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February 1,2003

Linda Senecal
Industry Analysis Division
Media Bureau
Federal Communications Commission
445 12th Street, SW
Room 2-C438
Washington, DC 20554

via US Postal First Class Mail

RE: American Cable Association ("ACA'));Reply Comments in MB Docket No. 02-277; 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules

Dear Ms. Senecal:

On behalf of ACA, we submit Reply Comments in MB Docket No. 02-277. We include nine copies for filing purposes.

We also enclose a copy of ACA's Reply Comments and ask that you date-stamp and return it in the enclosed Fed-Ex envelope. Thank you in advance for your help. If you have any questions, please call me or Chris Cinnamon at 312-372-3930.

Sincerely,

Emily A. Denney

Enclosure

cc: Matthew M. Polka
Chris Cinnamon

8 Copies

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

In the er of	)	
	)	
2002 Biennial Regulatory Review	)	
	)	
Review of the Commission's Broadcast	)	MB Docket No. 02-277
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202 of the	)	
Telecommunications *Act of* 1996	)	

American Cable Association

Reply Comments

I. INTRODUCTION

To accurately assess the consequences of unprecedented consolidation in the broadcast television sector, the Commission must examine how network owners and major affiliate groups exploit retransmission consent when dealing with small cable companies.

For smaller cable operators and smaller market consumers, retransmission consent has become a vise. On one side of the vise are a handful *of* media conglomerates – Disney, Fox, Hearst-Argyle, Gannett, and a few others – with ever increasing demands. On the other side are retransmission consent laws and outdated FCC market protection regulations. Squeezed in *the* middle are smaller cable operators and consumers

As a result, small cable companies and small market consumers must pay far more than their big city/big cable counterparts for access to local broadcast signals The higher costs come in two forms. First are retransmission consent tying arrangements. To get access to a local network signal, Disney, Fox, Hearst-Argyle and others force carriage of, and payment for, affiliated satellite programming. Second, in this most recent round, cash for carriage demands have proliferated The network owners demand tying arrangements or sham cash "alternatives" of on average $0 70 per customer per month. Gannett and Cox Broadcasting are demanding strictly cash for carriage, take it or leave it

The corporate quest *for* new revenue streams from smaller markets has washed away any pretense of localism. Smaller market consumers are the losers.

This problem draws a bright line between big and small First. this is a distinctly small cable problem. The big MSOs, with millions of customers and a range of other negotiation advantages. reportedly are receiving consent to carry local signals with little fanfare.[1] Not so for smaller cable operators. Second, this is big broadcaster problem. When dealing with independent broadcasters and small affiliate groups, ACA members report mutually beneficial carriage arrangements. In short. a few media conglomerates are exploiting hundreds of smaller cable companies and millions of rural consumers.

The consequences in smaller markets are self-evident: higher costs, fewer voices and choices. and utter disregard for localism. And it is getting worse

In this retransmission consent round, in growing numbers, small cable operators

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[1] *Most Cable MSOs Get Deals Done on Retransmission Consent,* Communications Daily

are concluding that neither their businesses nor their customers can support the retransinission consent demands of the media conglomerates. The broadcasters are withholding consent Signals are being dropped in market after market.

These Reply Comments provide the Commission with substantial evidence of pervasive exploitation of retransmission consent in smaller markets and the harm to the public interest in localism, choice and reasonable rates for basic cable We also append ACA's Petition for Inquiry into Retransmission Consent Practices and the First Supplement to that Petition [2] These filings contain numerous additional examples of retransmission consent abuse by network owners and should be included in this docket

American Cable Association ACA represents nearly 1,000 independent cable companies that serve about 7.5 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district The companies range from family-run cable businesses serving a single town io multiple system operators with small systems in small markets About half of ACA's members serve fewer than 1,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets Many ACA members are facing retransmission consent tying and cash for carriage demands by the networks owners and major affiliate groups

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(January 10, 2003)

[2] *Petition for Inquiry into Retransmission* Consent Practices, American Cable Association (filed October 1, 2002) ("Petition for Inquiry"); *Petition for Inquiry info Retransmission Consent* Practices, *First Supplement*, American Cable Association (filed December 9, 2002) ('Supplement'). We attach ACA's Petition for Inquiry as Exhibit A, and ACA's Supplement as Exhibit B

II. ANALYSIS

A. Exploitation of retransmission consent in smaller markets by a handful of media conglomerates has resulted in reduced choice, higher costs, and the loss of broadcast signals on rural cable systems.

Retransmission consent. 47 USC § 325, became the law of the land in 1992, at a time when broadcast ownership was far more dispersed than today In implementing Section 325, the Commission emphasized the fundamental importance of localism and cooperation between broadcasters and cable. "[T]he statutory goals at the heart of Sections 614 and 325 [are] to place local broadcasters on a more even competitive level and thus help preserve local broadcast service to the public."[3] Retransmission consent should provide "incentives for both parties to come to imutually-beneficial arrangements."[4] Since then, we have seen unprecedented consolidation of broadcast licenses and other media interests

Today, five coinpanins -- Disney, Hearst-Argyle, Fox, Gannett, and Cox Broadcasting – control at least 1C4 broadcast stations in 60 television markets[5] These markets encompass 65 million television households[6] ACA estimates that its members

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[3] *In the Matter of Implementation of fhe Cable Television Consumer Protection and Competition Act* of *1992; Broadcast Signal Carriage issues, Memorandum Opinion and Order,* 9 FCC Rcd 6723 (1994) ("*1994 Broadcast Signal Carriage Order*") at ¶ 104 (emphasis added).

[4] *Id.* at ¶ 115 (emphasis added), *See aiso* ¶ 107 (interpretation of Section 325 guided by maintaining ability of broadcasters and cable operators io negotiate mutually advantageous arrangements)

[5] See Exhibit C, summarizing data from www.hearstargyle.com/stations; www gannett com/map/television html; www.coxenterprises.com/corp/advertising/cxe html; www.newscorp com/feg/fegreport2002/fox annual2002 pdf: and 2002 Cable and Television Factbook. Volume No.70, p. A-1706

serve six million customers in these markets, most often in the smaller communities on the fringes of the DMA. Solely because of media consolidation and exploitation of retransmission consent, these smaller cable operators and their six million customers face higher costs and reduced choice. Moreover, as a result of excessive cash for carriage demands by Gannett, Cox Broadcasting and others, tens of thousands of rural consumers are losing access to local network programming on cable.

The following sections discuss the two principle tactics used to exploit retransmission consent – tying arrangements and cash for carriage

1. Retransmission consent tying – the exploitation **of** a local broadcast license to force carriage of, and payment for, affiliated satellite programming.

The attached Petition for Inquiry and First Supplement detail the pervasive problem of retransinission consent tying in the small cable sector. These filings describe how a handful of network owners and major affiliate groups use retransmission consent and "take it or leave it" tying arrangements to force small cable systems and their customers to pay for affiliated satellite programming as a condition of carriage of a local signal.

The Petition for Inquiry and Supplement contain numerous examples of tying arrangements foisted on ACA members. including:

- Tying retransmission consent for Hearst-Argyle stations to carriage of Lifetime and Lifetime Movie Network.

- Tying retransmission consent for ABC in one market *to* carriage of other

[5] See Exhibit C, summarizing data from 2002 Cable and Television Factbook, Volume No 70, pp. A-1 – *A-3.*

unwanted Disney programming in other markets.

- Tying retransmission consent *for* Fox and UPN to carriage of Fox Sports channels, Fox News, FX, National Geographic Channel, Fox Health Channel and Fox Movie Channel

During this round, ACA has received from members many more reports of increased tying demands by network owners and affiliate groups.[7] As described in the Petition for Inquiry, this conduct conflicts with the intent and purpose of Section 325 and increases costs while decreasing choice in smaller markets

Before reaching any conclusions on the consequences of media consolidation, ihe Commission should investigate the pervasive abuse of retransmission consent by a handful *of* media conglomerates. The Petition for Inquiry sets forth the legal basis for this action and provides ample evidence *to* support opening the inquiry.

2. Cash for carriage – use of a local broadcast license to extract revenue from smaller market cable operators and consumers.

In the most recent round of retransmission consent, the small cable sector has faced a proliferation of cash for carriage demands.[8] For example, Gannett has deployed a national strategy of demanding that small cable companies pay between $0.15 and Sl.OO per subscriber per inonth Disney and Hearst-Argyle are demanding $0.70 per subscriber per month if a cable operator will not agree to their tying arrangement Cox Broadcasting is demanding up *to* $0.30 per subscriber In short, retransmission consent has become a scheme for inedia congloinerates to transfer

[7] See Exhibit D containing representative examples of retransmission consent tying and cash for carriage demands

[a] *See* Exhibit D

wealth from rural consumers and small companies to corporate headquarters in New York, Los Angeles, and Atlanta

The potential cost to rural consumers is huge – more than $172 million per year, just for access to "free" over-the-air network programming.[9]

Small operators uniformly report that their systems and customers cannot support such demands. Moreover, for the first time, several small cable operators are being forced to remove local broadcast signals because of unreasonable cash for carriage demands.

For example, in Macon Georgia, the Gannett-owned CBS affiliate, WMAZ-TV, has demanded monthly fees of between $0.75 and $1 00 per subscriber per month in 2003. Three small cable operators. Piedmont Cable, Reynolds Cable, and Valley Cable, explained to Gannett that their customers would not stand for the rate increase required to fund these payments. The broadcaster remained intransigent. and the small cable systems were forced to delete the local CBS affiliate

Several other small cable operators and consumers have lost access to Cox. Gannett and Hearst-Argyle stations for the same reason:

- Cash for carriage demands forced Country Cable TV and Tele-Media to remove NBC affiliate WJAC-TV in Johnstown, Pennsylvania. Cox Broadcasting owns WJAC.

- Cash for carriage demands forced Bellair TV Cable Company in the Steubenville-Wheeling market to remove NBC affiliate WTOV – another station owned by Cox Broadcasting.

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[9] ACA members report cash for carriage demands for network signals that average about $0.60 per subscriber per month If all four major networks charged this fee, ACA's six million smaller market customers would pay about $172 8 million per year. mostly io Disney, Fox, Gannett, *Cox,* and Hearst-Argyle.

- Cash for carriage demands forced Community Cablevision, a rural Oklahoma operator, to dropped KOCO, the Hearst-Argyle owned ABC affiliate in Oklahoma City.

As current extensions of retransmission consent agreements expire, ACA anticipates that more small cable operators will be forced to drop local broadcast stations.

The media conglomerates will aim to lull the Commission into believing these developments are examples of a "vibrant marketplace for retransmission consent". In evaluating this pitch, remember the Commission's words ten years ago Retransmission consent should serve "to preserve local broadcast service to the public"[10] and provide "incentives for both parties to come to mutually-beneficial arrangements."[11] In markets served by small cable, media consolidation and corporate avarice have turned this policy on its head Now a few powerful players are using the retransmission consent process to withhold local network programming, unless consumers and small cable operators pay the price

B. FCC market protection regulations enable exploitation *of* retransmission consent; those regulations are obsolete and should be revised.

Media conglomerates form one side *of* the vise of retransmission consent. The other side consists of FCC market protection regulations. The regulations are known as Network Non-duplication[12] and Syndicated Exclusivity.[13] The Commission first

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[10] *1994 Broadcast Signal Carriage Order* at ¶ 104 (emphasis added).

[11] *Id* at ¶ 115 (emphasis added), See *also* ¶ 107.

[12] 47 CFR §§ 76 52 – 76.55.

promulgated these regulations more than 20 years ago, back when a local network broadcaster was truly local and needed protection

In a nutshell, these regulations entitle a media conglomerate to withhold a local network signal from a cable operator *and* prevent that cable operator from bringing in a substitute network signal Put another way, because of these regulations, no marketplace can exist for network signals on cable. This is precisely how Disney, Fox, Gannett and the others get the leverage to exploit retransmission consent. Because these companies can block substitute network and syndicated programming in a market, they are the only qarne in town.

Disney, Fox, Gannett and the others argue that the price they demand for their local network signals merely reflects the value of that programming. The Commission must see through this doublespeak. The reality is *that* the price they demand for their programming reflects market exclusivity enforceable through outdated regulations. To test this. the Coinmission should ask the following questions of Disney, Fox. Gannett, Cox Broadcasting, and Hearst-Argyle:

> *Would you object if a smaller cable operator obtained lower cost network programming from other markets? If you objecf, why?*

The answers to these questions will expose the fallacies of the "market value" arguments. The value does not come from "new, improved" network programming The value comes from market power and regulatory and contractual exclusivity

In the hands of the network owners and major affiliate groups, the market

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[13] 47 CFR §§ 76 101 – 76 110

protection regulations are no longer a shield *to* protect local stations These regulations have become a sword used to bleed small cable operators and consumers

Along with examining broadcast ownership regulations, the Commission should initiate a rulemaking to revise the market protection regulations *to* stop this conduct. it is past time for a change.

III. CONCLUSION

The network owners and major affiliate groups are using the retransmission consent process and the Cominission's market protection regulations to squeeze small cable and consumers The holders of more than 100 broadcast television licensees have abandoned any pretense *of* localism This conduct increases costs and reduces voices and choices.

To evaluate fully the consequences of broadcast media consolidation. the Commission must consider how the largest holders of broadcast licenses are exploiting retransmission consent in smaller markets. Easing current ownership restrictions will only allow the problem to spread. In addition, the Commission should:

- Initiate the retransmission consent inquiry requested by ACA.
- Initiate a rulemaking to update the regulations governing Network Non-duplication and Syndicated Exclusivity.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

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