

Exhibit A
Excerpt from ACA's
Digital Must Carry Comments
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**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

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I. 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.³⁰

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.

³⁰ 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 service; 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.