Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of | ) | |
| Retransmission Consent, | ) | RM-11203 |
| Cable Network Non-Duplication, | ) | |
| And Syndicated Exclusivity | ) | |

# COMMENTS OF
# MEDIACOM COMMUNICATIONS CORPORATION
# &
# CEBRIDGE CONNECTIONS


Megan Campbell
Vice President, Legal Affairs

Jane Belford
Vice President, Programming & Legal Affairs

Mediacom Communications Corp.
100 Crystal Run Road
Middletown, NY 10941
(845) 695-2600

Michael Zarilli
Senior Counsel & Director Government Relations

Peter M. Abel
Vice President, Community Relations

Cebridge Connections
12444 Powerscourt Drive, Suite 450
St. Louis, Missouri 63131
(314) 315-9400

## SUMMARY

Mediacom Communications Corporation ("Mediacom") and Cebridge Connections ("Cebridge") are submitting these comments in support of the petition of the American Cable Association ("ACA") that the Commission initiate rulemaking on retransmission consent.

The retransmission consent practices of the national broadcast networks in acting for their owned and operated stations and of some large station groups not affiliated with those networks have resulted in forced carriage by cable companies of unwanted networks with resulting higher costs for cable subscribers, demands for cash payments that would force MVPD customers to pay exorbitant sums for precisely the same broadcast television programming that is supposedly "free" and other undesirable results that have previously been identified by the ACA and others, such as Cox Enterprises, Inc.

Some broadcast networks, having already launched and secured the carriage of several cable networks in past rounds of retransmission consent negotiations, are now more vigorously seeking "cash for carriage." The large independent station groups are expected to aggressively pursue substantial monthly cash payments per subscriber during the coming round of negotiations. The ACA estimates that the impact to its members of the cash for carriage demands in the upcoming round could be an additional $5 per customer per month, which we think may be too low. If Mediacom's or Cebridge's cable systems, which carry from 8 to 20 broadcast stations eligible to elect retransmission consent, were required to pay from $0.70 to $2.00 per subscriber per month, as some broadcast station group owners have said their

programming is worth, the additional wholesale cost would be from $5.60 to $40.00 per subscriber per month, and subscribers, many of whom are already complaining about rates, could see their monthly cable or DBS bills increase by that amount (plus taxes and franchise fees mandated by government). So much for preserving "free" broadcast television.

It is essential to keep in mind that consumers ultimately bear the costs of retransmission consent—whether in the form of license fees for affiliated cable networks that we must carry to obtain consent or direct cash payments. Cable companies, for the most part, simply cannot afford to absorb the extra costs and must pass all or most of the added expense to subscribers. Since broadcast networks are carried on the basic tier, those required to pay include customers who subscribe only to a "lifeline" basic, such as senior citizens on low fixed incomes or others who cannot afford to buy expanded basic service.

It is equally important to recognize that distribution of broadcast television programming to cable subscribers produces benefits for broadcasters that are at least equal in value to them as the ability to provide that programming to subscribers is to cable companies. Moreover, broadcast television is based on an advertiser-supported model to a far greater degree than any cable network. A broadcast network or station covers its production and other costs by selling commercials and any consideration in exchange for retransmission consent is simply a windfall.

The problems associated with retransmission consent impact all cable operators and, therefore, any solutions that are implemented by the Commission (or Congress) should apply across the board. Nonetheless, the problems are

especially acute for ACA members. The broadcast networks and station group owners have much greater bargaining power than ACA members in negotiating retransmission consent deals. ACA members, including Cebridge and Mediacom, simply do not represent a sufficient share of the national television market to be able to exert leverage in retransmission negotiations that are conducted, not with local station managers, but with the corporate offices of media giants. Increased competition between DBS and cable operators has added immeasurably to broadcasters' and programmers' market power because it is difficult for a cable operator to drop a broadcast station's signal that continues to be carried by a competing DBS company.

Small cable systems, like those operated by ACA members, who face higher programming and other costs and earn fewer advertising dollars than large MSOs concentrated in the top MDAs and who do not own programming networks, lack the ability of large MVPDs to absorb increases in retransmission consent costs, rather than pass them through to subscribers. At the same time, their subscribers do not have the same levels of discretionary income as consumers in larger markets and so cannot easily afford the rate increases we would have to institute if we have to add $5 to $40 to their basic cable bills simply in order to continue to provide so-called "free" broadcast television.

Although Cebridge and Mediacom are considerably bigger than the average ACA member, they represent only small fractions of the cable-subscriber and television-viewer markets. Mediacom serves approximately 1.46 million

customers located in small communities in 23 states, while Cebridge serves approximately 400,000 customers located in primarily suburban, small-town, and rural communities in nearly two dozen states. Cebridge is only around one-seventh, and Mediacom is only about half, the size of Cablevision Systems, the sixth largest MSO, and Cebridge and Mediacom are, respectively, only approximately one-fiftieth and one-fifteenth of the size of Comcast, the largest MSO. Cebridge represents only 0.04%, and Mediacom only 0.13% of the more than 109,590,000 U.S. television households.

Cebridge and Mediacom are more like their fellow ACA members than larger MSOs in other respects as well. For example, like ACA members generally, neither Cebridge nor Mediacom is vertically integrated or affiliated with larger MSOs. Neither owns any interests in broadcast stations, programming networks or other media. Most importantly, their systems serve smaller communities in smaller markets across the country. Although it is the eighth largest MSO in the country, Mediacom focuses on providing entertainment, information and telecommunications services to the nation's smaller cities and towns. Mediacom operates in approximately 1,500 franchise communities, of which about 85% contain 2,000 or fewer subscribers. Cebridge operates approximately 700 headends, with an average of 600 customers each.

Mediacom and Cebridge are prepared to enter into retransmission consent agreements with the broadcast networks for their owned and operated stations and with the large independent station group owners on the basis that neither party needs to pay the other anything. Not only would that arrangement be fair

because it would involve the exchange by the parties of substantially equivalent values, but consumers would also gain because the operator would not have to pass through to subscribers the cost of paying cash or carrying additional cable networks in order to obtain retransmission consent. The broadcasters, however, insist on getting paid, either through direct cash payments or through carriage of affiliated cable networks. They use the use the leverage of their market power and government-conferred must-carry/retransmission consent rights to get their way. Ultimately, the cost must be passed on to consumers, which means that the "free" broadcast television that the must-carry/retransmission consent rules were supposed to preserve is an illusion for the more than 90 million Americans who receive broadcast television stations by cable or DBS rather than over-the-air.

We believe that conditions have changed radically since the Commission originally adopted its relevant rules and that the rules do not serve their intended purposes. Though retransmission consent is statutory, there is much that the Commission can do immediately. In fact, Congress has expressly directed the Commission to monitor and respond to the rate effects of retransmission consent. We respectfully request, therefore, that the Commission:

- Grant the ACA's request and, additionally, open a proceeding to thoroughly re-assess its existing rules and address the broader issues regarding retransmission consent, and identify further solutions that the Commission could implement without Congressional action and .

- Adopt an automatic stay to prevent loss of a signal while complaints over good faith negotiation are being submitted to a third party for resolution, as it did in the Fox decree.
- As part of its efforts to define MVPDs' "good faith" obligations in retransmission consent negotiations, revise its definition of the good faith negotiation obligations of broadcasters to make sure that they give due consideration to proposals that will avoid additional costs to consumers. In that regard, Mediacom is prepared, during the coming round of negotiations, to offer broadcast stations in appropriate markets and circumstances packages of various forms of non-cash consideration for retransmission consent that are appealing to local broadcast station managers, but are rejected by corporate owners who want cash for the national corporate treasury or carriage of cable networks that does not benefit local stations at all. If the Commission required broadcasters to fairly value non-cash compensation in lieu of cash or carriage of affiliated cable networks and to allow local managers to meaningfully participate in selecting among alternative compensation proposals in order to meet the broadcaster's good faith obligations under 47 C.F.R. § 76.65, that might aid in restoring localism into the retransmission consent process, which in turn is less likely to result in basic cable fee increases for customers.

**SUMMARY**

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COMMENTS OF
MEDIACOM COMMUNICATIONS CORPORATION
&
CEBRIDGE CONNECTIONS

## I. INTRODUCTION

Mediacom Communications Corporation ("Mediacom") and Cebridge Connections ("Cebridge") hereby submit these joint comments in response to the Commission's Public Notice[1] in the above-referenced rulemaking. More specifically, Mediacom and Cebridge support the petition (the "ACA Petition")[2] of the American Cable Association ("ACA") that the Commission initiate rulemaking on retransmission consent.

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[1] Public Notice: *Petition For Rulemaking Filed*, Consumer & Government Affairs Bureau Reference Information Center, RM 11203 (rel. Mar. 17, 2005).

[2] American Cable Association Petition for Rulemaking, *In the Matter of Retransmission Consent, Cable Network Non-Duplication, and Syndicated Exclusivity* (filed Mar. 2, 2005) (*"ACA Petition"*).

## II. RETRANSMISSION CONSENT DOES NOT FUNCTION AS CONGRESS ENVISIONED

Many of the local broadcast television stations in the country are owned and operated by the national broadcast networks, ABC, CBS, FOX, NBC, UPN and WB ("O&O Stations"). Others are independent local stations, many of which are affiliates of the national networks. All of the national broadcast networks and their respective O&O Stations are owned by five media conglomerates. Those five media companies also own or have interests in more than 110 cable networks.[3]

Besides the national broadcast networks, there are several other companies that own a large number of broadcast television stations. They include:

- Hearst-Argyle Television, Inc., which owns 25 television stations, and manages an additional three television stations. Those stations reach approximately 18% of U.S. TV households, making it one of the largest U.S. television station groups. It owns ten NBC affiliates, and is the second-largest NBC affiliate owner in terms of audience reach. Hearst-Argyle also owns 12 ABC stations and manages an additional ABC station owned by The Hearst Corporation, and is the largest ABC affiliate group in audience. It owns two CBS affiliates and a WB affiliate, and manages a UPN affiliate and an independent station.[4] Hearst-Argyle is majority owned by The Hearst Corporation, which has various media interests, including, through one or more affiliates, cross-ownership with NBC and ABC of interests in several leading cable networks such as ESPN, Lifetime and A&E. Lifetime has acted as proxy for the Hearst-Argyle television stations in retransmission consent negotiations.

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[3] Eleventh Annual Report, *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 (rel. Feb. 4, 2005) at ¶148.

[4] *See* http://www.hearstargyle.com/index2.html (last accessed 4/18/05).

- Sinclair Broadcast Group, Inc., which owns twenty FOX, nineteen WB, six UPN, eight ABC, three CBS and four NBC affiliates, as well as two independent stations, and reaches approximately 24% of all U.S. television households.[5]

- Young Broadcasting, Inc., which owns and operates ten television stations that have a total U.S. television household coverage of over 6%.[6]

The retransmission consent practices of the O&O Stations of the national broadcast networks have been described in great detail in various FCC filings.[7] The comments of Cox Enterprises, Inc. filed in the Commission's media ownership proceeding (the "Cox Comments") provide a concise summary of those practices:[8]

> The networks' broad and steadily increasing ownership reach has allowed them to force unwanted programming and higher costs on cable operators and their customers, thereby reducing the responsiveness of cable operators' programming decisions to local communities and driving up local cable rates. Congress and the Commission established the retransmission consent process to preserve local broadcast service to the community—specifically, to maintain the

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5 *See* http://www.sbgi.net/business/television.shtml (last accessed 4/18/05).

6 *See* *http://www.youngbroadcasting.com/ireye/ir_site.zhtml?ticker=ybtva&script=2100* (last accessed 4/18/05)

7 *See, e.g.,* Comments of Joint Cable Commenters, *In the Matter of Inquiry on Rules Affecting Competition in the Television Marketplace*, MB Docket No. 05-28 (filed March 1, 2005); Reply Comments of Cablevision Systems Corporation, *In the Matter of A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207 (filed Aug. 13, 2004), at 7-10; Reply Comments of Time Warner Cable Inc, *In the Matter of A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207(filed Aug. 13, 2004), at 11-13.

8 Comments of Cox Enterprises Inc, *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 No. 02-277 (filed Jan. 2, 2003) ("*Cox Comments*").

> competitive position of local broadcast voices against vertically-integrated cable operators in local markets. Today, however, the vertically-integrated networks' ability to leverage the retransmission consent process is undermining the localism principle that is at the heart of the statutory scheme. The networks' extensive ownership interests in both broadcast stations and cable channels, coupled with their increasingly national and cross-platform focus, have converted the retransmission consent process into the prime tool for implementing the networks' new national distribution and marketing strategies. The networks now negotiate retransmission consent for all of their O&Os nationwide at the same time, and condition such consent on carriage of their affiliated cable programming on all of the cable operator's systems nationwide (not just where the cable system and the O&O share a market). Consequently, retransmission negotiations no longer are based on the value of the broadcast station to the local market. Nor is the negotiation for the carriage and pricing of the network's affiliated cable programming based on its value to the local cable audience.[9]

The Cox Comments and the ACA Petition contain numerous specific examples of the problematic use of the retransmission consent process by the broadcast networks. As the Cox Comments and the ACA Petition explain, broadcast networks have conditioned retransmission consents upon the cable company's commitment to carry, and pay license fees for, their affiliated cable networks throughout all of its systems, not just those that serve the same market as a particular O&O Station. In many cases, the cable networks that are tied to retransmission consents are not widely viewed and would not be carried on their own merits. While this process is repeated every three years as retransmission consents expire, the commitments for carriage of the tied cable networks required by the networks are usually for longer than three years. As a result, having securely locked up carriage of the cable networks that were tied to

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[9] *Cox Comments, supra* note 8, at 42.

the last cycle's retransmission consent, the media giants are able to play the game all over again at the start of the next cycle by conditioning the renewal of the consent to the launch of new cable networks developed during the intervening three-year period.[10]

Some of the broadcast networks respond to complaints about the use of the retransmission consent right to secure carriage of cable networks by pointing out that the network is willing to accept cash payments in lieu of carriage commitments. For example, in recent testimony before the House Telecommunications Subcommittee, Ben Pyne, an executive of The Walt Disney Company ("Disney"), which owns ABC, said that ACA members who do not want to commit to carry Disney cable networks in order to obtain retransmission consent for ABC O&O Stations have the "option" of paying $0.70 per subscriber per month in cash.[11] He presented the Subcommittee with yet another report prepared for programmers by Economists Inc. which purports to establish that the fair market value of Disney O&O Stations affiliated with ABC is from $1.42

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[10] *Cox Comments, supra* note 8, at 26-31 & 43-47; *ACA Petition, supra* note 2, at 26-32.

[11] Testimony of Mr. Ben Pyne, Executive Vice President, Disney and ESPN Affiliate Sales and Marketing, before hearings on Competition and Consumer Choice in the MVPD Marketplace, Including an Examination of Proposals to Expand Consumer Choice, Such as A La Carte and Themed-Tiered Offerings, before the Subcommittee on Telecommunications and the Internet of the House Energy and Commerce Committee, 108th Cong., 2d Sess., Serial No. 108–110, at 125 (July 14, 2004).

to $2.09 per subscriber per month.[12] Such figures presented by broadcast networks have been repeatedly rejected by copyright and valuation authorities.[13]

The "cash for carriage" offer is expected to be prevalent and preeminent in the upcoming retransmission consent round. The broadcast networks, having already launched and secured the carriage of several cable networks, are now requesting "cash for carriage" in addition to the fees they are receiving for the locked up carriage of cable networks from previous retransmission consent rounds. The large independent station groups are expected to vigorously pursue substantial monthly cash payments per subscriber during the coming round of negotiations. The ACA estimates that the impact to its members of the cash for carriage demands in the upcoming round could be an additional $5 per customer per month.[14] It is essential to keep in mind that consumers ultimately bear the costs of retransmission consent—whether in the form of license fees for affiliated cable networks that we must carry to obtain consent or direct cash payments. Cable companies, for the most part, simply cannot afford to absorb

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[12] In last year's *a la carte* inquiry, Disney stated that the report concludes that the "understated, average value" for ABC O&O Stations ranges from $2.00 to $2.09 per subscriber per month. Comments of The Walt Disney Company, *In the Matter of A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207 (filed July 15, 2004), at 3.

[13] Relying upon Economists, Inc., broadcast networks once sought $1.22 per network station. That request was reduced by the Copyright Office to $0.27 for distant network signals and $0.00 for "local into local" signals. *In the Matter of 1996 Satellite Carrier Royalty Rate Adjustment Proceeding*, Report of the Panel, 96-3-CARP-SRA (Aug. 28, 1997); *Rate Adjustment for the Satellite Carrier Compulsory License,* 62 Fed. Reg. 55742 (Oct. 28, 1997). Subsequently, Congress reduced the rate further. (Until recently, the rate was $0.1485 for a distant network affiliate. 37 CFR § 258.3(c) SHVERA amended this to $0.209.) The cable compulsory license is effectively a still lower rate, and carriage of local-into-local network affiliates requires no royalty over and above the minimum fee. 37 CFR § 256.2. Even these amounts are paid to the owners of the underlying programming, because the stations seldom own the programming being carried.

[14] *ACA Petition*, *supra* note 2, at 24.

the extra costs and must pass all or most of the added expense to subscribers. Since broadcast networks are carried on the basic tier, those required to pay will include customers who subscribe only to a "lifeline" basic, such as senior citizens on low fixed incomes or others who cannot afford to buy expanded basic service.

It is equally important to recognize that distribution of broadcast television programming to cable subscribers produces benefits for broadcasters that are at least equal in value to them as the ability to provide that programming to subscribers is to cable companies. Moreover, broadcast television is based on an advertiser-supported model to a far greater degree than any cable network. There are few, if any, cable networks that could survive on advertising revenues alone, and their business model is based exclusively or to a crucial degree on receipt of license fees from distributors. By contrast, a broadcast network or station covers its production and other costs by selling commercials and any consideration in exchange for retransmission consent is simply a windfall.

The broadcast networks and large station group owners almost never mention the cost to consumers of their demands, the value to them of cable/satellite distribution or the fact that money extracted from cable companies and, ultimately, their subscribers is pure gravy. For obvious reasons, they prefer to conduct the debate in other terms. Often, for example, they emphasize the alleged unfairness of allowing huge, rich cable companies like Comcast to profit from broadcast programming without compensating the owners of that programming. As Mr. Pyne said in his prepared statement submitted to the House Telecommunications Subcommittee last year:

> The '92 Act required the cable systems to obtain the consent of, and to compensate the owner of, a broadcast channel before undertaking to sell that channel to consumers. Thus, retransmission consent is not regulatory intervention into the free market, but a Congressional recognition of free market principles, namely that broadcasters—like any other business—should be compensated for their product if sold by another entity.[15]

Mr. Pyne does not address the fact that an important part of the broadcaster's property for which it seeks compensation is a significant chunk of publicly owned radio frequency spectrum that broadcasters use for free. That particular form of profiting from that use of someone else's property without compensating the owner seems to be acceptable to Disney. He also conveniently ignores the fact that broadcasters are armed with must-carry rights, and so can demand carriage by cable systems without the operator's consent and without compensating the operator.

Moreover, cable distribution of broadcast television programming requires bandwidth owned by the cable system and that could be used for other purposes. Cable carriage benefits the broadcaster by increasing the number of viewers because many Americans cannot receive high-quality broadcast signals over-the-air. Moreover, the vast majority of Americans subscribe to cable or satellite television, and they might watch less broadcast television if it were available

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[15] Prepared Testimony of Testimony of Mr. Ben Pyne, Executive Vice President, Disney and ESPN, Affiliate Sales and Marketing, submitted in the hearings on Competition and Consumer Choice in the MVPD Marketplace, Including an Examination of Proposals to Expand Consumer Choice, Such as A La Carte and Themed-Tiered Offerings, before the Subcommittee on Telecommunications and the Internet of the House Energy and Commerce Committee, 108th Cong., 2d Sess., Serial No. 108–110, at 125 (July 14, 2004).

only over-the-air. Cable carriage, in short, increases viewership and that, in turn, enhances the broadcaster's advertising revenues. While Mr. Pyne is correct that cable systems use the products (programming) of broadcast stations, he ignores the fact that broadcast stations use the property (bandwidth) of cable companies and do so without paying them compensation, even though the broadcasters gain a substantial benefit.

Many representatives of broadcast networks have a curious myopia about the flow of value in a retransmission consent deal and simply assume, without bothering to offer any economic justification or other convincing rationale, that it should always be the case that the cable company pays the broadcaster. With all due respect to Mr. Pyne, we fail to understand why the operator could not claim that the distribution secured by the network is not at least equivalent in value to the programming obtained by the operator. There is no better evidence of the value to broadcasters of cable distribution than the broadcast industry's own statements.

During Congressional deliberations leading to adoption of the must-carry requirement and in litigation challenging that requirement after enactment, broadcast industry representatives produced testimony and other submissions seeking to demonstrate that distribution of broadcast station signals by cable systems was absolutely critical to the survival of broadcast television.[16] One broadcast industry executive explained it this way:

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[16] Soon after Congress enacted the 1992 Cable Act, Turner Broadcasting System, Inc. and others brought suit against the United States and the Commission in the United States

> Simply put, a television station's audience size directly translates into revenue—large audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station cannot serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the cycle will repeat.[17]

The broadcast industry did such a thorough and effective job of demonstrating that distribution of broadcast station signals by cable systems was crucial that Congress became convinced that "absent legislative action, the free local off air broadcast system is endangered."[18] The U.S. Supreme Court summed up the industry's efforts and their results as follows:

> Empirical research in the record before Congress confirmed the "direct correlation [between] size in audience and station

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District Court for the District of Columbia, challenging the constitutionality of the must-carry provisions under the First Amendment to the U. S. Constitution. The three judge District Court, in a divided opinion, granted summary judgment for the Government. *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32, 40, 45-47 (DC 1993). On appeal to the U.S. Supreme Court, the case was returned to the District Court for further development of the factual record. *See Turner Broadcasting System, Inc. v. FCC* ("*Turner I*"), 512 U.S. 622 (1994). Upon remand, the District Court again granted summary judgment for the Government, *Turner Broadcasting System, Inc.* v. *FCC,* 910 F. Supp. 734 (DC 1995). Its ruling was upheld upon appeal to the Supreme Court. *Tuner Broadcasting System, Inc.* v. FCC ("*Turner II*"), 520 U.S. 180 (1997). The District Court's decision was based on thousands of pages of materials originating with pre-enactment hearings before Congress and additional testimony and submissions made to the District Court on remand. *See Turner BroadcastingSystem, Inc.* v. *FCC,* 910 F. Supp. 734, 755 (DC 1995); *Turner II*, supra, 520 U.S. at (1997). In its opinion, the Supreme Court cited key parts of the record developed in the lower court.

[17] Competitive Issues in the Cable Television Industry: Hearing before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary, 100th Cong., 2d Sess., at 526-527 (statement of Gary Chapman).

[18] S. Rep. No. 102-92, at 42.

> [advertising] revenues," and that viewership was in turn heavily dependent on cable carriage.
>
> Considerable evidence, consisting of statements compiled from dozens of broadcasters who testified before Congress and the FCC, confirmed that broadcast stations had fallen into bankruptcy, curtailed their broadcast operations, and suffered serious reductions in operating revenues as a result of adverse carriage decisions by cable systems. The record also reflected substantial evidence that stations without cable carriage encountered severe difficulties obtaining financing for operations, reflecting the financial markets' judgment that the prospects are poor for broadcasters unable to secure carriage. Evidence before Congress suggested the potential adverse impact of losing carriage was increasing as the growth of clustering gave MSO's centralized control over more local markets. Congress thus had ample basis to conclude that attaining cable carriage would be of increasing importance to ensuring a station's viability. [19]

If, however, the subject shifts to retransmission consent, rather than must-carry, the broadcasters seem to forget everything they have said over the past decade or more about the importance of cable distribution. Mr. Pyne's testimony is devoid of any statement remotely like those made by broadcasters when the object was to convince Congress to grant or the courts to uphold must-carry rights. He testifies as to the value of ABC network programming to cable operators, but does not say a word about the value of cable distribution to ABC. Either the broadcasters have changed their minds since 1992 and no longer think that cable distribution is important, in which case there is no longer any justification for must-carry rights, or they continue to believe what they said in

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[19] *Turner II, supra* note 16, 520 U. S. at 209 (internal citations omitted).

1992, in which case their public statements and commissioned studies that seek to justify their retransmission consent practices are unreliable because they fail to give due consideration to the value of distribution to the broadcasters. Moreover, the broadcasters claim that retransmission consent is fair because a significant part of the money that a multi-channel video programming distributor ("MVPD") earns from subscribers is paid in order to view broadcast television fails to recognize, as Time Warner Cable, Inc. has pointed out, that "[w]hen viewers who may 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."[20]

Alarmist cries about the alleged dangers to "free over-the-air" television is another trick that the broadcasters pull out of their bags when the issue is must-carry and then conveniently forget about when complaining about how unfair it would be if they did not get paid for retransmission consent. Consider Disney, for example. After the Commission's 2001 decision regarding the definition of "primary video" for purposes of the must-carry rules, Disney claimed that the decision "contravenes the express goals of the 1992 Cable Act by arbitrarily denying the benefits of multicasting to a significant segment of the public, cable television subscribers, thereby disenfranchising them from the benefits of free,

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

over-the-air broadcasting and placing that service at risk."[21] According to Disney, "[a]t its core, the [1992] Cable Act was designed to protect the benefits to the public of free over-the-air broadcasting."[22] It is interesting to contrast Mr. Pyne's assertion that it is appropriate for ABC to charge $0.70 or more for retransmission consent to the following statement by Disney in its Petition for Reconsideration of the Commission's decision:

> Congress understood the inextricable relationship between the ability of free over-the-air broadcasting to continue to serve the public interest and the assured opportunity for broadcasters to continue to reach all potential viewers. . . .[23]

If Mediacom's or Cebridge's cable systems, which carry from 8 to 20 broadcast stations eligible to elect retransmission consent, were required to pay from $0.70 to $2.00 per subscriber per month, the additional wholesale cost would be from $5.60 to $40.00 per subscriber per month, and subscribers, many of whom are already complaining about rates, could see their monthly cable or DBS bills increase by that amount (plus taxes and franchise fees mandated by government). So much for preserving "free" broadcast television.

## III. RETRANSMISSION CONSENT PROBLEMS ARE ESPECIALLY ACUTE FOR ACA MEMBERS, INCLUDING CEBRIDGE AND MEDIACOM

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[21] *See* Reply of The Walt Disney Company, CS Docket 98-120, filed June 4, 2001, at 2.

[22] Petition for Reconsideration of The Walt Disney Company, CS Docket 98-120, filed April 25, 2001, at 4-5

[23] Petition for Reconsideration of The Walt Disney Company, CS Docket 98-120, filed April 25, 2001.

The issues identified above are problems for all cable operators and, therefore, any solutions that are implemented by the Commission (or Congress) should apply across the board. Nonetheless, the problems caused by the existing retransmission consent regime are especially acute for ACA members.

As a result of media consolidation, the emergence of DBS as an effective competitor and the maturation of the principal cable networks, the element of interdependence has largely disappeared from the relationship between the programmers and all but the very largest cable companies. In the words of a recent JPMorgan report on the MSO/programmer relationship, "it all comes down to negotiating leverage, and leverage hinges on (relative) scale."[24]

When it comes to scale, all but a few MVPDs are dwarfed by the handful of companies that control cable and broadcast programming. Most of the cable television programming services offered on a subscription basis by MVPDs are owned by only six companies, and five of those companies own the national broadcast networks. In addition to their cable network/services holdings, five of those six media companies have interests in virtually every media sector, including ownership of radio networks and stations, motion picture and television program production and distribution facilities, newspaper, magazine and book publishing units and record companies.

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[24] Spencer Wang and Jason Bazinet, *Cable vs. Programmers: Looking for the Win-Win*, JP Morgan (Dec. 3, 2003) ("*Wang/Bazinet*"), at 21.

In most cases, the broadcast networks and station group owners have much greater leverage than MVPDs in negotiating retransmission consent deals. That is especially true when the negotiations are with small system operators.[25] For one thing, the broadcast station owners have more financial and other resources than all but the largest MVPDs.[26] (Indeed, some of them are conglomerates that include large MVPDs.) More significantly, ACA members, including Cebridge and Mediacom, simply do not represent a sufficient share of the national television market to be able to exert leverage in retransmission negotiations that are conducted, not with local station managers, but with the corporate offices of media giants like Disney, Fox, NBC/Universal and Viacom.[27]

Increased competition between DBS and cable operators has added immeasurably to broadcasters' and programmers' market power. It is difficult for a cable operator to drop a broadcast station's signal, especially if it continues to be carried by a competing DBS company. To the extent that unhappy

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[25] *See* Comments of The National Telecommunications Cooperative Association, *In the Matter of A La Carte and Themed Tier Programming and Pricing Options for Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, (filed Aug.13, 2004), ("*NTCA Comments*"), at 2 ("Small cable television . . . providers and local exchange carriers . . . possess far less leverage in dealing with content providers than do the larger MSOs").

[26] "The . . . bulking up of the integrated media conglomerate is seen as a way for each to prevail in fights with other large media firms or with smaller independent distribution-centric or content-centric firms. Multiple platforms allow the integrated firm to harass their adversaries from different asset points." Edward J. Deak, *Technological Change, Convergence and the Strategic Struggle for Dominance in the Entertainment Industry* (Mar. 6, 2003), at 2, available at http://www. edwardjdeak.com/entertainment303.htm (last accessed 9/3/04).

[27] The average ACA member company serves 8,000 subscribers, which is about seven one-thousandths of one percent of the approximately 109,900,000 U.S. television households. While Cebridge and Mediacom are larger than the average ACA member, their percentages are still miniscule—0.04% and 0.13%, respectively.

subscribers switch to DBS, they will continue to be included in the network's subscriber base for purposes of setting advertising rates. The cable company, on the other hand, cannot replace the lost subscribers or revenues and its financial health and equity value suffer accordingly.[28]

For these reasons, with the possible exception of Comcast,[29] negotiating leverage ultimately resides with the national broadcast networks and large station groups. As one commentator has remarked:

> Smaller carriers . . . lack the leverage afforded by a large customer base. They must have access to the programming content that their customers demand in order to remain competitive with the larger MSOs. Content providers are aware of this, and thus are able to take a relatively inflexible position in the negotiations with small carriers. These carriers are not in a position to walk away from the negotiating table, and even if they did, the content providers' bottom line would be largely unaffected. Ultimately, this lack of leverage and negotiating power may lead to higher programming rates for the consumers served by smaller . . . carriers.[30]

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[28] One estimate is that a loss of 3% to 6% of subscribers to DBS results in declines in the equity values of select publicly traded MSOs of between 4% to 50%, depending on the degree to which the MSO is leveraged. *Wang/Bazinet*, *supra* note 24, at 8.

[29] Comcast's network passes nearly 40% of all the homes in the U.S. and serves almost 22 million cable television subscribers. It is widely believed that if push came to shove in negotiations, Comcast would have the advantage over virtually all of the networks. *See*, *e.g.*, Richard A. Billotti, Scott Babka & Kay Sheils, *Industry Overview: Entertainment—The Investment Case for Distribution Over Content* (Dec. 31, 2002)(Morgan Stanley Research Report), at 3, 7 ("Comcast could survive the deletion of one channel, but most programming networks could not survive the loss of a carriage agreement covering 21-22 million subscribers."). *See also* John Harring, Jeffrey Rohlfs and Harry M.S. Hooshan, *Anticompetitive Effects of the Proposed AT&T Comcast Merger* (April 29, 2002), at 8, available at http://www.spri.com/pdf/reports/Qwest/attcomcastmerger4-29-02.pdf (last accessed 9/3/04) (concluding that Comcast represents such a large share of the market that the threat of carriage loss threatens the life of virtually all networks).

[30] *NTCA Comments*, *supra* note 25, at 3.

This conclusion is supported by the outcomes of the public battles over carriage that have occurred in recent years as various affiliation agreements have expired. The impression within the industry is that the network has done better than the MVPD in those fights, primarily because of actual or feared loss of subscriber defections to competitors or because consumer backlash and political pressure tend to be focused on the operator, not the content owner.[31] For example, on May 1, 2000, Time Warner Cable pulled the Disney-owned ABC broadcasting stations off of its cable systems in a number of large cities, including New York and Los Angeles. The battle was largely over retransmission consent. Disney wanted extensive compensation for granting permission to carry owned and operated broadcast stations affiliated with the ABC network, including cash payment, the shifting of The Disney Channel from the premium to the basic tier and an agreement to carry two minor Disney networks. Time Warner Cable claimed that it was being strong-armed by Disney, being forced to add unwanted channels to its limited channel space and incur hundreds of millions of dollars of additional costs over the life of the agreement. The two parties settled the dispute fairly quickly on terms that were not made public; however, it is widely believed that Time Warner Cable, despite its status as the second largest cable company, essentially caved in to Disney's demands. Similar battles involving retransmission consent have occurred between Echostar and Disney and Echostar and Viacom, with essentially the

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[31] *Accord Wang/Bazinet*, *supra* note 24, at 15.

same result. If even industry giants like Time Warner Cable and Echostar are unable to resist the demands of broadcasters, imagine how little leverage the average ACA member, with 8,000 subscribers, has in retransmission consent negotiations with the broadcast networks or large station groups like Hearst-Argyle.

As a result of the lack of leverage and other practices of some programming conglomerates (such as volume discounting), ACA members—and ultimately their subscribers—pay significantly more for programming than the top five MVPDs. Since they do not have equity interests in programmers, like some of the largest MSOs, ACA members cannot recoup any of their programming costs through programming revenues. In addition, small market systems do not have the same capacity to earn revenues from the sale of ad avails because of the relatively small sizes of their markets. Even if ad avails or marketing support are provided, cable companies serving small markets may not be able to take advantage because those markets do not have sufficient local media outlets or the media serving larger regions are too expensive relative to the levels of support received from programmers. In addition, because of lower population densities, they must spend more dollars on more plant to reach an equivalent number of customers.

Those customers, in turn, tend to have far less money to spend on television service. For example, Mediacom's customers in Albany, Georgia, Clear Lake, Iowa, Moline, Illinois, Springfield, Missouri, and its other franchise areas

do not have discretionary incomes that match those of subscribers in the big cities. They cannot easily afford the rate increases we would have to institute if we have to add $5 to $40 to their basic cable bills simply in order to continue to provide basic subscribers with so-called "free" broadcast television.

Consider, for example, Hillsboro, a town in Hill County, Texas. Hillsboro has a population of 8,232 people and a median family income of $30,297. Around 17% of its citizens are 65 years of age or older, and in Mediacom's experience, cable prices are a major issue for many senior citizens living on fixed incomes in small communities like Hillsboro. About 21.8% of Hillsboro's population and 17.6% of its families are below the poverty line and, presumably, even a few dollars a month makes a big difference in terms of whether those individuals and families can afford cable or satellite television at all. Contrast Hillsboro to Highland Park in Dallas County, Texas, which has a population of 8,842 and a median family income of $200,000. About 14.6% of its citizens are 65 years of age or older, and 3.4% of the population and 1.6% of families are below the poverty line. The cable system in Hillsboro is owned by Northland Cable Communications Corp., which is a small MSO serving a total of around 179,000 subscribers. The cable system in Highland Park Township is owned by Comcast, which is the largest MSO in the country with about 21,487,000 subscribers. Obviously, the citizens of Highland Park are much better able to afford a $5 or $6 dollar per month increase in basic cable rates than the citizens of Hillsboro.

What all this means is that small cable systems, like those operated by ACA members, who face higher programming and other costs, earn fewer advertising dollars and do not own programming networks, lack the ability of large MVPDs to absorb increases in retransmission consent costs, rather than

pass them through to subscribers. At the same time, their subscribers do not have the same levels of discretionary income as consumers in larger markets and so cannot easily afford to pay the extra monthly charges.

In this regard, it is important to note that although Cebridge and Mediacom are considerably bigger than the average ACA member, they represent only small fractions of the cable-subscriber and television-viewer markets. Mediacom serves approximately 1.46 million customers located in small communities in 23 states, while Cebridge serves approximately 400,000 customers located in primarily suburban, small-town, and rural communities in nearly two dozen states. Cebridge is only around one-seventh, and Mediacom is only about half, the size of Cablevision Systems, the sixth largest MSO, and Cebridge and Mediacom are, respectively, only approximately one-fiftieth and one-fifteenth of the size of Comcast, the largest MSO. Cebridge represents only 0.04%, and Mediacom only 0.13% of the more than 109,590,000 U.S. television households. Accounting for such tiny fractions of total television viewers, Cebridge and Mediacom simply do not have the leverage to effectively resist the demands of the broadcast networks and large station-group owners in retransmission consent negotiations.

Cebridge and Mediacom are more like their fellow ACA members than larger MSOs in other respects as well. Like ACA members generally, neither Cebridge nor Mediacom is vertically integrated or affiliated with larger MSOs. Neither owns any interests in broadcast stations, programming networks or other media.

Most importantly, their systems serve smaller communities in smaller markets across the country. Although it is the eighth largest MSO in the country, Mediacom focuses on providing entertainment, information and telecommunications services to the nation's smaller cities and towns. Mediacom operates in approximately 1,500 franchise communities, of which about 85% contain 2,000 or fewer subscribers. Cebridge operates approximately 700 headends, with an average of 600 customers each.

In general, the most populous states and the largest cities and DMAs in the country are served by the largest MSOs. Over the past decade, as a result of their acquisition and divestiture strategies, the largest MSOs have clustered their operations around the major metropolitan markets. For example, Comcast's "Mid-Atlantic Super Cluster," with 4.4 million subscribers, includes clusters in Pennsylvania, New Jersey, Maryland, Virginia, the Washington, D.C. Metropolitan area, and Delaware.[32] In its merger with AT&T Broadband, Comcast acquired additional large clusters in the Chicago, San Francisco/Oakland/San Jose, and Boston areas, with approximately five million subscribers in those three clusters.[33] Research by Deutsche Bank Securities Inc. on the degree of concentration of MSOs within the top 50 DMAs indicates that only about 14% of Mediacom's subscribers are within these markets, while the corresponding percentages for the seven largest MSOs range from 52% to 100%. Cebridge's presence in the top 50 DMAs is comparable to Mediacom's.

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[32] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report*, CS Docket No. 01-129, 17 FCC Rcd. 1244, 1305 at ¶143 (2002).

[33] *Id.*

In short, the cable industry is not monolithic (nor, we submit, monopolistic), and it includes, in addition to big, vertically integrated MSOs, hundreds of independent companies like ACA members who provide cable television and advanced broadband services to millions of Americans in rural areas and small communities in all 50 states and who operate in circumstances radically different from, and do not possess anything near the negotiating leverage of, the giant programming conglomerates that own the national broadcast networks or the large station groups. While Cebridge and Mediacom are larger than the average ACA member, they are not vertically integrated and serve the same small and mid-sized markets and face many of the same challenges as other members, including dealing with the ever-increasing demands of the national broadcast networks and broadcast station groups that have significantly greater resources and bargaining power.

## IV. THE FCC SHOULD RE-EXAMINE RETRANSMISSION CONSENT AND ADJUST ITS RULES

The problems resulting from the retransmission consent process should not go unaddressed, given the upcoming election cycle. Though retransmission consent is statutory, there is much that the Commission can do immediately. In fact, Congress has expressly directed the Commission to monitor and respond to the rate effects of retransmission consent.[34] We suggest that at a minimum, the

[34] 47 U.S.C. § 325(b)(3)(A) ("The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 543(b)(1) of this title to ensure that the rates for the basic service tier are reasonable.") *See* "House Conference Report 102-862, at 76 (1992) ("In the proceeding implementing retransmission consent, the conferees direct the Commission to consider the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations adopted under this section do not conflict with the Commission's obligations to ensure that

Commission adopt an automatic stay to prevent loss of a signal while complaints over good faith negotiation are being submitted to a third party for resolution, as it did in the Fox decree.[35]

In addition, the Commission could, as part of its efforts to define MVPDs' "good faith" obligations in retransmission consent negotiations, revise its definition of the good faith negotiation obligations of broadcasters to make sure that they give due consideration to proposals that will avoid additional costs to consumers. In that regard, Mediacom is prepared, during the coming round of negotiations, to offer broadcast stations in appropriate markets and circumstances packages of various forms of non-cash consideration for retransmission consent, including the following:

- Carriage of multiplexed digital programming services that meet certain standards (such as not requiring a subscription fee).
- On-demand delivery of local newscasts, expanding the audience for a local station's largest money-maker.
- Purchase by the cable system of advertising on broadcast stations where the operator's service area overlaps substantially with the broadcaster's.
- Provision to the broadcaster of local advertising spots on the cable system
- Joint marketing campaigns for particular programs or services.

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rates for basic cable service are reasonable".)

[35] *General Motors Corporation, Hughes Electronics Corporation, and The News Corporation Limited*, Memorandum Opinion and Order, MB Docket No. 03-124, 19 FCC Rcd 473 at ¶221 *et seq.* (2004).

- Direct fiber connections from broadcast studio to cable head-end, to improve signal quality and to keep the broadcaster on the air even through storm damage.
- Bill stuffers to promote a local broadcaster.

In the combined experience of Mediacom and Cebridge, local broadcast station managers have expressed interest in and appreciation for proposals of this nature. It is the corporate owners that resist. If Commission required broadcasters to fairly value non-cash compensation in lieu of cash or carriage of affiliated cable networks and to allow local managers to meaningfully participate in selecting among alternative compensation proposals in order to meet the broadcaster's good faith obligations under 47 C.F.R. § 76.65, that might aid in restoring localism into the retransmission consent process, which in turn is less likely to result in basic cable fee increases for customers.

## V. CONCLUSION

Mediacom and Cebridge are prepared to enter into retransmission consent agreements with the broadcast networks for their owned and operated stations and with the large independent station group owners on the basis that neither party needs to pay the other anything. Not only would that arrangement be fair because it would involve the exchange by the parties of substantially equivalent values, but consumers would also gain because the operator would not have to pass through to subscribers the cost of paying cash or carrying additional cable networks in order to obtain retransmission consent. The broadcasters, however, insist on getting paid, either through direct cash payments or through carriage of affiliated cable networks. They use the use the leverage of their market power

and government-conferred must-carry/retransmission consent rights to get their way. Ultimately, the cost must be passed on to consumers, which means that the "free" broadcast television that the must-carry/retransmission consent rules were supposed to preserve is an illusion for the more than 90 million Americans who receive broadcast television stations by cable or DBS rather than over-the-air.

In the seventy years since the adoption of the Communications Act of 1934, Congress has consistently recognized the public interest in assuring that all American citizens, regardless of where they live, have access to high quality communications services at affordable prices. As a means to achieve this goal, Congress and the Commission have in recent years emphasized reliance upon market forces and have focused upon fostering greater competition in the delivery of multichannel video programming and other communications services. In the video arena, those efforts have been tremendously successful, and DBS today accounts for over 27% of the subscription video market. Ironically, while the trend has been to remove impediments to operation of the free market, the legislative and regulatory scheme relative to the broadcaster/cable company relationship continues to distort the market by giving broadcasters rights and advantages that vastly increase their market power and negotiating leverage.

Market forces, as shaped by the existing legislative and regulatory regime, have simply proved inadequate to achieve Congressional goals when it comes to carriage of broadcast television signals by cable companies, particularly

when it comes to insuring that the nation's rural areas and small towns and cities are not disadvantaged.

As noted, it is clear that Congress was concerned that retransmission consent would cause higher cable rates and directed that the Commission, in administering retransmission consent process, to take into account "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier."[36] As Time Warner Cable, Inc. has said, while the Commission saw no reason for concern in 1993, things have dramatically changed and "the time is ripe to re-evaluate that conclusion."[37] We believe that if a re-evaluation is undertaken, that the Commission will agree with the ACA, Cebridge and Mediacom that changes are needed. For that reason, we respectfully request the Commission to grant the ACA's request and, additionally, open a proceeding to address the broader issues regarding retransmission consent and identify further solutions that the Commission could implement without Congressional action. Further, Mediacom and Cebridge respectfully request that the Commission seriously consider providing guidance of the nature discussed above to facilitate negotiations in the upcoming retransmission consent round.

Respectfully submitted,

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[36] 47 U.S.C § 325(b)(3)(A).

[37] Reply Comments of Time Warner Cable Inc., *In the Matter of A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207 (filed Aug. 13, 2004), at 12.

MEDIACOM COMMUNICATIONS
CORPORATION

Megan Campbell
Vice President, Legal Affairs
Jane Belford
Vice President, Programming & Legal Affairs
Mediacom Communications Corporation
100 Crystal Run Road
Middletown, New York 10941
845/695-2600
845/695-2669 (fax)

CEBRIDGE CONNECTIONS

Michael Zarrilli
Senior Counsel & Director Government
Relations
Peter M. Abel
Vice President, Community Relations
Cebridge Connections
12444 Powerscourt Drive
Suite 450
St. Louis, Missouri 63131
(314) 315-9400

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