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Re: WBDT(DT), Springfield, OH, ID No. 70138,
File No. BALCDT-20100917AAT.

Dear Counsel:

This letter is in reference to the above-captioned application to assign the license of digital television station WBDT(DT), Springfield, Ohio, from ACME Television Licenses of Ohio, LLC ("ACME") to WBDT Television, LLC ("WBDT Television"). WBDT is assigned to the Dayton, Ohio Designated Market Area ("DMA").

Time Warner Cable Inc. ("TWC") filed a petition to deny the application,[1] and Buckeye Cablevision, Inc. ("Buckeye") filed an informal objection.[2] Both contend that grant of the application

[1] ACME and WBDT Television filed oppositions. LIN Television Corporation ("LIN"), the licensee of digital television station WDTN(DT), Dayton, Ohio, filed comments in opposition to the petition. TWC filed a reply.

would permit a single entity, LIN, to negotiate retransmission consent for two stations in the same market, in contravention of the public interest. For the reasons stated below, we deny the petition and grant the application.

Background. In its petition, TWC notes that WDTN obtains carriage through the retransmission consent process, while WBDT previously has relied on its must-carry rights for carriage. Now, however, TWC states that LIN, acting as the agent for ACME, has informed TWC that both WDTN and WBDT will be seeking compensation as part of a master retransmission consent agreement.

TWC argues that this consolidation of negotiating authority is evidence of a broken and increasingly unworkable retransmission consent process that permits broadcasters to engage in brinksmanship tactics – in particular by threatening to withdraw their signals – to extract higher prices for carriage. Such brinksmanship, TWC alleges, is enabled by the combination of robust competition among multichannel video program distributors ("MPVDs") and regulatory protections afforded broadcasters by various Commission rules, including the network non-duplication rule[3] and the syndicated exclusivity rule.[4] According to TWC, if stations are permitted to negotiate jointly, the stronger station in the pairing, like the NBC-affiliated WDTN, can threaten to withdraw *two* signals, thereby leveraging its market power to demand higher retransmission consent fees for the ostensibly less-desirable station, like the CW-affiliated WBDT, than that station could garner on its own.[5] Moreover, it asserts that the ability to apply such leverage in the context of retransmission consent negotiations exacerbates public interest harms associated with cooperative arrangements between in-market broadcasters, such as the proposed shared services agreement and joint sales agreement between LIN and WBDT Television.[6]

TWC further argues that, if the Commission grants the application, it should impose conditions to prevent abuses of the retransmission consent process. In particular, TWC would have the Commission order ACME, LIN, and WBDT Television to terminate any agreement that contemplates joint retransmission consent negotiations. It also proposes that the Commission forbid the stations from withholding their signals from an MVPD during the pendency of a retransmission consent dispute upon

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[2] ACME and WBDT Television filed oppositions.

[3] *See* 47 C.F.R. § 76.92(a).

[4] *See* 47 C.F.R. § 76.101.

[5] In support of its position, TWC cites to two studies filed in the current proceeding it commenced with respect to retransmission consent. *See Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Petition for Rulemaking, MB Docket No. 10-71 (filed Mar. 9, 2010)("*Retransmission Consent Proceeding*"). Those studies are William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees,* at 12, filed by the American Cable Association May 18, 2010, and Steven C. Salop, *et al., Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations,* at 54, filed by TWC June 3, 2010.

[6] To the extent that TWC challenges the propriety of in-market cooperative agreements, *per se*, such challenge is more appropriately raised in the context of the Commission's pending review of its media ownership rules. *See In the Matter of the 2010 Quadrennial Review – Review of the Commission's Media Ownership Rule and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Notice of Inquiry, 25 FCC Rcd 6086 (2010). Additionally, in its petition, TWC also states that "an agreement to set retransmission consent prices on behalf of independently owned stations in a single DMA *would likely* violate Section 1 of the Sherman Act." (emphasis added) Such a statement is speculative on its face and does not form a valid basis for a petition to deny.

the expiration of an existing agreement and, in the absence of a future retransmission consent agreement, would require the stations to submit to a Commission-supervised dispute resolution process.

In their respective opposition pleadings, ACME, WBDT Television, and LIN assert that TWC merely repeats arguments that it has raised in the Retransmission Consent Proceeding and that this adjudicatory proceeding is the wrong venue in which to address them. According to ACME and WBDT Television, TWC fails to show that the agreements at hand violate any provision of the Communications Act of 1934, as amended, any Commission rule, or precedent with respect to cooperative arrangements between in-market broadcasters. LIN argues that TWC has mischaracterized the facts of the retransmission consent negotiation process and that its predictions about future negotiations and future competitive harm are speculative. All contend that there is no legal authority or policy basis for the Commission to impose the conditions that TWC seeks, while LIN further notes that TWC has negotiated on behalf of Bright House Networks in markets where both have cable systems, yet it does not propose any corresponding conditions that would be imposed on MVPDs. In reply, TWC reiterates that it seeks only to address the transaction-specific harms that flow from the proposed assignment.

Discussion. The Commission applies a two-step analysis to a petition to deny under the public interest standard. First, it must determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.[7] This first step "is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established."[8] If the petition meets this first step, the Commission then must determine whether "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," the petitioner has raised a substantial and material question of fact as to whether the application would serve the public interest.[9]

TWC argues that permitting LIN to act as WBDT Television's agent in retransmission consent negotiations for the station will skew the balance of power in that process such that LIN *could* thereby gain bargaining leverage and enable WBDT to garner higher carriage fees as a result. We find this argument regarding the potential harmful effects of joint negotiation, decried in the context of a specific adjudicatory proceeding, to be speculative. The assertion that, if the application is granted, the station *might* threaten to withdraw its signal during negotiations is, likewise, speculative. Equally unavailing is the contention that the proposed assignment actually threatens concrete and imminent harms because WBDT has announced its intention to elect retransmission consent in the next cycle, whereas it previously has elected uncompensated must-carry status. The station has the right under our rules to elect retransmission consent, whether or not it requests LIN to negotiate on its behalf. Indeed, TWC makes no effort, beyond its generalized arguments, to demonstrate that the proposed assignment and related cooperative agreements violate our rules and precedent.

Thus, despite its claims to the contrary, it is apparent that TWC's real concern is its desire for reformation of the must-carry and retransmission consent process. The proper way to seek a reform of the

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[7] 47 U.S.C. § 309(d)(1); *Astroline Communications Co., Ltd. Partnership v. FCC,* 857 F.2d 1556 (D.C. Cir. 1988) ("*Astroline*").

[8] *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) ("*Gencom*").

[9] *Astroline,* 857 F.2d at 1561; 47 U.S.C. § 309(e).

Commission's rules is to file a petition for rulemaking, which TWC has done. That petition has been put on public notice, comment has been sought, and on March 3, 2001, the Commission adopted and released a Notice of Proposed Rulemaking ("NPRM")[10] to consider possible amendments to our rules. We will not address here the issues raised in the petition for rulemaking or the responsive comments, either for or against TWC's proposals. Furthermore, the NPRM expresses the Commission's view that it does not have the authority to require broadcast television stations to provide their signals to pay television providers or to require binding arbitration.[11] There is, therefore, no legal basis to impose the constraints that TWC proposes on the stations in their retransmission consent negotiations in the context of this proceeding.

In light of the above discussion, we find that the applicants are fully qualified, and conclude that the grant of the assignment application would serve the public interest.

ACCORDINGLY, IT IS ORDERED That the petition to deny filed by Time Warner Cable Inc. is DENIED. IT IS FURTHER ORDERED That the application for the assignment of license of WBDT(DT), Springfield, Ohio, from ACME Television Licenses of Ohio, LLC, to WBDT Television, LLC, (File No. BALCDT-20100917AAT) IS GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc: William H. Fitz, Esq.

[10] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, FCC 11-31 (rel. Mar. 3, 2011).
[11] *Id.* at ¶¶ 18-19.