

EXHIBIT A

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

In the Matter of)
)
Petition for Inquiry Into) MB Docket No. ____
Retransmission Consent Practices)
)
To: The Commission)



PETITION FOR INQUIRY
INTO RETRANSMISSION CONSENT PRACTICES

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SUMMARY

ACA asks the Commission to initiate an inquiry into the retransmission consent practices of network owners and major affiliate groups. In particular, the Commission should look at the retransmission consent tying arrangements that network owners and major affiliate groups force on smaller cable companies. Increasingly, a few media conglomerates – powerful players like Disney/ABC, Fox/News Corp., and GE/NBC – are pulling the strings behind local retransmission consent negotiations. They are tying carriage of a local network broadcast signal to carriage of, and payment for, one or more affiliated satellite services. Many of these arrangements require carriage of, and payment for, affiliated satellite programming on cable systems well outside the broadcaster's market.

In short, when dealing with smaller cable companies, these media conglomerates have turned retransmission consent into a one-way conversation driven by national corporate strategies *to* increase satellite programming revenues. These tying arrangements harm smaller cable companies and their customers by increasing basic cable *costs* and decreasing programming choices. This conduct by a few media conglomerates also places independent programmers with competing programming at a distinct disadvantage.

In the *Digital Must Carry Order*, the Commission acknowledged ACA's concerns with retransmission consent tying, asked for more information, and committed to take appropriate action as necessary. In response, ACA provided the Commission with specific examples of retransmission consent tying arrangements. Examples included:

- Tying of retransmission consent for ABC in one market to carriage of affiliated Disney programming in other markets.
- Tying of retransmission consent for ABC in one market to carriage of the Disney Channel on basic in other 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 other markets.
- Tying of retransmission consent for NBC in one market to carriage of MSNBC, CNBC, and payment of Olympics surcharge in other markets.

The upcoming round of retransmission consent is imminent. ACA members fear the worst. Media consolidation has accelerated. Network owners have achieved unbridled ability to use retransmission consent to force additional programming and higher costs on small cable companies and consumers. ACA asks the Commission to follow through on its commitment to monitor retransmission consent practices and address the harm to small cable operators and the consumers they serve. Initiating a Section 403 inquiry is the most efficient and restrained next step.

The Commission has ample statutory authority to initiate an inquiry into retransmission consent. The statutory bases for an inquiry into retransmission consent practices include the following: (i) the Commission's authority under 47 USC § 403; (ii) the retransmission consent provisions in 47 USC § 325; and (iii) the change of control provisions governing broadcast licenses in 47 USC § 310(d). The inquiry will enable the Commission to evaluate how network owners and major affiliate groups are abusing the retransmission consent process contrary to Section 325 and Commission regulations and policies, and whether certain retransmission consent practices constitute unauthorized changes in control of broadcast licenses.

Retransmission consent tying practices conflict with the intent and purpose of Section 325. As stated by the Commission, "the 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." The retransmission consent framework is aimed to secure local cable carriage of commercial broadcast signals through "mutually beneficial arrangements." Media consolidation has enabled a handful of companies to upend these goals. Retransmission consent tying arrangements have nothing to do with preserving local

broadcast service through "mutually beneficial arrangements." and everything to do with advancing the revenue goals of corporate parents and satellite programming affiliates on the backs of small cable operators and their customers. Similarly, the aim of achieving a more "even competitive level" in retransmission consent negotiations is now an anachronism, at least for small cable operators facing Disney/ABC, Fox/News Corp., GE/NBC, CBS/Viacom or Hearst-Argyle.

Section 325(b)(3)(A) also expressly directs the Commission to consider the impact of its retransmission consent regulations on basic rates. In 1993, the Commission found little evidence of rate impact. Nearly 10 years later, much has changed. The pressure on basic rates as a result of current retransmission consent tying practices should be self-evident.

These developments have occurred since the Commission implemented retransmission consent in 1993 and 1994. A Section 403 inquiry will help the Commission reevaluate the efficacy of current regulations in advancing the goals of Section 325, especially in light of unprecedented media consolidation.

Current retransmission consent practices constitute unauthorized transfers of control in violation of Section 310(d). Section 325 created retransmission consent rights for each commercial broadcast licensee, and no other entity. It is well-settled under Section 310(d) that a broadcast licensee cannot transfer or assign responsibility for these rights without first obtaining the Commission's consent. The examples of retransmission consent practices provided by ACA show how affiliated satellite programming entities are controlling retransmission consent rights of local stations. No Commission order has authorized these changes in control.

The good faith negotiation regulations provide no protection for small cable operators. The Commission has ample evidence that few, if any, small cable operators do not have the resources to file a complaint against Disney/ABC, Fox/News Corp., GEINBC, or CBS/Viacom under the good faith negotiation regulations. The lack of resources to defend against retransmission consent abuses is precisely what makes Small cable operators easy targets for the network owners and major affiliate groups.

An inquiry into retransmission consent practices is necessary and appropriate, and provides the most efficient means of Commission action. A Section 403 inquiry will provide the Commission with a developed record to determine the harm caused in smaller markets by retransmission consent tying and other practices of network owners and major affiliate groups. The inquiry will also provide independent satellite programmers an opportunity to present evidence of how tying arrangements impede their ability to distribute their programming. From that record, the Commission can determine what further action is most appropriate.

To assist the Commission in evaluating the conduct of network owners and major affiliate groups, ACA will supplement this Petition with information provided by its members concerning the retransmission consent practices they face in the upcoming months.

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PETITION FOR INQUIRY
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I. INTRODUCTION

ACA asks the Commission to initiate an inquiry into the retransmission consent practices of network owners and major affiliate groups. The inquiry should explore how retransmission consent tying arrangements employed by a few media conglomerates have fundamentally transformed the retransmission consent process in many markets served by smaller cable companies. Increasingly, powerful players like Disney/ABC, Fox/News Corp., and GE/NBC are pulling the strings behind local retransmission consent negotiations, and are tying consent to carry a local broadcast signal to carriage of, and payment for, one or more affiliated satellite services. Many of these arrangements require carriage of, and payment for, affiliated satellite programming on cable systems well outside of the broadcaster's market.

In short, when dealing with smaller cable companies, network owners and some major affiliate groups have turned retransmission consent into a one-way conversation driven by corporate strategies to increase satellite programming revenues. These tying arrangements harm smaller cable companies and their customers by increasing basic cable costs and decreasing programming choices. These resulting harms squarely conflict with the intent and purpose of the retransmission consent laws and regulations. Independent satellite programmers may also be harmed by retransmission consent tying. Due to limited capacity on smaller cable systems, tying arrangements restrict the ability of those systems to carry additional services.

The upcoming round of retransmission consent provides a key opportunity for the Commission to evaluate retransmission consent practices and their impact on smaller cable companies and consumers. ACA requests that the Commission initiate an inquiry to that end. To assist the Commission's consideration of the issues raised here, ACA will supplement this Petition with reports from its members on retransmission consent practices they face in the coming months.

American Cable Association. ACA represents more than 930 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 to multiple system operators with small systems that focus on small 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 lower density markets. Many ACA members have been on the receiving end of retransmission consent tying and fear increasing retransmission abuses in the upcoming round.

II. BACKGROUND – MEDIA CONSOLIDATION, THE RISE OF TYING ARRANGEMENTS, AND THE NEED TO EXAMINE CURRENT RETRANSMISSION CONSENT PRACTICES

Retransmission consent became law in 1992, with the intent to help local broadcasters secure carriage on cable systems through mutually beneficial arrangements. Since then, media ownership has consolidated at a remarkable pace. Programming and content companies have combined with television networks and broadcast licensees to create a few media powerhouses – Disney/ABC, CBS/Viacom, Fox/News Corp., and GEINBC. Major affiliate groups like Hearst-Argyle also control many network stations.

In many markets served by small cable operators, mutually beneficial arrangements negotiated with local network broadcasters have been supplanted by edicts from distant corporate offices, with consent to carry a local broadcast signal conditioned on a range of costly tying arrangements. Examples of retransmission consent tying faced by small cable operators include:

- Tying of retransmission consent for ABC in one market to carriage of affiliated Disney programming in other markets.
- Tying of retransmission consent for ABC in one market to carriage of the Disney Channel on basic in other 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 other markets.

- Tying of retransmission consent for NBC in one market to carriage of MSNBC, CNBC, and payment of Olympics surcharge in other markets
- Conditioning the consent to transfer a retransmission consent agreement from one small cable operator to another to carriage of additional satellite programming not required in the original agreement.

Increasingly for smaller cable operators, retransmission consent for network signals means being on the receiving end of a one-way conversation. The result⁷ Forced carriage of additional satellite programming and higher costs for small cable companies and their customers

ACA has been raising this issue consistently with the Commission since 1995.¹ Last year, in the *Digital Must Carry Order*, the commission expressly recognized small cable's "important concerns" over retransmission consent tying.² The Commission declined to act at that time, indicating that "substantial evidence must be presented to support a claim that a tying arrangement exists and that the operator suffers harm as a result."³ The Commission committed to "continue to monitor the situation with respect

¹ *In re Applications of Capital Cities/ABC, Inc. and the Walt Disney Company for Consent to the Transfer of Control of Broadcast and Television Station Licenses, Petition to Deny of the Small Cable Business Association ("SCBA")* (filed September 27, 1995); *in re Application for Transfer of Control of CBS Corporation and its Licensee Subsidiaries from Shareholders of CBS Corporation to Viacom, Inc., Petition to Deny of ACA* (filed December 31, 1999); *In the Matter of Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, Comments of SCBA (filed October 13, 1998), and Comments of the American Cable Association (filed June 8, 2001) ("ACA Digital Must Carry Comments")

² *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") at ¶ 35 (referencing comments of the Small Cable Business Association, the former name of ACA), ¶ 121, and *Final Regulatory Flexibility Analysis*, ¶ 20.

³ *Digital Must Carry Order* at ¶ 35.

to potential anticompetitive conduct by broadcasters in this context." Upon a showing that tying arrangements harm small cable operators and their subscribers, the Commission would "consider appropriate courses of action".⁵

In response, ACA provided the substantial evidence sought by the Commission – specific, real-world examples of retransmission consent tying faced by smaller cable companies.⁶ Each example involves tying retransmission consent for a local network signal to carriage of, and payment for, one or more satellite programs. Several of the cases describe tying carriage of satellite programming on cable systems *outside* the market of the local broadcast station. Most of these cases also involve obligations to carry, and pay for, satellite programming for years beyond the retransmission consent election period. These examples show how a few media conglomerates are exploiting local broadcast licenses to benefit their affiliated satellite programming, with no concern for the resulting harms of increased costs and decreased choice for smaller market cable systems and their customers.

The next round of retransmission consent is imminent. Small cable operators fear the worst. Media consolidation has accelerated. The disparities in company size, market power, and resources have become immense. Network owners have achieved unbridled ability to use retransmission consent to force additional programming and

⁴ *Id.*

⁵ *id*

⁶ ACA Digital Must Carry Comments at 1-16. We attach as Exhibit A pertinent excerpts from that filing. See also *In the Matter of Petition for inquiry into Network Practices* (filed March 8, 2001) (filed by Network Affiliated Stations Alliance) ("NASA Petition for inquiry"), ACA Comments (filed July 20, 2001).

higher costs on small cable companies and consumers, along with gaining a tremendous advantage over competing independent satellite programmers.

The problem has at least two solutions: (i) self-discipline by network owners and major affiliate groups in dealing with smaller cable companies; or (ii) increased regulation. We emphasize: ACA fully supports fair and reasonable retransmission negotiations with local broadcasters that result in mutually beneficial carriage arrangements. Many independently owned network affiliates continue to negotiate reasonable and mutually beneficial agreements with smaller cable companies. But as far as dealing with network owners and major affiliates, retransmission consent is anything but "local," and agreements are anything but "mutually beneficial." An examination of this conduct and the resultant harms might encourage a measure of moderation among network owners in their treatment of small cable companies that would obviate the need for additional regulation.

To that end, ACA asks the Commission to formalize its commitment "to monitor the situation with respect to potential anticompetitive conduct by broadcasters." We ask for a formal inquiry into retransmission consent practices of network owners and affiliate groups, especially in their dealings with small cable companies.

⁷ *Digital Must Carry Order* at ¶ 35

III. THE COMMISSION HAS AMPLE AUTHORITY AND EVIDENCE TO INITIATE AN INQUIRY INTO RETRANSMISSION CONSENT PRACTICES

The statutory bases for an inquiry into retransmission consent practices include the following: (i) the Commission's general investigation authority under 47 USC § 403; (ii) the retransmission consent provisions in 47 USC § 325; and (iii) the change of control provisions governing broadcast licenses in 47 USC § 310(d). The inquiry will enable the Commission to determine the extent to which network owners and major affiliate groups are abusing the retransmission consent process contrary to Section 325 and Commission regulations and policies, and if certain retransmission consent practices constitute unauthorized changes in control of broadcast licenses. The inquiry will also help the Commission to determine the need for additional retransmission consent regulations aimed at protecting smaller market cable operators and their customers from abuse by network owners and major affiliate groups.

- A. A formal inquiry under Section 403 provides the appropriate means to investigate the retransmission consent practices of network owners and major affiliate groups.**

The Commission has ample statutory authority to initiate an inquiry into retransmission consent practices under Section 403.⁸ Section 403 provides:

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, *to* or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter.

⁸ 47 USC § 403.

The Commission has relied on Section 403 to inquire into a range of improper conduct under its jurisdiction.⁹ The conduct identified here – the abuse of retransmission consent through tying arrangements, the exercise of retransmission consent rights by entities other than the broadcast licensee, and the harm to small cable businesses and consumers – all provide ample grounds to evaluate current retransmission consent practices under Section 403. In a similar vein, we note that the Commission has pending a request for a Section 403 inquiry into network owners' abusive practices and illegal conduct toward affiliates.¹⁰ That petition identifies the same handful of corporate actors as we do here.

As described below, the retransmission consent practices of network owners and major affiliate groups implicate Sections 325 and 310 and the underlying Commission regulations and policies, and provide a solid foundation for a Section 403 inquiry.

- B. Current retransmission consent practices of network owners and major affiliate **groups** conflict with the intent **and** purpose of Section 325.

The principal statutory focus of the inquiry requested here is Section 325. A review of the express language of the statute, the legislative intent, and related Commission action underscores the need for the Commission to examine current retransmission consent tying practices. This conduct and its consequences squarely conflict with Section 325.

⁹ See, e.g., *In the Matter of SBC Communications, Inc., Apparent Liability for Forfeiture*, FCC 02-112 (rel April 15, 2002) at ¶ 8; *In the Matter of Inquiry into Alleged Abuses of the Commission's Auction Processes*, Order, 9 FCC Rcd 6906 (1994) at ¶ 5; *In the Matter of Inquiry into Alleged Abuses of the Commission's Processes by Applicants for Broadcast Facilities*, Order, 3 FCC Rcd 4740 (1988); *In the Matter of Inquiry into Alleged Improper Activities by Southern Bell*, Order, 69 FCC.2d 1234 (1978).

1. **Current retransmission consent practices conflict with the fundamental goal of Section 325 – preserving local broadcast stations through mutually beneficial carriage arrangements.**

With Section 325, Congress created a new right for commercial broadcasters – a cable system cannot carry a broadcaster's signal without the broadcaster's consent. The emphasis throughout the statute is on retransmission rights for the local commercial broadcast station, not an ultimate corporate parent or an affiliated satellite programming vendor.¹¹ The language of Section 325(b) unambiguously states that cable carriage requires the "express authority of the originating station." The Commission has consistently interpreted retransmission consent as a "new right given to the broadcaster,"¹³ and a right "that vests in a broadcaster's signal." The fundamental purpose of vesting each commercial broadcast licensee with retransmission consent rights was to preserve local broadcast programming and create a level playing field for cable carriage negotiations. As stated by the Commission, "the statutory goals at the heart of Sections 614 and 325 [are] to place local broadcasters on

¹⁰ See NASA Petition for Inquiry

¹¹ 47 USC § 325(b)(1)(A) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except with the express authority of the originating station."). The legislative history indicates "the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals..." Senate Committee on Commerce, Science, and Transportation, S Rep. No. 92, 102d Cong., 1st Sess. (1991) at 36.

¹² 47 USC § 325(b)(1)(A) (emphasis added)

¹³ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage issues*, Memorandum Opinion and Order, 9 FCC Rcd. 6723 (1994) ("7994 Broadcast Signal Carriage Order") at ¶ 107 (emphasis added).

¹⁴ *In the Matter of implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage issues*, Report and Order, 8 FCC Rcd. 2965 (1993) ("7993 Broadcast Signal Carriage Order") at ¶ 173 (emphasis added).

a more even competitive level and thus help preserve local broadcast service to the public.¹⁵ In short, retransmission consent serves to advance the fundamental principals of localism and the promotion of local broadcast television, the same policy principals underlying much of the Commission's broadcast signal carriage regulations.¹⁶

In interpreting and implementing Section 325, the Commission has consistently emphasized the fundamental goals of localism and cooperation between broadcasters and cable operators. "Local broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals."¹⁷ Accordingly, in 1994, the Commission found that the retransmission consent framework provided "incentives for both parties to come to mutually-beneficial arrangements."¹⁸

Media consolidation has enabled a handful of companies to upend the goals that underline retransmission consent. As described in examples provided to the Commission, corporate parents have shifted retransmission consent authority away from local broadcast licensees to advance national strategies of expanded carriage of affiliated satellite programming." Often, the resulting tying arrangements require the

¹⁵ 1994 Broadcast Signal Carriage Order at ¶ 104 (emphasis added)

¹⁶ See, e.g., 1994 Broadcast Signal Carriage Order at ¶ 22 (noting the objective of localism underlying broadcast signal carriage obligations)

¹⁷ 1994 Broadcast Signal Carriage Order at ¶ 115.

¹⁸ *id.* at ¶ 115 (emphasis added); See also ¶ 107 (interpretation of Section 325 guided by maintaining ability of broadcasters and cable operators to negotiate mutually advantageous arrangements).

¹⁹ For example, a small cable company operating systems in several states was forced to deal with a representative for Disney cable networks in a distant city. The operator had no further contact with the local broadcaster. See Exhibit A, excerpt from ACA Digital Must Carry Comments at 5-6. Similarly, one

small cable operator to carry the affiliated satellite programming on cable systems that do not carry the broadcast signal.²¹ Moreover, the obligations to carry, and pay for, affiliated satellite programming often extend for years beyond the retransmission consent cycle. This conduct has nothing to do with preserving local broadcast service, and everything to do with revenue goals of corporate parents and satellite programming affiliates.

The aim of achieving a more "even competitive level" in retransmission consent negotiations is now an anachronism, at least for small cable companies facing network owners or major affiliate groups. No one can seriously question who holds the power when a small cable operator must deal with Disney/ABC, Fox/News Corp., GE/NBC or Hearst-Argyle. The network owners know that local network signals are essential services for small cable operators. They are exploiting this far beyond the intent and purpose of Section 325.

case involved an operator who was forced to deal with a Lifetime channel representative for carriage of ABC programming. Because of cost increases related to carriage of Lifetime, the operator had no choice but to increase his cable rates by 5%. See Exhibit A, excerpt from ACA Digital Must Carry Comments at 11-12. One cable operator was forced to negotiate with NBC cable network executives in a distant city for carriage of a local NBC broadcast station. See Exhibit A, excerpt from ACA Digital Must Carry Comments at 12-13.

²⁰ One example involves Disney's refusal to grant retransmission consent to a small operator unless he launched, and paid for, a new satellite network, Soapnet. To obtain essential ABC programming in one market, the operator was forced to carry Soapnet in a market several states away - in a market that did not even carry the broadcast signal. See Exhibit A, excerpt from ACA Digital Must Carry Comments at 6. Disney has also tied retransmission consent for ABC in one market to company-wide carriage of the Disney Channel on basic tiers. See Exhibit A, excerpt from ACA Digital Must Carry Comments at 7-8. Similarly, News Corp continually ties retransmission consent for Fox Network to carriage of Fox Sports, Fox News, FX, National Geographic Channel, and Fox Health Channel, and Hearst-Argyle ties retransmission consent for ABC to carriage of Lifetime. See Exhibit A, excerpt from ACA Digital Must Carry Comments at 8-12.

For ACA members dealing with network owners and major affiliate groups, retransmission consent tying has undercut the fundamental goals of Section 325. A Commission inquiry into retransmission consent practices will help create a record to assess how developments since 1992 have altered the marketplace for network broadcast signals and how retransmission consent tying impacts smaller cable companies, independent programmers, and consumers

2. Current retransmission consent practices add substantial costs to basic cable service warranting renewed scrutiny under Section 325.

In addition to the fundamental emphasis on mutually beneficial arrangements for local network programming, Section 325 reflects Congress' concern over the interplay of retransmission consent costs and basic rates. Section 325(b)(3)(A) expressly directs the Commission to consider the impact of its retransmission consent regulations on basic rates." In 1993, when the Commission first considered this question, it found little evidence of rate impact and declined to regulate retransmission consent rates at that time." Much has changed since 1993.

Based on input from ACA members, the Commission now has evidence of how network owners require small cable operators to carry, and pay for, additional satellite programming on basic as a condition of retransmission consent. In many cases, the obligation to carry, and pay for, affiliated satellite programming extends for years beyond the retransmission consent cycle. The pressure on basic rates is obvious

²¹ 47 USC § 325(b)(3)(A).

²² 1993 *Broadcast Signal Carriage Order* at ¶¶ 176, 178

Even more disturbing is how some network owners are requiring carriage of satellite programming on smaller cable systems outside the market where the broadcast signal is carried. As a result, small cable operators and consumers are forced to bear retransmission consent costs for broadcast stations they cannot even view.

In the same vein, in order to obtain retransmission for ABC in some markets, Disney has forced small operators to move the Disney Channel from a premium service to basic, even on cable systems that do not carry the broadcast signal. The Disney Channel is one of the most costly satellite services. Because of this practice, all basic customers served by these systems must now pay for the Disney Channel, just so that consumers served by one system can view the local ABC broadcast programming on cable. These examples show that retransmission consent practices are seriously out of alignment with the goals of "preserving local broadcast stations for the public," and maintaining reasonable rates for basic cable service.

The impact of retransmission consent tying on basic rates provides one quantifiable measure of the harm to small cable companies and consumers. A Commission inquiry will help collect and organize this information to determine the true costs of these practices for small cable companies and their Consumers.

- C. Current retransmission consent practices constitute an unauthorized change of control in violation of Section 310(d).

The retransmission consent practices of network owners also implicate the prohibition on unauthorized transfers of control of broadcast licenses. Section 325 created retransmission consent rights for each commercial broadcast licensee, and no

other entity." Consequently, determining terms of cable carriage constitutes an essential station matter and a fundamental operating policy. It is well-settled under Section 310(d) that a broadcast licensee cannot delegate or assign responsibility for such matters without first obtaining the Commission's consent."

The examples of retransmission consent practices provided by ACA show a consistent trend in how Disney, Fox, Hearst-Argyle, and NBC are appropriating retransmission rights from affiliated broadcast licensees. Most often, authority over retransmission consent is taken from the local station and assigned to a satellite programming affiliate. The question then becomes: Who controls the licensee? The evidence shows that satellite programming vendors control licensees, at least as far as retransmission consent is concerned.

A Commission inquiry will collect more information on how corporate owners and satellite programming affiliates are appropriating retransmission consent rights of local broadcast licensees. Insofar as this practice constitutes an unauthorized transfer of control of a fundamental station function, the Commission can then initiate appropriate enforcement action.

²³ See *supra*, Section III.B.1, at 9-12

²⁴ See, e.g., Letter from *FCC to Washington Broadcast Management Co., Inc.*, Licensee of *KBRO (AM)*, 13 FCC Rcd 24168, 24169 (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 S. Ulbricht*, Memorandum and Opinion and Order and Forfeiture Order, 12 FCC Rcd 11362, ¶ 6 (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.").

D. The good faith negotiation regulations do not provide a means for small cable operators to address retransmission consent tying.

In 2000, the Commission promulgated regulations to implement the good faith negotiation requirement under the Satellite Home Viewers Improvement Act of 1999.²⁵ Those regulations provide for objective standards of good faith negotiations, a subjective "totality of the circumstances" test, and a complaint process.²⁶ For most ACA members, case-by-case adjudication of retransmission consent abuse is not a realistic option, principally due to the administrative burdens and costs of engaging in a contested case before the Commission, and the loss of one or more network broadcast signals pending final resolution.

The Commission has ample evidence that smaller cable operators do not have the resources to file a retransmission consent complaint against Disney/ABC, Fox/News Corp., GE/NBC, or CBS/Viacom. As the Commission has recognized, distinguishing characteristics of small cable operators include the lack of personnel and resources and higher cost structures.²⁷ The most recent evidence can be found in more than 100 small cable company EAS financial hardship waiver requests pending before the Enforcement Bureau. Combined with the Commission's earlier study of small cable that

²⁵ See *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good faith Negotiation and Exclusivity*, CS Docket No. 99-363, *First Report and Order*, 15 FCC Rcd 5445 (2000) ("SHVIA Order"); *Satellite Home Viewers Act of 1988*, Pub.L. No. 100-667, 102 Stat. 3935 (Nov. 8, 1988), codified in 17 USC § 119 (1995), subsequently amended by *Satellite Home Viewer Improvement Act of 1999*, 1999, Pub.L. No. 106-113, 113 Stat. 1501 (November 29, 1999).

²⁶ See 47 CFR § 76.65.

²⁷ *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration* 10 FCC Rcd. 7393, at 7401-7402 and 7420 (1995) ("Small System Order"].

resulted in the *Small System Order*, the EAS waiver requests provide a detailed record of an industry sector under significant pressure. The lack of resources to defend against the retransmission consent practices described here is precisely what makes small cable systems easy targets for the network owners and major affiliate groups.

In addition, the complaint process does not protect against the biggest threat wielded by the network owners – denial of local network programming. Under current regulations, with a complaint pending a small cable operator must drop a network signal absent the broadcaster's consent *to carriage*.²⁹ Local network programming is an essential service for small cable operators, and the risk of those signals being withheld puts their businesses on the line.

Unless the Commission were to amend its regulations to permit small systems to initiate a complaint with an abbreviated form – much like the Commission did with the one-page FCC Form 1230 in the rate regulation context – and to allow continued carriage of network signals pending resolution of the complaint, the good faith negotiation regulations do not provide meaningful relief for small cable companies.

²⁹ See SHVIA Order at ¶ 84.

IV. AN INQUIRY INTO RETRANSMISSION CONSENT PRACTICES IS NECESSARY AND APPROPRIATE AND PROVIDES THE MOST EFFICIENT MEANS OF COMMISSION ACTION.

The examples of retransmission consent tying discussed in this Petition and on the record in other proceedings represent a pervasive problem that is harming the small cable sector and the smaller market consumers they serve. These persistent and dangerous trends warrant Commission action. The Commission took an important first step in the *Digital Must Carry* Order by inviting more information on this problem.²⁹ The inquiry requested here is the next most logical and restrained action for the Commission to take

A formal inquiry under Section 403 represents the most efficient use of Commission resources in this area. ACA members have much more information to share. The perspectives of consumer groups and franchise authorities should also be considered, along with the experiences of independent satellite programmers attempting to compete against tying arrangements. The network owners will have their side of the story as well, as will those local broadcasters that do not engage in practices that harm small cable operators

To that end, the inquiry should focus on at least the following retransmission consent practices and their consequences:

- Tying retransmission consent to carriage of one or more satellite signals
- Tying of retransmission consent to carriage of one or more satellite signals outside the market of the local broadcaster.

²⁹ *Digital Must Carry Order* at ¶ 121

- The transfer of control over retransmission consent rights from broadcast licensees to other entities.
- Threatening to withhold local network programming unless demands for satellite programming carriage are met.

From the record developed, the Commission can do the following: (1) assess the harm retransmission consent tying causes small cable operators and consumers; (2) determine the extent *to* which retransmission consent tying conflicts with Sections 325 and 310(d) and Commission regulations and policies; and (3) take other action it deems necessary.

V. CONCLUSION

ACA has provided the Commission with substantial evidence of retransmission consent tying by network owners and major affiliate groups. This action harms small cable businesses and their customers by increasing costs of basic cable and reducing programming choices. Retransmission consent tying also undercuts the goals of Section 325 by turning retransmission consent into a vehicle for a few media conglomerates *to* increase satellite programming distribution and revenues, rather than a process to achieve mutually beneficial arrangements for carriage of local network signals.

For these reasons, ACA asks the Commission to initiate an inquiry into retransmission consent practices. ACA offers all available resources to assist this *effort* and will supplement this Petition as necessary with updates on retransmission consent abuses encountered by its members.

Respectfully submitted,

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