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

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast Signals	)	CS Docket No. 98-120
	)	
Amendments to Part 76 of the Commission’s Rules	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	
	)	
Local Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	)	CS Docket No. 00-2

Comments of the

American Cable Association

Matthew M. Polka
President
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Christopher C. Cinnamon
Kurt J.H. Mueller
Rhondalyn D. Primes
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for American Cable Association

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SUMMARY

ACA's comments focus on one issue raised in this proceeding: the harm to independent cable companies and their customers caused by broadcast networks that engage in retransmission consent tying.

These comments provide concrete examples of how media conglomerates like Disney/ABC, Fox Network/News Corp., Hearst-Argyle and GE/NBC force costly tying arrangements on smaller cable companies. These tying arrangements include:

- Tying of retransmission consent for ABC in one market to carriage of affiliated Disney programming in many markets.
- Tying of retransmission consent for ABC in one market to carriage of the Disney Channel on basic in many markets.
- Tying of retransmission consent for Fox Network in one market to carriage of Fox Sports, Fox News, FX, National Geographic Channel, and Fox Health Channel in many markets.
- Tying of retransmission consent for ABC to carriage of Lifetime.
- Tying of retransmission consent for NBC in one market to carriage of MSNBC, CNBC, and payment of Olympics surcharge in many markets.
- The loss of control by local network stations over retransmission consent rights. Affiliated cable networks have taken control of retransmission consent for O&O network stations.

For ACA members, these examples show a marketplace suffering from serious malfunction. As Disney, Fox, NBC and others know, independent cable operators cannot survive without network programming. At the same time, those network broadcasters benefit from protected markets. No genuine substitute for network broadcast programming exists in smaller markets. The network owners wield overwhelming market power over smaller cable systems.

The consequences in smaller markets? Forced carriage of unwanted programming, higher cable rates, and decreased programming diversity. Moreover, network owners impose onerous nondisclosure obligations on smaller cable companies to prevent public scrutiny of this conduct.

By themselves, ACA and its members have not been successful in changing the behavior of media conglomerates like Disney, News Corp, and others. To the contrary, retransmission consent tying is getting worse. To reverse this persistent and dangerous trend, we need the Commission's help. To that end, these comments also propose the beginnings of a solution – discrete steps the Commission can take to help remedy the problem. The Commission should:

- Prohibit nondisclosure obligations related to retransmission consent.
- Initiate an inquiry into network owners' retransmission consent practices.
- Act on any unauthorized transfer of control of retransmission consent rights by broadcast licensees.

ACA will assist the Commission with all available resources in this effort.

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Comments of the

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I. INTRODUCTION

ACA submits these comments on behalf of more than 900 independent cable companies. Together, ACA members serve about 7.5 million cable subscribers. ACA members range from small, family-run cable systems to multiple system operators focusing on smaller systems and smaller markets. About half of ACA's members serve less than 1,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in smaller markets and rural areas.

These comments focus on one issue raised in this proceeding: the harm to independent cable companies and their customers caused by broadcast networks that tie retransmission consent to carriage of other programming. The *Digital Must Carry Order* addressed retransmission consent tying arrangements as follows:

> While we acknowledge the important considerations raised by [ACA], we will not adopt rules specifically prohibiting tying arrangements at this time. In coming to this conclusion, we recognize that substantial evidence must be presented to support a claim that a tying arrangement exists and that the operator suffers harm as a result. Without proof to support the case, it is difficult for the Commission to formulate an appropriate remedy. . . we will continue to monitor the situation with respect to potential anticompetitive conduct by broadcasters in this context. If, in the future, cable operators can demonstrate harm to themselves or their subscribers due to tying arrangements, we will be in a better position to consider appropriate courses of action.[1]

ACA appreciates the Commission's concern. These comments aim to assist the Commission by providing substantial evidence of the harm caused by retransmission consent tying, and by suggesting the next steps the Commission should consider to remedy this harm.

Below we provide concrete examples of how media conglomerates like Disney/ABC, Fox Network/News Corp., Hearst-Argyle and GE/NBC force costly tying arrangements on smaller cable companies. A review of this information will show the Commission a dark side of the continuing trend of media concentration in the network

[1] *In the Matter of Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-22 (rel. January 23, 2001) ("*Digital Must Carry Order*"), ¶ 35 (referencing comments of the Small Cable Business Association, the former name of ACA); see also ¶ 121, and Final Regulatory Flexibility Analysis, ¶ 20.

broadcast and satellite programming industries. We note that network affiliates are also beginning to speak out about abuse of market power by network owners.[2]

For ACA members, the tying examples in these comments provide just a glimpse of a marketplace suffering from serious malfunction. As Disney, Fox, NBC and others know, independent cable operators cannot survive without network programming. At the same time, those network broadcasters benefit from protected markets. Network nonduplication, syndicated exclusivity, and market restrictions in affiliate agreements, all serve to insulate network broadcasters from competition. As a result, no genuine substitute for network broadcast programming exists in a market, and the entity controlling the license wields overwhelming market power over smaller cable systems.

Independent cable companies and their customers increasingly pay the costs of the abuse of this market power. The consequences: forced carriage of unwanted programming, higher cable rates, and decreased programming diversity.

ACA and its members have not succeeded in changing the behavior of media conglomerates like Disney and News Corp. We need the Commission's help. To that end, these comments conclude with discrete steps the Commission can take to help remedy the problem.

The *Digital Must Carry Order* also seeks information concerning capacity on smaller cable systems and the costs of delivering digital signals to subscribers in smaller markets.[3] ACA is still gathering this data and plans to submit it during the reply comment cycle.

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[2] *Petition For Inquiry Into Network Practices*, Network Affiliated Stations Alliance (filed May 8, 2001).
[3] *Digital Must Carry Order*, ¶ 121, *Final Regulatory Flexibility Analysis*, ¶ 20.

II. ANALYSIS

A. Examples of retransmission consent tying arrangements forced on smaller market cable operators.

This section provides recent examples of retransmission consent tying arrangements forced on smaller market cable operators by Disney/ABC, Fox Network/News Corp., Hearst-Argyle and GE/NBC. Each case demonstrates the overwhelming market power of network broadcasters over independent cable, and the high costs of retransmission consent tying on smaller market cable systems and their customers.

As a precaution, we present these examples in sanitized form. Independent cable companies are keenly aware of the power wielded by companies like Disney/ABC, Fox Network/News Corp., and others. Small cable operators fear retribution. In the words of one small cable veteran, "They have us in a bind, and they will squeeze us." Still, these examples describe actual carriage terms forced on independent cable companies in the past 24 months. To obtain more specific information will require Commission protection.[4]

1. Disney/ABC

The merger of the Disney companies and Capital Cities/ABC aligned Disney's satellite programming assets with ABC owned and operated network stations in many markets. Disney's demands to tie retransmission consent for ABC to carriage of Disney-affiliated programming promptly followed the merger.

[4] For example, the Commission might seek more specific information and protect it from disclosure under 47 CFR § 0.459.

Last year's retransmission consent dispute between Disney/ABC and Time Warner garnered much attention. That case demonstrates the market power wielded by owners of broadcast licenses and satellite programming. Even the impressive resources and resolve of Time Warner had to yield to the tremendous pressure that followed deletion of ABC from certain Time Warner cable systems for just two days in May 2000.

If Disney/ABC has leverage like that over Time Warner, how do independent cable companies fare in the retransmission consent process? As the following two examples show, they do not stand a chance.

a. Tying of retransmission consent for ABC in one market to carriage of Soapnet in other markets.

One ACA member faced the following situation in seeking consent to retransmit an O&O ABC station. This case provides a dramatic example of the power of Disney to use retransmission consent tying to raise the costs of cable in smaller markets.

The small cable company operates several small systems in a number of states. In one market served by the cable company, it serves a few thousand customers. In another area of the company's operations, several states removed, it serves tens of thousands of customers. In the market where the company serves a few thousand customers, the cable operator obtains ABC programming from a station owned by Disney Enterprises Inc.

The O&O ABC station elected retransmission consent. The cable operator was then directed to deal with a representative for Disney cable networks in a distant city. There was no further contact with the local broadcaster. All communications were with

Disney cable network personnel. Disney refused to grant retransmission consent unless the cable operator launched, and paid for, a new satellite network, Soapnet.

Disney did not limit its demands to launching Soapnet to the market served by the O&O ABC. Again, in that market the cable operator serves a few thousand customers. Instead, Disney conditioned retransmission consent to the launch of Soapnet in a market several states away, where the cable operator serves several times that many customers.

To obtain consent to carry essential ABC programming in one market, Disney gave the small cable company no choice but to carry Soapnet in other markets. The Soapnet contract extends for a number of years beyond the 2000 - 2002 election period. Aggregate payments exceed a quarter million dollars. A representative of the cable operator stated "No way would we have agreed to carry Soapnet, but we needed ABC programming in that one market."

This case demonstrates three consequences of the overwhelming market power of media conglomerates like Disney/ABC over independent cable companies:

- Using retransmission consent rights in one market to force carriage of undesired programming.
- Using retransmission consent rights in one market to increase the costs of cable services in other markets.
- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

The following example demonstrates another way that Disney uses retransmission consent to force unwanted programming and costs on smaller market cable customers.

b. Tying of retransmission consent for ABC in one market to company-wide carriage of the Disney Channel on basic.

An ACA member serving subscribers in small communities in several states faced the following situation in seeking consent to retransmit an O&O ABC station. For the 2000 - 2002 election period, the broadcaster elected retransmission consent, then sent the cable operator a three-year retransmission consent agreement. Within 30 days, the cable operator returned the agreement to the broadcaster with minor comments. During this same period, Disney Channel representatives approached the cable operator to renegotiate terms of carriage for the Disney Channel.

The broadcaster then declined to execute the retransmission consent agreement it had previously offered to the cable operator. Instead, the broadcaster granted rolling 30-day extensions of retransmission consent. It then became clear to the cable operator that the broadcaster would not, or could not, execute the three-year agreement that it had originally provided, until the Disney Channel concluded negotiations.

At issue is carriage of Disney on basic. The cable operator currently offers the Disney Channel as a premium service. The cable operator bases this decision in part on customer demand and in part on cost – the Disney Channel charges one of the highest per subscriber license fees of any programming carried by the cable operator. Currently less than 10% of the cable operator's customers request the Disney Channel. Those customers that want the channel pay extra. Those customers that do not, pay less.

Disney Channel is demanding company-wide carriage of Disney on basic. In other words, as a condition of obtaining a settled retransmission agreement for ABC in one market, Disney will require all basic customers in all markets to pay for the Disney Channel. Disney's proposal would result in substantial increases in the cost of cable in each of the smaller markets in question. The cable operator estimates that company-wide, Disney's proposal would increase programming costs by nearly $1.5 million per year.

This situation demonstrates three consequences of the overwhelming market power of media conglomerates like Disney/ABC over independent cable companies:

- Using retransmission consent rights in one market to increase the costs of cable services in many markets.
- Using retransmission consent rights in one market to force carriage of satellite services in many markets.
- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

As described in the next example, Fox Network/News Corp. is employing similar tactics.

2. Fox Network/News Corp.

Tying of retransmission consent for Fox Network to carriage of Fox Sports, Fox News, FX, National Geographic Channel, and Fox Health Channel.

News Corp. controls O&O Fox Network broadcast licensees, along with multiple satellite programming services. ACA members are increasingly facing costly tying arrangements as a condition of carriage of O&O Fox Network stations.

An ACA member serving small communities in several states faced the following conduct by Fox. This case provides a disturbing example of the network owner's manipulation of the retransmission consent process and its disregard for the consequences on smaller market cable systems and their customers.

Shortly before the 2000 – 2001 retransmission consent election cycle began, the cable operator received a rate increase notice from a Fox regional sports network. During a period where the inflation rate was about 3%, Fox Sports sought a rate increase of over 75%. The cable operator informed Fox Sports representatives that it could not carry the network at that cost.

As an alternative, Fox proposed carriage of Fox Sports at a lower rate, so long as the cable operator agreed to carry, and pay for, Fox News, FX, and the National Geographic Channel. The cable operator declined this alternative as well, due to the cost and the difficulty in reconfiguring channel line-ups in its smaller systems.

While these negotiations were underway, an O&O Fox Network station carried by the cable operator delivered a retransmission consent election for the 2000 - 2002 election period. In earlier election periods, the cable operator and the station had promptly concluded negotiations for mutually acceptable terms of carriage. The cable operator received no indication initially that the retransmission consent process would differ from before.

When the negotiations with Fox Sports deadlocked, however, the Fox team brandished the retransmission consent lever. Months into the negotiations, Fox Sports representatives took the position that if the cable operator did not agree to carry Fox

Sports under one of the two alternatives proposed by Fox, then the Fox broadcast licensee would not grant retransmission consent.

Faced with the loss of essential broadcast programming, including local interest programming carried exclusively on the Fox broadcast station, the cable operator had no choice but to accept Fox's deal. The cost to subscribers? The cable operator estimates at least an additional $1.5 million per year.

Unfortunately, the story did not end there. To add insult to injury, after the cable operator agreed to the terms of carriage for Fox Sports, Fox took the position that retransmission consent would not be part of the deal unless the cable operator also carried yet another additional satellite network – the Fox Health Channel – at a rate 100% higher than the previous year.

It is important to note that during the same period, the cable operator received a retransmission consent election from a Fox Network affiliate, not an Fox O&O, in an adjacent market. No tying demands were made by the affiliate, and the parties promptly concluded negotiations.

This situation demonstrates three consequences of the overwhelming market power of media conglomerates like Fox Network/News Corp. over independent cable companies:

- Using retransmission consent rights in one market to increase the costs of cable services in many markets.
- Using retransmission consent rights in one market to force carriage of satellite services in many markets.

- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

3. Hearst-Argyle/ABC

Tying of retransmission consent for ABC to carriage of Lifetime.

Hearst-Argyle controls multiple broadcast licenses and satellite programming services including Lifetime. ACA members have faced widespread use of tying arrangements by Hearst-Argyle with costly consequences for smaller market cable systems and their customers. An ACA member serving less than 2,000 customers faced the following situation.

The cable operator obtained ABC programming in its market from an ABC affiliate controlled by Hearst-Argyle Television Inc. The broadcaster elected retransmission consent for the 2000 - 2001 election cycle. In earlier cycles, representatives of the cable operator and the station had promptly concluded agreements for retransmission consent on mutually agreeable terms. Not the case during the 2000 - 2001 election cycle. The difference? Lifetime representatives took over negotiations. Hearst Corp. and The Walt Disney Company reportedly own Lifetime.

Lifetime's representative proposed the following alternative: Put on Lifetime and pay $0.30 per customer per month or pay $0.50 per customer per month for retransmission consent for ABC only. As the cable operator served less than 2,000 customers and it had no choice but to carry ABC network programming, Lifetime had no incentive to negotiate. And it did not.

As a consequence of the cost increases related to forced carriage of Lifetime, a channel that no customer asked for, the cable operator had to institute a rate increase of 5%.

The small cable operator feels that abuse of retransmission consent by companies like Hearst-Argyle is undermining his business. He remarked, "we have a right to make the business decisions to program our systems, and the network conglomerates are taking that away. It feels like blackmail to put another channel on to get essential broadcast programming that's free over the air."

This situation demonstrates three consequences of the overwhelming market power of media conglomerates like Hearst-Argyle over independent cable companies:

- Using retransmission consent rights to increase the costs of cable services in smaller markets.
- Using retransmission consent rights to force carriage of undesired satellite services in smaller markets.
- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

The following examples show that GE/NBC is employing similar tactics.

4. GE/NBC

Multi-industry conglomerate GE controls NBC stations in many markets along with several affiliated satellite programming services. ACA members are facing increasing demands by O&O NBC stations to carry additional satellite programming as a condition of retransmission consent, with costly consequences for smaller market cable customers.

a. Tying of retransmission consent for NBC/ refusal to deal with small operator competing with major MSO.

One ACA member described the following situation. The cable operator operates one small system serving less than 2,000 customers. The system competes with a top three MSO. The MSO's system carries both the in-market NBC affiliate, and an O&O NBC station from an adjacent market. The small operator carries the in-market NBC affiliate and sought consent to carry the adjacent O&O NBC station as well.

A representative of the cable company contacted the senior executive at the station. After initial conversations, the cable operator was informed that all discussion must take place with NBC cable network representatives in a distant city. NBC cable then conditioned carriage of the broadcast signal on the following:

- Carriage of, and payment for, MSNBC.
- Carriage of, and payment for, CNBC.
- Carriage of Valuevision.
- Payment of a substantial multi-year surcharge for additional Olympic coverage on MSNBC and CNBC.

The small cable operator indicated that it could not accommodate the additional channels and cost. NBC cable refused to negotiate further. As a result, the cable operator still does not offer the NBC station offered by its major MSO competitor.

b. Tying of retransmission consent for NBC to carriage of MSNBC, CNBC, and payment of Olympics surcharge.

Another ACA member faced a similar situation in dealing with an O&O NBC station in another market. As conditions of carriage of the NBC broadcast signal for three years, the cable operator was required to sign multi-year agreements to carry MSNBC, CNBC, Valuevision, and pay a substantial surcharge for the Olympics.

This situation provides a telling example of how corporate parents are supplanting broadcast stations in the retransmission consent process. The representative of the cable operator handling this negotiation had developed over the years a good working relationship with the senior management of the broadcast station. But in the 2000 – 2001 election cycle, the station did not participate in the negotiations. NBC cable network representatives reportedly stated that they now spoke for the station. The station's general manager reportedly confided that the "station was a pawn", and he could do nothing.

This situation demonstrates three consequences of the overwhelming market power of media conglomerates like GE/NBC over independent cable companies:

- Using retransmission consent rights to increase the costs of cable services for smaller cable systems.
- Using retransmission consent rights to force carriage of satellite services.
- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

For ACA members, the above examples of retransmission consent tying provide just a glimpse of increasing marketplace failure. When seeking retransmission consent for network programming from companies like Disney, Fox, Hearst-Argyle and NBC, independent cable operators have little or no bargaining power. The concept of "retransmission consent negotiations" does not apply. Smaller cable companies must deliver network programming to their customers, and the in-market network broadcaster has a virtual monopoly over the service. The media conglomerates discussed above are fully exploiting their monopoly power through retransmission consent tying.

The consequences? Forced carriage of unwanted programming, higher costs to consumers, and decreased programming diversity. These problems are exacerbated by onerous nondisclosure terms imposed as part of retransmission consent tying arrangements, shielding the conduct of network owners from scrutiny.

The question becomes: What to do? The next section outlines the beginning of a solution.

B. The consequences in smaller markets of retransmission consent tying warrant Commission intervention.

The persistent and dangerous trends in retransmission consent tying warrant Commission action. The Commission has taken an important first step in the *Digital Must Carry Order* by seeking to develop a better record on this problem. We suggest below additional steps to correct this marketplace failure.

At this point, ACA does not call for comprehensive regulation. The *Digital Must Carry Order* makes clear that the Commission first requires a more substantial record of marketplace failure. ACA also believes that Commission scrutiny on this issue might alleviate the problem without full-blown regulation. Shedding some light on network owners' conduct might encourage different behavior. To that end, we suggest steps in a process that will either: (i) encourage more responsible conduct by network owners toward independent cable; or (ii) provide the Commission a well-developed record from which to develop additional regulations of the retransmission consent process.

1. The Commission should prohibit nondisclosure obligations related to retransmission consent.

Nondisclosure obligations in retransmission consent tying arrangements serve to shield the network broadcasters and affiliated programmers from scrutiny. These provisions prevent customers, franchise authorities, the Commission, and other interested parties from knowing the reasons behind programming changes and rate increases related to retransmission consent.

The Commission can readily determine that it is in the public interest for consumers, franchise authorities and others to have free access to the terms of retransmission consent tying arrangements. Commission cable regulations already contain several provisions requiring notice to franchise authorities of programming changes, rate increases, and the reasons for these changes. Cable operators should not be prevented by network owners from fully disclosing to regulators and the public the costly consequences of tying arrangements. To codify this provision, the Commission should add nondisclosure obligations to the list of presumptively unreasonable broadcaster bargaining positions contained in 47 CFR § 76.65(b)(1).

2. The Commission should initiate an inquiry into network broadcasters' retransmission consent practices.

As stated in the *Digital Must Carry Order*, the Commission needs to develop a more complete record on retransmission consent tying. To do so, the Commission should initiate an inquiry into the retransmission consent practices of network owners. ACA members have much more information to share. The perspectives of consumer groups and franchise authorities should also be considered. The network owners will have their side of the story as well.

The Commission could conduct this inquiry through a separate Notice of Inquiry, through one or more public forums, or in conjunction with an inquiry into network practices in response to the pending *Petition for Inquiry into Network Practices*. The retransmission consent inquiry could explore questions like:

- How do network broadcast licensees square their public interest obligations with the retransmission consent tying arrangements forced on smaller market cable?
- Why are corporate owners transferring retransmission consent rights from network broadcast licensees to satellite programming divisions?
- What steps are media conglomerates like Disney/ABC, Fox/News Corp., and others taking to address the unique circumstances of smaller market cable systems? For example, why are they not demonstrating the same concern for the public interest as AOL Time Warner did in committing not to tie services in dealing with independent cable?[5]

Responses to questions like these would help establish a solid record, and might help network owners gain a better understanding of the consequences of their conduct.

3. The Commission should examine whether retransmission consent practices constitute an unauthorized transfer of control.

The examples described above demonstrate a consistent trend in how Disney, Fox, Hearst-Argyle, and NBC are managing their television broadcast properties - authority over retransmission consent is taken from station management and assigned to a satellite programming division. As retransmission consent rights rest solely with a commercial television broadcast licensee, and not with a satellite programmer, this practice raises a fundamental question: Who controls the licensee? As must carry/retransmission consent falls within the basic operating policies of the licensee,

[5] *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and American Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, CS Docket No. 00-30, *Memorandum Opinion and Order*, 2001 FCC LEXIS 432, ¶¶ 101-103 (rel. January 22, 2001). ("ACA sought a commitment from the applicants that they would not engage in

does this conduct constitutes a transfer of control?[6] If so, failure to receive prior Commission consent to such transfers should result in prompt enforcement actions.

The three steps outlined above could go a long way toward alleviating retransmission consent tying in smaller markets. We cannot rule out that the power of Commission scrutiny alone may lead to positive changes. If not, further regulation of network broadcasters may be warranted.

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such tactics. Subsequently, Time Warner representatives stated at the Commission's en banc hearing in this proceeding that the merged firm would not condition access to its programming on carriage of AOL.").

[6] *See, e.g. Washington Broadcast Management Co. v. FCC*, 13 FCC Rcd 24168, [ ] (1998) ("Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming, and finances, cannot be delegated."); *In the Matter of Liability of Kenneth B. Ulbricht v. FCC*, 12 FCC Rcd 11362, [ ] (1996) ("In ascertaining whether an unauthorized transfer of control has occurred, the Commission focuses on whether an individual or entity other than the licensee has obtained the right to determine the basic operating policies of the station.")

III. CONCLUSION

ACA appreciates the concern about retransmission consent tying expressed in the *Digital Must Carry Order*. For ACA members, the problems of tying are genuine, costly, and threaten to undermine their businesses.

The tying examples in these comments provide the Commission a glimpse of a widespread problem. With protection from retribution by media conglomerates, ACA members can provide more specific examples.

The Commission can begin to address these problems with three steps:

- Prohibit nondisclosure obligations related to retransmission consent.
- Initiate an inquiry into network owners' retransmission consent practices.
- Act on any unauthorized transfer of control of retransmission consent rights.

ACA commits all of its available resources to assist the Commission in this effort.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By:__________________________

Christopher C. Cinnamon
Kurt J.H. Mueller
Rhondalyn D. Primes
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois
(312) 372-3930

Attorneys for American Cable Association

Matthew M. Polka
President
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

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