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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Petition for Inquiry Into	)	MB Docket No. _____
Retransmission Consent Practices	)	
	)	
To: The Commission	)	

PETITION FOR INQUIRY INTO RETRANSMISSION CONSENT PRACTICES

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October 1, 2002

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October 1, 2002

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
c/o Vistronix, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002
Phone: (202) 418-0300

via hand delivery

RE: American Cable Association ("ACA");
Petition for Inquiry into Retransmission Consent Practices

Dear Ms. Dortch:

On behalf of ACA, we submit this Petition for Inquiry into Retransmission Consent Practices. We include an original and ten copies for filing and distribution to the Chairman and Commissioners.

We also enclose a copy of the Petition and ask that you date-stamp and return it in the enclosed Fed-Ex envelope. Thank you in advance for your help. If you have any questions, please call Emily Denney or me at 312-372-3930.

Sincerely,

Christopher C. Cinnamon

Enclosure

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Matthew M. Polka

Via email: Catherine Crutcher Bohigian
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SUMMARY

ACA asks the Commission to initiate an inquiry into the retransmission consent practices of network owners and major affiliate groups. In particular, the Commission should look at the retransmission consent tying arrangements that network owners and major affiliate groups force on smaller cable companies. Increasingly, a few media conglomerates – powerful players like Disney/ABC, Fox/News Corp., and GE/NBC – are pulling the strings behind local retransmission consent negotiations. They are tying carriage of a local network broadcast signal to carriage of, and payment for, one or more affiliated satellite services. Many of these arrangements require carriage of, and payment for, affiliated satellite programming on cable systems well outside the broadcaster's market.

In short, when dealing with smaller cable companies, these media conglomerates have turned retransmission consent into a one-way conversation driven by national corporate strategies to increase satellite programming revenues. These tying arrangements harm smaller cable companies and their customers by increasing basic cable costs and decreasing programming choices. This conduct by a few media conglomerates also places independent programmers with competing programming at a distinct disadvantage.

In the *Digital Must Carry Order*, the Commission acknowledged ACA's concerns with retransmission consent tying, asked for more information, and committed to take appropriate action as necessary. In response, ACA provided the Commission with specific examples of retransmission consent tying arrangements. Examples included:

- Tying of retransmission consent for ABC in one market to carriage of affiliated Disney programming in other markets.

- Tying of retransmission consent for ABC in one market to carriage of the Disney Channel on basic in other markets.

- Tying of retransmission consent for Fox Network in one market to carriage of Fox Sports, Fox News, FX, National Geographic Channel, and Fox Health Channel in other markets.

- Tying of retransmission consent for NBC in one market to carriage of MSNBC, CNBC, and payment of Olympics surcharge in other markets.

The upcoming round of retransmission consent is imminent. ACA members fear the worst. Media consolidation has accelerated. Network owners have achieved unbridled ability to use retransmission consent to force additional programming and higher costs on small cable companies and consumers. ACA asks the Commission to follow through on its commitment to monitor retransmission consent practices and address the harm to small cable operators and the consumers they serve. Initiating a Section 403 inquiry is the most efficient and restrained next step.

The Commission has ample statutory authority to initiate an inquiry into retransmission consent. The statutory bases for an inquiry into retransmission consent practices include the following: (i) the Commission's authority under 47 USC § 403; (ii) the retransmission consent provisions in 47 USC § 325; and (iii) the change of control provisions governing broadcast licenses in 47 USC § 310(d). The inquiry will enable the Commission to evaluate how network owners and major affiliate groups are abusing the retransmission consent process contrary to Section 325 and Commission regulations and policies, and whether certain retransmission consent practices constitute unauthorized changes in control of broadcast licenses.

Retransmission consent tying practices conflict with the intent and purpose of Section 325. As stated by the Commission, "the statutory goals at the heart of Sections 614 and 325 [are] to place <u>local broadcasters</u> on a more even competitive level and thus <u>help preserve local broadcast service to the public</u>." The retransmission consent framework is aimed to secure local cable carriage of commercial broadcast signals through "mutually beneficial arrangements." Media consolidation has enabled a handful of companies to upend these goals. Retransmission consent tying arrangements have nothing to do with preserving local

broadcast service through "mutually beneficial arrangements," and everything to do with advancing the revenue goals of corporate parents and satellite programming affiliates on the backs of small cable operators and their customers. Similarly, the aim of achieving a more "even competitive level" in retransmission consent negotiations is now an anachronism, at least for small cable operators facing Disney/ABC, Fox/News Corp., GE/NBC, CBS/Viacom or Hearst-Argyle.

Section 325(b)(3)(A) also expressly directs the Commission to consider the impact of its retransmission consent regulations on basic rates. In 1993, the Commission found little evidence of rate impact. Nearly 10 years later, much has changed. The pressure on basic rates as a result of current retransmission consent tying practices should be self-evident.

These developments have occurred since the Commission implemented retransmission consent in 1993 and 1994. A Section 403 inquiry will help the Commission reevaluate the efficacy of current regulations in advancing the goals of Section 325, especially in light of unprecedented media consolidation.

Current retransmission consent practices constitute unauthorized transfers of control in violation of Section 310(d). Section 325 created retransmission consent rights for each commercial broadcast licensee, and no other entity. It is well-settled under Section 310(d) that a broadcast licensee cannot transfer or assign responsibility for these rights without first obtaining the Commission's consent. The examples of retransmission consent practices provided by ACA show how affiliated satellite programming entities are controlling retransmission consent rights of local stations. No Commission order has authorized these changes in control.

The good faith negotiation regulations provide no protection for small cable operators. The Commission has ample evidence that few, if any, small cable operators do not have the resources to file a complaint against Disney/ABC, Fox/News Corp., GE/NBC, or CBS/Viacom under the good faith negotiation regulations. The lack of resources to defend against retransmission consent abuses is precisely what makes small cable operators easy targets for the network owners and major affiliate groups.

An inquiry into retransmission consent practices is necessary and appropriate, and provides the most efficient means of Commission action. A Section 403 inquiry will provide the Commission with a developed record to determine the harm caused in smaller markets by retransmission consent tying and other practices of network owners and major affiliate groups. The inquiry will also provide independent satellite programmers an opportunity to present evidence of how tying arrangements impede their ability to distribute their programming. From that record, the Commission can determine what further action is most appropriate.

To assist the Commission in evaluating the conduct of network owners and major affiliate groups, ACA will supplement this Petition with information provided by its members concerning the retransmission consent practices they face in the upcoming months.

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PETITION FOR INQUIRY INTO RETRANSMISSION CONSENT PRACTICES

I. INTRODUCTION

ACA asks the Commission to initiate an inquiry into the retransmission consent practices of network owners and major affiliate groups. The inquiry should explore how retransmission consent tying arrangements employed by a few media conglomerates have fundamentally transformed the retransmission consent process in many markets served by smaller cable companies. Increasingly, powerful players like Disney/ABC, Fox/News Corp., and GE/NBC are pulling the strings behind local retransmission consent negotiations, and are tying consent to carry a local broadcast signal to carriage of, and payment for, one or more affiliated satellite services. Many of these arrangements require carriage of, and payment for, affiliated satellite programming on cable systems well outside of the broadcaster's market.

In short, when dealing with smaller cable companies, network owners and some major affiliate groups have turned retransmission consent into a one-way conversation driven by corporate strategies to increase satellite programming revenues. These tying arrangements harm smaller cable companies and their customers by increasing basic cable costs and decreasing programming choices. These resulting harms squarely conflict with the intent and purpose of the retransmission consent laws and regulations. Independent satellite programmers may also be harmed by retransmission consent tying. Due to limited capacity on smaller cable systems, tying arrangements restrict the ability of those systems to carry additional services.

The upcoming round of retransmission consent provides a key opportunity for the Commission to evaluate retransmission consent practices and their impact on smaller cable companies and consumers. ACA requests that the Commission initiate an inquiry to that end. To assist the Commission's consideration of the issues raised here, ACA will supplement this Petition with reports from its members on retransmission consent practices they face in the coming months.

American Cable Association. ACA represents more than 930 independent cable companies that serve about 7.5 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators with small systems that focus on small markets. About half of ACA's members serve less than 1,000 subscribers. All ACA members face the challenges of building, operating, and

upgrading broadband networks in lower density markets. Many ACA members have been on the receiving end of retransmission consent tying and fear increasing retransmission abuses in the upcoming round.

II. BACKGROUND – MEDIA CONSOLIDATION, THE RISE OF TYING ARRANGEMENTS, AND THE NEED TO EXAMINE CURRENT RETRANSMISSION CONSENT PRACTICES

Retransmission consent became law in 1992, with the intent to help local broadcasters secure carriage on cable systems through mutually beneficial arrangements. Since then, media ownership has consolidated at a remarkable pace. Programming and content companies have combined with television networks and broadcast licensees to create a few media powerhouses – Disney/ABC, CBS/Viacom, Fox/News Corp., and GE/NBC. Major affiliate groups like Hearst-Argyle also control many network stations.

In many markets served by small cable operators, mutually beneficial arrangements negotiated with local network broadcasters have been supplanted by edicts from distant corporate offices, with consent to carry a local broadcast signal conditioned on a range of costly tying arrangements. Examples of retransmission consent tying faced by small cable operators include:

- Tying of retransmission consent for ABC in one market to carriage of affiliated Disney programming in other markets.
- Tying of retransmission consent for ABC in one market to carriage of the Disney Channel on basic in other markets.
- Tying of retransmission consent for Fox Network in one market to carriage of Fox Sports, Fox News, FX, National Geographic Channel, and Fox Health Channel in other markets.

- Tying of retransmission consent for NBC in one market to carriage of MSNBC, CNBC, and payment of Olympics surcharge in other markets.
- Conditioning the consent to transfer a retransmission consent agreement from one small cable operator to another to carriage of additional satellite programming not required in the original agreement.

Increasingly for smaller cable operators, retransmission consent for network signals means being on the receiving end of a one-way conversation. The result? Forced carriage of additional satellite programming and higher costs for small cable companies and their customers.

ACA has been raising this issue consistently with the Commission since 1995.[1] Last year, in the *Digital Must Carry Order*, the Commission expressly recognized small cable's "important concerns" over retransmission consent tying.[2] The Commission declined to act at that time, indicating that "substantial evidence must be presented to support a claim that a tying arrangement exists and that the operator suffers harm as a result."[3] The Commission committed to "continue to monitor the situation with respect

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[1] *In re Applications of Capital Cites/ABC, Inc. and the Walt Disney Company for Consent to the Transfer of Control of Broadcast and Television Station Licenses,* Petition to Deny of the Small Cable Business Association ("SCBA") (filed September 27, 1995); *In re Application for Transfer of Control of CBS Corporation and Its Licensee Subsidiaries from Shareholders of CBS Corporation to Viacom, Inc.,* Petition to Deny of ACA (filed December 31, 1999); *In the Matter of Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, Comments of SCBA (filed October 13, 1998), and Comments of the American Cable Association (filed June 8, 2001) ("ACA Digital Must Carry Comments").

[2] *In the Matter of Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-22 (rel. January 23, 2001) ("*Digital Must Carry Order*") at ¶ 35 (referencing comments of the Small Cable Business Association, the former name of ACA), ¶ 121, and *Final Regulatory Flexibility Analysis*, ¶ 20.

[3] *Digital Must Carry Order* at ¶ 35.

to potential anticompetitive conduct by broadcasters in this context."[4] Upon a showing that tying arrangements harm small cable operators and their subscribers, the Commission would "consider appropriate courses of action".[5]

In response, ACA provided the substantial evidence sought by the Commission – specific, real-world examples of retransmission consent tying faced by smaller cable companies.[6] Each example involves tying retransmission consent for a local network signal to carriage of, and payment for, one or more satellite programs. Several of the cases describe tying carriage of satellite programming on cable systems *outside* the market of the local broadcast station. Most of these cases also involve obligations to carry, and pay for, satellite programming for years beyond the retransmission consent election period. These examples show how a few media conglomerates are exploiting local broadcast licenses to benefit their affiliated satellite programming, with no concern for the resulting harms of increased costs and decreased choice for smaller market cable systems and their customers.

The next round of retransmission consent is imminent. Small cable operators fear the worst. Media consolidation has accelerated. The disparities in company size, market power, and resources have become immense. Network owners have achieved unbridled ability to use retransmission consent to force additional programming and

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[4] *Id.*

[5] *Id.*

[6] ACA Digital Must Carry Comments at 4-16. We attach as Exhibit A pertinent excerpts from that filing. *See also In the Matter of Petition for Inquiry into Network Practices* (filed March 8, 2001) (filed by Network Affiliated Stations Alliance) ("NASA Petition for Inquiry"), ACA Comments (filed July 20, 2001).

higher costs on small cable companies and consumers, along with gaining a tremendous advantage over competing independent satellite programmers.

The problem has at least two solutions: (i) self-discipline by network owners and major affiliate groups in dealing with smaller cable companies; or (ii) increased regulation. We emphasize: ACA fully supports fair and reasonable retransmission negotiations with local broadcasters that result in mutually beneficial carriage arrangements. Many independently owned network affiliates continue to negotiate reasonable and mutually beneficial agreements with smaller cable companies. But as far as dealing with network owners and major affiliates, retransmission consent is anything but "local," and agreements are anything but "mutually beneficial." An examination of this conduct and the resultant harms might encourage a measure of moderation among network owners in their treatment of small cable companies that would obviate the need for additional regulation.

To that end, ACA asks the Commission to formalize its commitment "to monitor the situation with respect to potential anticompetitive conduct by broadcasters."[7] We ask for a formal inquiry into retransmission consent practices of network owners and affiliate groups, especially in their dealings with small cable companies.

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[7] *Digital Must Carry Order* at ¶ 35.

III. THE COMMISSION HAS AMPLE AUTHORITY AND EVIDENCE TO INITIATE AN INQUIRY INTO RETRANSMISSION CONSENT PRACTICES

The statutory bases for an inquiry into retransmission consent practices include the following: (i) the Commission's general investigation authority under 47 USC § 403; (ii) the retransmission consent provisions in 47 USC § 325; and (iii) the change of control provisions governing broadcast licenses in 47 USC § 310(d). The inquiry will enable the Commission to determine the extent to which network owners and major affiliate groups are abusing the retransmission consent process contrary to Section 325 and Commission regulations and policies, and if certain retransmission consent practices constitute unauthorized changes in control of broadcast licenses. The inquiry will also help the Commission to determine the need for additional retransmission consent regulations aimed at protecting smaller market cable operators and their customers from abuse by network owners and major affiliate groups.

A. A formal inquiry under Section 403 provides the appropriate means to investigate the retransmission consent practices of network owners and major affiliate groups.

The Commission has ample statutory authority to initiate an inquiry into retransmission consent practices under Section 403.[8] Section 403 provides:

> The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter.

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[8] 47 USC § 403.

The Commission has relied on Section 403 to inquire into a range of improper conduct under its jurisdiction.[9] The conduct identified here – the abuse of retransmission consent through tying arrangements, the exercise of retransmission consent rights by entities other than the broadcast licensee, and the harm to small cable businesses and consumers – all provide ample grounds to evaluate current retransmission consent practices under Section 403. In a similar vein, we note that the Commission has pending a request for a Section 403 inquiry into network owners' abusive practices and illegal conduct toward affiliates.[10] That petition identifies the same handful of corporate actors as we do here.

As described below, the retransmission consent practices of network owners and major affiliate groups implicate Sections 325 and 310 and the underlying Commission regulations and polices, and provide a solid foundation for a Section 403 inquiry.

B. Current retransmission consent practices of network owners and major affiliate groups conflict with the intent and purpose of Section 325.

The principal statutory focus of the inquiry requested here is Section 325. A review of the express language of the statute, the legislative intent, and related Commission action underscores the need for the Commission to examine current retransmission consent tying practices. This conduct and its consequences squarely conflict with Section 325.

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[9] *See, e.g., In the Matter of SBC Communications, Inc., Apparent Liability for Forfeiture*, FCC 02-112 (rel. April 15, 2002) at ¶ 8; *In the Matter of Inquiry into Alleged Abuses of the Commission's Auction Processes, Order*, 9 FCC Rcd 6906 (1994) at ¶ 5; *In the Matter of Inquiry into Alleged Abuses of the Commission's Processes by Applicants for Broadcast Facilities, Order*, 3 FCC Rcd 4740 (1988); *In the Matter of Inquiry into Alleged Improper Activities by Southern Bell, Order*, 69 FCC.2d 1234 (1978).

1. Current retransmission consent practices conflict with the fundamental goal of Section 325 – preserving local broadcast stations through mutually beneficial carriage arrangements.

With Section 325, Congress created a new right for commercial broadcasters – a cable system cannot carry a broadcaster's signal without the broadcaster's consent. The emphasis throughout the statute is on retransmission rights for the local commercial broadcast station, not an ultimate corporate parent or an affiliated satellite programming vendor.[11] The language of Section 325(b) unambiguously states that cable carriage requires the "express authority of the originating station."[12] The Commission has consistently interpreted retransmission consent as a "new right given to the broadcaster,"[13] and a right "that vests in a broadcaster's signal."[14] The fundamental purpose of vesting each commercial broadcast licensee with retransmission consent rights was to preserve local broadcast programming and create a level playing field for cable carriage negotiations. As stated by the Commission, "the statutory goals at the heart of Sections 614 and 325 [are] to place local broadcasters on

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[10] See NASA Petition for Inquiry.

[11] 47 USC § 325(b)(1)(A) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except with the express authority of the originating station."). The legislative history indicates "the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals..." Senate Committee on Commerce, Science, and Transportation, S.Rep. No. 92, 102d Cong., 1st Sess. (1991) at 36.

[12] 47 USC § 325(b)(1)(A) (emphasis added).

[13] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues, Memorandum Opinion and Order*, 9 FCC Rcd. 6723 (1994) ("*1994 Broadcast Signal Carriage Order*") at ¶ 107 (emphasis added).

[14] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, Report and Order*, 8 FCC Rcd. 2965 (1993) ("*1993 Broadcast Signal Carriage Order*") at ¶ 173 (emphasis added).

a more even competitive level and thus help preserve local broadcast service to the public."[15] In short, retransmission consent serves to advance the fundamental principals of localism and the promotion of local broadcast television, the same policy principals underlying much of the Commission's broadcast signal carriage regulations.[16]

In interpreting and implementing Section 325, the Commission has consistently emphasized the fundamental goals of localism and cooperation between broadcasters and cable operators. "Local broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals."[17] Accordingly, in 1994, the Commission found that the retransmission consent framework provided "incentives for both parties to come to mutually-beneficial arrangements."[18]

Media consolidation has enabled a handful of companies to upend the goals that underline retransmission consent. As described in examples provided to the Commission, corporate parents have shifted retransmission consent authority away from local broadcast licensees to advance national strategies of expanded carriage of affiliated satellite programming.[19] Often, the resulting tying arrangements require the

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[15] *1994 Broadcast Signal Carriage Order* at ¶ 104 (emphasis added).

[16] *See, e.g., 1994 Broadcast Signal Carriage Order* at ¶ 22 (noting the objective of localism underlying broadcast signal carriage obligations).

[17] *1994 Broadcast Signal Carriage Order* at ¶ 115.

[18] *Id.* at ¶ 115 (emphasis added); *See also* ¶ 107 (interpretation of Section 325 guided by maintaining ability of broadcasters and cable operators to negotiate mutually advantageous arrangements).

[19] For example, a small cable company operating systems in several states was forced to deal with a representative for Disney cable networks in a distant city. The operator had no further contact with the local broadcaster. *See* Exhibit A, excerpt from ACA Digital Must Carry Comments at 5-6. Similarly, one

small cable operator to carry the affiliated satellite programming on cable systems that do not carry the broadcast signal.[20] Moreover, the obligations to carry, and pay for, affiliated satellite programming often extend for years beyond the retransmission consent cycle. This conduct has nothing to do with preserving local broadcast service, and everything to do with revenue goals of corporate parents and satellite programming affiliates.

The aim of achieving a more "even competitive level" in retransmission consent negotiations is now an anachronism, at least for small cable companies facing network owners or major affiliate groups. No one can seriously question who holds the power when a small cable operator must deal with Disney/ABC, Fox/News Corp., GE/NBC or Hearst-Argyle. The network owners know that local network signals are essential services for small cable operators. They are exploiting this far beyond the intent and purpose of Section 325.

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case involved an operator who was forced to deal with a Lifetime channel representative for carriage of ABC programming. Because of cost increases related to carriage of Lifetime, the operator had no choice but to increase his cable rates by 5%. *See* Exhibit A, excerpt from ACA Digital Must Carry Comments at 11-12. One cable operator was forced to negotiate with NBC cable network executives in a distant city for carriage of a local NBC broadcast station. *See* Exhibit A, excerpt from ACA Digital Must Carry Comments at 12-13.

[20] One example involves Disney's refusal to grant retransmission consent to a small operator unless he launched, and paid for, a new satellite network, Soapnet. To obtain essential ABC programming in one market, the operator was forced to carry Soapnet in a market several states away - in a market that did not even carry the broadcast signal. *See* Exhibit A, excerpt from ACA Digital Must Carry Comments at 6. Disney has also tied retransmission consent for ABC in one market to company-wide carriage of the Disney Channel on basic tiers. *See* Exhibit A, excerpt from ACA Digital Must Carry Comments at 7-8. Similarly, News Corp continually ties retransmission consent for Fox Network to carriage of Fox Sports, Fox News, FX, National Geographic Channel, and Fox Health Channel, and Heart-Argyle ties retransmission consent for ABC to carriage of Lifetime. *See* Exhibit A, excerpt from ACA Digital Must Carry Comments at 8-12.

For ACA members dealing with network owners and major affiliate groups, retransmission consent tying has undercut the fundamental goals of Section 325. A Commission inquiry into retransmission consent practices will help create a record to assess how developments since 1992 have altered the marketplace for network broadcast signals and how retransmission consent tying impacts smaller cable companies, independent programmers, and consumers.

2. Current retransmission consent practices add substantial costs to basic cable service warranting renewed scrutiny under Section 325.

In addition to the fundamental emphasis on mutually beneficial arrangements for local network programming, Section 325 reflects Congress' concern over the interplay of retransmission consent costs and basic rates. Section 325(b)(3)(A) expressly directs the Commission to consider the impact of its retransmission consent regulations on basic rates.[21] In 1993, when the Commission first considered this question, it found little evidence of rate impact and declined to regulate retransmission consent rates at that time.[22] Much has changed since 1993.

Based on input from ACA members, the Commission now has evidence of how network owners require small cable operators to carry, and pay for, additional satellite programming on basic as a condition of retransmission consent. In many cases, the obligation to carry, and pay for, affiliated satellite programming extends for years beyond the retransmission consent cycle. The pressure on basic rates is obvious.

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[21] 47 USC § 325(b)(3)(A).

[22] *1993 Broadcast Signal Carriage Order* at ¶¶ 176, 178.

Even more disturbing is how some network owners are requiring carriage of satellite programming on smaller cable systems outside the market where the broadcast signal is carried. As a result, small cable operators and consumers are forced to bear retransmission consent costs for broadcast stations they cannot even view.

In the same vein, in order to obtain retransmission for ABC in some markets, Disney has forced small operators to move the Disney Channel from a premium service to basic, even on cable systems that do not carry the broadcast signal. The Disney Channel is one of the most costly satellite services. Because of this practice, all basic customers served by these systems must now pay for the Disney Channel, just so that consumers served by one system can view the local ABC broadcast programming on cable. These examples show that retransmission consent practices are seriously out of alignment with the goals of "preserving local broadcast stations for the public," and maintaining reasonable rates for basic cable service.

The impact of retransmission consent tying on basic rates provides one quantifiable measure of the harm to small cable companies and consumers. A Commission inquiry will help collect and organize this information to determine the true costs of these practices for small cable companies and their consumers.

C. Current retransmission consent practices constitute an unauthorized change of control in violation of Section 310(d).

The retransmission consent practices of network owners also implicate the prohibition on unauthorized transfers of control of broadcast licenses. Section 325 created retransmission consent rights for each commercial broadcast licensee, and no

other entity.[23] Consequently, determining terms of cable carriage constitutes an essential station matter and a fundamental operating policy. It is well-settled under Section 310(d) that a broadcast licensee cannot delegate or assign responsibility for such matters without first obtaining the Commission's consent.[24]

The examples of retransmission consent practices provided by ACA show a consistent trend in how Disney, Fox, Hearst-Argyle, and NBC are appropriating retransmission rights from affiliated broadcast licensees. Most often, authority over retransmission consent is taken from the local station and assigned to a satellite programming affiliate. The question then becomes: Who controls the licensee? The evidence shows that satellite programming vendors control licensees, at least as far as retransmission consent is concerned.

A Commission inquiry will collect more information on how corporate owners and satellite programming affiliates are appropriating retransmission consent rights of local broadcast licensees. Insofar as this practice constitutes an unauthorized transfer of control of a fundamental station function, the Commission can then initiate appropriate enforcement action.

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[23] See *supra*, Section III.B.1, at 9-12.

[24] *See, e.g., Letter from FCC to Washington Broadcast Management Co., Inc., Licensee of KBRO (AM),* 13 FCC Rcd 24168, 24169 (1998) ("Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming, and finances, cannot be delegated."); *In the Matter of Liability of Kenneth B. Ulbricht, Memorandum and Opinion and Order and Forfeiture Order,* 12 FCC Rcd 11362, ¶ 6 (1996) ("In ascertaining whether an unauthorized transfer of control has occurred, the Commission focuses on whether an individual or entity other than the licensee has obtained the right to determine the basic operating policies of the station.").

D. The good faith negotiation regulations do not provide a means for small cable operators to address retransmission consent tying.

In 2000, the Commission promulgated regulations to implement the good faith negotiation requirement under the Satellite Home Viewers Improvement Act of 1999.[25] Those regulations provide for objective standards of good faith negotiations, a subjective "totality of the circumstances" test, and a complaint process.[26] For most ACA members, case-by-case adjudication of retransmission consent abuse is not a realistic option, principally due to the administrative burdens and costs of engaging in a contested case before the Commission, and the loss of one or more network broadcast signals pending final resolution.

The Commission has ample evidence that smaller cable operators do not have the resources to file a retransmission consent complaint against Disney/ABC, Fox/News Corp., GE/NBC, or CBS/Viacom. As the Commission has recognized, distinguishing characteristics of small cable operators include the lack of personnel and resources and higher cost structures.[27] The most recent evidence can be found in more than 100 small cable company EAS financial hardship waiver requests pending before the Enforcement Bureau. Combined with the Commission's earlier study of small cable that

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[25] *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, *First Report and Order*, 15 FCC Rcd 5445 (2000) ("SHVIA Order"); Satellite Home Viewers Act of 1988, Pub.L. No. 100-667, 102 Stat. 3935 (Nov. 8, 1988), *codified in* 17 USC § 119 (1995), *subsequently amended by* Satellite Home Viewer Improvement Act of 1999, 1999, Pub.L. No. 106-113, 113 Stat. 1501 (November 29, 1999).

[26] See 47 CFR § 76.65.

[27] *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration* 10 FCC Rcd. 7393, at 7401-7402 and 7420 (1995) *("Small System Order")*.

resulted in the *Small System Order*, the EAS waiver requests provide a detailed record of an industry sector under significant pressure. The lack of resources to defend against the retransmission consent practices described here is precisely what makes small cable systems easy targets for the network owners and major affiliate groups.

In addition, the complaint process does not protect against the biggest threat wielded by the network owners – denial of local network programming. Under current regulations, with a complaint pending a small cable operator must drop a network signal absent the broadcaster's consent to carriage.[28] Local network programming is an essential service for small cable operators, and the risk of those signals being withheld puts their businesses on the line.

Unless the Commission were to amend its regulations to permit small systems to initiate a complaint with an abbreviated form – much like the Commission did with the one-page FCC Form 1230 in the rate regulation context – and to allow continued carriage of network signals pending resolution of the complaint, the good faith negotiation regulations do not provide meaningful relief for small cable companies.

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[28] *See* SHVIA Order at ¶ 84.

IV. AN INQUIRY INTO RETRANSMISSION CONSENT PRACTICES IS NECESSARY AND APPROPRIATE AND PROVIDES THE MOST EFFICIENT MEANS OF COMMISSION ACTION.

The examples of retransmission consent tying discussed in this Petition and on the record in other proceedings represent a pervasive problem that is harming the small cable sector and the smaller market consumers they serve. These persistent and dangerous trends warrant Commission action. The Commission took an important first step in the *Digital Must Carry Order* by inviting more information on this problem.[29] The inquiry requested here is the next most logical and restrained action for the Commission to take.

A formal inquiry under Section 403 represents the most efficient use of Commission resources in this area. ACA members have much more information to share. The perspectives of consumer groups and franchise authorities should also be considered, along with the experiences of independent satellite programmers attempting to compete against tying arrangements. The network owners will have their side of the story as well, as will those local broadcasters that do not engage in practices that harm small cable operators.

To that end, the inquiry should focus on at least the following retransmission consent practices and their consequences:

- Tying retransmission consent to carriage of one or more satellite signals.
- Tying of retransmission consent to carriage of one or more satellite signals outside the market of the local broadcaster.

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[29] *Digital Must Carry Order* at ¶ 121.

- The transfer of control over retransmission consent rights from broadcast licensees to other entities.
- Threatening to withhold local network programming unless demands for satellite programming carriage are met.

From the record developed, the Commission can do the following: (1) assess the harm retransmission consent tying causes small cable operators and consumers; (2) determine the extent to which retransmission consent tying conflicts with Sections 325 and 310(d) and Commission regulations and polices; and (3) take other action it deems necessary.

V. CONCLUSION

ACA has provided the Commission with substantial evidence of retransmission consent tying by network owners and major affiliate groups. This action harms small cable businesses and their customers by increasing costs of basic cable and reducing programming choices. Retransmission consent tying also undercuts the goals of Section 325 by turning retransmission consent into a vehicle for a few media conglomerates to increase satellite programming distribution and revenues, rather than a process to achieve mutually beneficial arrangements for carriage of local network signals.

For these reasons, ACA asks the Commission to initiate an inquiry into retransmission consent practices. ACA offers all available resources to assist this effort and will supplement this Petition as necessary with updates on retransmission consent abuses encountered by its members.

Respectfully submitted,

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ACA Petition for Inquiry 093002.doc

Exhibit A
Excerpt from ACA's
Digital Must Carry Comments
Pages 4-15
(filed June 8, 2001)

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

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast Signals	)	CS Docket No. 98-120
	)	
Amendments to Part 76 of the Commission's Rules	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	
	)	
Local Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	)	CS Docket No. 00-2

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I. ANALYSIS

A. Examples of retransmission consent tying arrangements forced on smaller market cable operators.

This section provides recent examples of retransmission consent tying arrangements forced on smaller market cable operators by Disney/ABC, Fox Network/News Corp., Hearst-Argyle and GE/NBC. Each case demonstrates the overwhelming market power of network broadcasters over independent cable, and the high costs of retransmission consent tying on smaller market cable systems and their customers.

As a precaution, we present these examples in sanitized form. Independent cable companies are keenly aware of the power wielded by companies like Disney/ABC, Fox Network/News Corp., and others. Small cable operators fear retribution. In the words of one small cable veteran, "They have us in a bind, and they will squeeze us." Still, these examples describe actual carriage terms forced on independent cable companies in the past 24 months. To obtain more specific information will require Commission protection.[30]

1. Disney/ABC

The merger of the Disney companies and Capital Cities/ABC aligned Disney's satellite programming assets with ABC owned and operated network stations in many markets. Disney's demands to tie retransmission consent for ABC to carriage of Disney-affiliated programming promptly followed the merger.

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[30] For example, the Commission might seek more specific information and protect it from disclosure under 47 CFR § 0.459.

Last year's retransmission consent dispute between Disney/ABC and Time Warner garnered much attention. That case demonstrates the market power wielded by owners of broadcast licenses and satellite programming. Even the impressive resources and resolve of Time Warner had to yield to the tremendous pressure that followed deletion of ABC from certain Time Warner cable systems for just two days in May 2000.

If Disney/ABC has leverage like that over Time Warner, how do independent cable companies fare in the retransmission consent process? As the following two examples show, they do not stand a chance.

a. Tying of retransmission consent for ABC in one market to carriage of Soapnet in other markets.

One ACA member faced the following situation in seeking consent to retransmit an O&O ABC station. This case provides a dramatic example of the power of Disney to use retransmission consent tying to raise the costs of cable in smaller markets.

The small cable company operates several small systems in a number of states. In one market served by the cable company, it serves a few thousand customers. In another area of the company's operations, several states removed, it serves tens of thousands of customers. In the market where the company serves a few thousand customers, the cable operator obtains ABC programming from a station owned by Disney Enterprises Inc.

The O&O ABC station elected retransmission consent. The cable

operator was then directed to deal with a representative for Disney cable networks in a distant city. There was no further contact with the local broadcaster. All communications were with Disney cable network personnel. Disney refused to grant retransmission consent unless the cable operator launched, and paid for, a new satellite network, Soapnet.

Disney did not limit its demands to launching Soapnet to the market served by the O&O ABC. Again, in that market the cable operator serves a few thousand customers. Instead, Disney conditioned retransmission consent to the launch of Soapnet in a market several states away, where the cable operator serves several times that many customers.

To obtain consent to carry essential ABC programming in one market, Disney gave the small cable company no choice but to carry Soapnet in other markets. The Soapnet contract extends for a number of years beyond the 2000 - 2002 election period. Aggregate payments exceed a quarter million dollars. A representative of the cable operator stated "No way would we have agreed to carry Soapnet, but we needed ABC programming in that one market."

This case demonstrates three consequences of the overwhelming market power of media conglomerates like Disney/ABC over independent cable companies:

- Using retransmission consent rights in one market to force carriage of undesired programming.
- Using retransmission consent rights in one market to increase the costs of

cable services in other markets.

- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

The following example demonstrates another way that Disney uses retransmission consent to force unwanted programming and costs on smaller market cable customers.

b. Tying of retransmission consent for ABC in one market to company-wide carriage of the Disney Channel on basic.

An ACA member serving subscribers in small communities in several states faced the following situation in seeking consent to retransmit an O&O ABC station. For the 2000 - 2002 election period, the broadcaster elected retransmission consent, then sent the cable operator a three-year retransmission consent agreement. Within 30 days, the cable operator returned the agreement to the broadcaster with minor comments. During this same period, Disney Channel representatives approached the cable operator to renegotiate terms of carriage for the Disney Channel.

The broadcaster then declined to execute the retransmission consent agreement it had previously offered to the cable operator. Instead, the broadcaster granted rolling 30-day extensions of retransmission consent. It then became clear to the cable operator that the broadcaster would not, or could not, execute the three-year agreement that it had originally provided, until the Disney Channel concluded negotiations.

At issue is carriage of Disney on basic. The cable operator currently offers the Disney Channel as a premium service. The cable operator bases this decision in part on customer demand and in part on cost – the Disney Channel charges one of the highest per subscriber license fees of any programming carried by the cable operator. Currently less than 10% of the cable operator's customers request the Disney Channel. Those customers that want the channel pay extra. Those customers that do not, pay less.

Disney Channel is demanding company-wide carriage of Disney on basic. In other words, as a condition of obtaining a settled retransmission agreement for ABC in one market, Disney will require all basic customers in all markets to pay for the Disney Channel. Disney's proposal would result in substantial increases in the cost of cable in each of the smaller markets in question. The cable operator estimates that company-wide, Disney's proposal would increase programming costs by nearly $1.5 million per year.

This situation demonstrates three consequences of the overwhelming market power of media conglomerates like Disney/ABC over independent cable companies:

- Using retransmission consent rights in one market to increase the costs of cable services in many markets.
- Using retransmission consent rights in one market to force carriage of satellite services in many markets.
- Control of retransmission consent rights by satellite programming entities

instead of the broadcast licensee.

As described in the next example, Fox Network/News Corp. is employing similar tactics.

2. Fox Network/News Corp.

Tying of retransmission consent for Fox Network to carriage of Fox Sports, Fox News, FX, National Geographic Channel, and Fox Health Channel.

News Corp. controls O&O Fox Network broadcast licensees, along with multiple satellite programming services. ACA members are increasingly facing costly tying arrangements as a condition of carriage of O&O Fox Network stations.

An ACA member serving small communities in several states faced the following conduct by Fox. This case provides a disturbing example of the network owner's manipulation of the retransmission consent process and its disregard for the consequences on smaller market cable systems and their customers.

Shortly before the 2000 – 2001 retransmission consent election cycle began, the cable operator received a rate increase notice from a Fox regional sports network. During a period where the inflation rate was about 3%, Fox Sports sought a rate increase of over 75%. The cable operator informed Fox Sports representatives that it could not carry the network at that cost.

As an alternative, Fox proposed carriage of Fox Sports at a lower rate, so long as the cable operator agreed to carry, and pay for, Fox News, FX, and the

National Geographic Channel. The cable operator declined this alternative as well, due to the cost and the difficulty in reconfiguring channel line-ups in its smaller systems.

While these negotiations were underway, an O&O Fox Network station carried by the cable operator delivered a retransmission consent election for the 2000 - 2002 election period. In earlier election periods, the cable operator and the station had promptly concluded negotiations for mutually acceptable terms of carriage. The cable operator received no indication initially that the retransmission consent process would differ from before.

When the negotiations with Fox Sports deadlocked, however, the Fox team brandished the retransmission consent lever. Months into the negotiations, Fox Sports representatives took the position that if the cable operator did not agree to carry Fox Sports under one of the two alternatives proposed by Fox, then the Fox broadcast licensee would not grant retransmission consent.

Faced with the loss of essential broadcast programming, including local interest programming carried exclusively on the Fox broadcast station, the cable operator had no choice but to accept Fox's deal. The cost to subscribers? The cable operator estimates at least an additional $1.5 million per year.

Unfortunately, the story did not end there. To add insult to injury, after the cable operator agreed to the terms of carriage for Fox Sports, Fox took the position that retransmission consent would not be part of the deal unless the cable operator also carried yet another additional satellite network – the Fox

Health Channel – at a rate 100% higher than the previous year.

It is important to note that during the same period, the cable operator received a retransmission consent election from a Fox Network affiliate, not an Fox O&O, in an adjacent market. No tying demands were made by the affiliate, and the parties promptly concluded negotiations.

This situation demonstrates three consequences of the overwhelming market power of media conglomerates like Fox Network/News Corp. over independent cable companies:

- Using retransmission consent rights in one market to increase the costs of cable services in many markets.
- Using retransmission consent rights in one market to force carriage of satellite services in many markets.
- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

3. Hearst-Argyle/ABC

Tying of retransmission consent for ABC to carriage of Lifetime.

Hearst-Argyle controls multiple broadcast licenses and satellite programming services including Lifetime. ACA members have faced widespread use of tying arrangements by Hearst-Argyle with costly consequences for smaller market cable systems and their customers. An ACA member serving less than 2,000 customers faced the following situation.

The cable operator obtained ABC programming in its market from an ABC

affiliate controlled by Hearst-Argyle Television Inc. The broadcaster elected retransmission consent for the 2000 - 2001 election cycle. In earlier cycles, representatives of the cable operator and the station had promptly concluded agreements for retransmission consent on mutually agreeable terms. Not the case during the 2000 - 2001 election cycle. The difference? Lifetime representatives took over negotiations. Hearst Corp. and The Walt Disney Company reportedly own Lifetime.

Lifetime's representative proposed the following alternative: Put on Lifetime and pay $0.30 per customer per month or pay $0.50 per customer per month for retransmission consent for ABC only. As the cable operator served less than 2,000 customers and it had no choice but to carry ABC network programming, Lifetime had no incentive to negotiate. And it did not.

As a consequence of the cost increases related to forced carriage of Lifetime, a channel that no customer asked for, the cable operator had to institute a rate increase of 5%.

The small cable operator feels that abuse of retransmission consent by companies like Hearst-Argyle is undermining his business. He remarked, "we have a right to make the business decisions to program our systems, and the network conglomerates are taking that away. It feels like blackmail to put another channel on to get essential broadcast programming that's free over the air."

This situation demonstrates three consequences of the overwhelming

market power of media conglomerates like Hearst-Argyle over independent cable companies:

- Using retransmission consent rights to increase the costs of cable services in smaller markets.
- Using retransmission consent rights to force carriage of undesired satellite services in smaller markets.
- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

The following examples show that GE/NBC is employing similar tactics.

4. GE/NBC

Multi-industry conglomerate GE controls NBC stations in many markets along with several affiliated satellite programming services. ACA members are facing increasing demands by O&O NBC stations to carry additional satellite programming as a condition of retransmission consent, with costly consequences for smaller market cable customers.

a. Tying of retransmission consent for NBC/ refusal to deal with small operator competing with major MSO.

One ACA member described the following situation. The cable operator operates one small system serving less than 2,000 customers. The system competes with a top three MSO. The MSO's system carries both the in-market NBC affiliate, and an O&O NBC station from an adjacent market. The small

operator carries the in-market NBC affiliate and sought consent to carry the adjacent O&O NBC station as well.

A representative of the cable company contacted the senior executive at the station. After initial conversations, the cable operator was informed that all discussion must take place with NBC cable network representatives in a distant city. NBC cable then conditioned carriage of the broadcast signal on the following:

- Carriage of, and payment for, MSNBC.
- Carriage of, and payment for, CNBC.
- Carriage of Valuevision.
- Payment of a substantial multi-year surcharge for additional Olympic coverage on MSNBC and CNBC.

The small cable operator indicated that it could not accommodate the additional channels and cost. NBC cable refused to negotiate further. As a result, the cable operator still does not offer the NBC station offered by its major MSO competitor.

b. Tying of retransmission consent for NBC to carriage of MSNBC, CNBC, and payment of Olympics surcharge.

Another ACA member faced a similar situation in dealing with an O&O NBC station in another market. As conditions of carriage of the NBC broadcast signal for three years, the cable operator was required to sign multi-year

agreements to carry MSNBC, CNBC, Valuevision, and pay a substantial surcharge for the Olympics.

This situation provides a telling example of how corporate parents are supplanting broadcast stations in the retransmission consent process. The representative of the cable operator handling this negotiation had developed over the years a good working relationship with the senior management of the broadcast station. But in the 2000 – 2001 election cycle, the station did not participate in the negotiations. NBC cable network representatives reportedly stated that they now spoke for the station. The station's general manager reportedly confided that the "station was a pawn", and he could do nothing.

This situation demonstrates three consequences of the overwhelming market power of media conglomerates like GE/NBC over independent cable companies:

- Using retransmission consent rights to increase the costs of cable services for smaller cable systems.
- Using retransmission consent rights to force carriage of satellite services.
- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

For ACA members, the above examples of retransmission consent tying provide just a glimpse of increasing marketplace failure. When seeking retransmission consent for network programming from companies like Disney,

Fox, Hearst-Argyle and NBC, independent cable operators have little or no bargaining power. The concept of "retransmission consent negotiations" does not apply. Smaller cable companies must deliver network programming to their customers, and the in-market network broadcaster has a virtual monopoly over the service. The media conglomerates discussed above are fully exploiting their monopoly power through retransmission consent tying.

The consequences? Forced carriage of unwanted programming, higher costs to consumers, and decreased programming diversity. These problems are exacerbated by onerous nondisclosure terms imposed as part of retransmission consent tying arrangements, shielding the conduct of network owners from scrutiny.