October 13, 2017

Mr. Edward Gresser
Chairman
Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th St NW
Washington, DC 20006

RE: Request for Comments on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement with Canada and Mexico (82 F.R. 98 23699-23700, Docket No. USTR-2017-0006) – "NAFTA NEGOTIATIONS"

Dear Chairman Gresser:

The undersigned cable television system operators and associations representing cable television system operators (the "Cable Industry Stakeholders") hereby submit this letter responding to the June 12, 2017 comments submitted by the National Association of Broadcasters (the "Broadcast Industry Stakeholders") in the above-referenced matter.[1/] The Cable Industry Stakeholders are responding specifically to the Broadcast Industry Stakeholders' request that the negotiating objectives of the United States Trade Representative ("USTR") with respect to the renegotiation of the North American Free Trade Agreement ("NAFTA") include "address[ing] Canada's lack of a [broadcast] signal retransmission consent regime."[2/]

As discussed more fully below, the Broadcast Industry Stakeholders' comments paint a misleading and incomplete picture of the impact that requiring Canadian multichannel video

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1/ *Comments of the National Association of Broadcasters*, Docket ID No. USTR-2017-0006 (filed June 12, 2017) ("Broadcast Industry Stakeholders' Comments").

2/ *Broadcast Industry Stakeholders' Comment*s at 3.

programmer distributors ("MVPDs")[3/] to pay retransmission consent fees to broadcasters in the United States would have on American consumers. Over the past decade, the retransmission consent regime enacted in the United States has driven up the price consumers pay for cable service and been the source of hundreds of service interruptions impacting millions of American television viewers without any countervailing improvement in broadcast programming. It is thus highly unlikely that any revenues that US broadcasters obtain from Canadian MVPDs will benefit the American public. On the other hand, it is far more certain that requiring Canadian MVPDs to pay US broadcasters will directly lead to the imposition of a reciprocal retransmission consent requirement on those American MVPDs that have historically distributed Canadian broadcast stations to American audiences, driving up prices for American consumers and increasing the number of service disruptions that they face.[4/] Moreover, while focusing on a single difference in US and Canadian law with respect to the retransmission by MVPDs of broadcast stations and broadcast programming, the Broadcast Industry Stakeholders have ignored the complexity of the two nations' respective communications and copyright law provisions defining the rights and obligations of broadcasters and MVPDs and the difficulty inherent in any effort to reconcile all of the differences in those provisions.

Requiring Canadian MPVDs to Negotiate for a Broadcaster's Retransmission Consent Will End Up Harming American Consumers. The Broadcast Industry Stakeholders' comments paint a rosy picture of the benefits that will accrue to American television viewers if United States' broadcasters are able to demand retransmission consent fees from Canadian MVPDs (and, ultimately, Canadian viewers), claiming that the collection of such fees from US MVPDs (and their customers) has "fostered significant investment by US broadcasters in more, and higher

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3/ Note that, in Canada, MVPDs are referred to as broadcast distribution undertakings, or "BDUs." In these comments, the term "MVPD" will be used to describe these systems regardless of where they are located.

4/ While the Broadcast Industry Stakeholders' comments focus exclusively on the objective of gaining additional revenues from Canadian cable and satellite companies, the issues and concerns raised herein would also apply to efforts to change Mexican law in ways that would result in an increase in the cost to American consumers of receiving Mexican stations or in an interruption to or loss of access to Mexican stations.

quality, local content and services by broadcasters."[5/] However, the Broadcast Industry Stakeholders fail to acknowledge the real negative impacts that American consumers will face when Canadian broadcasters begin demanding the same fees from American MVPDs.

To begin with, the question of how much, if any, of the retransmission consent revenues received by United States broadcasters (estimated at more than $20 billion in just the past five years) is being invested in improved broadcast content and facilities has been and continues to be a hotly debated topic. For example, while broadcast-industry commissioned studies purport to show that retransmission consent has led to an increase in the quantity and quality of local content, other studies have concluded that retransmission consent fees do not support "localism" and instead largely flow into the coffers of the large station groups and national broadcast networks, who use those revenues to fund the acquisition of non-broadcast networks, the payment of dividends, and stock buy-backs.[6/] Comments from network executives support this conclusion: in 2006, CBS President and CEO Les Moonves commented at a media conference that all of the retransmission consent revenue earned by his company "fall[s] to the corporate bottom line."[7/] Just a few months ago, Mr. Moonves linked the $1 billion in retransmission consent revenues received by CBS in 2016 to the company's ability to acquire additional broadcast stations.[8/]

That retransmission consent fees are not being used to produce a better viewing experience for consumers is further evidenced by the fact that even as retransmission consent revenues have dramatically increased (by more than 22,000 percent since 2005),[9/] broadcast viewership ratings

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5/ *Broadcast Industry Stakeholders' Comments* at 3.

6/ *See, e.g.*, Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism*, available at https://www.americantelevisionalliance.org/wp-content/uploads/2013/07/Retransmission_Consent_and_Localism_Paper_by_Napoli_FINAL.pdf, Nov. 2011; *Petition for Rulemaking of Mediacom Communications Corporation*, CG RM 11752 (filed Jul. 7, 2015).

7/ TV NewsCheck, *Moonves: Retrans Dollars Just Weeks Away*, available at http://www.tvnewscheck.com/article/1360/moonves-retrans-dollars-just-weeks-away (Mar. 1, 2006).

8/ Broadcasting and Cable, *CBS Interested in Buying Stations If Caps Are Raised*, available at http://www.broadcastingcable.com/news/currency/cbs-interested-buying-stations-if-caps-are-raised/163382 (Feb. 15, 2017).

9/ *See Comments of the American Television Alliance*, MB Docket No. 15-216 at p. 14 (filed Dec. 1, 2015).

have been in a fairly steady decline.[10/] The broadcasters' claims of improved quality programming are difficult to square with the results of this year's Emmy awards, where only three programs aired by the Big Four networks (CBS, ABC, NBC, and FOX) were winners in the top 32 categories and, in the seven "best" series or movie categories, the Big Four collected only 11 out of 42 nominations, with six of those nominations coming in the low budget "Variety Talk" and "Reality" categories.[11/] Simply put, the broadcasters' claims that consumers benefit from the current retransmission consent regime, and would benefit from the extension of that regime to Canada, should be viewed skeptically, at best.

On the other hand, it is indisputable that there are real and significant harms to consumer welfare associated with the US retransmission consent regime. These harms include not only the rising price of MVPD service that is fueled by the billions of dollars in retransmission consent fees demanded by broadcasters, but also the disruptions in service that all too frequently occur as a result of broadcaster intransigence in retransmission consent negotiations. The American Television Alliance has tracked more than 145 retransmission consent-related "blackouts" already this year, including blackouts that disrupted viewers' access to the Super Bowl, the NCAA Men's Basketball tournament, the Grammys, and a host of other important broadcast programming events.[12/] These blackouts, of course, also have disrupted consumers' access to local content, including news, weather, and public affairs programming.

The harms outlined above would only be exacerbated if the USTR pursues changes to domestic Canadian law to establish a separate retransmission consent regime in that country under which United States broadcasters could demand payment from Canadian MVPDs. This is because it is all but certain that if Canadian MVPDs are required to obtain retransmission consent from United States stations, American MVPDs will be subjected to a reciprocal obligation under which they would face demands for payment in order to continue carrying Canadian stations – carriage

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10/ *See, e.g.*, Philadelphia Inquirer, *Why is your pay-TV bill rising? 'Free' TV not socks consumers with billions in fees*, available at http://www.philly.com/philly/business/Free-TV-now-socks-consumers-with-billions-of-.html (Dec. 25, 2016).

11/ *See* Entertainment Weekly, *Emmy Awards 2017: The winners list*, available at http://ew.com/tv/2017/09/17/emmy-winners-2017/ (Sept. 17, 2017).

12/ *See* American Television Alliance, *Broadcasters Go Nuclear On Blackouts*, available at http://www.americantelevisionalliance.org/broadcasters-go-nuclear-on-blackouts/ (April 3, 2017).

which currently is not covered by the Communications Act's retransmission consent provisions.[13/] The result will be one of three outcomes: (1) further increases in the cost of MVPD service for American consumers as MVPDs pass through the new fees; (2) the removal from channel lineups of Canadian stations that have long been a part of the viewing experience in American communities located near the US-Canada border; or (3) the removal of other channels from channel lineups to offset the new retransmission consent costs. None of these results benefit United States consumers, and they must be weighed against the ephemeral nature of the benefits claimed by the Broadcasting Industry Stakeholders.

Canadian Law and United States Law Governing Broadcast Retransmissions Are Not Readily Reconciled. The Broadcast Industry Stakeholders frame their proposal as a simple step that would bring Canadian and United States law into alignment with regard to the retransmission of broadcast stations by MVPDs, noting that "[s]chemes exist in both Canada and the United States to compensate copyright holders for retransmission of content but unlike the United States, Canada has no signal retransmission consent regime."[14/] This is true as far as it goes. But to the extent this statement implies that the absence of a separate retransmission consent regime in Canada is the only difference in the rights and obligations of broadcasters and MVPDs in the two countries, or that Canada has not made its own conscious determinations regarding the nature and scope of broadcasters' protected property interest in their signal, it is a gross oversimplification.

In fact, Canada and the United States each have their own complex set of rules pertaining to the retransmission by MVPDs of domestic and foreign broadcast stations. The myriad differences in these rules both directly and indirectly impact the regimes for compensating all rights holders, including broadcasters, for such retransmissions. Adding a retransmission consent scheme, as the Broadcaster Industry Stakeholders' Comments suggest, would not be a simple task: instead it would upset the careful balance struck in Canada in creating a complex and comprehensive set of laws and rules governing the retransmission of broadcast signals and the compensation due broadcasters for such retransmissions – laws and rules that differ in various

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13/ *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, at n. 401 (1993); *See also* 47 C.F.R. § 76.5(b).

14/ *Broadcast Industry Stakeholders' Comments* at 2.

respects from the complex and comprehensive laws and rules governing these same matters in the United States.

To cite but one example, under United States copyright law, cable operators may carry any Canadian stations pursuant to a statutory "compulsory license," but only if the cable system is located within a narrow geographic area close to the United States-Canada border.[15/] Canada, on the other hand, does not impose geographic limitations on where American broadcast stations may be retransmitted, but allows such carriage only with respect to specific stations that the Canadian Radio and Television Commission ("CRTC") has certified as eligible for carriage; at present, fewer than 35 stations (or less that 4 percent of all United States commercial broadcast stations) are eligible for carriage in Canada.[16/] Canada and the United States also have complicated and differing schemes for protecting the economic interests of broadcast stations – the United States requires the deletion (or "blackout") of duplicating content and bars commercial subsitutions, whereas Canada requires the substitution of a Canadian station's signal for that of an American station where the two stations are carrying the same content.[17/]

The scope of the rights covered by the two nations' copyright laws, how royalties for the retransmission of broadcast stations are calculated, and who is eligible to receive a share of those royalties are additional and critical points of distinction between United States and Canadian law. Of particular significance is the fact that as a matter of copyright law Canada recognizes that a broadcaster has certain protected property rights in its signal, while in the United States law, a broadcaster's signal has no protection under the Copyright Act. Also, cable operators in the United States perfect their compulsory copyright license for the carriage of broadcast stations by making payments into a royalty "pool" pursuant to statutory formulae that take into account various factors, including a system's gross receipts for the provision of "basic" cable service and,

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15/ 17 U.S.C. 111(c)(4) (limiting compulsory copyright to cable carriage of Canadian signals in communities that are located within 150 miles of the United States-Canadian border an also located south of the 42nd parallel of latitude).

16/ *See* Canadian Radio-television and Telecommunications Commission, *Revised list of non-Canadian programming services and stations authorized for distribution*, available at http://www.crtc.gc.ca/eng/publications/satlist.htm.

17/ *See, e.g.*, Canadian Radio-television and Telecommunications Commission, *Seeing Canadian Commercials on American Channels*, available at http://www.crtc.gc.ca/eng/television/publicit/america.htm.

in the case of larger systems, the number and type (*e.g.*, network v. non-network) of stations that the system carries beyond the stations' "local service area." The royalty pool is then distributed by the Copyright Royalty Judges to the owners of copyrighted "non-network" content carried outside the station's "local service area." While Canadian law also distinguishes between "local" and "distant" signals, the definitions of these terms differ from those applied in the United States and Canadian law draws no distinction between network and non-network content. Furthermore, Canadian MVPDs make payments directly to specified "collective societies" – including one that represents United States broadcasters whose stations are retransmitted in Canada.[18/]

Thus, contrary to the Broadcast Industry Stakeholders' assertions that "U.S. broadcasters are not allowed to be economic participants in Canada's market"[19/] and that "the entire economic benefit [for US broadcasters' content] is captured by Canadian cable and satellite TV distributors,"[20/] both American and Canadian broadcasters *are* entitled to compensation under Canadian copyright law. What the Broadcast Industry Stakeholders desire is not merely for the USTR to seek changes in Canadian law for the purpose of "remedying the unfair practice…[of] Canadian distributors free rid[ing] off US broadcasters' investment."[21/] What the broadcasters are seeking is for the USTR to demand changes to Canadian domestic law that would ultimately expand the rights of both Canadian and United States broadcasters to withhold access to their signals as a means of extracting *more* money from consumers. Such a revision in Canadian law already has been considered by the Canadian Radio-television and Telecommunications

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18/ In the United States, a government agency, the Copyright Royalty Judges, holds proceedings to determine the amount of the royalty pool to be distributed to each of seven "claimant" groups, including the "Canadian" claimants. *See* 17 U.S.C. § 801(b)(3). In Canada, MVPDs make payments directly to separate "collective societies" pursuant to a rate schedule established and published by the Copyright Board of Canada. *See, e.g.*, Copyright Board of Canada, List of Copyright Collective Societies, available at http://www.cb-cda.gc.ca/societies-societes/index-e.html#retrans. As indicated above, one of the societies receiving royalty payments is "Border Broadcasters, Inc.," which represents US broadcasters which "provide their own copyrighted programming to Canadian cable subscribers." Border Broadcasters, Inc., *About Us*, available at http://borderbroadcasters.com/about.html.

19/ *Broadcast Industry Stakeholders' Comments* at 3 n.6.

20/ *Id*. at 3. *See also id*. at 2 (citing the alleged "inability" of United States broadcasters "to obtain economic benefit for the retransmission of their broadcast signals in Canada").

21/ *Id.* at 4.

Commission and rejected by the Canadian Supreme Court as being fundamentally incompatible with Canada's existing copyright scheme.[22/]

In conclusion, the undersigned submit that USTR's focus in renegotiating NAFTA should be on addressing those areas where a change in current Canadian (or Mexican) law will produce clear benefits for United States consumers without undermining well-settled market expectations in either the United States or the other NAFTA countries. Expending any effort on seeking changes in Canadian law relating to the carriage of United States broadcast stations – an issue that is complex and controversial and is likely to result in reciprocal changes in law that will harm American consumers with little or no offsetting benefits – would be a mistake. The United States should therefore not pursue any changes to NAFTA which would require the Canadian government to amend its existing TV content compensation rules.

Respectfully Submitted,

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22/ *In the Matter of the Broadcasting Act*, [2012] 3 S.C.R. 489 (Can.).

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