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October 16, 2008

Marlene Dortch
Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Ave, NE
Washington, DC 20002

via hand delivery

Re: Baja Broadband Operating Company, LLC ("Baja"); Petition for Declaratory Ruling, Retransmission Consent Complaint, and Request for Stay (CSR-8062-C)

Dear Ms Dortch:

We enclose an original and four copies for filing in CSR-8062-C the American Cable Association's comments in support of Baja's Petition for Declaratory Ruling, Retransmission Consent Complaint, and Request for Stay.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Matthew M. Polka'.

Matthew M. Polka
President and CEO
American Cable Association

Enclosures

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)
)
Baja Broadband Operating Company,)
LLC) CSR-8062-C
)
v.)
)
ComCorp of El Paso License Corp.,)
licensee of KTSM-TV, El Paso, Texas)
)
Petition for Declaratory Ruling,)
Retransmission Consent Complaint, and)
Request for Stay)
)
To: Chief, Media Bureau)



**COMMENTS IN SUPPORT OF BAJA BROADBAND PETITION FOR DECLARATORY
RULING, RETRANSMISSION CONSENT COMPLAINT, AND REQUEST FOR STAY**

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October 16, 2008

I. Introduction.

ACA submits these Comments in support of Baja Broadband Operating Company, LLC's ("Baja") Petition for Declaratory Ruling, Retransmission Consent Complaint, and Request for Stay ("Petition").

In essence, the problem is this: Broadcasters use their market power and bad faith bargaining tactics to extract unreasonable retransmission consent terms and conditions from small cable operators. And if small and medium-sized cable operators want to bring a complaint over this broadcaster behavior, no mechanism exists to permit the cable operator to continue carriage during the pending complaint. ACA has consistently documented this problem at the Commission. Now, as we enter a new retransmission consent cycle, we are seeing broadcasters take their bad faith bargaining tactics to a heightened level. To protect the continued viability of small and medium-sized cable operators, ACA recommends that:

- The Commission permit cable operators to carry a broadcast station during a pending complaint, and grant Baja's Request for Stay.
- The Commission rule that a broadcaster can expressly assent to retransmission consent through silence, and grant Baja's Petition for Declaratory Ruling.
- The Commission enforce its objective standards of good faith, and grant Baja's Complaint and sanction KTSM.

American Cable Association. ACA represents nearly 1,100 independent cable companies that serve more than 8 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states and in virtually every congressional district. The companies range from family-run cable businesses serving a single town to multiple-system operators that focus on serving

smaller markets. More than half of ACA's members serve fewer than 1,000 subscribers. All ACA members face the challenges of upgrading and operating broadband networks in lower-density markets.

ACA members share a vital interest in this matter. ACA's members are smaller and medium-sized cable operators that do not own programming, but rather solely provide advanced voice, video and data services to their subscribers. ACA members built or acquired their systems to serve the unique needs of their customers in these more rural markets. Typical density for most ACA members' markets is 20 homes per mile, compared to hundreds of homes per mile in urban markets. As a result, ACA members do not have significant market-share in any one designated market area (DMA).

I. The Commission must permit cable operators to carry a broadcast station during a pending complaint, and grant Baja's Request for Stay.

ACA has repeatedly asked the Commission to extend conditions from the *News Corp./DirecTV Order* that permit cable operators to continue carriage of Fox owned and operated stations during arbitration proceedings.¹ This carriage condition has worked effectively to bring a measure of balance to retransmission consent negotiations with a powerful broadcaster.² Additionally, the Commission has recognized this reality by seeking comment last fall in the *Wholesale Programming* proceeding as to whether

¹ See, e.g., *In the Matter of Implementation Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17,791, Comments of the American Cable Association at 26 (filed Jan. 3, 2008).

² *News Corp. Order*, ¶¶ 222, 223.

temporary stay orders would encourage parties to resolve disputes, and to make use of the Commission's complaint procedures when needed.³

Moreover, the public interest benefits overwhelmingly favor granting a stay during a pending complaint. Small and medium-sized cable operators are particularly vulnerable to the withdrawal of “must have” programming.⁴ Competition and consumers are harmed when broadcasters extract unreasonable terms and conditions for retransmission consent from small cable companies. Conversely, granting operators’ requests for stays will advance the key public interest goal of avoiding temporary foreclosure and maintaining access to “must have” programming.

Additionally, ACA members rarely serve a large enough market share to give the operator any market power in negotiations with broadcasters and programmers. This is where a stay helps bring a measure of balance to the negotiations. When granted, a stay will restrict a broadcaster from using the threat of temporary foreclosure, enabling the operator to continue to provide its customers with access to “must have” programming during negotiations. This, in turn, keeps customers from potentially moving to another provider who has the “must have” programming, thus ensuring that video competition and customer viewing patterns – both important Commission goals – do not suffer.⁵ Therefore, the Commission must rule that cable operators may continue

³ *In the Matter of Implementation Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17,791, ¶ 137 (2007) (“*Program Access FNPRM*”).

⁴ *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶ 176 (2004) (“*News Corp. Order*”); *Program Access FNPRM*, ¶ 120.

⁵ *News Corp. Order*, ¶ 161 (“The transaction would result in secondary public harms by depriving subscribers of access to RSN programming during the period of temporary foreclosure or by causing subscribers to change MVPDs to access the foreclosed programming, even where they would otherwise not desire to change providers with greater frequency than today”).

to carry a broadcast signal during a pending complaint, and grant Baja's Request for Stay.

II. The Commission must rule that a broadcaster can expressly assent to retransmission consent through silence, and grant Baja's Petition for Declaratory Ruling.

The Commission has ample authority to rule that a broadcaster can expressly assent by silence with regards to retransmission consent. Under Section 325(b) of the Communications Act, cable operators must obtain a station's "express consent" to retransmit the signal.⁶ Section 325(b) does not further define "express consent." Because of this ambiguity, section 325(b) does not override the well-established contract law principal of assent by silence.

Beyond the legal authority, policy considerations strongly suggest that the Commission must stop this type of broadcaster behavior.⁷ ACA has heard of broadcasters who deny the assumption of existing retransmission consent agreements in an attempt to extract more favorable retransmission consent terms, such as noted in Baja's Petition.⁸ For many small cable operators with limited financial resources, this threatens their viability. This is especially true when the smaller operator competes with DBS, the phone companies, or major MSOs.

⁶ 47 U.S.C. § 325(b)(1).

⁷ In addition to Baja's Petition, ACA members Trust Cable of Mississippi, Inc. and Paul Bunyan Rural Telephone Cooperative have also recently filed retransmission consent complaints.

⁸ *In the Matter of: Baja Broadband Operating Company, LLC v. ComCorp of El Paso License Corp., Licensee of KTSM-TV, El Paso, Texas, Petition for Declaratory Ruling, Retransmission Consent Complaint, and Request for Stay*, at 3-4 (filed Sept. 18, 2008) ("*Baja's Petition*").

This type of behavior cannot be condoned. ACA therefore urges the Commission to rule that a broadcaster can expressly assent to retransmission consent by silence, and grant Baja's Petition for Declaratory Ruling.

III. The Commission must enforce its objective standards of good faith, and grant Baja's Complaint and sanction KTSM..

In implementing Section 325(b)(3)(C), the Commission established seven objective standards to determine good faith in retransmission consent negotiations.⁹ In adopting the objective standards, the Commission intended to provide "concise, clear" standards where the proscribed conduct would "constitute a violation of the good faith standard in all possible instances."¹⁰ Put another way, the objective standards require the Commission to take KTSM's conduct at face value – and on its face, KTSM's statement that "you clearly will lose this station at the end of the year based on your complete disregard for the law"¹¹ readily establishes a refusal to negotiate in good faith. To protect ACA members from similar conduct both now and in the future, the Commission must enforce the objective standards of conduct set forth in 47 C.F.R. § 76.65(b)(1), and grant Baja's Complaint and sanction KTSM.

IV. Conclusion

As we enter a new retransmission consent cycle, broadcasters continue to use their market power and bad faith bargaining tactics to extract unreasonable retransmission consent terms and conditions from small cable providers. ACA has

⁹ 47 C.F.R. §§ 76.65(b)(1), (2).

¹⁰ *In the Matter of 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, ¶ 31 (2000) (emphasis added).

¹¹ *Baja's Petition*, Exhibit 3.

documented these abuses to the Commission on many occasions. Here, the Commission has the chance to ensure that broadcasters are not rewarded by bad faith negotiation strategies. ACA urges the Commission to rule that cable operators may continue to carry broadcast signals during a pending complaint by granting Baja's Request for Stay. Moreover, the Commission should rule that broadcasters may express assent to retransmission consent by silence by granting Baja's Petition for Declaratory Ruling, and also enforce the objective standards of good faith set forth in 47 C.F.R. §§ 76.65(b) by granting Baja's Complaint and sanction KTSM.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION



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