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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Annual Assessment of the Status Of Competition In Markets For The Delivery of Video Programming	)))	**CS Docket No. 98–102**

REPLY COMMENTS OF
MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Motion Picture Association of America, Inc. (MPAA), by its attorneys, submits these reply comments in accordance with the procedure set forth in the "Notice of Inquiry," 63 Fed. Reg. 36688 (July 7, 1998), issued in the above-captioned docket. These comments respond to the Satellite Broadcasting and Communications Association's (SBCA) attempts to have the Commission address the recent copyright royalty rate adjustment under 17 U.S.C. § 119 ordered by the Librarian of Congress.

SBCA's comments reflect its long-standing effort to rewrite the statutory "fair market value" standard used in Section 119 rate adjustment proceedings to one that is more to SBCA's liking. SBCA's effort has already been rebuffed by the Librarian of Congress, who was entrusted by Congress with the authority to determine the appropriate rate. In addition, SBCA's claim that satellite carriers pay far more on average than cable does on average is based upon simplistic and faulty assumptions. If satellite carriers were required to calculate royalty fees in the same manner as cable systems, carriers would likely pay more than the new 27-cent per subscriber rate ordered by the Librarian, although, in some circumstances, carriers would pay less or about the same. In other words, satellite carriers are not unfairly disadvantaged vis-à-vis cable by the adjusted royalty rates. Finally, the continued strong growth of DTH service undermines SBCA's suggestion that the new rates constitute an unfairly high barrier to the DTH's efforts to become an effective competitor to cable.

SBCA statutory analysis begins with an incredible proposition that Congress did not know what it was doing in establishing the "fair market value" standard as part of the 1994 Act. SBCA states: "The 1994 Act, however, changed the rate determination criteria for the CARP sufficiently so as to undermine what [SBCA thinks] should have been the true goal of the panel: determining a rate which was comparable to the rates paid by DTH's competitor, cable." SBCA Comments at 16 (emphasis added). Determining a rate comparable to the rates paid by cable had been the goal under the prior Act. Consequently, the change in the 1994 Act to fair market value was intended to create a wholly new standard. This intent was clearly expressed in the statute and was properly interpreted by the Librarian as not allowing a rate comparable to cable, since the cable rate is widely acknowledged to be a political compromise, not a market rate. Further, the Librarian did consider the satellite carriers' competitive position with cable, but found this consideration did not outweigh the primary intent to set fair market value rates.

SBCA's constant reference to "average cable copyright royalty fees" (e.g., SBCA Comments at 17) as the appropriate comparison is overly simplistic and misleading. Cable rates vary enormously from system to system, even among the largest cable systems. These variances occur to no small degree because the cable royalty calculation follows now defunct 1976 FCC rules regarding station and program carriage. Consequently, the number and type of distant stations retransmitted plus the market in which a system is located influence the royalty payment by cable systems. In addition, cable is still governed by the Commission's syndex, sports exclusivity and network nonduplication rules, none of which apply to satellite carriers. Were cable systems, like satellite carriers, not subject to these rules, cable royalty rates would have to be adjusted upward under the cable statutory plans.

MPAA believes that a fair assessment of whether the new satellite carrier rates are higher than the cable rates can be determined by analyzing the rates that satellite carriers would pay if they had to use the cable royalty plan to calculate their royalty payments. To this end, MPAA determined the royalty fee that would be paid by a satellite carrier if it were a cable system located in several different cities in either the Top 50, Second 50 or Smaller market groups. This analysis used all figures reported by the largest cable system in each city, except for distant signal carriage. For distant signal carriage, the analysis compares the per subscriber rate that would be paid for carriage of from three to six distant signals under the cable royalty plan with the new satellite carrier rate of 27 cents per subscriber.

As the results show, the per subscriber <u>cable</u> rate in all these situation is generally higher than the 27-cent rate when four distant signals are carried, and is <u>always</u> higher when five or six distant signals are offered. The cable per subscriber rate is lower only when three distant signals are offered. This comparison gives a more realistic assessment of the variations in cable royalty rates, and thus a more realistic assessment of what satellite carriers would actually pay if they were treated in the same manner as cable systems. The comparison shows that satellite carriers would likely pay <u>more</u> if they were subject to the cable royalty plan, depending on circumstances, than they have to pay under the new adjusted satellite rate of 27 cents per subscriber set by the Librarian. This analysis undermines SBCA's claims that carriers are being unfairly treated. There is little or no disparity between the 27-cent rate and what carriers would pay under the cable royalty plan, notwithstanding SBCA's unsubstantiated claims to the contrary.

In any event, it is apparent from SBCA's own data that the adjusted royalty fees have had no detrimental effect on DTH's growth. Satellite subscriber growth remained steady at about 2 million new subscribers annually in the last two measurement periods. SBCA Comments 7–8. Because the new rates went into effect on January 1, 1998, MPAA compared subscriber growth for January—July 1998 with the same period in 1997. (SBCA Comments, Appendix A). Total DTH subscribers increased by 875,000 from January to July 1998 as compared to 722,000 over the same period in 1997. If the rate change adversely affected the carriers' competitive position, it would be expected that 1998 subscriber growth would be less than growth in 1997. Yet, the opposite is true; in fact, the pace of growth is nearly 20% faster in 1998.

This comparison suggests that the rate adjustment has had no discernible effect on the satellite industry's rapid and sustained growth. Moreover, DTH penetration continues to grow throughout the entire country including in more urbanized states. SBCA Comments at 8. This continued strong growth demolishes SBCA's hypothesis that the adjusted royalty rate has eroded the satellite industry's competitive position. From every indication, the satellite industry remains strong and vibrant, and fully capable of providing serious national competition to the cable industry.

MPAA applauds the growth of the satellite industry into an important provider of programming. Not only does the satellite industry offer a new market for programmers, but it expands viewing choices for the public. Continued growth should not come, however, through subsidies (in the form of below-market royalties) paid for by copyright owners. Satellite carriers are owned by very large companies. *See* SBCA Comments at 4. These companies can and do pay market prices for a host of products and services, including cable network programming. There is no reason, particularly given congressional intent to adopt a fair market value statutory standard in Section 119, why they should not pay market-based rates for distant television programming. SBCA's alarmist cry that market–based rates will hurt their competitive position cannot be squared with SBCA's own evidence of accelerating growth of the industry.

Respectfully submitted,

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COMPARISON OF CABLE AND SATELLITE ROYALTY

TOP 50 MARKET CITIES

PHOENIX

# DISTANT STATIONS	SATELLITE ROYALTY/SUB	CABLE ROYALTY/SUB
3	$0.81	$0.52
4	$1.08	$0.90
5	$1.35	$1.27
6	$1.62	$1.65

BOSTON

# DISTANT STATIONS	SATELLITE ROYALTY/SUB	CABLE ROYALTY/SUB
3	$0.81	$0.55
4	$1.08	$0.95
5	$1.35	$1.35
6	$1.62	$1.75

NEW ORLEANS

# DISTANT STATIONS	SATELLITE ROYALTY/SUB	CABLE ROYALTY/SUB
3	$0.81	$0.66
4	$1.08	$1.13
5	$1.35	$1.60
6	$1.62	$2.08

COMPARISON OF CABLE AND SATELLITE ROYALTY

2ND 50 MARKET CITIES

ORLANDO

# DISTANT STATIONS	SATELLITE ROYALTY/SUB	CABLE ROYALTY/SUB
3	$0.81	$0.59
4	$1.08	$1.01
5	$1.35	$1.43
6	$1.62	$1.86

WICHITA

# DISTANT STATIONS	SATELLITE ROYALTY/SUB	CABLE ROYALTY/SUB
3	$0.81	$0.53
4	$1.08	$1.51
5	$1.35	$2.49
6	$1.62	$3.47

OMAHA

# DISTANT STATIONS	SATELLITE ROYALTY/SUB	CABLE ROYALTY/SUB
3	$0.81	$0.69
4	$1.08	$1.19
5	$1.35	$1.68
6	$1.62	$2.18

SMALLER MARKET CITIES

LEXINGTON

# DISTANT STATIONS	SATELLITE ROYALTY/SUB	CABLE ROYALTY/SUB
3	$0.81	$0.75
4	$1.08	$1.09
5	$1.35	$1.42
6	$1.62	$1.76

MONTEREY

# DISTANT STATIONS	SATELLITE ROYALTY/SUB	CABLE ROYALTY/SUB
3	$0.81	$0.95
4	$1.08	$1.38
5	$1.35	$1.81
6	$1.62	$2.23