small cable companies face as powerful broadcasters demand a "price" for retransmission consent.

The broadcast exclusivity and retransmission consent regulations were intended to protect broadcasters from unfair cable competition and to foster a fair marketplace for carriage negotiations. When dealing with small cable companies, broadcasters now abuse these regulations to extract higher prices for retransmission consent. This conduct conflicts with the intent of the broadcast exclusivity regulations and the intent and express language of the good faith negotiation regulations.

To promote the public interest in competition and reasonably priced basic cable service in markets served by small cable companies, the Commission must adjust these regulations. The next section details the changed market conditions that support the changes ACA requests here.

III. CHANGED MARKET CONDITIONS WARRANT THE RULEMAKING PROPOSED BY ACA.

The Commission has made clear that broadcast exclusivity is "not sacrosanct."[40] Ample evidence proves that changed market conditions require the adjustments proposed here. Three sets of changes are particularly germane. These are:

- Ad-revenue supported commercial broadcasting has become a mature, financially robust industry.
- Consolidation in the broadcast industry and the "must have" nature of network programming has eliminated any competitive threat to network broadcasters by small cable companies.
- Broadcasters are targeting the small cable sector with unprecedented cash demands. Absent relief, consumers served by small cable companies face more than $860 million added to the cost of basic cable in the upcoming retransmission election period.

We discuss each of these changes below.

A. Ad-revenue supported commercial network broadcasting has matured into a robust "survivor in a sea of competition" and does not need additional leverage over small cable companies.

Broadcast exclusivity arose from the fear that harmful competition from cable systems would hurt the free, over-the-air, broadcast system. These concerns predated 1992, when must carry and retransmission consent became law. By all accounts, since 1992, commercial broadcasting has flourished. The Commission and its staff have identified several indicia of this. First, since 1992, the number of commercial broadcast stations has increased more than 15% to 1,747 from 1,518.[41] Since 1994, broadcast advertising revenues have increased well ahead of the rate of inflation, notwithstanding

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[40] *1966 Cable Carriage Order,* ¶ 27 (citing *1965 Cable Carriage Order,* ¶ 57).

[41] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 04-227, *Eleventh Annual Report*, FCC 05-13, 2005 WL 275740 (rel. Feb. 4, 2005), ¶ 14.

decreasing audience levels.[42] Total broadcast advertising revenue for 2002 exceeded $41 billion, with more than $15 billion of that going to the Big Four networks.[43] Since 1992, broadcasting has attracted investment from powerful conglomerates like Disney, GE, Viacom, News Corp., Gannett, and Hearst-Argyle. Revenue, cash flow, profits and continuing operations all point to a mature, financially healthy broadcast industry.[44]

In 2002, the Commission's Office of Plans and Policy published a detailed study of these developments.[45] *OPP Working Paper 37* concludes that amidst a "sea of competition," ad-supported broadcast television has remained a viable, even thriving, business. The report states:

> "[T]he absolute level of both network and station advertising revenues actually increased, even in real terms (with the exception of a dip in 2001, from which it appears that the industry will recover). The television broadcast industry is larger, in terms of stations on the air, than it was [in 1992], and no full power stations have gone dark. Although the available data have limitations, it appears that, overall, the television station sector is at least as profitable as it was ten years ago."[46]

Several portions of the analysis bear directly on the issues raised here.

OPP Working Paper 37 makes clear that the lifeblood of local broadcasting is advertising revenues, and by all measures, broadcasters have benefited from, and will continue to benefit from, a healthy advertising market. The report states:

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[42] Jonathan Levy et al., *Broadcast Television: Survivor In A Sea Of Competition* (Federal Communications Commission, Office of Plans and Policy, Working Paper Series No. 37, 2002) ("*OPP Working Paper 37*") at 12.

[43] *In the Matter of: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, *Tenth Annual Report*, 19 FCC Rcd. 1606 (2004) ("*Tenth Annual Report*"), ¶ 16.

[44] *OPP Working Paper 37* at 12, 29 and 30.

[45] *See generally OPP Working Paper 37.*

[46] *OPP Working Paper 37* at 1.

> Broadcast television in the United States is financed by the sale of advertising time.[47]
>
> * * *
>
> [P]rofit margins remain high for a large segment of the television station business.[48]
>
> * * *
>
> Despite the proliferation in the number of non-broadcast programming networks, and despite the increase in availability of non-broadcast programming, broadcasters still attract substantial revenues to support the production, acquisition, and distribution of programming.[49]
>
> * * *
>
> The longstanding stable relationship between GDP and advertising volume suggests that all of the video advertising sectors will continue to grow over time.[50]
>
> * * *
>
> Based on available evidence at this point, it appears that a solid and gradually expanding advertising revenue base will be available to support broadcast television programming.[51]
>
> * * *
>
> In 2000, both profits and cash flow data are positive in every category and quite robust particularly for the larger markets. ... It appears that cash flow margins for the average station have increased over the past decade.[52]

These conclusions establish two important points. First, the cash demanded from small cable companies is <u>not</u> necessary to preserve free over-the-air broadcasting or to advance localism. The sale of advertising continues to serve these purposes well. Second, any use of exclusivity to extract a supracompetitive price for retransmission

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[47] *OPP Working Paper 37* at 7.

[48] *Id.* at 29.

[49] *Id.* at 4.

[50] *Id.* at 12.

[51] *Id.* at 17.

[52] *Id.* at 30-1.

consent conflicts with a fundamental purpose of those regulations. The Commission implemented broadcast exclusivity to "protect the local advertising and the public service announcements within and adjacent to network programming. They do not, however, allow the network to increase its revenues; nor was this their intent."[53] Yet, this is precisely how broadcasters use exclusivity when dealing with small cable companies. In these cases, exclusivity must give way to a competitive market for network programming.

B. Small cable companies present no threat of harmful competition to network broadcast stations.

The Commission enacted the broadcast exclusivity regulations to protect ad-supported local broadcasting from harmful competition from cable television. Today, no argument can be made that small cable companies present any harmful competitive threat to stations owned by, or affiliated with, the major networks. The exact opposite is true. As the Commission has recently concluded, network stations now threaten the survival of small cable companies.[54] Two developments have solidified the competitive imbalance in favor of broadcasters: (i) consolidation in the broadcast industry resulting in large companies owning more stations; and (ii) the "must have" nature of network

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[53] *1988 Second Syndex Order*, ¶ 110 (emphasis added).

[54] *See, e.g., In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd. 473 (2004) ("*News Corp. Order*"), ¶ 202 ("[W]e agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings.") and ¶ 176 ("[W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for 'must have' programming. . . .").

programming and the vulnerability of small cable companies to withdrawal of this programming.

Consolidation in the broadcast industry has minimized any competitive threat from small cable companies.

The Commission has repeatedly recognized that media consolidation has led to larger and larger companies owning more and more stations.[55] As a result, retransmission consent negotiations now pit small cable companies against media conglomerates with far greater resources.[56] In these circumstances, lack of carriage by the small cable company does not materially harm the broadcaster. With carriage by major MSOs and DBS providers providing the bulk of the viewing audience, a broadcaster can withhold its signal from a small cable company with little, if any, downside. This is the exact opposite of the market conditions that led to the broadcast exclusivity regulations, where the fear was denial of carriage by cable operators.

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[55] *See, e.g., Tenth Annual Report at* ¶ 95; *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket 99-230, *Sixth Annual Report*, 15 FCC Rcd. 978 (2000), ¶ 104.

[56] *See, e.g., News Corp. Order*, ¶ 209 (recognizing use of market power in retransmission consent negotiations); ¶ 176. *See also In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 03-172, Comments of the American Cable Association (filed September 11, 2003) at 1-8 (abuses by media conglomerates equals less choice and higher costs for consumers and an increasing competitive disadvantage for smaller cable companies); *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 02-277, Reply Comments of the American Cable Association (filed February 3, 2003) at 6-8 (in retransmission consent negotiations, ACA members face pervasive abuse of retransmission consent by a handful of media conglomerates); *ACA Petition for Inquiry* at 3-4 (describing how network owners and major affiliate groups use retransmission consent to force additional programming and higher costs on small cable companies and consumers); *ACA Petition for Inquiry Supplement* at 7-18 (citing specific examples of how small cable operators are harmed by retransmission consent abuse by media conglomerates).

It should come as no surprise that networks and affiliate groups are targeting small cable companies with a sharply increased "price" for retransmission consent.

Network programming has become "must have" programming for small cable companies.

The second significant change involves the "must have" nature of network programming in today's video marketplace. The Commission has repeatedly recognized this.[57] Since the proliferation of DBS competition, the Commission has further determined that loss of network programming can place a cable operator at a serious competitive disadvantage.[58] Most importantly for our purposes here, the Commission has found that small cable companies are especially vulnerable to the loss of network programming. "<u>[W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for 'must have' programming</u>. . . ."[59]

As discussed below, broadcasters are exploiting this competitive imbalance to extract wealth from consumers served by smaller cable systems.

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[57] *See, e.g., News Corp. Order*, ¶¶ 201-202.

[58] *Id.* ¶¶ 201-211.

[59] *Id.* ¶ 176 (emphasis added).

C. Broadcasters are targeting the small cable sector and its customers for more than $860 million in additional retransmission consent payments.

Network owners and affiliate groups have made clear that in the upcoming round of retransmission consent, they will demand substantial per subscriber fees from small cable companies. Examples include:

- Disney/ABC - at least $0.75 per month per subscriber.[60]
- Viacom/CBS - at least $0.75 for retransmission consent.[61]
- News Corp/ FOX - at least $0.60 per month per subscriber.[62]
- Gannett - up to $1.00 per month per subscriber.[63]
- Sinclair - at least $0.50 per month per subscriber.[64]
- Nexstar - at least $0.30 per month per subscriber.[65]
- Cox Broadcasting - up to $0.40 cents a customer per month.[66]

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[60] *In the Matter of Comments Requested on A La Carte and Themed Tier Programming and Pricing Options for Programming Distributions on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Comments of The Walt Disney Company (submitted July 15, 2004) at 3, 43 and Ex. 2 at 4, 15.

[61] Linda Moss, *CBS Affil 'Macon' Retrans Trouble*, Multichannel News, Jan. 2, 2003, *available at* http://www.multichannel.com/index.asp?layout=print_page&doc_id=110388.

[62] Linda Moss, *Some Net Seek Bucks for Retrans*, Multichannel News, Dec. 16, 2002, *available at* http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA265800.

[63] Linda Moss, *Extensions Granted in Retans Talks*, Multichannel News, Jan. 6, 2003, *available at* http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA268764.

[64] Open Letter from Sinclair Broadcast Group, Inc. to Our Viewers (on file with author).

[65] Linda Moss, *Cox Seeks FCC Help in Retrans Row*, Multichannel News, Jan. 20, 2003, *available at* http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA497915.

[66] Linda Moss, *Must-See Retrans Spat: Small Ops Vs. Cox TV*, Multichannel News, Jan. 20, 2003, *available at* http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA271373.

In nearly all cases, each of these fees will represent new, incremental costs for small cable companies. Absent relief, on January 1, 2006, the small cable companies will have to pay or drop the signal.

To be clear, the problem is not that broadcasters are seeking a "price". The problem is that the "price" faces no market discipline. That problem carries a price tag of more than $860 million to consumers served by small cable companies.[67]

The changes requested here will bring a measure of market discipline to retransmission consent "pricing." As a matter of economic theory, there should be no controversy over the proposition that the availability of substitutes results in efficient pricing of a good.[68] Conversely, when the law or a seller erects barriers preventing access to substitutes, the seller can price the good above what a competitive market would bear.[69] The "pricing" of retransmission consent for network stations is no different.

The Commission need not rely solely on economic theory to evaluate the changes proposed here, however. As discussed in the next section, two recent examples show how well the market for retransmission consent works when artificial barriers are eliminated.

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[67] Smaller cable companies serve approximately in the aggregate about eight million customers, about 7% of US TV households. Assuming a per major network retransmission consent fee of $0.75 per customer per month, the aggregate cost for the 36 month cycle totals 8,000,000 x $0.75 x 4 x 36 = $864,000,000.

[68] Hal R. Varian, Intermediate Microeconomics: A Modern Approach (5th ed. 1999), 263- 264; Richard A. Posner, Economic Analysis of Law (5th ed 1998) ("Posner"), 4-6.

[69] Paul Krugman and Robin Wells, Microeconomics, (2004), 348-349; Posner, 302-304.

IV. RECENT EXAMPLES INVOLVING SMALL CABLE COMPANIES SHOW THAT MARKET FORCES RESULT IN EFFICIENT PRICING OF RETRANSMISSION CONSENT.

The two examples discussed below involve small cable companies and powerful media conglomerates. The first example arises from a case decided by the Media Bureau last year, *Monroe v. WGMT*.[70] The second example involves a small cable company in Georgia and its retransmission consent negotiations with WXIA, the Gannett-owned NBC affiliate in Atlanta.

Monroe v. WMGT

The *Monroe v. WGMT* case shows how networks and affiliate groups use contracts to erect barriers to competition and prop up the "price" of retransmission consent. The case provided the Media Bureau with the first opportunity to consider such contractual considerations under the good faith negotiation regulations. The case also shows how powerful networks and affiliate groups will fight to maintain artificial barriers to competition, even when dealing with a very small cable company.

Background. Monroe operates a cable system serving about 5,800 customers in and around Monroe, Georgia. Monroe falls within the Atlanta DMA. Gannett-owned WXIA is the Atlanta NBC affiliate. WGMT is the Macon DMA NBC affiliate owned by Morris Network.

Depiction of the geography of the case is helpful. As shown below, the Monroe cable system falls within the Atlanta DMA but outside the protected zone of WXIA. Consequently, WXIA does not have network nonduplication rights against the system. Monroe is also sufficiently close to Macon to pick up an adequate signal from WGMT.

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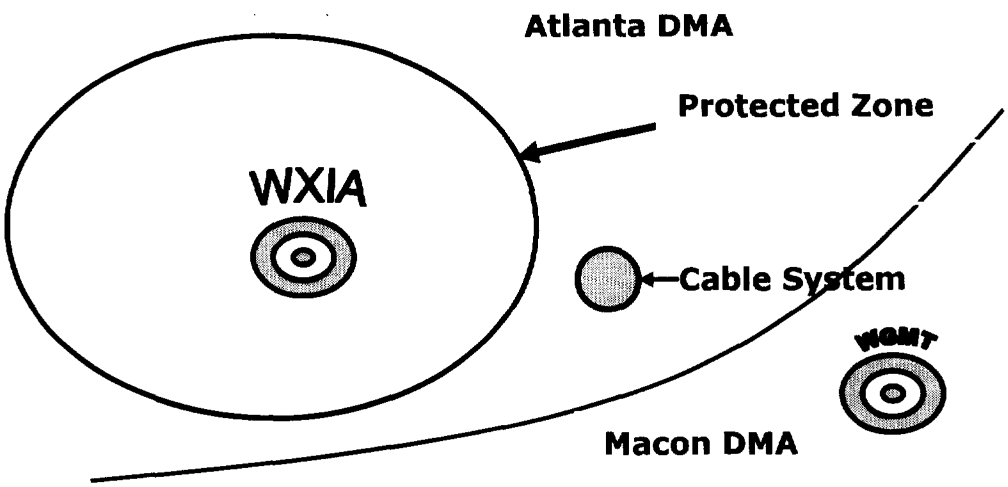
[70] *Supra*, note 38 at 16.

Monroe Cable v. WGMT



For the 2003-2005 retransmission consent cycle, WXIA elected retransmission consent. When dealing with small cable companies, WXIA reportedly demanded at least $1.00 per subscriber for retransmission consent. Monroe declined to pay this amount. Gannett required Monroe to drop the station. Monroe requested retransmission consent from WGMT. WGMT granted consent and executed a retransmission consent agreement.

Then NBC became involved. The network reminded WGMT that the NBC/WGMT affiliation agreement prohibited WGMT from granting retransmission consent to any cable operator outside of WGMT's DMA. WGMT informed Monroe that the station could not honor the retransmission consent agreement. Monroe then filed its petition and complaint.

The claims. Monroe claimed two violations of Commission regulations, one under the good faith negotiation regulations and one under the network nonduplication regulations.

Failure to negotiate in good faith. Monroe claimed that WGMT violated 47 C.F.R. § 76.65(b)(1)(vi) when it executed an affiliation agreement that prohibited the station from entering into an out-of-market retransmission consent agreement.

As the record reflected, the WGMT/NBC agreement contained the following unqualified prohibition on the station's ability to grant retransmission consent. "Station shall not grant consent to the retransmission of its broadcast signal by any cable television system ... if such cable system or MVPD is located outside the ADI to which Station is assigned ...."[71]

Monroe's argument was straightforward. WGMT entered into an agreement with NBC that required WGMT not to enter into a retransmission consent agreement with Monroe, or any other cable operator outside the Macon DMA. This violated the express restriction of the regulation.

Violation of network nonduplication regulations. Monroe also claimed that the restriction in the NBC affiliate agreement conflicts with the network nonduplication regulations. The regulations limit a broadcaster's network nonduplication rights to a "specified zone," generally 35 miles around the station.[72] Monroe argued that the NBC affiliation agreement violates this restriction by granting exclusivity for WXIA far beyond the specified zone.

Broadcaster response. In response, the broadcasters and NBC glossed over the plain language of the regulations. Instead, they described a parade of horribles that

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[71] *Id.*

[72] 47 C.F.R. § 76.92, note.

would result if Monroe's small cable system offered consumers network programming at a "price" below that demanded by Gannett. WXIA claimed that if Monroe were able to enforce the WGMT agreement, a cataclysm would follow. "[I]t would wreak havoc on local broadcasting, the network programming distribution system that has been established for over 50 years in this country, and the retransmission consent process."[73] NBC predicted a similarly awful outcome. "If Monroe wins its unprecedented challenge, the loser will not just be the two local stations involved, but localism, local television stations, all program suppliers, and the public."[74]

The outcome. Despite the horrific predictions of the broadcasters and NBC, the Media Bureau granted Monroe's complaint. The Media Bureau found that WGMT had granted retransmission consent in writing, and that resolved the case.[75]

In a footnote, the Media Bureau addressed Monroe's allegations that the NBC affiliate agreement violated the good faith negotiations regulations. The Media Bureau sent a strong signal that the regulation applies to any agreement with any party, including networks, and on <u>both sides</u> of a DMA boundary. "[W]e caution broadcasters to be aware of existing contractual obligations that affect a television station's ability to negotiate retransmission consent in good faith. <u>The statute appears to apply equally to stations and MVPDs in the same local market or in different markets</u>."[76]

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[73] *Comments of Gannett Georgia, L.P.* (filed October 2, 2003), 5.

[74] *Opposition of NBC* (filed October 2, 2003) at 2.

[75] *Monroe Order,* ¶¶ 8, 9.

[76] *Monroe Order*, note 24 (emphasis added).

The aftermath. So what happened when Monroe provided a lower cost alternative for WXIA? Did the sky fall as predicted by the broadcasters and NBC? Of course not. Instead, cable consumers in Monroe, Georgia are viewing NBC programming without an additional $1 per month added to their bill. As for Gannett, we could find no report that Monroe's carriage of WGMT had a material adverse impact on Gannett's broadcast portfolio. To the contrary, Gannett recently reported glowing financial performance.[77] This hardly suggests "havoc" befell the broadcaster. This case shows a healthy ad-supported broadcast business and an efficient price for retransmission consent determined in a marketplace free of artificial barriers.

Valley Cable and WMAZ

The Valley Cable/WMAZ retransmission consent negotiations provide another perspective on how market forces can affect the "price" for retransmission consent. More specifically, the case shows how a broadcaster will rapidly *lower* its price in response to competition.

Background. Valley Cable serves about 2,500 customers in rural Peach County, Georgia, located in the Macon DMA. WMAZ is the Gannett-owned CBS affiliate in Macon.

In the last retransmission consent round, Gannett demanded that Valley Cable pay about $1.00 per subscriber per month. Valley Cable reportedly told Gannett that the company did not believe that was a fair price. Gannett declined to compromise. As

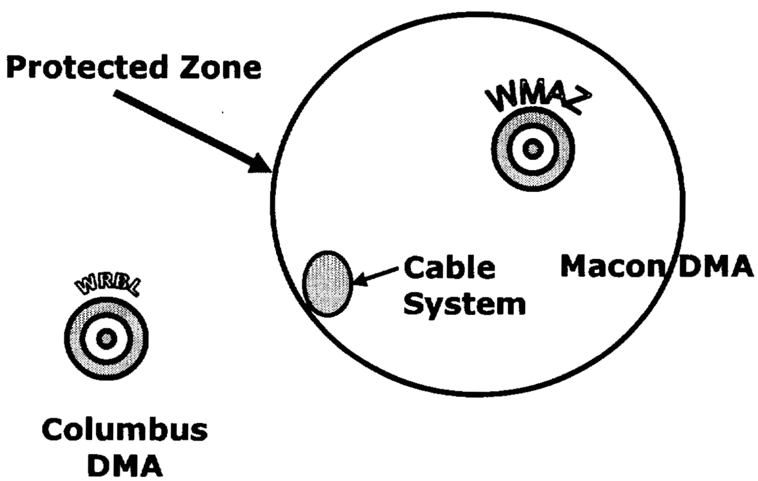
[77] For the first nine months of 2004, the company reported total revenues of $5.42 billion, a 10.8 increase over 2003, and an increase of 10.1 percent in net income to $939 million and the company's "broadcast sector benefited from Summer Olympics-related advertising on our NBC-affiliated stations and strong political advertising". Press Release, Gannett Co., Inc., Gannett Co., Inc. Report Third Quarter Results (Oct. 12, 2004).

small cable companies can do, Valley Cable polled its customers. The poll results indicated that the customers would prefer a lower cost alternative. Gannett refused to lower the price, and Valley Cable was forced to drop the signal.

WRBL is the CBS affiliate in the Columbus, Georgia, DMA. Valley Cable could readily pick up the signal and obtained retransmission consent to carry the station. WRBL is also significantly viewed in Peach County, so WMAZ does not have network nonduplication rights against the station. Valley Cable began to distribute WRBL.

The diagram below depicts the geography of the case.

Valley Cable and WMAZ



The outcome. Within a short time of Valley Cable commencing carriage of WRBL, WMAZ granted retransmission consent to Valley Cable. While the terms of that agreement are confidential, Valley Cable did not raise basic cable rates following WMAZ's return to the channel line-up. The clear implication is that the "price" of retransmission consent for WMAZ fell substantially when faced with competition.

These examples show that readily available substitutes from neighboring markets exist and that substitutes can lower the "price" of retransmission consent. Technology has also expanded the range of alternatives. Access to network programming via fiber connections or satellite delivered signals provide additional alternatives. For example, cable operators can obtain ABC network programming from Denver-based KMGH via satellite. The price is reportedly less than $0.20 cents per subscriber. Compare this with Disney's claims that its network programming is worth more than $2.00 per subscriber.[78]

The hitch, of course, is that to receive KMGH via satellite, a cable operator must receive permission from Disney/ABC. As stated by the station, "The decision to grant or deny . . . consent is not ours; therefore, we suggest you contact ABC directly."[79]

As discussed in Section III.B., this refusal to grant retransmission consent cannot be squared with the broadcaster's good faith negotiation obligations.

These examples show that when small cable companies can access substitutes, market forces have a predictable affect on the price for retransmission consent. Consumers and competition benefit. These examples also show that when dealing with small cable companies, broadcasters and networks will use all available means to obstruct access to substitutes and erect barriers to market pricing of retransmission consent. This is why the Commission must act.

The regulatory amendments proposed in the next section will help address these problems.

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[78] *Supra* note 60 at 24.

[79] Letter from Mickey Petty, KMGH-TV, to George D. Callard, Attorney, Cinnamon Mueller (February 27, 2003) (on file with author).

V. THE AMENDMENTS PROPOSED BY ACA WILL REMOVE ARTIFICIAL BARRIERS TO MARKETPLACE PRICING OF RETRANSMISSION CONSENT FOR SMALL CABLE COMPANIES.

ACA asks the Commission to adjust three sections of Part 76 to remove artificial barriers to market "pricing" of retransmission consent for small cable companies. The applicable sections are 76.64, 76.93, and 76.103. The proposed changes establish the following mechanism for pricing retransmission consent: In cases where a broadcaster seeks additional consideration for retransmission consent from a small cable company, neither that broadcaster nor any other party can prevent the small cable company from obtaining retransmission consent and carrying an alternative source of network programming. Exhibit A contains the text of the proposed changes.

A. The changes will not harm network broadcasters.

First, let us be clear what is not intended by these changes.

- ACA is not requesting a prohibition on additional cash payments or other consideration for retransmission consent.[80] We are only requesting that for small cable companies, marketplace forces help determine the "price."
- ACA is not requesting "wholesale change" for the broadcast television industry or the network/affiliate structure. The changes requested here are limited to small cable companies. These companies serve only 7% of the television households in the United States.
- ACA is not requesting elimination of broadcast exclusivity. The amendments do not change broadcast exclusivity rights for stations that assert must carry or for stations that elect retransmission consent without additional consideration for carriage.
- ACA does not intend widespread carriage of out-of-market stations by small cable companies. We only seek marketplace discipline on the "price" charged small cable companies.

[80] Through the cable compulsory copyright license, each small cable company already pays for each broadcast signal carried. 17 U.S.C. § 111.

In short, all that we request is this: When a broadcaster seeks a "price" for retransmission consent, small cable company has the ability to "shop" for lower cost network programming for its customers. When artificial barriers to alternative sources of network programming are removed, the marketplace works well to determine an efficient price for retransmission consent.

B. The changes are limited in scope.

The changes requested here are limited to smaller cable companies. The Commission has previously determined that companies of this size face a range of special circumstances warranting regulatory relief.[81] These circumstances include higher costs, fewer administrative resources, and limited access to capital.[82] Most importantly for this proceeding, the Commission has concluded that small and medium size cable companies are especially vulnerable to the exercise of market power by powerful owners of broadcast licenses.[83]

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[81] *See, e.g., In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulations;* MM Docket Nos. 92-266, 93-215, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd. 7393 (1995), ¶ 28 ("[O]ur relief for smaller cable entities is aimed at those that do not have access to the financial resources, purchasing discounts, and other efficiencies of larger companies."). *See also News Corp. Order* at ¶ 176 ("[W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for "must have" programming…"); *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access;* CS Docket No. 96-60, *Second Report and Order and Second Order on Reconsideration of the First Report and Order,* 12 FCC Rcd. 5267 at 5331-5332, 5333 (1997) (special small cable leased access rules).

[82] *Id.*

[83] *See supra* note 56 at 22.

The limited scope of the amendments should also alleviate any legitimate concern that the changes would "wreck havoc" upon the broadcast industry. At most, the changes will affect cable systems serving 7% of the TV households in the U.S.[84]

C. This proceeding will help resolve the ACA Petition for Inquiry into Retransmission Consent Practices.

ACA has filed a Petition for Inquiry and asked the Commission to investigate retransmission consent practices of certain network owners and affiliate groups. As requested in the Petition and First Supplement, the information gained from such an investigation would provide the Commission a detailed record of how media conglomerates use market power and the retransmission consent process to increase costs and reduce choice for consumers served by small cable companies.

The changes requested here would help resolve the issues raised in the Petition for Inquiry. ACA is prepared to withdraw that Petition as part of the rulemaking requested here.

VI. CONCLUSION

For the reasons set forth above, we ask the Commission to initiate a rulemaking to adopt the regulations proposed in Exhibit A to this Petition. In essence, broadcasters have presented the Commission with the following choice: Do nothing while powerful broadcasters extract an additional $860 million from consumers served by small cable companies, or initiate a rulemaking to remove artificial barriers to marketplace pricing of retransmission consent. The public interest in more choices and lower costs is

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[84]We recognize that other parties may advocate broader application of the changes proposed here. We do not in any way discourage consideration of comments in that vein.

manifest, and the changes requested here align fully with Commission policy and precedent.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

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March 2, 2005

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Exhibit A

Proposed amendments

47 CFR §76.64 - new subsection (n)

(n) Where a commercial broadcast station seeks consideration for retransmission consent from a small cable company beyond carriage and channel placement, neither such commercial broadcast station nor any other party, shall take any action which has the purpose or effect of hindering or preventing the small cable company from retransmitting the signal of any other local or non-local commercial broadcast station. A party shall be deemed to be preventing or hindering a small cable company where such local commercial broadcast station or any other party does the following:

(1) Asserts network non-duplication or syndicated exclusivity under Sections 76.92 and 76.101 of this Part with respect to such small cable company.

(2) Influences or controls by contract or otherwise a commercial broadcast station's decision or ability to grant retransmission or influences or controls by contract or otherwise the terms and conditions of such station's retransmission consent for retransmission of its signal by a small cable company.

Addition of underlined text to the following sections.

47 CFR § 76.93. Parties entitled to network non-duplication protection. <u>Subject to 47 CFR § 76.64(n),</u> television broadcast station licensees shall be entitled to exercise non-duplication rights pursuant to § 76.92 in accordance with the contractual provisions of the network-affiliate agreement.

47 CFR § 76.103(a). Parties entitled to syndicated exclusivity. Television broadcast station licensees shall be entitled to exercise exclusivity rights pursuant to § 76.101 in accordance with the contractual provisions of their syndicated program license agreements, consistent with § 76.109 <u>and subject to § 76.64(n).</u>