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Symposium on the Commission's Inquiry Concerning A La Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems

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Testimony of Ben Hooks

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Introduction

Good morning, my name is Ben Hooks. I am from Tyler, Texas, and I serve as CEO of Buford Media Group. We are a small cable company and operate 78 cable systems, serving about 56,000 subscribers in six states. I have been in the cable television business for 37 years, most of this time involved with smaller cable systems.

I am past chairman of the American Cable Association and speak today on behalf of ACA. I am also a board member of the National Cable Television Cooperative, the buying group that helps smaller cable operators purchase programming.

For ACA and our more than 1,000 small cable company members, this is a critically important proceeding. We work hard to serve small markets that are increasingly dominated by a few media companies. The questions members of Congress have asked go right to the heart of our deepest concerns.

Powerful interests are working to deflect scrutiny from the status quo and convince you that the only question here is about mandatory a la carte. Don't take that bait.

What is ***really*** driving this inquiry are increasing concerns in three areas – ***choice, cost and content***. The much more important question, the question at the heart of these concerns, is this:

What limitations exist on cable operators' flexibility to offer programming choices to customers?

When you run down the list of questions Congress asked you to study, that very question is right at the top.

ACA, its staff and counsel are committed to helping you answer these important questions. I also want to thank the Media Bureau for your outstanding work in many areas. You have done a great job in understanding the tough issues facing smaller market cable operators.

Your recent work on the News Corp./DirecTV merger is a superb example. You really got it right. You concluded that a company controlling "must have" broadcast and satellite programming has substantial market power. You also found that a company can use that market power to raise costs, reduce choice, and harm customers. Finally, you concluded that smaller cable companies are particularly vulnerable.

When we boil it all down, that is the essence of ACA's input here. The exercise of market power by a few media conglomerates limits our ability to provide our customers more choice and raises costs. We want to provide more choice and better value. We can't.

Our comments provide detailed answers to several of the questions you asked us. With my time here, I will focus on four points.

First, I want to describe how the practices of a few dominant companies restrict choice and raise costs. To understand the limitations on our flexibility to offer programming choice, you really need to study this.

Second, I will suggest how marketplace solutions could work to bring greater flexibility and choice, and even lower costs for some customers.

Third, I want to suggest a few additional questions that will help you dig deeper here, certainly deeper than the big programmers want you to.

Finally, I will conclude with what the smaller cable sector respectfully requests that you include in your report.

How wholesale programming practices and retransmission consent restrict choice.

To understand the limitations on how we sell programming, you need to focus on two areas – the wholesale practices of the major program suppliers and the retransmission consent practices of the network owners and major affiliate groups. Four of the five major satellite program suppliers also control the broadcast networks, so you don't need to look far to find the culprits.

Wholesale programming practices

In the wholesale programming market, the distribution restrictions are imposed through programming contracts. To describe how this works, I want to refer to Table 1, which is the next to last page of my written testimony.

Let's turn to that.

What you have there are the Top 50 cable channels, organized by ownership. You see the familiar flagship "must have" channels like ESPN, Fox Sports, MTV, Nick, CNN and others. And you also see that five companies, the "Big Five" we call them – Viacom, Disney, GE/NBC, News Corp. and Time Warner – control about 75% of those top 50 channels.

What you **<u>don't</u>** see are the specific distribution restrictions imposed by the Big Five programmers.

Here are the rules of the game when you play with the Big Five.

- For nearly all the Top 50 channels, contracts require me to deliver each channel to all or nearly all of our customers. Everybody must receive these channels and, of course, pay for them. If I don't agree to do that, I do not get the channel.

- For many of the Top 50 channels, contracts require me to distribute, and pay for, affiliated channels. In some cases, this involves several additional channels. In some cases, the tie-in is mandatory. In other cases, the tie-in is coerced. For example, if I do not carry the affiliated channel, I pay double, or more, for the "must have" channel.

All this combines to fill up our basic or expanded basic service with channels controlled by a few companies. But it doesn't stop there. Now that many smaller cable systems are upgrading to digital, the same game is being played there.

Let's look now at Table 2. That's the last page of my written testimony.

Table 2 has what we call the Second Tier channels. These are typically the channels that are included in digital packages. You see that close to half of these are controlled by three of the Big Five companies.

Initially, smaller cable operators had some choices in how they purchased and packaged digital channels. We could offer theme tiers, for example. That was good. But now, the contracts are changing. Increasingly, we are being obligated to distribute Second Tier channels to **all** digital customers. This is undermining what little flexibility we had.

In comments you have received, some people say cable operators, large and small, have many choices and options. Let me be clear: This is **not** the experience of more than 1,000 cable companies represented by ACA.

Because what you do **not** see in the record is the fine print of the contracts.

You do **not** see the obligations to distribute programming to nearly all customers.

You do **not** see the obligations to carry affiliated channels, and you do **not** see the steep penalties if distribution obligations are not met, and much more.

That's one part of the problem. The other is retransmission consent.

Retransmission consent

ACA has provided the Commission with a lot of information on retransmission consent. Here's the main problem: To obtain a "must have" network signal, we must carry affiliated satellite programming. This further restricts our flexibility and raises costs. It's a major problem for us and our customers.

This conduct continues to expand. In addition to all that we have reported to you, ACA members are now encountering retransmission consent tie-ins when they try to get consent to launch digital broadcast signals. Certain network owners and affiliate groups are refusing to allow cable systems to distribute DTV signals unless they agree to distribute even more affiliated programming.

When all this is taken together, it should become clear why smaller cable operators have very little flexibility in how they offer programming to customers.

Program diversity

This is a good place to touch upon program diversity as well. You have received many comments that argue how mandatory a la carte will hurt program diversity. That is an important concern. But those arguments deal with a hypothetical mandatory a la carte world. The more important question is how the current practices of the Big Five affect program diversity today.

There is plenty on the record about that too, especially from independent programmers.

I will give you my own example. My systems serve several areas with good numbers of Hispanics customers. I would love to provide those local markets with more Spanish-language programming on expanded basic. Right now, I cannot. Nearly all of that channel capacity is tied up by programming controlled by the Big Five. And under my current programming contracts, if I did add another channel, it would need to be one of theirs.

And the record contains other examples.

So when you report on what ***might*** happen to program diversity under a different wholesale regime, you should also discuss how current programming practices hurt distribution of independent channels.

Price Discrimination

For smaller operators, these problems get worse because of price discrimination. Members of Congress have asked you about this too. As our comments indicate, ACA members' programming costs are up to 30% higher than what the big cable operators pay.

ACA members, like me, have seen this firsthand when they buy systems from major MSOs. On the day of closing, the same head-ends receive the same programming from the same satellites as the day before. The cost of producing programming did **not** change. The cost of delivering the programming did **not** change. The only change is that the owner got smaller.

Think about what is going on here. Because of price discrimination, rural cable providers and customers are subsidizing the programming costs of their big city counterparts. Compare this to the telephone industry where it's the smaller market providers that receive the subsidy. Here, we are not asking for subsidies. We are asking to end non-cost-based price discrimination.

I understand that the record contains comments from companies like Disney, Fox, NBC and Viacom. They encourage you to disregard these concerns as just the complaints of a few small cable companies. The record you have tells a different story.

In addition to ACA, you have heard from small telcos and co-ops that provide cable. You have heard from EchoStar, one of our biggest competitors. You have heard from many independent programmers. Those groups are delivering a very similar message. Like us, they say, 'Look at the current programming and retransmission consent practices of the Big Five.' The problems are there.

Enough about the problems for now.

Marketplace solutions

Our comments describe marketplace solutions first, then a range of statutory and regulatory fixes. First, let's talk about marketplace solutions.

Most of what the Big Five and others powerful interests are harping about is a dangerous, unrealistic world of mandatory a la carte. I want to talk about a different world. I want to talk about a world where smaller cable operators have more flexibility in how programming is offered locally – to help, not harm, our customers.

Imagine this: One of my cable systems serves a market where many customers are not that interested in sports programming. Because of a struggling local economy, they are much more interested in spending less for cable. So in this imaginary world, I move high-cost sports channels like ESPN and Fox Sports to a sports tier. And I reduce the costs of expanded basic service.

Imagine another example. In some of our rural markets, there is a lot of concern over the content of some programming, particularly the music video channels and some of the racier entertainment channels like E!, FX, Spike and others. Those channels contain partial nudity, sexually suggestive content and profanity. Right now the channels must be carried on expanded basic. Again, we could offer them on a separate "Contemporary Adult Tier" in some markets.

I believe that just a few changes would go a long way toward addressing concerns about choice, cost and content. There is one sure way to find out. Give it a try. Let's experiment. There are small cable companies right now in ACA that are ready to try these ideas.

So why isn't that happening?

That leads to my next topic – a few questions you might ask.

Some questions to ask

I understand the record contains hundreds of pages describing how a national, mandatory a la carte regime would be a disaster. Let's leave that aside for a moment and ask some different questions.

What about smaller scale change?

What would happen if media conglomerates allowed smaller cable operators more flexibility?

What would happen if some smaller systems had the ability to offer a Sports Tier? Or a Contemporary Adult Tier?

Those of us that serve rural customers everyday have some ideas about what might happen. The basic and expanded basic tier model would remain the model. Customers would just get more control over content and costs.

That leads to another question. Why won't the media conglomerates even try it in some smaller markets? Wouldn't real life experience provide better data than their fancy studies and projections?

A final question: ACA member companies are ready to step up and try this right now. What prevents the Big Five from making the same small steps?

We suggest you ask them.

What ACA would like included in the report

I want to conclude with five points that we encourage you to include in your report. The record supports these points, and Congress needs to hear them from you.

First, ACA's 1,000 smaller cable companies believe that the wholesale programming and retransmission consent practices of the media conglomerates prevent us from offering more choices to customers. A handful of companies control most of the "must have" satellite and broadcast channels we carry. They are exercising their market power to reduce local choices and increase costs of cable.

Second, programming costs are higher for smaller market providers. Because of this, rural providers and customers subsidize the programming costs of the big MSOs and urban customers. There is no evidence showing that these differences are due to differences in costs. It's all about market power.

Third, ACA's 1,000 smaller cable companies believe that more flexibility in how we package channels for customers will go a long way to address concerns about choice, cost and content. For example, the ability to offer a Sports Tier or a Contemporary Adult Tier would help us control costs and give customers more choices. This is pro-consumer, pro-competition, and will not impair the Big Five's ability to make their billions from smaller markets.

Fourth, these changes will not require a mandatory a la carte regime. These changes will not necessarily require legislation or regulation, but they might. One way to achieve these changes is for the media conglomerates to exercise self-restraint when dealing with smaller distributors. They should listen to our ideas, and try them.

Finally, you can report to Congress that ACA members are ready to act, to test, and to support these changes now.

Again, I thank you for the opportunity to speak with you today. On behalf of ACA and its 1,000 member companies, I commend you in undertaking this very important study, and we look forward to your report.

Table 1. Top Fifty Channels[1]

Channel	Ownership	Channel	Ownership
MTV	Viacom / CBS	Animal Planet	Liberty Media
Nickelodeon	Viacom / CBS	Discovery	Liberty Media
Spike	Viacom / CBS	Travel	Liberty Media
TV Land	Viacom / CBS	TLC	Liberty Media
VH1	Viacom / CBS	Golf	Comcast Corp.
Comedy Central	Viacom / CBS	Outdoor Life	Comcast Corp.
BET	Viacom / CBS	E!	Comcast Corp.
CMT	Viacom / CBS	QVC	Comcast Corp.
Disney	Walt Disney Co. / ABC	HGTV	Scripps Company
ESPN	Walt Disney Co. / ABC	Food	Scripps Company
ESPN 2	Walt Disney Co. / ABC	AMC	Rainbow / Cablevision Systems
Lifetime	Walt Disney Co. / Hearst	C-Span	National Cable Satellite Corp.
ABC Family	Walt Disney Co./ ABC	C-Span II	National Cable Satellite Corp.
A&E	Hearst/ABC/NBC	WGN	Tribune Company
History	Hearst/ABC/NBC	Hallmark	Crown Media Holdings
CNBC	GE/NBC	Weather	Landmark Communications
MSNBC	GE/NBC	HSN	IAC/InterActiveCorp.
Sci-fi	GE/NBC		
USA	GE/NBC		
Bravo	GE/NBC		
Shop NBC	GE/NBC		
Fox News	News Corp.		
Fox Sports	News Corp.		
FX	News Corp.		
Speed	News Corp.		
TV Guide	News Corp.		
CNN	Time Warner / Turner		
Headline News	Time Warner / Turner		
TBS	Time Warner / Turner		
TCM	Time Warner / Turner		
TNT	Time Warner / Turner		
TOON	Time Warner / Turner		
Court TV	Time Warner / Liberty Group		

[1] Table 1 organizes the Top 50 channels by ownership and does not rank the channels by number of subscribing households.

Table 2. Second Tier Channels.

Channel	Ownership	Channel	Ownership
MTV2	Viacom / CBS	Discovery Home	Liberty Media
MTV Espanol	Viacom / CBS	Discovery Kids	Liberty Media
MTV Hits	Viacom / CBS	Discovery Wings	Liberty Media
VH1 Classic	Viacom / CBS	FitTV	Liberty Media
VH1 Country	Viacom / CBS	Disc.Espanol	Liberty Media
Nick GAS	Viacom / CBS	Discovery Health	Liberty Media
Nicktoons	Viacom / CBS	Discovery Times	Liberty Media
Noggin	Viacom / CBS	Science	Liberty Media
ESPN Classic	Walt Disney Co. / ABC	International	Liberty Media
ESPNEWS	Walt Disney Co. / ABC	style!	Comcast Corp.
Soapnet	Walt Disney Co. / ABC	techTV	Comcast Corp.
Toon Disney	Walt Disney Co. / ABC	Independent Film	Rainbow Media Holdings
LMN	Walt Disney Co. / Hearst	WE	Rainbow Media Holdings
National Geographic	News Corp.	GAC	Jones Media Networks
FMC	News Corp.	GSN	Sony Pictures/Liberty Media
		HITN	Hispanic Information & Telecommunications Network
		INSP	Inspiration Network
		Outdoor Channel	Outdoor Channel Holdings, Inc.
		Oxygen	Oxygen Media

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