

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
 )  
Review of the Commission's Program ) **MB Docket No. 07-198**  
Access Rules and Examination of )  
Programming Tying Arrangements )

To: The Commission

**COMMENTS OF THE COMMUNITY BROADCASTERS ASSOCIATION**

1. The Community Broadcasters Association ("CBA") hereby submits its comments in response to the Commission's Notice of Propose Rulemaking ("NPRM") in the above-captioned proceeding, FCC 07-169, released October 1, 2007.<sup>1</sup> CBA is the trade association of the nation's Class A and Low Power Television stations (together referred to herein as "LPTV") and represents the LPTV industry in regulatory, judicial, and legislative proceedings.

2. CBA's comments address an issue of major significance to LPTV stations, which is whether the Commission should prohibit the owner of popular programming from conditioning the grant or sale of distribution rights to a cable television system on the cable system's also carrying or buying other programming that the cable operator might otherwise choose not to carry.<sup>2</sup> The NPRM recognizes that such conditioning of program carriage rights is a common practice. CBA urges the Commission to prohibit the practice, because it deprives the public of a maximum diversity of program voices, and it enhances the monopoly power of large businesses at the expense of small businesses.

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<sup>1</sup> The deadline for filing Comments was extended until January 4, 2008, in a Public Notice, DA 07-4668, released November 20, 2007.

<sup>2</sup> See NPRM at par. 119 *et seq.*

3. As the Commission is well aware, very few LPTV stations have mandatory cable carriage rights, because Section 614(h)(2) of the Communications Act restricts must-carry rights to only stations in the smallest communities in counties with no full power television service. Most LPTV stations must thus earn cable carriage based on presenting the merits of their programming to the cable operator. Convincing a cable operator to carry a channel that sells advertising in competition with the cable operator's own local sales is a daunting enough challenge to begin with; but if cable operators are to be believed, the cable access problem is seriously exacerbated when scarce capacity is used up by forced carriage of channels that cable operators must accept in order to obtain the right to carry major television networks and the most popular cable channels. It would be impossible to count up how many times cable operators have turned down requests to carry LPTV stations because there is "no room at the inn" -- "we would like to carry you, but we don't have any available channel capacity."<sup>3</sup>

4. In other words, the burden on an LPTV station is significantly increased by the scarcity of cable channel capacity created by acceptance of multiple channels forced by the owners of the most popular broadcast and cable programming.<sup>4</sup> The result is to concentrate programming power in the hands of a few and to silence a multiplicity of new voices that have

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<sup>3</sup> While LPTV operators often view these claims by cable operators with some skepticism, because cable operators seem to be able to find room for something that they want to carry badly enough (especially channels in which they have an ownership or other economic interest), the fact remains that vacant analog cable channels are not commonplace.

<sup>4</sup> It should be noted that the practice is not limited to popular network-affiliated broadcast stations in negotiating retransmission consent. Major cable channel programmers engage in the same practice to force open the marketplace for new channel ventures they want to start up.

merit and strive to be heard.<sup>5</sup> It stifles small business enterprises that this country has always tried to support. Thus both content and economic diversity suffer.

5. CBA does not see why tying carriage of one channel to carriage of others is any different from the motion picture “block-booking” practice that was soundly struck down by the Supreme Court as a Sherman Act<sup>6</sup> antitrust violation in *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). As the Court explained in that case, the ability of the owner of a popular movie or program channel gains its bargaining power solely by virtue of its ownership of a copyright on content.<sup>7</sup> Similarly, without the copyright barrier, a cable operator could carry any programming it liked. The Court noted with approval “[t]hat enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials.”

6. The Court continued:

“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors...But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed

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<sup>5</sup> CBA is aware of the arguments made in the past by specialized program services, including minority-owned services, that they need the helping hand of programming giants to gain access to cable and reach the minimum critical economic mass necessary to survive. However, LPTV stations also need to reach a critical economic mass, and the inability to win cable carriage cuts off access to a majority of TV receivers and thus strangles LPTV operators. LPTV stations specialize in serving local and specialized audiences, including minority audiences; so their programming on the whole has as much or more merit as anyone else’s. Moreover, specialized cable channel operators may win an alliance with a major program source by selling an interest in their service to the major source, a practice that simply enhances the economic power of the majors and ought not to be the favored method of gaining cable access as a public interest matter.

<sup>6</sup> 15 USC Secs. 1, 2.

<sup>7</sup> As the Supreme Court described it, “[b]lock-booking is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period.” *Paramount, supra*.

only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirements that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have...the policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest, in a practice which contravenes the policy of the anti-trust laws, receive judicial sanction.

The Court concluded: “We do not suggest that films may not be sold in blocks or groups, *when there is no requirement, express or implied, for the purchase of more than one film.* All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted [*emphasis added*].”

7. The parallel to the practice of tying carriage of one program channel to carriage of other channels is remarkably similar to the forbidden motion picture block-booking practice -- so much so, in fact, that CBA submits that there can be no distinction in how the legal principle must be applied. Tying carriage of one program channel to carriage of others is an abuse of the copyright on the first channel, in violation of the Sherman Act. The practice must not be tolerated by the Commission, not only because of antitrust law but also because, contrary to sound public policy and the public interest, it stifles diversity of voices and the ability of small businesses to succeed based on the inherent merit of their product. Both the public and industry suffer where copyright holders reach for benefits beyond those to which they are legally entitled.

Fletcher, Heald & Hildreth, PLC  
1300 N . 17<sup>th</sup> St., 11<sup>th</sup> Floor  
Arlington, VA 22209-3801  
Tel. 703-812-0404  
Fax 703-812-0486

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Respectfully submitted,

  
Peter Tannenwald

Counsel for the Community  
Broadcasters Association