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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Lisa Chandler Cordell

January 21, 2000

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VIA HAND DELIVERY

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: CS Docket No. 99-363
Reply Comments of the American Cable Association

Dear Ms. Salas:

On behalf of the American Cable Association ("Association"), we enclose ten (10) copies of the Association's Reply Comments in the above-referenced docket. We request that each Commissioner receive a copy of these materials.

We also include a "FILE COPY." We ask that you date-stamp and return it to the courier.

Please call with any questions.

Very truly yours,

Lisa Chandler Cordell

Lisa Chandler Cordell

Enclosures

- cc: American Cable Association
- cc: Certificate of Service list

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)	
)	
Implementation of the Satellite)	CS Docket No. 99-363
Home Viewer Improvement)	
Act of 1999)	
)	
Retransmission Consent Issues)	

To: The Commission

**REPLY COMMENTS OF THE
AMERICAN CABLE ASSOCIATION**

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January 21, 2000

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

In the Matter of:)	
)	
Implementation of the Satellite Home Viewer Improvement Act of 1999)	CS Docket No. 99-363
)	
Retransmission Consent Issues)	

To: The Commission

**REPLY COMMENTS OF THE
AMERICAN CABLE ASSOCIATION**

The American Cable Association ("Association") files these Reply Comments to address other commenting parties' misconceptions regarding the retransmission consent process as it relates to smaller cable businesses and their systems. As the Association explained in detail in its Comments, smaller cable businesses and their systems have faced serious challenges in obtaining retransmission consent on reasonable terms and conditions.¹ Wholly unreasonable and impracticable broadcaster demands have even resulted in smaller cable businesses having to forego carriage of local broadcast signals altogether in some instances.²

¹ See *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, Comments of the American Cable Association in CS Docket No. 99-363 (January 12, 2000) at 7-15 ("DBS Retransmission Consent Comments").

² See *id.*

I. THE WIDEST POSSIBLE DISTRIBUTION OF BROADCAST SIGNALS IS NOT BROADCASTERS' OVERRIDING INTEREST IN THEIR RETRANSMISSION CONSENT NEGOTIATIONS WITH SMALLER CABLE BUSINESSES.

Broadcast interests insist that they have every incentive to reach retransmission consent agreements with multichannel video programming distributors ("MVPDs"), citing their overarching concern for securing the widest possible distribution of their signals.³ As NBC articulated,

Broadcasters have every incentive to enter into retransmission consent agreements with these satellite providers, as well as other MVPDs serving their market. Television broadcasters are in the business of getting the maximum number of viewers as possible for our programs. A television station wants to be carried on as many competing MVPD systems as possible, thereby ensuring the largest possible audience for our shows and increasing advertising revenue. In addition, because of intense competition between and among television stations in any given market, a television broadcaster wants to be carried on at least as many MVPD systems as its competitors. The existence of one retransmission agreement between a station and an MVPD becomes a driver of other retransmission deals. This then is a typical and healthy free market transaction in which both parties derive a substantial benefit from reaching an agreement.⁴

³ See Comments of National Broadcasting Company, Inc. in CS Docket No. 99-363 at 1, 3 (Jan. 12, 2000) ("NBC Comments") ("The broadcasters have tremendous incentive to reach agreements with each and every multichannel video program distributor.") *Id.* at 1 (emphasis added); Comments of CBS Corporation in CS Docket No. 99-363 at 4 (Jan. 12, 2000) ("[B]roadcasters have a powerful marketplace incentive to reach retransmission consent agreements with all MVPDs, including satellite carriers." (emphasis added); Comments of the National Association of Broadcasters in CS Docket No. 99-363 at 1, 12 (Jan. 12, 2000) ("[S]tations have strong incentives to be carried by MVPDs in the station's local markets." (emphasis in original)); Joint Comments of the ABC, CBS, FOX, and NBC Television Network Affiliate Associations in CS Docket No. 99-363 at 8-9 (Jan. 12, 2000) ("Network Affiliates Comments") ("Surely the Commission must recognize that local stations desire to have -- indeed, must have -- program distribution by local MVPDs.").

⁴ See NBC Comments at 3-4.

Explained another way,

Local television stations depend on viewership for advertising sales. More viewers yield more advertising revenue. More advertising revenue yields more net profits. It is as simple as that. This fundamental market force works to restrain a local television station from engaging in abusive negotiating practices.⁵

The Association suggests that all broadcasters follow their own advice and refrain "from engaging in abusive negotiating practices." The facts from smaller cable businesses' experiences in negotiating retransmission consent agreements prove that broadcasters' interests do not strictly involve securing the widest possible distribution of their signals. Rather, broadcasters' behavior is motivated by one thing -- profit maximization, by whatever means possible. The facts show that profit remains their overriding concern.⁶ If this were not the case, as the broadcasters loftily claim above, then broadcasters would elect must-carry in every instance to ensure the availability of their signals to the widest audience possible. They don't, of course, creating the very same negotiating abuses the Association has in its comments asked the Commission to rectify.

"Pure" broadcasters probably would want the widest possible distribution of their broadcast signals. However, as the Association points out in the next section, thanks to mega-media conglomeration between broadcasters and programmers, there are few "pure" broadcasters left.

⁵ See Network Affiliates Comments at 8-9 (emphasis added).

⁶ See DBS Retransmission Consent Comments at 7-15 (outlining broadcasters' unreasonable retransmission consent demands).

II. RETRANSMISSION FOR CARRIAGE IS A PREVALENT PRACTICE, BUT IS NOT AN ACCEPTABLE NORM.

One DBS provider suggests that "retransmission for carriage" serves as an acceptable "norm" in the context of broadcaster-cable retransmission consent arrangements, so the Commission can therefore consider it as an acceptable competitive marketplace consideration.⁷ EchoStar suggests that there exists a

consistent pattern showing that competitive marketplace considerations have led the broadcasters to give cable operators their retransmission consent either for free or at a very low cost. Generally, where the broadcaster or network has received consideration at all, it has been in the non-monetary form of carriage of certain cable networks affiliated with the broadcast entity. These "retransmission-for-carriage" deals offer strategic benefits to the broadcasters at very little or no cost to the cable operator. In particular, the cost to the cable operator of carrying a broadcast-affiliated cable network (assuming limited shelf-space) is no more than the opportunity cost it incurs in therefore not being able to carry another, presumably more popular cable network – a negligible amount.⁸

While many retransmission consent agreements require cable operators to carry satellite cable programming in exchange for retransmission consent, the Commission must not assume that smaller cable businesses find these practices acceptable or that such requirements come at "little or no cost to the cable operator."

⁷ See Comments of EchoStar Satellite Corporation in CS Docket No. 99-363 (Jan. 12, 2000) at iv, 14 -15 ("EchoStar Comments"). EchoStar seems to suggest that it will accept "retransmission for carriage" as a permissible condition for its carriage of broadcasters' signals. See *id.* at iv.

⁸ EchoStar Comments at 14-15.

As the Association has explained, local broadcast signals remain an integral component of smaller cable's competitive strategy, especially in light of DBS's recent introduction of local service.⁹ That smaller cable businesses must frequently capitulate to broadcasters' demands for carriage of satellite cable programming in exchange for retransmission consent results from customer demand for the local signal and the absence of any meaningful alternative. The Commission therefore must not interpret smaller cable's "assent" as its acceptance of this practice as an industry norm.

For channel-locked smaller systems, these demands also come at a very high price -- in terms of both actual out-of-pocket cost and expense and loss of precious channel capacity. "[T]he increased concentration of media programmers with broadcast networks [has] exacerbate[d such tying demands] Mega-programmers continue to leverage their market share and negotiating imbalance by demanding increasing amounts of channel capacity to the exclusion of other programmers."¹⁰ With each additional cable network, a channel-locked system must discontinue carriage of other, often more popular, programming. Such demands diminish smaller cable businesses' ability to compete with other MVPDs that do not suffer from as limited channel capacity. The Commission therefore should not consider "retransmission for carriage" as an acceptable "competitive marketplace consideration," at least as it relates to retransmission consent negotiations involving smaller cable businesses.

⁹ See DBS Retransmission Consent Comments at 3.

¹⁰ See DBS Retransmission Consent Comments at 10.

III. CONCLUSION

Smaller cable's experiences relating to retransmission consent negotiations belie broadcasters' assertions that they have every incentive to enter into retransmission consent agreements; instead, profit maximization by whatever means available remains a primary motivation. Smaller cable's experiences similarly suggest that the Commission should not consider "retransmission for carriage" an acceptable competitive marketplace consideration as it relates to retransmission consent negotiations involving smaller cable businesses.

Respectfully submitted,

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January 21, 2000

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CERTIFICATE OF SERVICE

I, Brunetta Bishop, certify that a copy of the foregoing REPLY COMMENTS was sent via first class mail, except where noted, on this 21st day of January, 2000 to each of the following:

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