

SCBA and its members continue to actively pursue a reliable and reasonably priced source of a digital add-on product delivered directly to subscriber homes as one way to provide digital capacity to the smallest systems. Before the announcement of the Primestar merger, SCBA members had worked closely with Primestar to develop a digital product that Primestar would deliver directly to subscriber homes. At the home, the cable operator would integrate the product with its wire-based service, providing seamless service to its customers. It remains unclear whether Primestar will return to the originally designed product, one that cable could self-brand. Nevertheless, SCBA and its members seek to continue their discussions with alternative providers.

Sufficient competition exists today to require those small cable businesses that had not sought digital solutions to now find them. The harsh economic realities, however, still preclude digital carriage by many smaller systems. The multi-channel video programming market has evolved in rural and insular markets to the point where incentives to cable system development and digital implementation overcomes the need for government involvement. Where it is economically feasible and sufficient product exists to support new technologies, small cable has tremendous incentive to find unique and innovative ways to implement them. Small cable businesses, not government regulators, know best what their markets want and what options are economically viable.

E. Until Technologically Viable and Commercially Reasonable, No System Between 5,000 and 15,000 Subscribers Should Have Any Digital Carriage Requirement.

Economic and technological viability remain the key to any digital carriage requirement that the Commission may impose on small systems between 5,000 and 15,000 subscribers. Any regulation that imposes requirements that are not economically

or technologically feasible will threaten the viability of small cable. The Commission must factor these considerations into its regulations now as many small cable systems provide service to rural and insular areas that happen to fall in large television markets.

1. Systems in this size range present an infinite variety of circumstances, making regulation by definitive rule impossible.

At this point of technical uncertainty and economic unknowns, crafting appropriate and detailed regulations regarding small cable obligations presents the Commission with a difficult task. Delay in crafting such rules, however, will also introduce regulatory uncertainty that will chill small cable's capital markets. The Commission must decide the small cable issues concurrent with its decision for the entire industry. SCBA recommends a simple but effective solution.

2. Certification that carriage is not technologically viable or commercially reasonable should remove small cable's carriage obligation.

SCBA proposes a solution that would result in a dialogue between broadcasters and small cable but not impose an obligation on small cable unless carriage of the digital signals prove both technologically and economically feasible. The process would follow a number of steps:

a. Broadcaster notice.

A broadcaster would have to provide a small cable operator with notice that it seeks carriage of its digital broadcast signal. The notice would contain all pertinent technical data that the cable operator needs to identify the headend and system changes required to carry the signal.

b. Cable operator response.

The small cable system operator would respond to the broadcaster with its decision regarding carriage. The small cable system could decline carriage if it certified to the broadcaster that carriage was either technically or economically unviable. For example, a limited bandwidth system or a headend with older electronics may not facilitate introduction of digital signals into the system. If technologically feasible, carriage may still be economically infeasible. If the costs of new equipment, including all costs associated with its acquisition,²² installation and operation would place too great a burden on subscriber rates, the operator would certify that to the broadcaster. The Commission could define the point of economic viability using a flexible standard of commercial reasonableness or as a maximum cost per subscriber.

c. Alternative solutions.

If a cable operator cannot legitimately comply with a request for carriage, the broadcaster would have a number of choices. For example, it could request carriage in the future if circumstances change. It could also agree to underwrite some of the costs of small cable carriage to overcome economic viability issues. Rather than bear the costs alone, broadcasters in a market could band together and share the cost of digital signal implementation as well. In short, SCBA's proposal would protect small cable from unrealistic demands. At the same time, it would encourage business-to-business discussions and marketplace solutions.

²²Acquisition cost must include the cost of capital and a return on that capital.

V. OTHER COMMISSION PROPOSALS FALL SHORT OF ADDRESSING SMALL CABLE'S TRUE ISSUES.

In its *NPRM*, the Commission poses several alternatives for digital carriage during the transition period. As explained below, these alternatives fail to address the unique circumstances of small cable.

A. The Commission Should Not Tie Carriage Requirements to System Upgrades.

The Commission's proposal mistakenly assumes that system upgrades to expand analog capacity will make the system capable of digital carriage. The Commission's proposal fails to consider that the capital cost to receive, process and distribute digital signals remains prohibitive to many small systems. If the Commission required every upgraded system to carry digital signals, it would discourage those small systems that could afford analog, but not digital, upgrades from bringing more channels and services to their customers.

B. The Phase-In Approach Does Not Adequately Consider Headend Costs.

The Commission's phase-in proposal does not fully consider the costs associated with digital carriage. The Commission suggests requiring cable systems to "commence some carriage of digital broadcast stations as they come on-the-air, but that some limit on the number that must be added be included in the transitional rules to avoid substantial channel line-up disruptions."²³ This approach would help minimize instances of massive dislocation of existing programming services. It fails, however, to consider that the addition

²³ *NPRM* at ¶ 46.

of the first signal carried would impose unaffordable capital costs. On that point, the proposal fails for small cable.

C. The “Either-Or” Proposal Fails to Consider Small Cable’s Economic Viability.

The Commission’s “either-or” proposal, which would “require broadcasters to choose mandatory carriage for either the analog signal or the digital transmission, but not both, during the early years of the transition period,”²⁴ similarly fails to consider the economic feasibility of digital carriage for small cable. This option merely defers a digital carriage requirement until 2005 when broadcasters must simulcast 100 percent of their programming and the mandatory carriage option would default to digital transmission.²⁵ As discussed throughout these comments, a requirement that small cable carry digital transmissions by a certain date fails to consider the economic reality of digital carriage for many small systems.

D. The Equipment Penetration Proposal Does Not Address Small Cable’s Concerns.

The Commission’s equipment penetration proposal most closely identifies a major force that should drive digital carriage — consumer demand — but still fails to consider the economics of digital carriage for small cable. With this approach, the Commission suggests that a carriage obligation would not become effective until a “significant number of consumers have receivers or digital-to-analog converter boxes.”²⁶

²⁴ *Id.* at ¶ 47.

²⁵ *Id.*

²⁶ *Id.* at ¶ 48.

To accommodate the economic realities of digital carriage for small cable, technical and economic feasibility, not regulation, should dictate small cable's movement to digital transmissions. This approach recognizes the need for consumer demand to drive digital carriage. It fails, however, to consider the often insurmountable technical and financial burdens imposed by system infrastructure changes necessary to process and cablecast a digital signal.

E. Deferral of Mandatory Digital Carriage Fails to Ameliorate the Financial Burdens on Small Cable.

Deferring mandatory digital carriage until a later date does not consider the financial impact digital carriage would ultimately have on small cable. The Commission proposes deferral of carriage obligations as another alternative for digital carriage during the transition period.²⁷ As SCBA discusses throughout these comments, an unconditional carriage requirement would impose significant financial burdens on small cable. Given the financial impact any digital carriage requirement would have on many small cable systems, this option accomplishes nothing except to cast a cloud that would discourage investment in small cable.

F. Waivers Alone Will Not Provide an Adequate Relief Mechanism.

A process that would allow small cable to petition the Commission for special relief cannot provide the principal vehicle for relief.²⁸ Rather, the petition for special relief should remain the ultimate safety net.

²⁷ See *NPRM* at ¶ 49.

²⁸ *NPRM* at ¶ 53.

A mechanism to permit special relief in cases of financial hardship to small cable operators would impose severe strains on the Commission's administrative resources. There presently are over 7,000 small, independently owned systems. Digital carriage threatens harsh financial consequences for many, if not all, of these systems. It is unrealistic and unreasonable for the Commission to act on thousands of petitions for special relief. Rather than imposing mandatory carriage and permitting small cable to seek waivers, allowing market forces and the laws of economics to dictate small cable's transition to digital carriage would better serve the public interest and protect the Commission's limited resources.

A waiver process also burdens small cable's financial resources. The filing fee alone costs almost \$1,000, not to mention the thousands of dollars of professional assistance necessary to prepare a petition. These costs make a waiver process prohibitively expensive and time-consuming.

The uncertainty attached to a waiver process poses further financial obstacles for small cable. As discussed above, mandatory digital carriage will almost certainly adversely affect capital investment. The uncertainty of relief inherent in a case-by-case waiver process would also deter capital investments. The administrative and financial burdens of a waiver process do not justify its use as a means to provide small cable relief.

VI. UNREGULATED ANALOG RETRANSMISSION CONSENT DEMANDS POSE A MAJOR THREAT TO SMALL CABLE'S VIABILITY.

A. Unequal Bargaining Power Has Caused Inequitable Retransmission Consent Agreements.

Small cable businesses find they lack the requisite bargaining power to effectively negotiate retransmission consent agreements. Most small cable businesses have found

retransmission consent offers made on a "take it or leave it" basis. Often, small cable even has trouble making contact with appropriate broadcast station personnel to initiate discussions.

Small cable lacks bargaining power because it lacks a sufficient customer base, relative to the broadcaster's total market, to withhold from the broadcaster. Broadcasters have no downside if a small cable system does not carry its signal. The loss of viewers is simply insignificant and does not impact the broadcaster's revenue. Small cable and its customers suffer, however, if broadcasters withhold their analog signals.

B. Broadcasters Can Mandate Immediate Small Cable Carriage of Digital Signals by Holding Retransmission Consent of Analog Signals Hostage.

Unregulated retransmission consent agreements will undermine any digital signal carriage framework crafted by the Commission other than a complete requirement for all systems to carry all digital signals. The Commission must adopt a comprehensive policy regarding the carriage of digital signals that private parties cannot circumvent.

1. Obtaining carriage for digital signals in exchange for retransmission consent is consistent with past conduct.

SCBA members have received indications that broadcasters in many markets will demand carriage of their digital signals in exchange for retransmission consent for their analog signals. Because localism, including carriage of local broadcast signals, constitutes an integral component of small cable's competitive strategy, carriage of local analog signals becomes critical to small cable's viability.

Small cable's reliance on local signal carriage, coupled with small service areas that encompass only a fraction of the broadcaster's total market, put small cable at a serious

disadvantage at the bargaining table. Broadcasters know that small cable needs their signals. Further, if broadcasters fail to grant consent, they know they will lose access to only a tiny fraction of their markets. Unlike large systems that can threaten to remove the signal from a large section of the broadcaster's market, small cable comes to the negotiating table at a significant disadvantage.

Small cable fears a repeat of prior retransmission consent agreements when they begin negotiations next year for the right to carry analog signals after December 31, 1999.²⁹ In prior years, broadcasters have employed a number of troubling tactics.

a. Demand carriage of new programming services.

Broadcasters have often demanded carriage of their cable products (e.g., ESPN2, fX, local weather services) in exchange for retransmission consent. Consequently, the demand for carriage of their digital products in the absence of a Commission mandate would fall in line with prior conduct.

b. Demand exorbitant cash compensation in the alternative.

Broadcasters have previously demanded cash for compensation as an alternative to carriage of new cable programming products. Often, however, the cash payments demanded far exceeded the cost of purchasing the cable programming product, making the cash payment alternative illusory.

²⁹47 C.F.R. § 76.64(f)(2).

c. Demand higher costs from small cable.

Regardless of whether they have required payment for programming or cash payment for consent, broadcasters have historically imposed higher rates for small cable. As one broadcaster put it when offering retransmission consent in exchange for cash, "Naturally, quantity discounts are available under both arrangements."³⁰ No justification exists to extract higher per subscriber payments from small cable systems for retransmission consent.

2. Broadcaster demands could result in loss of analog signal carriage.

Lack of bargaining power and broadcasters' claims that they cannot offer small cable systems adjusted terms and conditions will force many small cable businesses to lose carriage of local analog signals. This result would harm localism and undercut the objectives of Congress to have the widest possible dissemination of broadcast signals.

Broadcasters often use claims of "most favored nations" clauses in their contracts with large cable systems as grounds for refusing to offer small cable systems more favorable terms and conditions that reflect the unique circumstances of small cable businesses. If allowed to continue, this almost uniform refusal to negotiate, that spanned the last two retransmission consent cycles, inevitably will result in widespread removal of local analog broadcast signals from small cable systems.

³⁰Letter from KGO-TV to Lynn Simpson, Sun Country Cable, dated September 21, 1993 (Exhibit B).

3. No limit exists on retransmission requirements.

When establishing analog must-carry, Congress limited to one-third the amount of channel capacity that mandatory carriage of commercial stations could consume.³¹ No similar limit exists for retransmission consent requirements.

Small cable, especially those systems serving areas in large markets, will easily reach the one-third limit. At that point, small systems will face a choice. If they must carry, and can afford to carry, digital signals, small cable will have to either delete more satellite programming services to clear channel capacity or they will drop less viewed analog signals. Hence, carriage of digital signals as a result of the retransmission consent process would likely lessen diversity of programming in conflict with federal law.

C. The Commission Must Limit Digital Carriage Demands Placed on Small Cable Via Retransmission Consent Agreements.

The advent of digital broadcast spectrum requires the Commission to place limitations on retransmission consent agreements to prevent those agreements from undermining the regulatory and market development policies adopted by the Commission in this proceeding. SCBA understands the reluctance of the Commission to undertake new regulatory initiatives. Nevertheless, as outlined above, small cable — and the viewing public — need limits placed on broadcaster demands.

The Commission should prevent broadcasters from tying carriage of digital products to consent for analog signal carriage for small cable. Further, the Commission must prevent the cost disparity among the various options offered by the broadcaster. The past conduct of broadcasters with respect to small cable warrants these boundaries. Small

³¹See 47 U.S.C. § 534(b)(1)(B).

cable lacks the necessary negotiating leverage and therefore needs these boundaries to avoid contractual imposition of mandatory digital carriage.

VII. CONCLUSION

Any digital signal carriage obligations not carefully tailored to the needs of small cable will have a significant adverse impact on the viability of small cable. SCBA has outlined a framework of considerations and alternatives for the Commission. If it ultimately imposes any carriage requirement, SCBA strongly urges the Commission to incorporate the alternatives proposed above. In all events, however, the Commission must reign in the ability of broadcasters to demand digital carriage in return for analog retransmission consent.

Respectfully submitted,



Eric E. Breisach
Christopher C. Cinnamon
Lisa M. Chandler

Bienstock & Clark
5360 Holiday Terrace
Kalamazoo, Michigan 49009
(616) 353-3900

Attorneys for the Small Cable Business
Association

EXHIBIT A

New Battles for Small Cable Operators

By DAVID KINLEY

Small cable's version of the Vietnam War came to a close on March 31. Mercifully, the long, tedious battle with the broadcasters over must-carry ended. As with Vietnam, many of us thought at first that the war was necessary. But as the must-carry battle dragged on after the Supreme Court remand, many of us began to question whether the potential casualties were worth it.

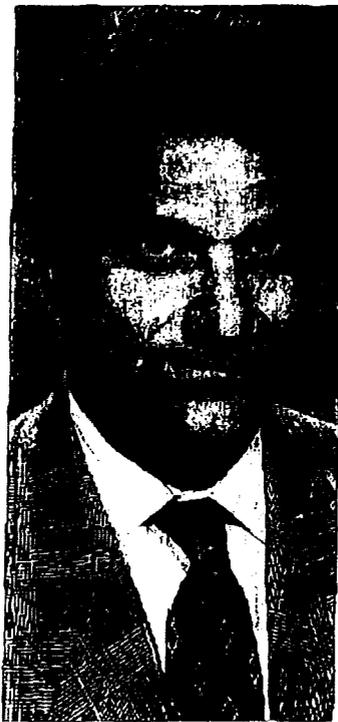
In particular, the cable industry's challenge to must-carry was preventing us from forming an alliance with the broadcasters against DBS, just as the United States was stopped during the Vietnam conflict from pursuing broader goals in foreign policy.

So this small operator is relieved that it's over and that we lost. True, I feel that my First Amendment rights

tory burden cable has, such as must-carry, retransmission consent or PEG access requirements. There will be pressure for this session of Congress to review the Satellite Home Viewers Act and repeal the prohibition against DBS' retransmission of network signals into the local affiliate's service area.

The Small Cable Business Association has announced its intention to launch a broad attack on both DBS' proposals and the ASkyB/Echostar merger, to ensure fair competition between small cable and the DBS industry.

1. SCBA will file extensive comments in the Federal Communications Commission's recently reopened rulemaking on the public-interest obligations for DBS licensees. SCBA will seek to have established the same public-service obligations for DBS that now are being



KINLEY

approved by the FCC until it decides what these obligations are. Murdoch's proposal for ASkyB's free use of network programming to spot beam into selected markets, without shouldering any of these responsibilities, is a blatant attack on the FCC's statutory obligation to foster local programming.

The second jaw of the vise squeezing small cable is its

programming on reasonable terms. Over the past year, the SCBA has spent nearly \$200,000 to keep the heat turned up on this issue. Our goal is simple: All cable programming should be made available to small operators through the National Cable Television Cooperative. The costs and terms should be the same for NCTC as for a similar-sized MSO. Yet eight of the most popular cable networks refuse to sell to small operators through NCTC.

In 1996, SCBA used the regulatory proceedings on two mergers as vehicles for keeping Washington policymakers focused on this issue. We vigorously opposed the ABC-Disney merger at the FCC. We also strongly opposed the Turner-Time Warner merger at the Federal Trade Commission unless there were strong protections for the hard-won programming agreements between Time Warner and NCTC. As a result, for the first time, a federal regulatory agency decided that NCTC qualified as a legitimate purchasing agent under rules prohibiting price discrimination.

In 1993, the FCC had the same opportunity to do so, but instead fashioned a definition out of thin air that ex-

During the course of the FTC's review, SCBA gained the support of the Small Business Administration. In a well-researched filing, SBA strongly supported SCBA's contention that the FTC should ensure renewal of all the NCTC contracts with both Turner and Time Warner. This was the first time SBA had taken a position on the issue of the disparity in programming costs for small operators. The alliance of SBA and SCBA converted program access into a small business issue.

It is apparent that DBS companies like DirecTV and PrimeStar have huge advances in the wholesale rates they are obtaining from the programmers.

If small cable sits on the sidelines in the battle over network signals, we may face DBS competitors who will then have both lower programming costs and the signals of the local network affiliates. Therefore, SCBA is seeking allies among small-market broadcasters to achieve these goals. Now that must-carry keeps us linked, it should be easier for us to form this alliance.

David Kinley is chairman of the Small Cable Business Association and president of

"Local broadcasters, particularly those in smaller markets, are the most natural allies we have."

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most natural allies we have.

have been trampled; the federal government seized one-third of my expensive channel capacity without any reimbursement for me. But in the meantime, Rupert Murdoch wants to defoliate my small rural system with lots of local and distant network napalm. So small cable needs all the allies it can find. Local broadcasters, particularly those in smaller markets, are the most natural allies we have.

DBS is the first jaw of a vise that is closing on small operators. The Satellite Home Viewers Act essentially prohibits direct-broadcast services' beaming of network signals into areas that are served by a network affiliate. But, as discussed in a recent article in the *Wall Street Journal*, many believe there are wholesale violations of this statutory prohibition. As a result, several lawsuits have already been launched by local stations, backed by their respective network affiliates group.

Letter-writing campaigns generated by dish dealers to remove the restriction on DBS have already begun. DBS wants to be able to distribute broadcast signals indiscriminately — without bearing any of the regula-

applied to small cable. These include PEG access, leased access, must-carry/retransmission consent, copyright liability, ownership restrictions and the right of local franchising authorities to levy fees. SCBA will also seek restrictions on DBS providers to avoid harm to outlets for local programming.

2. SCBA will file a petition to deny the DBS license transfers that are necessary to complete the EchoStar merger with Fox's ASkyB. SCBA believes that this merger will create significant new vertical integration of major programming sources and distribution outlets, which will result in increased discrimination against small cable in program pricing. SCBA raised the same objections to other recent media mega-mergers, such as ABC-Disney.

DBS is an industry that has committed wholesale violations of the Satellite Home Viewers Act. Now it wants the law changed in its favor while trying to avoid any public-interest obligations. The FCC should scrutinize the industry's conduct in deciding what DBS' public-interest obligations should be. The merger of EchoStar with ASkyB should not be

FCC's statutory obligation to foster local programming.

The second jaw of the vise squeezing small cable is its continued inability to access

In 1993, the FCC had the same opportunity to do so, but instead fashioned a definition out of thin air that excluded NCTC.

David Kinley is chairman of the Small Cable Business Association and president of Sun Country Cable.

Multichannel News Online

Multichannel News Online is the only format. First, check our Web site (<http://www.multichannel.com>) for **Multichannel News Digest**, which gives you an early look at the biggest cable news. You'll also find excerpts from **Broadband Week**, our section on broadband news, plus comprehensive listings of other cable resources available on the Net.

Full text of past Multichannel News Digests can be retrieved on Information Access' Business Library, which is available on Nexis, Dialog and Dow Jones News Retrieval. Questions? Contact finance editor **John M. Higgins** (higgins@dorsai.org).

EXHIBIT B

Exhibit 1

KGO-TV, Inc. 800 Front Street San Francisco CA 94111-1450 (415) 964 7700



Jim Topping
President and General Manager

September 21, 1993

Lynn Simpson
Sun Country Cable
5976 W. Las Positas
Suite 202
Pleasanton, CA 94588

Dear Ms. Simpson:

I have enclosed for your convenience and review a sample copy of KGO-TV's Retransmission Consent Agreement and Fee Schedule.

You will note that the Retransmission Consent Fee structure is outlined for both three year and six year terms. Naturally, quantity discounts are available under both arrangements.

We appreciate your interest in continuing your uninterrupted carriage of KGO-TV on your cable television system and trust that we can arrive at the most mutually satisfying arrangement for each of our companies.

If you have any question, please feel free to contact me or Charles Ward who may be reached here at the Station at (415) 954-7241.

Sincerely,

Jim Topping
President & General Manager

cc: **C. Ward**
K. Conlan

THREE YEAR AGREEMENT
MONTHLY RETRANSMISSION FEES

	<u>FIRST</u> <u>YEAR</u>	<u>SECOND</u> <u>YEAR</u>	<u>THIRD</u> <u>YEAR</u>
RATE CARD	\$.24	\$.28	\$.32
CHANNEL PLACEMENT (MUST-CARRY EQUIVALENT)	(.02)	(.02)	(.02)
TIMELY CONTRACT SIGNING; e.g. 8/1/93	<u>(.02)</u>	<u>(.01)</u>	<u>-</u>
MONTHLY FEE BEFORE QUANTITY DISCOUNTS	\$.20	\$.25	\$.30
<u>NET FEES AFTER</u> <u>QUANTITY DISCOUNTS</u>			
MINIMUM 1¢	.19	.24	.29
MAXIMUM 6¢	.14	.19	.24

QUANTITY DISCOUNTS

IF THE TOTAL NUMBER OF SUBSCRIBERS
SERVED IN EIGHT MARKETS IS:

AMOUNT OF MONTHLY FEE
REDUCTION PER SUBSCRIBER

1 TO 249,999	\$.00
250,000 TO 499,999	.01
500,000 TO 749,999	.02
750,000 TO 999,999	.03
1,000,000 TO 1,199,999	.04
1,200,000 TO 1,499,999	.05
1,500,000 OR MORE	.06

SIX YEAR AGREEMENT
MONTHLY RETRANSMISSION FEES

	<u>1ST</u> <u>YR</u>	<u>2ND</u> <u>YR</u>	<u>3RD</u> <u>YR</u>	<u>4TH</u> <u>YR</u>	<u>5TH</u> <u>YR</u>	<u>6TH</u> <u>YR</u>
<u>MONTHLY FEE BEFORE</u> <u>QUANTITY DISCOUNTS</u>						
THREE YEAR AGREEMENT	\$.20	\$.25	\$.30	-	-	-
SIX YEAR AGREEMENT	.15	.19	.23	\$.27	\$.31	\$.35