

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20054**

**In the Matter of:**

**Retransmission Consent, Cable Network  
Non-Duplication, and Syndicated Exclusivity**

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}

**RM-11203**

**TO: OFFICE OF THE SECRETARY  
ATTN: THE COMMISSION**

**COMMENTS OF  
PAPPAS TELECASTING COMPANIES**

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April 18, 2005

## **SUMMARY**

Pappas Telecasting Companies submits these comments in opposition to the Petition for Rulemaking filed by the American Cable Association to compel local broadcasters to choose between one of two longstanding and fundamental rights: the right to enter into retransmission consent negotiations or the right to network non-duplication and syndicated exclusivity.

In its Petition, ACA would limit the ability of a local broadcaster to exercise its rights to network non-duplication and syndicated exclusivity in the event that the broadcaster sought to receive compensation from a cable operator in exchange for granting consent to the retransmission of its signal. However, as discussed herein, the requested rule changes would violate the specific rights provided to broadcasters under the Cable Act of 1992 and the Satellite Home Viewer Improvement Act of 1999.

Moreover, to the extent that ACA wishes to have market forces determine whether broadcasters should receive compensation for granting consent for the retransmission of their signals, ACA need look no further than the DBS-broadcaster retransmission consent agreements whereby market forces determined that broadcasters should receive a modest fee for granting such consent. Finally, ACA has failed to explain why its Petition could not have been filed any earlier than seven months prior to the expiration of the upcoming cable carriage election period. By filing its petition so late, ACA is attempting to create an artificial urgency for the expeditious processing of its proposed sweeping rule changes.

ACA has failed to provide any justification for the drastic changes to the central tenets of both the Cable Act and SHVIA, which are proposed simply to advance their own economic interests. In light of these considerations, the Commission must dismiss the Petition without further consideration.

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Pappas Telecasting Companies ("Pappas"), by and through its attorneys, hereby submits the following Comments in response to the Petition for Rulemaking filed by the American Cable Association ("ACA") on March 2, 2005,<sup>1</sup> seeking to eliminate the important protections granted to local television by Congress under the Cable Act of 1992 and the Satellite Home Viewers Improvement Act.<sup>2</sup>

Specifically, ACA proposes essentially to eliminate the existing rights of broadcast television licensees under the Cable Act to elect to enter into retransmission consent negotiations in connection with granting authority to a cable operator to carry its signal on the cable company's system. ACA seeks to have the Commission undo a fundamental provision of the Cable Act by adopting rules that would permit cable operators to import distant signals, i.e., network signals from outside the DMA of the cable system, in all instances where a local broadcast station elects to negotiate a retransmission consent agreement. Put differently, ACA seeks to compel local broadcasters to choose between one of two longstanding and fundamental

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<sup>1</sup> See *Petition for Rulemaking*, filed by ACA on March 2, 2005 (the "Petition"). The Commission released a Public Notice of the filing of the Petition on March 17, 2005 (Rpt. No. 2696), establishing April 18, 2005, as the deadline for submitting Comments in this proceeding.

<sup>2</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Cable Act"). See also Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, Appendix 1 (1999) ("SHVIA").

rights: the right to enter into retransmission consent negotiations or the right to network non-duplication and syndicated exclusivity. ACA seeks to have the Commission impose upon broadcasters a Hobson's choice between two statutory rights for the sole purpose of conferring additional leverage upon cable companies.

While disguised as a "pro-market" solution that is intended to permit "market forces [to] help determine the 'price'" for network programming,<sup>3</sup> the proposed evisceration of broadcast television licensees' right to negotiate retransmission consent with cable operators by granting cable operators the right to avoid such negotiated consent by instead importing distant broadcast signals into a particular station's protected service area flies in the face of the intent of Congress in adopting both the Cable Act and SHVIA. In addition, by attempting to condition the rights of affiliates to establish territorial exclusivity with their networks, ACA would seriously undermine the value of existing contracts and substantially reduce the value of such affiliation arrangements for local television broadcasters.

As the largest privately-owned commercial television broadcasting company,<sup>4</sup> Pappas unequivocally opposes any modification of the status quo, which reflects the considered view of

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<sup>3</sup> *Petition*, pg. 3.

<sup>4</sup> Through its affiliated entities, Pappas is the licensee or permittee of 18 full-power television stations, operates three additional full-power stations pursuant to local marketing agreements, and provides free over-the-air local television programming in 15 markets in 10 states across the country: WSWS-TV, Opelika, Alabama (Columbus, Georgia Designated Market Area or "DMA"); KPWB-TV, Ames, Iowa (Des Moines, Iowa DMA); KMPH(TV), Visalia, California, and KFRE-TV, Sanger, California (Fresno, California DMA) WTWB-TV, Lexington, North Carolina (Greensboro-Winston-Salem-High Point, North Carolina DMA); KAZH(TV), Baytown, Texas (Houston, Texas DMA); KDBC-TV, El Paso, Texas (El Paso, Texas DMA); KTVG(TV), Grand Island, Nebraska, KHGI-TV, Kearney, Nebraska, KSNB-TV, Superior, Nebraska, and KWNB-TV, Hayes Center, Nebraska (Lincoln-Hastings-Kearney, Nebraska DMA); KAZA-TV, Avalon, California (Los Angeles, California DMA); WMMF-TV, Fond du Lac, Wisconsin (Green Bay, Wisconsin DMA); KPTM(TV) and KXVO(TV), Omaha, Nebraska (Omaha, Nebraska DMA); KREN-TV, Reno, Nevada (Reno, Nevada DMA); KTNC-TV, Concord, California, (San Francisco, San Jose and Sacramento-Modesto, California DMAs); KUNO-TV, Fort Bragg, California (San Francisco, California DMA), KPTH(TV), Sioux City, Iowa (Sioux City, Iowa DMA); KSWT(TV), Yuma, Arizona (Yuma, Arizona/El Centro, California DMA) KAZW-TV, Walla Walla, Washington (Yakima-Pasco-Richland-Kennewick, Washington DMA).

Congress for more than a decade. The Cable Act and SHIVA specifically provide broadcasters the right to negotiate compensation provisions as part of retransmission consent agreements. The proposed rules would undermine the intent of Congress in passing these important pieces of legislation.

More recently, with the introduction of new competition in the delivery of video programming services from satellite multichannel video program distributors ("MVPDs"), the Commission has specifically provided for broadcasters to seek compensation from these parties, and abstained from adopting rules that would give the Commission a role in reviewing the specific terms of such agreements.<sup>5</sup> The introduction of satellite MVPDs has also nearly eliminated the local cable operators' monopoly over the delivery of video programming in local communities.

In light of the clear expression of Congressional intent, and the Commission's faithful implementation of its statutory direction to not involve itself with a review of the specific terms and conditions contained in retransmission consent agreements, Pappas urges the Commission to reject the anti-competitive efforts of ACA to limit broadcasters rights to enter into retransmission consent negotiations, and requests that the Commission dismiss the Petition pursuant to Section 1.407 of the Commission's rules.<sup>6</sup>

## **DISCUSSION**

At its core, ACA's Petition is a preemptive strike against broadcasters designed to provide greater leverage to cable companies in the upcoming election round that will conclude on October 1, 2005. Specifically, ACA proposes the following modifications:

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<sup>5</sup> See *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445 (2000).

<sup>6</sup> 47 C.F.R. §1.407 (2004)(dismissing petitions for rulemaking without issuing a notice of proposed rulemaking where insufficient justifications are provided for the proposed rules).

1. Maintain broadcast exclusivity for only those stations that elect must carry or that do not seek additional consideration for retransmission consent;
2. Eliminate exclusivity when a broadcaster elects retransmission consent and seeks additional consideration for carriage by a cable company; and
3. Prohibit any party, including a network, from preventing a broadcast station from granting retransmission consent to a cable company.<sup>7</sup>

However, as discussed in more detail below, the Petition must be dismissed since it fails to conform with both Congressional intent, and the Commission's past decisions, relating to retransmission consent agreements.

**A. ACA'S PETITION VIOLATES CONGRESSIONAL INTENT AS EXPRESSED IN THE CABLE ACT OF 1992 AND THE SATELLITE HOME VIEWER IMPROVEMENT ACT OF 1999.**

Congress passed the Cable Act in order to level the playing field between cable operators and local television licensees. In passing the Cable Act, Congress noted that cable operators had obtained "great benefits from local broadcast signals...without the consent of the broadcasters or any copyright liability. *This has resulted in an effective subsidy of the development of cable systems by local broadcasters.*"<sup>8</sup> As such, Congress passed the Cable Act to "ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers."<sup>9</sup>

In light of these concerns, Congress adopted a two-part signal carriage system whereby local television licensees would be entitled to carriage in their local markets (must-carry), or could elect to enter into retransmission agreements with cable operators. At the same time, Congress prohibited the carriage of any television signal where the television licensee did not

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<sup>7</sup> *Petition*, pg. iii.

<sup>8</sup> Cable Act, 106 Stat. 1460, 1462.

<sup>9</sup> *Id.*, at 1463.

make one of these choices.<sup>10</sup>

When the Commission adopted the rules to implement the Cable Act, it clearly stated that it would stay out of the business of dictating the terms of retransmission consent agreements.<sup>11</sup> In fact, the Commission acknowledged that Section 325 of the Communications Act, as amended, “contained no standards pursuant to which broadcasters were required to negotiate with MVPDs.”

As ACA’s exhaustive analysis of the history of the network non-duplication and syndicated exclusivity rules indicates,<sup>12</sup> both rules were in place when Congress adopted the Cable Act, and when the Commission adopted rules to implement the Cable Act, and neither Congress nor the Commission sought to modify the applicability of these rules in relation to retransmission consent agreements.

In the absence of such consideration when the Cable Act was adopted and implemented, it is particularly striking that cable companies now seek to hold network non-duplication and syndicated exclusivity rights hostage, and thereby cripple the ability of local broadcasters to enter into retransmission consent agreements in violation of the clear spirit and intent of the Cable Act.

Moreover, while ACA goes to great lengths to attempt to shoe-horn its proposed changes into the “good faith” negotiation standards established in the Satellite Home Viewer Improvement Act of 1999,<sup>13</sup> it is patently clear that its proposed revisions would violate the intent of Congress in passing SHVIA.

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<sup>10</sup> 47 U.S.C. § 325(b)(1) (2000).

<sup>11</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Broadcast Signal Carriage Issues*, 7 FCC Rcd 8055 (1992)(stating “It is not our intention, nor do we have the resources, to regulate every detail of the terms and conditions of retransmission consent agreements.”).

<sup>12</sup> *Petition*, pg. 5-17.

<sup>13</sup> *See Petition*, pg. iv.

Specifically, ACA cites the seven objective “good faith” standards and “totality of the circumstances” tests adopted by the Commission when implementing SHVIA to argue that the Commission “did not intend the standards to govern negotiations on one side of a DMA boundary and not the other.”<sup>14</sup> However, ACA ignores the specific decision made by the Commission when it implemented SHVIA **not** to get involved in reviewing the terms and conditions contained in retransmission consent agreements.

For example, in direct contrast to ACA’s proposed rule changes, the Commission stated that Section 325(b)(3)(C) was not:

intended to subject retransmission consent negotiation to detailed substantive oversight by the Commission or indeed that there exist objective competitive marketplace factors that broadcasters must ascertain and base any negotiations and offers on...Although some parties earnestly suggest, for example, that broadcasters should be entitled to zero compensation in return for retransmission consent...*this seems to us precisely the judgment that Congress generally intend the parties to resolve through their own interactions and through the efforts of each to advance its own self interest.*<sup>15</sup>

Moreover, the Commission concluded that Congress intended to leave the negotiation of retransmission consent agreements “to the give and take of the competitive marketplace...[and]...absent conduct that is violative of national policies favoring competition, we believe Congress intend this same give and take to govern retransmission consent.”<sup>16</sup>

Finally, while the Commission did list four examples of anti-competitive considerations,<sup>17</sup> ACA has failed to demonstrate that its perceived problems with the current retransmission consent regime violate these standards. In fact, the Commission specifically carved out from these examples of anti-competitive behavior the exact situation that ACA now argues should be included, namely the right of broadcasters to block carriage of programming that substantially

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<sup>14</sup> See *Petition*, pg. 15.

<sup>15</sup> See *SHVIA Order*, ¶ 53 (emphasis added).

<sup>16</sup> *Id.*, ¶ 56.

<sup>17</sup> *Id.*, ¶ 58.

duplicates the local broadcaster's programming.<sup>18</sup>

Also, while ACA cites to the *Monroe Utilities Network* decision as support for its proposed rules, the opposite is actually correct.<sup>19</sup> In reaching its decision, the Media Bureau followed the specific intent of Congress and the Commission's rules in deciding that it would not involve itself with the terms of a retransmission consent agreement. Instead, the Media Bureau stated that it would not get involved with the "specific arguments concerning private agreements between broadcasters and MVPDs," and reminded the parties that the good faith requirement contained in SHVIA "applies to negotiations between MVPDs and broadcast stations, and not between a network and an affiliate."<sup>20</sup>

In light of the Commission's past statements clearly asserting its intent to not involve itself with the terms and conditions of retransmission consent agreements, and the specific direction provided by the Media Bureau in the *Monroe Utilities Network* decision, the Commission should reject ACA's proposed rules that would require the Commission to adopt rules depending upon the specific terms included in retransmission consent agreements.

**B. MARKET CONDITIONS SUPPORT FLEXIBILITY IN NEGOTIATING RETRANSMISSION CONSENT AGREEMENTS.**

Next, ACA argues that the competitive landscape between cable operators and local broadcasters has changed to such a degree that its proposed modifications to the Commission's rules are necessary to protect cable operators from "powerful broadcasters."<sup>21</sup> However, ACA's argument does not reflect the true market reality.

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<sup>18</sup> *Id.*

<sup>19</sup> *See Monroe, Georgia Water Light and Gas Commission d/b/a Monroe Utilities Network*, 19 FCC Rcd 13,977 (MB 2004).

<sup>20</sup> *Id.* at 13,980-13,981, nt. 24.

<sup>21</sup> *Petition* at pg. 21.

These “powerful” broadcasters have been unable to extract a penny in retransmission consent from cable companies since 1992. Instead, since there is usually one cable company in a particular area, particularly in the rural areas of the country, broadcasters were forced to deal with the local MVPD monopoly to extend their reach. Cable carriage is an important factor for broadcasters because cable leads to an increase in the station’s advertising revenues since it serves more potential consumers. However, this landscape has changed in two important ways over the past five years.

First, local broadcasters have expended billions of dollars to construct digital transmission facilities and to retrofit their existing studios to provide digital programming in accordance with the Commission’s tight DTV transition schedule. The introduction of additional two to four multicast signals per local station substantially increases the value of the broadcasters’ product, and alters the nature of the negotiating positions of broadcasters and cable operators.

However, if ACA’s Petition is granted, as soon as a local television broadcaster attempts to enter into a retransmission consent negotiations to seek compensation, the local cable operator would be permitted to negotiate with a broadcaster from another DMA to import a distant signal on better terms. Such an action would render virtually meaningless the broadcaster’s significant investment in its digital facility, and undermine the free, over-the-air broadcasting system that has been in place since the dawn of broadcasting.

This is especially true since the Commission recently rejected rules that would have required cable operators to carry the multicast signals of these broadcasters pursuant to the Commission’s must-carry rules. Instead, the Commission concluded that television licensees could rely upon the retransmission consent provisions in the Commission’s rules to negotiate carriage of their multicast signals with cable operators. Thus, in the digital environment, must-

carry may not even be an option for some television licensees.<sup>22</sup>

Moreover, the proposed rules would undermine the basic structure of network broadcasting, which is premised on exclusivity within a certain geographic area. Under the proposed rules, network affiliation agreements, which grant exclusive rights to programming within a certain geographic area, would now be eliminated, leading to the real possibility that network programming will become, in effect, a Starbucks on every corner. The value of network programming, both for the network and its affiliates, would be substantially undercut and the bargained-for benefit of being a network affiliate would be diminished greatly if ACA's Petition is granted.

In addition, television broadcasters have been entitled to negotiate retransmission consent agreements with satellite MVPDs for carriage of their local signals. That, in turn, fundamentally altered the negotiating position of cable companies, as, for the first time, they have to face competition in the local markets for the provisions of video programming services.

With the entry of this new competitor, satellite MVPDs and broadcasters have been required to conduct these negotiations pursuant to Section 325(b)(3)(C), just as ACA would have cable operators and local television licensees do so under its proposed rules. As a result, many broadcasters and satellite MVPDs have concluded that the correct "price" for carriage of the local television signals includes a modest payment made to local television broadcasters in exchange for the right to retransmit their valuable programming.

Therefore, instead of concluding that the correct "price" for carriage of local television signals includes the elimination of the network duplication and syndicated exclusivity rules, the Commission should very well conclude that some MVPDs have already reached the proper pricing structure. Other than oft repeating the highly speculative calculation that its

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<sup>22</sup> See *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, FCC 05-27, released Feb. 14, 2005

membership will be forced to pay \$860 million dollars in the upcoming election round, ACA has failed to rebut the proposition that certain MVPDs (and the market) have already concluded that local television broadcasters are entitled to compensation for the carriage of their signals.

Finally, ACA ignores the give and take between cable operators and local television broadcasters. Contrary to than the ominous picture pictured by ACA, both parties reap substantial benefits from the carriage of local television stations. Broadcasters are continuously asked by advertisers to justify their rates in relation to the extent of their cable carriage rights. In addition, cable operators receive subscription fees for providing local television service to their customers. Despite ACA's claim, neither party wins if a television station is not carried by the local cable system.

### **C. ACA's PETITION CREATES FALSE SENSE OF URGENCY**

Finally, it is unclear why ACA waited until seven months prior to the conclusion of the upcoming election round to file its Petition. As a seasoned participant in Commission proceedings,<sup>23</sup> ACA should have expected that its Petition would not be uniformly accepted by those in the broadcasting and cable industries, and filed its petition with sufficient time for the parties, and the Commission, to review the merits of its proposals. One can only assume that the Petition was filed to create a false sense of urgency, and with the hope that the Commission would act quickly in granting the Petition without providing sufficient time for all interested parties to fully consider the impact of ACA's proposals.

ACA's proposed rule changes are **not** merely cosmetic. To the contrary, they propose to substantially circumscribe the effectiveness of the Commission's established rules relating to network non-duplication protection and syndication exclusivity. Not only would ACA have the

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<sup>23</sup> See *Petition*, pg. 4, nt. 2 (citing past filings with the Commission).

Commission eliminate one of the central provisions of the Cable Act, it would also have the Commission intrude into the relationship between networks and their affiliates. Given the substantial changes in the Commission's rules being proposed, and their significant impact on the relationship between networks and their affiliates, the Commission should have great pause and consider the impact of ACA's proposed changes on the television broadcasting industry.

As such, should the record that is developed as a result of the filing of ACA's Petition convince the Commission that further inquiry is necessary, Pappas urges the Commission to issue a Notice of Proposed Rulemaking pursuant to Section 1.407 of its rules, and not act immediately in adopting ACA's proposed changes.

While Pappas in no way supports further consideration of ACA's Petition, as it has demonstrated above that the proposed rules would violate the Cable Act and SHVIA, at most, the changes proposed by ACA require full review by the Commission, and the involved parties must have the benefit of responding to a formal Notice of Proposed Rulemaking prior to the implementation of any or all of ACA's proposed changes to the Commission's rules.

## **CONCLUSION**

ACA has failed to provide any evidence that would justify the drastic changes to central tenets of both the Cable Act and SHVIA that there are proposed simply to advance their own economic interests. While ACA attempts to cloak its arguments in the context of small cable operators, there is little doubt that, should the proposed rules be adopted, the next step would be their applicability for all cable operators.

Moreover, to the extent that ACA would like the free market to "price" the value of network programming, it need not look any further than the current DBS-Broadcaster retransmission consent agreements whereby DBS operators have agreed to pay a modest fee

for the right to retransmit the valuable programming provided by local broadcasters. This new entrant into the MVPD industry can be seen as the true source for ACA's concern over the upcoming carriage election period. However, the fact that cable operators now face competition in their local markets does not mean that broadcasters must sacrifice either their statutory rights to enter into retransmission negotiations, or their rights to territorial exclusivity over network and syndicated programming.

Therefore, in light of arguments presented herein, and the clear direction provided by Congress, ACA's Petition should be dismissed without further consideration.

Respectfully submitted,

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