

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

In the Matter of )  
 )  
Annual Assessment of the Status of )  
Competition in the Market for the ) MB Docket No. 03-172  
Delivery of Video Programming )  
 )  
To: The Commission )

**COMMENTS**



**I. Introduction**

On behalf of more than 1,000 smaller market and rural cable operators, the American Cable Association (“ACA”) submits these Comments to assist the Commission with its inquiry into the status of competition in the MVPD marketplace. These Comments focus on questions raised in the Notice of Inquiry concerning access to programming and retransmission consent.<sup>1</sup>

Access to broadcast network programming and key satellite programming is essential for smaller market cable operators to serve their communities and compete against DirecTV and EchoStar. As reported by ACA and others to the Commission, a handful of media conglomerates that control key satellite and broadcast programming continue to exploit their market power and leverage over

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<sup>1</sup> *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry*, MB Docket No. 03-172 (rel. July 30, 2003) (“NOI”) at ¶¶ 13, 15, 16, and 39.

smaller distributors. Smaller cable operators pay far more for satellite programming than the top MSOs. Similarly, retransmission consent negotiations for stations controlled by the networks or certain major affiliate groups have in many ways become “one-way conversations,” with corporate headquarters dictating costly terms and conditions for retransmission of local broadcast stations. The result: less choice and higher costs for consumers and an increasing competitive disadvantage for a thousand smaller cable companies against DirecTV and EchoStar. ACA addresses these issues in detail on the record in other proceedings and incorporates those filings by reference in these Comments.<sup>2</sup>

To fully comprehend the competitive reality in smaller markets, the Commission must consider how media consolidation, combined with current laws

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<sup>2</sup> See *American Cable Association Petition for Inquiry into Retransmission Consent Practices*, Proceeding PRM02MB (filed Oct. 1, 2002) (“ACA Petition for Inquiry”) and *First Supplement* (filed Dec. 9, 2002) (“ACA Supplement”); *In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Sunset of Exclusive Contract Prohibition*, CS Docket No. 01-290, Comments of the American Cable Association (filed Dec. 3, 2001) and Reply Comments of the American Cable Association (filed Jan. 7, 2002); *In re Consolidated Application of General Motors Corporation, Hughes Electronic Corporation, and The News Corporation for Consent to Transfer Control*, MB Docket No. 03-124, Comments of the American Cable Association (filed June 16, 2003) and Reply Comments of the American Cable Association (filed July 1, 2003); *In the Matter of Carriage of Digital Television Broadcast Signals – Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, CS Docket Nos. 98-120, 00-96 and 00-2, Comments of the American Cable Association (June 8, 2001) (“ACA Digital Must Carry Comments”); *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, Reply Comments of the American Cable Association (February 1, 2003) (“ACA Broadcast Ownership Reply Comments”).

and regulations, has placed smaller operators at a structural disadvantage compared to the two DBS providers seeking to dominate smaller markets.

ACA represents the interests of more than 1,000 smaller market cable companies that range from small, family-run cable systems to multiple system operators focusing on smaller systems and markets. Together, ACA members serve about 7.5 million cable and Internet subscribers, primarily in smaller markets and rural areas. Our members are located in all 50 states and in virtually every congressional district.

## **II. Access to Programming**

**Must-have programming.** Program access remains a critical issue for ACA members. In Paragraph 13 of the NOI, the Commission asks:

*[Are there] certain programming services (i.e., “marquee” program services) or types of services (e.g., movie, sports, or news channels) without which competitive video service providers may find themselves unable to compete effectively?*

The answer is an unqualified “yes.” A core set of video services is essential to the viability of a cable system. This programming includes the major broadcast networks and “must-have” or “marquee” satellite programming, including ESPN (Disney), CNN, HBO and Cinemax (AOL Time Warner), and regional sports networks like Fox Sports Net Midwest, Fox Sports Net North, and Fox Sports Net South (News Corp.),<sup>3</sup> among others.

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<sup>3</sup> The Commission has recognized that RSNs are “sought-after and non-duplicable.” See *In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, CS Docket No. 01-290, FCC 02-176 (rel. June 28, 2002) at ¶ 32.

As previously recognized by the Commission, “if [an MVPD] were to be deprived of only some of this ‘must have’ programming, their ability to retain subscribers would be jeopardized.”<sup>4</sup> Without access to key programming on reasonable prices, terms and conditions, ACA members face an insurmountable competitive disadvantage against the two national DBS providers.

**A la carte and mini-tiers.** ACA members are fundamentally interested in offering their customers more choice. The ability to offer high-priced programming services on an “a la carte” or “mini-tier” basis is also essential to their continuing viability. In Paragraph 15 of the NOI, the Commission asks:

*To what extent have distributors offered, currently offer, or plan to offer consumers discrete programming choices (i.e., service on an “a la carte” or individual channel, or “mini-tier” basis) rather than programming service packages (i.e., tiers of programming services)?*

For widely viewed, high-cost services, the answer is “to no extent.” In short, the sole reason that ACA members do not offer high-priced programming on an “a la carte” or “mini-tier” basis is because media conglomerates, including Disney, Fox, and others, flatly deny this option to smaller cable operators.

At a recent meeting held by the National Cable Television Cooperative (“NCTC”), an ESPN executive stated to a group of smaller market cable operators, “I’m not interested in selling you ESPN on an a la carte basis.”<sup>5</sup> Disney insists that smaller cable operators carry ESPN on expanded basic, and refuses to allow a la carte or sports tier distribution of the sports service, despite

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<sup>4</sup> *Id.* at ¶ 33.

<sup>5</sup> Linda Moss, *ESPN Grilled at NCTC Meeting*, Multichannel News (July 29,

repeated calls for a la carte carriage from Senator John McCain.<sup>6</sup> Moreover, ABC/Disney demands company-wide carriage of the Disney Channel on the basic tier as a condition of obtaining retransmission agreements for local ABC affiliates.<sup>7</sup>

The types of practices described above reduce programming diversity, raise costs for subscribers, and hurt smaller cable operators' ability to compete.

### III. Retransmission Consent

**Tying.** As described in the *ACA Petition for Inquiry* and the *ACA Supplement*, smaller market cable operators and consumers are becoming increasingly vulnerable to the manipulation of the retransmission consent rules by huge media conglomerates like Disney, Fox, Hearst-Argyle, and Gannett.

In Paragraph 16 of the NOI, the Commission asks:

*How often are cable or satellite operators compelled to carry programming they would not otherwise carry on a tier they would not otherwise choose but for a retransmission consent tie-in requirement with an essential broadcast station?*

The answer is "far too frequently." As illustrated in detail in the *ACA Petition for Inquiry* and *ACA Supplement*, every time that smaller market cable operators deal with Disney, Fox, Hearst-Argyle, or an NBC O&O, they are forced

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2003).

<sup>6</sup> See, e.g., Ted Hearn & Mike Farrell, *Tier Law? No Way*, Multichannel News (May 26, 2003); Ted Hearn, *Little Ops Unafraid to Take on Net Powers*, Multichannel News (June 9, 2003); Peter Grant and Joe Flint, *ESPN Rate Boost Provokes Howls of Protest*, Wall St. J., 2003 WL-WSJ 3966429 (May 1, 2003).

<sup>7</sup> See *ACA Digital Must Carry Comments* at 7-8. See also *Mediacom Revised Reply* at 48-52.

to carry unwanted programming and place programming on a tier they would not otherwise choose.

As a condition of retransmission of its ABC O&Os, Disney forces smaller cable operators to carry unwanted satellite programming like SoapNet or Toon Disney, and to carry the Disney Channel on the basic tier.<sup>8</sup>

Similarly, as a condition of consent to retransmission of its O&Os, Fox forces many smaller operators to carry, and pay for, unwanted satellite programming like the Fox Digital Nets, FX, Fox Health Channel, the new Fox “Fuel” extreme sports channel, and the National Geographic Channel.<sup>9</sup>

Fox and ABC are not the only source of concern for smaller cable operators. For example, as a condition of retransmission of its ABC O&Os, Hearst-Argyle has required many smaller cable operators to first carry Lifetime Network and now to add Lifetime Movie Network.<sup>10</sup> GE forces smaller cable operators in many markets to carry unwanted satellite programming like MSNBC and CNBC in return for consent to carry its NBC O&Os.<sup>11</sup>

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<sup>8</sup> We describe these practices in detail in the *ACA Petition for Inquiry* at 7-11 and the *ACA Digital Must Carry Comments* at 7-8. See also *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules*, MB Docket Nos. 02-277, 01-235, 01-317 and 00-244, Revised Reply Comments of Mediacom Communications Corporation (Feb. 10, 2003) (“*Mediacom Revised Reply*”) at 47-52.

<sup>9</sup> We describe these practices in detail in the *ACA Petition for Inquiry* at 11-18 and the *ACA Digital Must Carry Comments* at 8-10. Fox has adopted a policy where it grants retransmission consent without a tie-in to the very smallest cable operators.

<sup>10</sup> *ACA Digital Must Carry Comments* at 11-12.

<sup>11</sup> *ACA Digital Must Carry Comments* at 13-14.

These types of tying arrangements and carriage conditions harm smaller cable companies and their customers by increasing basic cable costs and decreasing programming choices.

To make the situation worse, tying arrangements often go hand-in-hand with cash-for-carriage demands.

**Cash for carriage.** In Paragraph 39 of its NOI, the Commission asks:

*To what extent are cable television... retransmission consent negotiations providing broadcasters with an additional revenue source?...[W]hat forms of consideration are exchanged in this process?*

ACA members estimate that cash retransmission consent demands in the next round of negotiations could result in a cost increase of more than \$172 million per year for ACA members, just for access to “free” over-the-air network programming.<sup>12</sup> As described in the *ACA Broadcast Ownership Reply Comments*, this will result in a major transfer of wealth from rural cable systems and consumers to the distant corporate headquarters of a few network owners and major affiliate groups. Specific examples of cash for carriage demands include:

- Disney/ABC demanding \$0.70 per subscriber per month for ABC O&Os.<sup>13</sup>
- Fox threatening smaller cable operators with fees as high as \$1.00 per subscriber per month for its O&Os.<sup>14</sup>

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<sup>12</sup> *ACA Broadcast Ownership Reply Comments* at 7 and note 9.

<sup>13</sup> *ACA Supplement* at 9-10.

<sup>14</sup> *Id.* at 14.

- Hearst-Argyle demanding \$0.30 per subscriber per month for an ABC O&O tied to Lifetime, or \$0.50 per subscriber for the ABC O&O alone.<sup>15</sup>
- Gannett deploying a national strategy demanding that small cable companies pay between \$0.15 and \$1.00 per subscriber per month.<sup>16</sup>
- Cox Broadcasting demanding up to \$0.30 per subscriber per month.<sup>17</sup>

If the actions of media conglomerates continue without restraints imposed by the Congress or the Commission, the types of retransmission consent abuse described in these Comments will only increase. Higher costs and unreasonable conditions of carriage will ultimately fall on the shoulders of smaller market cable operators and their customers.

#### **IV. Conclusion**

In smaller markets, program access and retransmission consent are becoming insurmountable obstacles for smaller cable operators. The Commission must consider how media consolidation, combined with current laws and regulations, only works to facilitate abuses by media conglomerates. The result is less choice and higher costs for consumers and an increasing competitive disadvantage for more than a thousand smaller cable companies.

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<sup>15</sup> *ACA Digital Must Carry Comments* at 11. See also *Mediacom Revised Reply* at 47-48.

<sup>16</sup> *ACA Broadcast Ownership Reply Comments* at 6.

<sup>17</sup> *Id.*

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**

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