Underlying the Retransmission Consent Regime

Among other demands, CBS has maintained that any retransmission consent deal for its O&O stations must also include the purchase of CBS-affiliated pay-television programming services, at rates and terms that CBS could never obtain if those programming services were sold separately. TWC has repeatedly requested that CBS provide a standalone offer for retransmission consent with respect to its O&O stations. But CBS has steadfastly declined to do so, insisting for months that the broad composition of its programming package was non-negotiable. While CBS purported to offer a smaller programming package in the days preceding the blackout, that "offer" still sought to bundle CBS with Showtime, and in any event was clearly a sham designed to whitewash CBS's coercive conduct, as it would have required TWC to pay even *higher* fees for the smaller package than the already-inflated price of CBS's larger, previously proposed bundle. As TWC and others have explained in this proceeding, such abusive conduct is growing increasingly common among the Big Four broadcast networks, each of which controls a large portfolio of affiliated pay-television programming services.[1]

CBS's coercive bundling demands are plainly at odds with the legislative intent underlying the retransmission consent regime. Congress created retransmission consent and must-carry to "advance the public interest" by preserving the public's access to free over-the-air television.[2] But as the current dispute with CBS illustrates, broadcasters' efforts to condition the grant of retransmission consent on the purchase of other programming services are now *impeding* consumers' access to local broadcast signals by making blackouts more likely and more frequent. The legislative history of retransmission consent also indicates that it was intended "to give bargaining power to local broadcasters when negotiating the terms of cable carriage—not to serve as a subsidy for major networks."[3] But CBS's bundling demands turn this view of retransmission consent on its head. Broadcasters now use this artificial right to bargain for carriage of their local *signal* as a duplicative means of seeking compensation for the copyright interest in network *programming*, notwithstanding the statutory provision confirming

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1 *See, e.g.*, Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 11-12 (filed May 27, 2011) ("TWC Retrans NPRM Comments"); Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 22-24 (filed Jun. 27, 2011); Comments of Cablevision Systems Corp., MB Docket No. 10-71, at 15-17 (filed May 27, 2011); Reply Comments of Public Knowledge, MB Docket No. 10-71, at 4-5 (Jun. 3, 2010).

2 S. REP. NO. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168.

3 138 CONG. REC. H6493 (July 23, 1992) (statement of Rep. Chandler).

that nothing in the retransmission consent regime was intended to modify the compulsory copyright license under Section 111 of the Copyright Act or copyright licensing agreements.[4].

Forced Bundling Also Conflicts with the Public Interest Standard

CBS's coercive bundling practices also undermine the Commission's core public interest goals of promoting competition, localism, and diversity. Such conduct harms competition by preventing TWC from exercising its independent judgment as to the merits of CBS's less desirable programming services, and by limiting TWC's ability to consider other competitive options. CBS-affiliated programming services thus are insulated from the competitive stresses of the open market, leading to a reduction in competition on the merits among programmers seeking carriage on TWC's systems.[5] And as noted above, due to this reduction in competition, CBS and other major broadcast networks have grown more "resolute" in their efforts to leverage their must-have programming to obtain supracompetitive rates and terms for their affiliated programming services.[6]

CBS's bundling practices likewise undermine the Commission's localism goals. By abusing its retransmission consent rights, CBS can demand massive fees for its bundled programming, but, contrary to congressional intent and the Commission's expectations, CBS has no interest in investing such funds in local content. Indeed, CBS's President and CEO Les Moonves has confirmed that local content is the last thing on broadcasters' minds when they demand increases in retransmission consent fees—stating that "[i]f a station is really looking at what's bringing in the money," it is national network programming, and "not the local news," that is "bringing in the big bucks."[7]

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4 47 U.S.C. § 325(b)(6).

5 In addition to bundling, CBS has proposed other terms that threaten to harm competition, including terms that would force TWC to drop CBS's O&O stations outside their local areas, even where an O&O station is significantly and historically viewed, where an in-market CBS affiliate has blacked its signal as part of a retransmission consent dispute. Such proposed terms are plainly designed to increase the leverage of CBS affiliates, and appear to reflect anticompetitive collusion with CBS's independently owned affiliates in an effort to drive up the price of retransmission consent for *all* CBS-affiliated stations. TWC's previous submissions in this docket describe in greater detail the serious competitive harms that result from broadcaster collusion. *See, e.g.*, Ex Parte Letter of Time Warner Cable Inc., MB Docket No. 10-71 (filed Jun. 7, 2013); Ex Parte Letter of Time Warner Cable Inc., MB Docket No. 10-71 (filed Apr. 4, 2013).

6 *See* David Lieberman, *Les Moonves Says CBS Will Remain "Resolute" in Talks with Time Warner Cable*, Deadline (Jul. 31, 2013), *available at* http://www.deadline.com/2013/07/cbs-les-moonves-time-warner-cable-carriage-negotiations/.

7 *See Les Moonves Insists That Retrans Cash Is Network Driven*, RADIO BUSINESS REPORT (Jun. 3, 2011), *available at* http://rbr.com/les-moonves-insists-that-retrans-cash-is-network-driven/.

The harms to diversity from coercive bundling are also significant. Programming packages consume large amounts of bandwidth on MVPDs' systems and sap their programming budgets, which leaves less room to carry independent programmers and to pay for independent programmers' content. In cases where broadcasters are successful in forcing MVPDs to accept bloated programming packages, independent programmers are less able to secure sufficient carriage on MVPDs' systems and thus less likely to become or remain profitable. A number of independent programmers have explained to the Commission that bundling practices like CBS's are shutting niche networks out of the marketplace.[8] Even CBS's Moonves has acknowledged that, because of broadcasters' tying conduct, "smaller cable channels not tied to the big content companies" are particularly vulnerable in the current environment.[9]

The Commission Should Take Prompt Action To Reform Its Retransmission Consent Rules To Prevent Significant and Increasing Harm to Consumers

In light of all these harms, the Commission should take definitive action to address the coercive bundling practices used by CBS and other major broadcasters. In particular, the Commission should clarify that "good faith" negotiation requires broadcasters to offer standalone terms for retransmission consent, and that such standalone terms cannot be "sham" offers that make purchasing a larger programming package the only economically rational option. The Commission did indicate over a decade ago that, under the competitive conditions present at that time, it believed that "[p]roposals for carriage conditioned on carriage of any other

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8 *See, e.g.*, Comments of Discovery Communications at 3, MB Docket No. 10-71 (filed May 18, 2010) (pointing out the "equally strong harm to consumers that arises from the impact broadcasters' rising leverage has had on the ability of independent programmers (those with no affiliation to 'must have' broadcasters) to contribute diverse, informative programming to Americans' channel line-ups"); Comments of Starz Entertainment, MB Docket No. 10-71, at 7 (filed May 27, 2011) ("Consumers are harmed [when] [d]ecisions as to which cable program networks will be carried by MVPDs are not based on the merits, popularity, or quality of the cable program networks, but rather, in the first instance, by whether or not the cable networks are owned by broadcasters."); Comments of the Africa Channel, MB Docket No. 10-71, at 3 (filed May 18, 2010) (explaining that independent programmers that do obtain carriage can do so only "by accepting reduced compensation, less favorable tier placements, and other less favorable terms"); *see also Report on the Packaging and Sale of Video Programming Services to the Public*, at 80, Nov. 18, 2004, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf (noting "concern that non-affiliated program networks may not be able to gain widespread carriage due to the industry practice of tying carriage of popular program networks or broadcast stations with carriage of less-popular program networks").

9 *Les Moonves Insists That Retrans Cash Is Network Driven*, RADIO BUSINESS REPORT, June 3, 2011, *available at* http://rbr.com/les-moonves-insists-that-retrans-cash-is-network-driven/.

programming" were presumptively consistent with the good faith standard,[10] subject to the important exception that such proposals cannot stem "from an exercise of market power by a broadcast station."[11] Today, however, that exception has become the rule, as broadcasters increasingly seek to exploit their market power in order to force an MVPD to accept terms for broadcaster-affiliated programming services that the MVPD would not otherwise accept.

More broadly, the Commission should adopt reforms aimed at preventing the disruptions caused by broadcaster abuses of the retransmission consent regime. In comments filed earlier in this proceeding, TWC laid out two possible paths to address these abuses.[12] First, the Commission, working in tandem with Congress, could pursue a deregulatory path aimed at eliminating the special protections for broadcasters that cause significant marketplace distortions under the existing rules, thus facilitating *genuine* market-based negotiations. Such reforms would include repealing the network non-duplication and syndicated exclusivity provisions, clarifying and modifying the tier-placement requirements applicable to stations electing retransmission consent, and amending the good-faith rules to prevent anticompetitive conduct by networks and stations alike. Alternatively, if such regulatory protections for broadcasters remain in place, the Commission should amend its rules to curb broadcasters' abuses of the regulatory regime, including in particular their use of threatened and actual blackouts to drive up fees and extract burdensome carriage terms.

Under this latter approach, the Commission's reforms should include, among other things, new rules that would allow for interim carriage in the event of negotiating impasses. While the Commission has expressed uncertainty as to whether it can grant such relief in the retransmission consent context, Section 325 plainly confers the necessary authority. Section 325 provides the Commission with uncommonly broad power "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[13] In addition to that general mandate, Congress directed the Commission to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier" and "to ensure that the rates for the basic service tier are reasonable."[14] As the legislative history of Section 325 confirms, this far-reaching grant of authority empowers the Commission to take the steps necessary to protect consumers affected by retransmission consent disputes, including by ordering interim carriage to maintain the status quo.[15] Furthermore, the Commission's ancillary

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10 *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 ¶ 56 (2000).

11 *Id.* ¶ 58.

12 *See generally* TWC Retrans NPRM Comments at 21-41.

13 47 U.S.C. § 325(b)(3)(A).

14 *Id.*

15 *See* Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30, 2007) (explaining that that Section 325's directives mean, "[a]t a minimum," that "Americans should not be shut off from

authority complements these concrete statutory responsibilities,[16] and, as the Supreme Court has acknowledged, authorizes the Commission to issue an order maintaining the status quo in cable carriage disputes where "the public interest demands interim relief."[17]

The Commission has asserted authority and a need for interim carriage in disputes involving cable-affiliated programming services (*i.e.*, in the program access and program carriage contexts), while suggesting that interim carriage in disputes involving retransmission consent for broadcast stations is unwarranted or unauthorized. But that approach is entirely backwards. As TWC has explained, an interim carriage remedy in the context of free-market negotiations over copyright licenses to pay-television programming is unjustified, both as a statutory matter and under the First Amendment.[18] By contrast, carriage negotiations in the broadcast context take place against the backdrop of an artificial retransmission consent regime, distinct from copyright,[19] and created by Congress and the Commission in order to promote the

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broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution]"); *see also* 138 CONG. REC. S14615-16 (statement of Sen. Lautenberg) ("[I]f a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights. Instead, cable operators will have an opportunity to seek relief at the FCC.").

16 47 U.S.C. § 303(r) (authorizing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of Title III of the Act); *id.* § 154(i) (authorizing the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions").

17 *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180 (1968).

18 *See, e.g.*, Reply Comments of Time Warner Cable Inc., MB Docket No. 12-68, at 5-7 (filed Jan. 14, 2013) (noting First Amendment issues surrounding standstill remedy in program access context); Opening Brief of Petitioner Time Warner Cable Inc. at 53-61, *Time Warner Cable Inc. v. FCC*, No. 11-5152 (2d Cir. Mar. 27, 2012) (addressing statutory and constitutional issues arising from standstill remedy in program carriage context).

19 *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 ¶ 173 (1993) ("The legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster's signal, completely separate from the programming contained in the signal. Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights. . . . [R]etransmission consent is a right created by the Communications Act that vests in a broadcaster's signal; hence, the parties to any contract must have bargained over this specific right, not a copyright interest.").

public interest in continuous, uninterrupted access to broadcast programming.[20] When broadcasters, who received their spectrum *for free* in exchange for the obligation to serve the public interest, use retransmission consent as a weapon to threaten massive blackouts if their demands for spiraling fees and onerous terms are not met, the Commission is not only authorized but *obligated* to intervene and prevent broadcasters from misusing the retransmission consent regime.

At bottom, CBS's coercive conduct illustrates that broadcasters' abuses of retransmission consent have only gotten worse, not better, since the Commission released its NPRM on these issues in 2011. The time has come for the Commission to take decisive action to address these abuses, including by adopting the "standalone offer" requirement and broader reform measures discussed above. We look forward to continuing a dialogue with the Commission as it considers further reforms of the broken retransmission consent regime.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
Counsel for Time Warner Cable

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20 *See supra* note 2.