

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

REPLY COMMENTS

Fox Entertainment Group, Inc. and Fox Television Stations, Inc.; National Broadcasting Company, Inc. and Telemundo Communications Group, Inc.; Viacom; and The Walt Disney Company and The ABC Television Network (collectively the "Broadcast Networks") hereby submit this reply to the opening comments of certain cable industry parties with respect to the retransmission consent practices of the Broadcast Networks. Cox Communications, Inc. ("Cox") and the American Cable Association ("ACA") (together, the "Cable Commenters") seek to obtain retransmission consent without cost as part of their continuing efforts to defeat the retransmission consent negotiation process established by Congress in 1992 to protect broadcasters from the perceived market power of vertically integrated cable companies.

In short, the Cable Commenters ignore the well-founded precedent concerning good faith negotiations for retransmission consent and, in so doing, attempt to transform the Commission's annual review of the market for the delivery of video programming into a platform to address their unfounded retransmission consent grievances. The

Commission should ignore the Cable Commenters' plea for unwarranted governmental intervention in marketplace negotiations.

I. STRIPPED OF VERBIAGE, COX AND ACA SIMPLY WANT A FREE RIDE ON SOME OF THE MOST VALUABLE PROGRAMMING THEY CARRY – THE BROADCAST NETWORKS

Cox, a vertically integrated cable operator (under common control with the licensee of broadcast television stations), complains that the Broadcast Networks require carriage of their affiliated cable programming channels in exchange for retransmission consent. The reality is that the Broadcast Networks offer Cox and other cable operators multiple options for consideration in exchange for retransmission consent, most often a cash payment per subscriber or carriage of affiliated cable programming channels.

Whether Cox or any cable operator carries affiliated programming channels or pays cash is the result of its choices made in marketplace negotiations. Cox has offered no evidence whatsoever that these negotiations fail to maximize consumer, broadcaster and cable operator welfare.¹

ACA, which represents smaller market cable operators, also alleges that its members are "forced" to carry cable program channels affiliated with the Broadcast Networks.² ACA – whose earlier Commission filings Cox cites with approval – makes clear, however, that its members in fact have an option to pay cash for retransmission consent (though it complains that the price is too high). Yet, ACA makes no effort to

¹ Cox alleges that the retransmission consent practices of the Broadcast Networks crowd out independent cable programming. *See* Cox Comments, at 18. Cox, however, does not cite (and the Broadcast Networks are not aware of) a single instance where an independent channel was in fact not carried or was dropped due to retransmission consent negotiations.

² ACA Comments, at 5.

explain why payment for what is often a cable operator's most popular programming – broadcast networks – is unreasonable or disproportionate to the costs paid for other cable programming. Moreover, it is ironic to say the least that ACA complains about cash charges for retransmission consent that Cox's television stations seek.³ Indeed, ACA has asserted elsewhere that Cox is "demanding strictly cash for carriage, take it or leave it."⁴

In any event, ACA makes little effort to conceal its real goal: to avoid payment for some of the most popular programming available on its cable systems. As James Gleason, Chairman of ACA and CEO of a small cable company, recently admitted: "We do want [retransmission consent] free and so do the big [cable] guys."⁵

Cox's intentions are no different. After complaining about carriage of broadcaster-affiliated cable networks, Cox seems to suggest that broadcasters should not be permitted even to seek cash payments in exchange for retransmission consent.⁶ Thus Cox would have its cake and eat it too – barring broadcasters from accepting either cash payments or carriage of additional cable channels. This suggestion should be rejected out of hand as unwarranted interference with marketplace bargaining.

The fact is, the retransmission negotiation process has worked well, with very few bargaining impasses. The parties reach agreement because each side realizes important

³ See ACA Comments, at 8.

⁴ ACA Reply Comments, at 2, filed as part of the Commission's Biennial Regulatory Review Proceeding, *In Re 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*, Notice of Proposed Rulemaking, FCC 02-249 (released September 23, 2002).

⁵ Ted Hearn, "Little Ops Unafraid to Take On Net Powers," *Multichannel News*, at 7 (June 9, 2003).

⁶ See Cox Comments, at 19.

benefits. Cable operators benefit from carriage of network-owned stations and the broadcaster-affiliated cable networks they choose to carry. For their part, broadcasters must achieve carriage of their stations to ensure that they reach the widest audience possible. Neither the broadcast network nor a local television station can afford to lose even a few percentage points of audience coverage. The ability to reach virtually every viewer nationwide has always been a critical factor in the attractiveness of broadcast networks to national advertisers. If a network is unable to provide complete nationwide reach, it would no longer be able to command advertising rates comparable with those charged by its competition and would be handicapped in competing for the most attractive programming. These powerful economic forces must be considered by the Broadcast Networks when they negotiate for retransmission consent and help to ensure that agreement is reached.

II. BARGAINING PROPOSALS THAT INCLUDE VARIOUS FORMS OF CONSIDERATION IN EXCHANGE FOR RETRANSMISSION CONSENT ARE EXPRESSLY PERMITTED BY THE FCC'S RULES AND BENEFIT CABLE OPERATORS

The Broadcast Networks are in full compliance with the FCC's retransmission consent rules. Cox and ACA not only unfairly describe the substance of retransmission consent negotiations, they also completely ignore the FCC's well-established rules, which require "good faith" negotiation on the part of broadcasters. Under these rules, a cable company (or other multichannel video programming distributor ("MVPD")) that is aggrieved by a broadcaster displaying a lack of good faith in retransmission consent negotiations can file a complaint with the FCC against that broadcaster.⁷ The rules

⁷ See 47 C.F.R. § 76.65. The letter to the Commission from Sylvia Lesse and Marci Greenstein on behalf of a coalition of small video operators (the

prohibit, for example, a simple refusal to negotiate or "take it or leave it" proposals – such as the Cox bargaining tactics described by ACA.⁸ Neither Cox nor ACA offers any evidence or policy reason why the Broadcast Networks' retransmission negotiations violate the Commission's rules.

On the contrary, the legislative history of the 1992 Cable Act and Commission precedent make clear that unfettered negotiation is necessary to ensure a competitive balance in the video marketplace. When Congress passed the retransmission consent provision of the Cable Act in 1992, it acted to ensure the continued viability of over-the-air television and to protect its related public interest benefits.⁹ As the Senate Report explained, the legislation was in part designed to put an end to the subsidization of cable operators by broadcasters:¹⁰

Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with

"Coalition") simply incorporates prior comments of its members and focuses, in large part, on the adequacy of the Commission's retransmission consent complaint procedures. *See* Letter to Marlene Dortch, submitted September 11, 2003. While the Coalition rails against the structure and effectiveness of the procedures, the anonymous complaint fails to cite a specific example of the system's failure. This general indictment of the Commission's processes does not supply any evidence that the procedures do not work.

⁸ 47 C.F.R. § 76.65(b).

⁹ S. Rep No. 102-92 (1991) ("The Committee has concluded that the exception to section 325 for cable retransmissions has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting.").

¹⁰ *See id.* ("In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.").

broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.¹¹

The Senate Report also concluded that cable operators should pay for carriage of a broadcast signal, just as they pay for cable program services:

Cable television is now an established service. Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently.¹²

Furthermore, Congress recognized that, in the exercise of their retransmission consent rights, broadcasters may seek alternative forms of compensation.¹³ "[Some] broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system."¹⁴

The Commission's rules regarding retransmission consent are fully consistent with the congressional mandate. The Commission expressly permits offering retransmission consent on a barter basis (*e.g.*, carriage of associated cable network or other broadcast stations). As the FCC has explained: "*We do not find anything to suggest that, for example, requesting an MVPD to carry an affiliated channel, another broadcast signal in*

¹¹ *Id.*

¹² *Id.*

¹³ *See id.*

¹⁴ *Id.*

*the same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace consideration . . . [and] we point out that these are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own."*¹⁵

The ability to include carriage of an associated cable network as part of retransmission consent negotiations is not only permitted by the Commission – it also benefits cable companies by expanding bargaining options. As the Commission has explained: "We also believe that to arbitrarily limit the range or type of proposal that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and MVPDs to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent."¹⁶

Nationwide bargaining for retransmission consent is fully consistent with the Commission's rules. Cox also claims that the Broadcast Networks "negotiate retransmission consent for all of their [network-owned stations] nationwide at the same

¹⁵ *In Re Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 56 (2000) ("*SHVIA Order*") (emphasis added). In 2001, the FCC applied this principle in rejecting a complaint brought by EchoStar. The FCC stated that "offering retransmission consent in exchange for the carriage of other programming such as a cable channel" is "consistent with competitive marketplace considerations." *In Re EchoStar Satellite Corporation v. Young Broadcasting, Inc.; KRON-TV, Young Broadcasting Co. of San Francisco; Young Broadcasting of Nashville, Inc.; News 2, Inc.; Young Broadcasting of Los Angeles, Inc. and KCAL-TV*, Memorandum Opinion and Order, 16 FCC Rcd 15070, ¶ 21 (2001). The FCC added more specifically that "[g]ood faith negotiation requires only that the broadcaster at least consider some other form of consideration if the MVPD cannot accommodate such carriage." *Id.*

¹⁶ *SHVIA Order*, at ¶ 56.

time, and have conditioned such consent on carriage of their affiliated cable programming on all of the cable operator's systems nationwide (not just where the cable system and the network-owned station share a market)."¹⁷ In other words, Cox apparently is worried that retransmission consent negotiations could result in a particular Cox cable system agreeing to carry cable programming affiliated with a Broadcast Network even though the network may not have a broadcast station in the local market in question.¹⁸ Consequently, according to Cox, retransmission consent negotiations no longer are based on the value of a broadcast station to the local market. Nothing compels Cox to choose the same form of consideration in every market – in some markets Cox could agree to pay cash while in others it could agree to carry programming. In short, if the value of a broadcast station to the cable subscribers in the local market is not part of the calculus Cox uses to determine what it is willing to pay for retransmission consent rights, it is only because of the particular manner in which Cox conducts its retransmission consent negotiations.

¹⁷ Cox Comments, at 17.

¹⁸ Similarly, ACA previously has claimed that ABC (as well as other broadcasters) required a system operator to carry an ABC-affiliated cable channel on another of the operator's cable systems in a market where ABC did not own a television station. *See Petition for Inquiry Into Retransmission Consent Practices*, filed October 2, 2002, at 34. ACA neglected to mention, however, that the cable operator's system in the market where ABC owned a television station lacked the capacity to add an ABC-affiliated cable channel. Therefore, as an accommodation, ABC agreed that the capacity-constrained system operator could add the ABC-affiliated cable channel to another of the operator's cable systems that was not capacity-constrained. ACA should not be heard to complain now about a practice that was designed for its member's benefit.

Cox also criticizes the "high level of corporate involvement" in the retransmission consent negotiation process.¹⁹ However, cable operators themselves negotiate carriage of cable networks at the corporate level. Just as a cable programmer seeks carriage on a national level, a multiple system operator, such as Cox, can add or drop a cable network on most or all of its individual local cable systems. And again, if Cox believes that local conditions warrant, it can choose to pay cash rather than carry a broadcaster's associated cable network on a particular system.

CONCLUSION

Congress established the current retransmission consent regime to "help preserve local broadcast service to the public."²⁰ The complaints of the Cable Commenters are little more than ill-conceived attempts to revisit and defeat the retransmission consent process established by Congress. The present retransmission consent negotiation process works as envisioned by Congress and the Commission, helping to ensure a competitive video marketplace.

¹⁹ *Id.* at 18.

²⁰ *In Re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, ¶ 104 (1994).

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September 26, 2003