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

In the Matter of	)	
A La Carte and Themed Tier	)	
Programming and Pricing Options for	)	MB Docket No. 04-207
Programming Distribution on Cable Television	)	
and Direct Broadcast Satellite Systems	)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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Cablevision Systems Corporation ("Cablevision") hereby submits these reply comments in response to the Commission's Public Notice[1/] in the above-referenced proceeding.

INTRODUCTION AND SUMMARY

Cablevision has long believed that giving customers more choice over what programming they buy is a significant competitive opportunity because it empowers the consumer and distinguishes a service from that of other multichannel providers. As Congress and the Federal Communications Commission ("FCC" or "Commission") have recognized in many communications policies, greater consumer choice leads to more varied, innovative, higher-quality products and services.

Cablevision has been at the forefront of efforts to enhance customer choice. It has conducted several a la carte experiments. It has invested heavily in the technology that allows subscribers to select (or not select) add-on services, such as digital tiers, foreign language programming, on-demand services, voice service and broadband service.

[1/] Comment Requested on a la Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, Public Notice, MB Docket No. 04-207 (rel. May 25, 2004) ("*Notice*").

As Cablevision's Chairman, Charles Dolan, explained to the Senate Commerce Committee in 2003 in the attached testimony, Cablevision's goal of offering "more for less to everyone" has been impeded by various government rules and industry practices that restrict operators' ability to market programming services.[2] By forcing subscribers to pay for programming they may not want, these rules and practices put upward pressure on subscriber rates.

Requirements imposed by the government for the benefit of broadcasters restrict consumer choice, artificially raise consumer costs, and deny Cablevision and other cable operators the ability to tailor service packages based on competitive pressures and customer needs. In particular,

- the "must buy" provisions of the Communications Act force cable subscribers -- but no other MVPD subscribers -- to purchase broadcast programming as a condition of receiving access to the programming they want; and
- broadcasters abuse the retransmission consent process to force the carriage of multiple, unpopular broadcast-affiliated cable networks.

Congress should eliminate must buy and retransmission consent because they no longer serve their intended purposes and reduce subscriber choice.

Also, Cablevision's ability to offer subscribers the greatest possible choice is restricted by the common industry practice of programmers insisting that cable operators carry their programming in the expanded basic tier as a condition of carriage.

I. SUBSCRIBERS DEMAND CHOICE IN VIDEO PROGRAMMING

Technological advances in the way video programming is offered and consumed are giving cable subscribers more control over programming and costs and allowing them to exercise

[2] *See* Testimony of Charles F. Dolan before the U.S. Senate Committee on Commerce, Science and Transportation, May 6, 2003, attached as Exhibit A.

choice through a more interactive television viewing experience. As Chairman Powell recently remarked:

> The new technologies have a premium on personalization, that it's customized for your preferences and I think interestingly enough, I think it has to have some capability for interactivity and consumer interaction and even to some degree mobility. I think consumers are looking for the ability to sort of unplug things, put them in their pocket, move to other places, stick whatever that thing is in another box and have the world that they've spent time creating over here, available to wherever they go.[3/]

Cablevision and other cable operators must meet this trend toward more subscriber choice and control in their television viewing experience to remain competitive. Extensive on-demand programming, single channel offers and themed tiers allow cable operators to reach new audiences that are underserved by traditional expanded basic cable services. Programming services available individually or in themed tiers, such as foreign language programming, do not always have the kind of appeal that would sustain them in a general interest tier such as "expanded basic." The ability to offer them in mini-tiers and on an individual channel basis gives these programmers and MVPDs new markets to serve discrete audiences.

Other means of facilitating user choice include the increasingly ubiquitous electronic program guides and the nascent digital video recorder ("DVR") industry. DVRs, which record television according to subscriber preferences, place the consumer's choices at the center of the television viewing experience. Enabled by these technologies, services will increasingly be offered in small tiers or on a pure a la carte, on-demand basis, giving subscribers significant control over what they watch and pay for. Nevertheless, while the technology is facilitating customer choice, digital boxes would have to be deployed in every home to achieve a full a la carte framework. This would be a formidable task and would require a major change-out of technology in the home.

[3/] Michael K. Powell, Chairman, Federal Communications Commission, Remarks at the National Cable and Telecommunications Association Convention (May 4, 2004).

Cablevision has a long history of seeking to increase consumer value by offering programming on an a la carte basis or as part of a smaller themed tier. On three occasions in the early 1990s, Cablevision gave consumers the option to purchase individual program services or programming clusters. While none of these offers remains available today, the efforts provided Cablevision with valuable insight into providing services a la carte. It is clear, for instance, that a cable operator cannot successfully make a la carte programming options available if programmers will not agree to provide the necessary flexibility. Cablevision also learned that while customers enjoy a la carte options, the majority of subscribers desire a more traditional expanded basic tier as well.

Cable operators, facing increasing competition from DBS and other providers, need the greatest possible flexibility in how they identify and offer that programming so that they can continue to be creative in how they structure consumer offerings. Cablevision wants to be able to develop, test and -- where successful -- widely implement different business models. Unfortunately, it is restrained by regulatory and contractual restrictions that significantly limit its options -- and thus, consumer choice.

II. STATUTORY PROVISIONS THAT FAVOR BROADCAST OVER OTHER PROGRAMMING RESTRICT CABLE OPERATORS' FLEXIBILITY TO OFFER CREATIVE PROGRAMMING PACKAGES

Despite the best efforts of Cablevision and other MVPDs to offer their subscribers the greatest possible choice, cable operators are limited in their ability to structure their offering of broadcast channels and other programming services owned or controlled by the broadcast networks. The Commission should consider in this regard the legacy of the must buy[4/] and

[4/] 47 U.S.C. § 543(b)(7)(A).

retransmission consent[5/] requirements embodied in current law. These requirements exacerbate the leverage of programmers affiliated with broadcast owners and so impair customer choice.

A. The "Must Buy" Requirements Cause Consumers To Purchase Broadcast Programming As A Condition Of Receiving Any Other Cable Programming.

The requirement in federal law that consumers "must buy" the broadcast basic tier as the price of accessing any other cable programming limits consumer choice and increases the costs of cable service. Due to the must-carry law, requiring carriage of all local broadcast stations that demand it, the typical cable system carries approximately 20 channels of local broadcast programming regardless of consumer demand or interest for those channels. These channels -- which cable subscribers are then required under "must buy" regime to purchase -- cost each subscriber about $13.00 per month. If they wish to receive any cable programming, they must purchase the entire tier of broadcast channels as a condition of access to the cable service they want.

Even assuming the propriety of a "must-carry" requirement, there is no justification for giving broadcast channels a mandatory "pride of place" in a cable operator's line-up through "must buy." The original rationales for the imposition of these requirements -- an assumption that all cable subscribers would want to purchase broadcast channels because improved broadcast reception was their primary reason for subscribing to cable service,[6/] and a fear that in the absence of these requirements and as cable programming grew more popular, cable would not make broadcasters readily available to all subscribers for anticompetitive reasons -- clearly

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[5/] 47 U.S.C. § 325(b)(1)(A).

[6/] *See* Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(17) ("Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services. . . or cannot otherwise receive broadcast television services.").

do not hold up today.

First, as cable service has become less a vehicle for improved reception of broadcast signals and more a home to creative and popular programming services, the related requirement that customers purchase broadcast programming as a condition of access to other cable programming services has become an increasing cause of customer dissatisfaction. Even in 1992, members of Congress warned that broadcast programming should not enjoy special advantages because it was no longer providing the expected quantity or quality of diverse, creative programming and viewers were finding it substantially less attractive than cable programming.[7/] Some members of Congress likewise recognized at the time that requiring carriage and purchase of all local broadcast stations "is essentially a mandatory subsidy, the costs of which will be imposed on competing television systems and cable consumers regardless of whether they want the channels . . . If they are put in the basic package, the cost of paying for those retransmissions are being passed on to people who may or may not want to see those channels or may or may not want to pay for them."[8/] The cost of this regime to consumers is especially apparent with regard to Cablevision's international programming packages. Because of the "must buy" requirements, accessing these packages is more expensive for consumers who may have little or no interest in English-only broadcast stations that the government makes them purchase.

Second, the forced purchase of broadcast programming by cable subscribers also raises

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[7/] *See, e.g.*, 138 Cong. Rec. S400, 431-432 (Jan. 27, 1992) (statement of Sen. Wirth) (noting lack of educational children's programming and overall lack of diverse programming on commercial broadcast stations).

[8/] 138 Cong. Rec. S. 627, 644 (Jan. 30, 1992) (statement of Sen. Brown). Ironically, while Congress barred the "forced" purchase of cable programming tiers as a condition of receiving per channel or per program offerings, *see* 47 U.S.C. § 543(b)(8), it required all subscribers to purchase broadcast channels as condition of access to any other tier of service.

competitive fairness issues not contemplated by Congress in 1992. Unlike cable, satellite subscribers are not forced to buy broadcast programming as part of their service offering. Rather, they can choose to receive it for a separate fee. This gives satellite operators -- whose subscriber growth rate is consistently in the double digits[9/] -- an unfair competitive disadvantage over cable in competing for certain customers (*i.e.*, those not interested in receiving broadcast programming from an MVPD). This competitive disparity is unjustified. The Commission should reconsider the value of the statutory "must buy" requirement such that cable subscribers, like satellite subscribers, can control what they pay for.[10/]

B. Retransmission Consent Demands Limit Cable Operator Control Over Whether To Carry Broadcast-Affiliated Programming, How To Offer It And Where To Place It.

While "must buy" makes consumers who do not want broadcast stations buy them, "retransmission consent" gives broadcasters undue leverage because of subscribers who do. Broadcasters have significant leverage when negotiating with cable operators over retransmission because both know that many MVPD subscribers demand access to broadcast network programming as part of the cable service. Broadcasters have withheld retransmission consent -- in effect, threatening to deny consumers access to broadcast programming sent over the public airwaves, even though they are supposed to be the trustee of this public asset on behalf of consumers -- unless cable operators agree to carry one or more of the broadcast network's

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9/ *See, e.g.*, *In the Matter of Annual Assessment of the State of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606, 1650-1651 ¶ 65 (2004) (DBS experienced 12% subscriber growth rate from June 2002-June 2003).

10/ Cablevision also believes that the must buy requirement raises serious First Amendment issues. By requiring cable operators to package broadcast programming in every programming offering, it restricts cable operators' speech rights by preventing them from speaking in a manner that would expand access to, and the audience for, their messages, and by preventing individuals from obtaining access to speech they would like to receive. While *Turner* narrowly upheld the right of Congress to force particular cable operator speech -- the inclusion of broadcast programming in the channel line-up -- in order to protect over-the-air broadcasting, it did not address the additional burden on cable speech of forcing subscribers to purchase broadcast speech as a condition of hearing cable speech.

affiliated cable networks, often at above-market prices. Broadcasters further require that their affiliated programming be placed on the most popular programming tiers, regardless of whether cable subscribers want to watch it, and sometimes before the affiliated network has even been launched.[11/]

Broadcasters' exploitation of this government-conferred leverage has contributed to the size of the expanded basic cable tier and put pressure on rates. The pressures brought to bear by broadcast-affiliated cable programmers have increased in recent years in light of extensive media consolidation. Today, 56 national cable networks are held by a broadcast affiliate, an increase from eight in 1993, just after retransmission consent was enacted, and an increase from 19 in 1996. In addition to contributing to increased rates, the forced carriage of many of these networks may even displace services more desired by subscribers. Cable operators' restricted ability to respond to consumer demands because of the number of channels occupied by broadcaster-affiliated programmers increases consumer dissatisfaction with service offerings. The problem would increase in a multicast environment, when even the broadcast spectrum will include multiple services that broadcasters insist be carried by cable operators and the government requires that customers buy as a condition of access to the services they really want.

Like "must buy," the predicate for the imposition of retransmission consent requires reexamination. In 1992, Congress recognized that broadcasters were already deriving significant compensation by being carried on cable networks, in the form of increased advertising

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[11/] Many of the initial comments filed in this proceeding demonstrate the widespread nature of retransmission consent abuse. *See, e.g.*, Comments of American Cable Association at 30-38; Comments of EchoStar Satellite L.L.C. at 2-7; Comments of Advance/Newhouse Communications at 7. *See also In the Matter of News Corporation, General Motors Corporation, and Hughes Electronics Corporation*, MB Docket No. 03-124, Comments of Joint Cable Commenters at 15-29 (filed June 16, 2003); Comments of American Cable Association at 8-15 (filed June 16, 2003).

revenues,[12/] but felt that because broadcast programming was responsible for drawing most of cable's subscribers, broadcasters were due additional compensation.[13/]

Broadcasters, however, no longer dominate cable service in popularity, and many cable customers subscribe to cable for reasons unrelated to broadcast programming. The amount of time viewers spend watching broadcast television has steadily decreased over the last ten years, while cable viewership has steadily increased.[14/] While cable programming won only 13 Prime Time Emmy's in 1992, it won 39 in 2003.[15/]

Revisiting retransmission consent is important to ensuring stability in cable rates and needs to be part of the FCC's comprehensive review of policies that impair consumer choice. Modifications to the retransmission consent regime have the potential to increase subscriber control over their programming services, preserve program diversity by limiting broadcasters to the right to demand carriage of only a single program stream, and increase cable operators' flexibility to structure programming tiers in the way that best responds to the subscriber and the market. While ultimately any substantial revisions to retransmission consent would require

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[12/] *See* Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(15) ("A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership and thereby attract additional advertising revenues."); 138 Cong. Rec. S400, S413 (Jan. 27, 1992) (statement of Sen. Danforth) ("Broadcasters, of course, benefit from being carried on cable systems. Many may determine that the benefits of carriage are sufficient compensation.").

[13/] *See*, *e.g.*, Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(19) ("broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. Also, cable programming placed on channels adjacent to popular off-the-air signals obtains a larger audience than on other channel positions. Cable systems, therefore, obtain great benefits from local broadcast signals . . . This has resulted in an effective subsidy of the development of cable systems by local broadcasters.").

[14/] *See* National Cable & Telecommunications Association, 2004 Mid-Year Industry Overview 13 (2004), *available at* http://www.ncta.com/pdf_files/Overview.pdf.

[15/] *See* National Cable & Telecommunications Association, Major Television Awards Won by Cable: 1998-2002 *at* http://www.ncta.com/Docs/PageContent.cfm?pageID=318 (data provided by the Academy of Television Arts Sciences).

legislative action, a preliminary and comprehensive review of the issues presented by this legal regime and the tying practices associated with it is appropriate in consideration of issues related to consumer choice.

III. INDUSTRY PRESSURE TO INCLUDE NETWORKS IN THE EXPANDED BASIC TIER REDUCES OPERATORS' ABILITY TO RESPOND TO CONSUMER CHOICE

With the number of cable programming networks expanding each year, cable operators have a greater opportunity to design an expanded basic menu of services that interests their subscribers, and increased competitive pressure to find programming that can appeal to the broadest possible subscriber base by meeting niche interests. Because programmer revenues from carriage fees and advertising are generally based on the number of subscribers *potentially* watching them -- *i.e.*, the number of subscribers to the tier on which they are carried -- it is understandable that every programming service wants to be carried on the most popular tier. However, the costs of programming are escalating, placing upward pressure on rates. As the GAO found, cable operators' programming costs increased 34% between 1999 and 2002, with sports programming costs increasing by 59% in this same time period.[16/]

The fact is, not every service is sufficiently popular and broad in appeal -- or sufficiently cost-efficient -- to warrant carriage on the expanded basic tier. Many of those with more targeted appeal or that add significant costs to the tier rates are better placed on a smaller tier or on their own. Programmers nonetheless condition carriage of their "must see" programming with less attractive offerings. The FCC should evaluate whether more emphasis should be placed on ensuring that no program vendor may demand as a condition of carriage that the cable

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[16/] U.S. General Accounting Office, Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry 22 (Oct. 2003), available at http://www.gao.gov/new.items/d048.pdf.

operator require all its customers to buy that vendor's programming.[17/]

CONCLUSION

Cablevision is working hard to bring cable consumers diverse and flexible programming packages at prices they select and control. Congress can promote consumer choice by eliminating the outdated constraints imposed on cable operators by the must buy and retransmission consent requirements, and by encouraging cable programmers to allow carriage of their networks without requiring all cable subscribers to buy their programming. If cable operators do not have to structure programming offerings around these artificial barriers, all television viewers will benefit.

Respectfully submitted,

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[17/] EchoStar also noted in its initial comments that Congress should "exhort programmers to alleviate programming requirements that serve as obstacles to a la carte offerings." Comments of EchoStar Satellite L.L.C. at 8-9.