BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004	)	MB Docket No. 05-28
	)	
Report to Congress	)	

REPLY COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc., by its attorneys, respectfully submits these reply comments in response to the Media Bureau's Public Notice in this proceeding.[1] In comments filed in a prior proceeding concerning "a la carte" programming, Time Warner Cable explained that retransmission-consent has developed into a much more onerous burden on MVPD subscribers than originally expected, and that there is no policy justification to justify a burden that onerous.[2] In its opening comments in this proceeding, NAB purports to respond to Time Warner Cable's a la carte comments,[3] but it misunderstands Time Warner Cable's point. Thus, for the reasons set forth in Time Warner Cable's a la carte comments, and for the reasons set forth below, the Bureau should urge Congress to re-evaluate retransmission consent.

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[1] Public Notice, MB Docket No. 05-28, DA 05-169 (rel. Jan. 25, 2005).

[2] *See A La Carte and Themed Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Reply Comments of Time Warner Cable Inc., at 10-15 (filed Aug. 13, 2004) ("*Time Warner Cable A La Carte Reply Comments*").

[3] *See Inquiry Regarding the Impact of Certain Rules on Competition in the Multichannel Video Programming Distribution Market*, MB Docket No. 05-28, Comments of the National Association of Broadcasters (filed Mar. 1, 2005) ("*NAB Comments*").

I. RETRANSMISSION CONSENT HAS DEVELOPED INTO A MUCH MORE ONEROUS BURDEN ON MVPD SUBSCRIBERS THAN ORIGINALLY EXPECTED.

As we explained in our prior comments, retransmission-consent now is very different from what Congress likely expected when it enacted the retransmission-consent statute in 1992.[4] At that time, Congress expressed concern that the broadcasting industry's viability was in jeopardy.[5] In response, Congress enacted the must-carry/retransmission-consent combination. Must-carry was intended to ensure that broadcast stations would continue to be carried on cable, thereby guaranteeing them advertising revenue.[6] Retransmission consent was intended to give broadcasters a "right to . . . be compensated for others' use of their signals," which, like must-carry, would generate funding for over-the-air television and thereby help "ensure that our system of free broadcasting remain vibrant."[7] Given that Congress perceived a threat to broadcasters' viability serious enough to warrant a must-carry requirement,[8] however, it had no

[4] *See Time Warner Cable A La Carte Reply Comments* at 10-14.

[5] *See* S. Rep. No. 102-92, at 41 (1991) (expressing concern that broadcasting's "vital role in serving the public interest . . . is in jeopardy").

[6] *See*, *e.g.*, H.R. Conf. Rep. No. 102-862, at 75 (1992) ("Given the current economic condition of free, local over-the-air broadcasting, an affirmative must-carry requirement is the only effective mechanism to promote the overall public interest.")

[7] S. Rep. at 36; *see also 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) ("the statutory goals at the heart of Sections 614 and 325 [are] to place local broadcasters on a more even competitive level and thus help preserve local broadcast service to the public")

[8] *See* Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1462, § 2(a)(16) (1992) ("As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.").

reason to believe that many broadcast stations would choose retransmission-consent rather than must-carry status.[9]

Even so, Congress expressed concern that retransmission consent — even if invoked by only small numbers of broadcasters — might result in higher cable rates. It therefore instructed the Commission that, in implementing retransmission consent, it should "consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier."[10] Eventually, however, the Commission found that there was no cause for concern: in 1993, before it had gathered real-life experience with retransmission consent, the Commission stated that there was "no evidence that the effect may be significant."[11]

In the past decade, retransmission consent has developed into something very different from what Congress and the Commission expected in the early 1990s. *First*, the retransmission-consent tail now wags the must-carry dog. In the most recent cycle, "virtually all" commercial stations went the retransmission-consent route.[12] In particular, all stations owned by or affiliated with the top six broadcast networks now appear to elect retransmission consent. Broadcasters' increased confidence in the value of their signals no doubt at least in part reflects increased competitiveness in the MVPD industry: in light of increased competition from DBS and other

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[9] *See*, *e.g.*, S. Rep. at 35 ("many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system").

[10] 47 U.S.C. § 325(b)(3)(A).

[11] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, ¶ 178 (1993).

[12] *Most TV Stations Go for Retransmission Consent*, Warren's Cable Regulation Monitor, Oct. 7, 2002, *available at* 2002 WL 8174460.

MVPDs, the price that MVPDs pay (in lost subscribers) for failing to carry popular broadcast stations has likewise increased.[13]

Second, retransmission consent has had the unexpected consequence of encouraging development of non-broadcast video-programming services. In the retransmission-consent process, broadcasters have been able to persuade MVPDs to carry affiliated programming services that otherwise might not have been carried or carried on the same terms.[14] These carriage rights (bringing advertising and license-fee revenue) are valuable, or broadcasters would not accept them in lieu of cash.[15] Retransmission consent's unintended consequence, then, was to channel investment away from over-the-air broadcasting and towards non-broadcast video-programming services. That redirection does not help retransmission consent's intended beneficiaries (over-the-air viewers), who cannot receive non-broadcast video-programming services. To the contrary, investment in non-broadcast video programming arguably harms over-the-air viewers by taking away advertising dollars from the broadcast signals that they do receive.

[13] *See* NAB Comments at 18 ("the rise of DBS and other cable competitors has enhanced the leverage of broadcasters by providing them with an additional avenue for reaching viewers"); *see also General Motors and Hughes Electronics, Transferors, and the New Corp. Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 202 (2004) ("*News Corp.-DirecTV Order*") ("carriage of local television broadcast stations is critical to MVPD offerings").

[14] *See, e.g.*, General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, at 29 (Oct. 2003) ("These [retransmission-consent] agreements often include, as part of the agreement between cable operators and broadcasters for the right of the cable operator to carry the broadcast station, a simultaneous agreement to carry one or more broadcast-owned cable networks.").

[15] *See* NAB Comments at 19 ("broadcast programmers . . . gained valuable distribution access"); *A La Carte and Themed Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Comments of the Walt Disney Co., at 43 (filed July 15, 2004) (explaining that Disney will accept either cash or carriage rights).

Finally, the amount at stake has proved much greater than expected. For example, according to comments filed with the Commission last year by the Walt Disney Company (and which Disney has asked to be incorporated into the record here), ABC-affiliated stations now have the power to demand $2 per MVPD subscriber per month.[16] Whether broadcasters receive this value in the form of cash or in the form of carriage rights, MVPD subscribers ultimately end up paying for it.[17] And, quite apart from the value transferred, MVPD subscribers end up bearing the sizable transaction costs of negotiating, concluding, and administering retransmission-consent agreements with literally hundreds of broadcasters, both large and small.

II. THE STRONG POLICY JUSTIFICATION THAT WOULD BE REQUIRED TO JUSTIFY AN ONEROUS RETRANSMISSION-CONSENT BURDEN DOES NOT EXIST.

As we also explained in our a la carte comments, retransmission consent's grounding in policy is not sufficiently strong to justify a subsidy of the size that broadcasters say they can now obtain.[18] The main argument to the contrary — that retransmission consent simply places

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[16] *See A La Carte and Themed Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Comments of the Walt Disney Co., at 43 (filed July 15, 2004); *Inquiry Regarding the Impact of Certain Rules on Competition in the Multichannel Video Programming Distribution Market*, MB Docket No. 05-28, Comments of the Walt Disney Co., at 3 (filed Mar. 1, 2005).

[17] *See News Corp.-DirecTV Order* ¶ 160 ("fees are unlikely to be absorbed solely by MVPDs, but would be passed on to consumers in the form of higher rates"). Broadcasters argue that consumers are not hurt — by relying on evidence that broadcaster-affiliated non-broadcast video-programming services do not charge higher license fees than services that are not affiliated with broadcasters. *See* NAB Comments at 21; *Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Market Place*, Comments of the ABC, CBS, FBC, and NBC Television Affiliate Associations, at 8, MB Docket No. 05-28 (filed Mar. 1, 2005). That misses the point. In the absence of retransmission-consent, MVPDs might carry fewer, cheaper, or better non-broadcast video-programming services.

[18] *See Time Warner Cable A La Carte Reply Comments* at 14-15.

broadcasters in the same position as non-broadcast video-programming services — is unpersuasive. Broadcasters are different: they were granted free spectrum and other benefits on the understanding that they would provide access to their services for free. Over-the-air viewers' ability to receive broadcast programming *gratis* weakens any policy that makes MVPD subscribers pay for it.

In addition, when viewers who can access broadcast programming off-air for free are willing to pay extra for viewing it off-MVPD, they are paying for improved reception, not for content.[19] That is why cable operators, who must buy copyright licenses to carry a non-broadcast video-programming service, are granted compulsory licenses largely for free insofar as local broadcast signals are concerned.[20] MVPDs spent billions of risk-bearing dollars to build the infrastructure enabling improved reception. Broadcasters did not contribute to that investment, and therefore have no strong claim on its reward.

Even if there were a convincing rationale for retransmission consent, the size of the current burden would be disproportional. Broadcasters undoubtedly incur costs in connection with creating and maintaining an infrastructure of terrestrial transmitters. But those costs are not so large as to justify the kind of subsidy that Disney says it merits. And it is no answer to say, as

[19] *Cf. Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399 (1968) (cable "no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set"); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408 (1974) ("The reception and rechanneling of [broadcast] signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer."); *see also* H.R. Conf. Rep. at 57 ("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.").

[20] *See* 17 U.S.C. § 111(c) & (d) (requiring only a modest fee that does not vary depending on the number of non-distant stations carried).

some broadcasters do, that the size of retransmission-consent payments is the result not of regulation but merely of market forces.[21] Retransmission consent *is* regulation: it is a law requiring MVPD subscribers to pay for something that others may obtain for free. The extent to which MVPD subscribers should be required to make such payments is a question of policy, not of market forces.

III. NAB'S RESPONSE IS UNCONVINCING.

In its opening comments in this proceeding, the National Association of Broadcasters portrays Time Warner Cable's argument as complaining of broadcasters' attempts "to leverage their relationships with other MVPDs to obtain monetary compensation from cable operators."[22] In other words, NAB depicts Time Warner Cable's argument as a lament that, now that cable operators are subject to vigorous competition from DBS operators, it has become harder to withstand demands for cash compensation. NAB then dismisses the supposed complaint by arguing that broadcasters have every right to demand cash.[23]

But NAB mischaracterizes our argument. We are not singling out cash compensation — our point goes to *all* retransmission-consent compensation equally. Our point is that, whether the retransmission-consent subsidy is paid in cash, carriage, or some other form, it is greater than can be justified by the policy basis that supposedly undergirds it. If anything, NAB helps make that

[21] *See, e.g.*, *Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Market Place*, Comments of NBC Universal, Inc., at 2, MB Docket No. 05-28 (filed Mar. 1, 2005) ("the specific terms for a station's programming that are developed between a programming redistributor and a specific broadcaster are a matter of private negotiation, not government regulation").

[22] NAB Comments at 17.

[23] *See id.* at 18-19 ("Congress clearly approved monetary compensation as a possible term of retransmission consent . . . .").

point by conceding that the amount of compensation that broadcasters can extract depends on competition at the MVPD level. Competition at that level has increased dramatically since 1992, and, with the imminent entry of incumbent local exchange carriers, is about to increase even further. Yet, for the reasons set forth above, the strength of the subsidy rationale is not increasing. Thus, with the passage of time, the subsidy is becoming more and more difficult to justify.

Conclusion

For the reasons set forth above, the Bureau should urge Congress to re-evaluate retransmission consent.

Respectfully submitted,

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March 31, 2005

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