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

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

Wholesale Packaging of Video Programming: Reply to ACA and Dish Network

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A. Alleged Tying

The Commission requested information on whether cable programming suppliers are "tying carriage of their desirable channels to carriage of other less desirable owned or affiliated channels." (NPRM ¶ 130.) Comments filed by the American Cable Association ("ACA") provided specific information about alleged tying.[1] ACA wrote:

> When dealing with small and medium-sized cable companies, owners of "must have" satellite channels almost invariably tie or bundle those channels with less desired (or undesired) channels. Table 1 [in the ACA Comments] summarizes the range of satellite channel tying and bundling arrangements reported by ACA members….As shown, across the ACA members surveyed, the rights to distribute 13 of the most powerful channels or their HD counterparts, are tied to or bundled with obligations to distribute at least 60 other channels. (ACA Comments, pp. 5-6, emphasis omitted)

I understand ACA's Table 1 to contain examples of bundles of programming that its members were allegedly required to carry as a condition for carrying various "desired" channels. According to ACA, each of four networks offered by Viacom, Fox and NBCU—MTV, Nickelodeon, Fox Sports, and USA Network—was allegedly available only if a cable system agreed to take a bundle of other networks.[2] I have analyzed da-

[1] In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-198, American Cable Association, "Comments," January 3, 2008.

[2] ACA also alleged a tie involving USA HD, but the data available to me do not distinguish between HD and non-HD carriage of USA Network.

ta provided by Viacom, Fox and NBCU to determine whether the data support these specific allegations.

1. Nickelodeon is allegedly tied to a bundle consisting of TV Land, Country Music Television (CMT), MTV, VH1, Spike, Noggin, GAS, Nicktoons TV, MTV 2, MTV Hits and VH1 Classic. Viacom provided data on the carriage of 18 Viacom networks by 205 U.S. cable systems with fewer than 10,000 subscribers that contract for network carriage directly with Viacom, not through the NCTC.[3] Nickelodeon is carried by 139 of these systems. Of these, only three also carry the bundle of networks that ACA alleges cable systems are required to carry as a condition for carrying Nickelodeon. In other words, 98 percent of the small systems taking Nickelodeon do not take the bundle that is allegedly tied to it. It is clearly not the case that Viacom requires cable systems to carry this bundle as a condition of carrying Nickelodeon.

Far from the entire bundle being required, there is no evidence that any individual network in ACA's bundle is required as a condition for carrying Nickelodeon. None of the individual networks in ACA's purported tied bundle is carried by all the systems carrying Nickelodeon. Nor is it the case that systems are required to take a substantial number of the networks in ACA's bundle. For instance, only 13 percent of the systems take five or more of the eight networks in the bundle.

2. MTV is allegedly tied to a bundle consisting of TV Land, Country Music Television (CMT), VH1, Nickelodeon, Noggin, VH1 Soul, CMT Pure Country and MTV Jams. The Viacom data described above showed that among the 205 small cable systems purchasing Viacom networks directly from Viacom, 62 carry MTV but only two of these 62 carry the bundle of networks to which MTV is allegedly tied. Most (97 percent) of the systems taking MTV do not take the bundle of networks allegedly tied to MTV. Thus, Viacom does not condition the carriage of MTV on the carriage of this bundle. Nor are the individual networks in ACA's bundle tied to MTV. None of the individual networks in ACA's purported tied bundle is carried by all the systems carrying MTV. Only 28 percent of the systems take five or more of the 11 networks in ACA's bundle.

3. Fox Sports allegedly is available only to cable systems also taking National Geographic, Fox Soccer Channel, Fox Business Network, Fox College Sports, Fox Reality, FUEL TV, Big Ten Network and Fox Movie Channel. Fox supplied data identifying each

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[3] NCTC is a buying cooperative made up of small and medium-size cable operators. See its web site (http://www.cabletvcoop.org/abouts.asp).

of the cable systems carrying its networks. Due to the Commission's focus on "small" systems, I restricted the analysis to systems owned by MSOs with fewer than 400,000 subscribers.[4] This restriction eliminated the systems owned by the ten largest MSOs.[5] I identified 3,337 small systems carrying one or more of Fox's regional sports networks that make up Fox Sports Net. Of these, only two carry all of the networks that are allegedly required for a system wanting to carry a Fox regional sports network.[6] In other words, almost no systems carrying one or more Fox regional sports networks carries the bundle of networks with which they are allegedly tied. The alleged bundle of networks is clearly not a precondition for carrying a Fox regional sports network. Furthermore, none of the individual networks in ACA's purported bundle is required as a condition for carrying a Fox regional sports network. None of the individual networks in ACA's purported tied bundle is carried by all the systems carrying a Fox regional sports network. In fact, over a third of the systems carrying a Fox regional sports network do not carry any of the seven networks I studied in ACA's bundle, and only 20 percent carry four or more of these seven networks.

4. USA Network allegedly is tied to a bundle consisting of MSNBC, CNBC, Sci Fi Channel, Comedy Central and Bravo.[7] I note at the outset that this reported bundle throws further doubt on ACA's claims, since it is not plausible that NBCU required systems to

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4 The Commission has elsewhere used this definition to delineate small cable systems. See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266; MM Docket No. 93-215, Released June 5, 1995; Adopted May 5, 1995, ¶ 3. Note that the 400,000 subscriber cut-off applies to the number of subscribers on all of an operator's systems, whereas the 10,000 subscriber level used in describing the Viacom data refers to the number of subscribers on each individual system.

5 The largest 25 MSOs and their total subscriber counts are available from the NCTA (citing Kagan data) at http://www.ncta.com/ContentView.aspx?contentId=73 (visited November 15, 2007). The MSOs eliminated from the analysis are Comcast, Time Warner, Cox, Charter, Cablevision, Bright House, Suddenlink, Mediacom, Insight and CableOne.

6 The data immediately available do not permit me to test whether systems carrying a Fox regional sports network were also carrying Fox Business Network. For purposes of these calculations, I applied the test using only seven of the eight networks in ACA's purported bundle. If I had included Fox Business Network in the test, the number of systems carrying a Fox regional sports network and the eight-network bundle could decrease or remain the same but could not increase.

7 ACA also alleges that an Olympics surcharge was required from cable systems wanting to carry USA Network.

carry a non-NBCU network (Comedy Central, owned by Viacom) as a condition of carrying USA Network. NBCU provided data showing each cable *operator* (including MSOs) taking any NBCU network on any of its systems and specifying which networks were carried. I focused on 271 cable operators with fewer than 400,000 subscribers that carry at least one NBCU network but that do not contract for any NBCU networks through NCTC. Of the 161 operators carrying USA Network, 15 carry the bundle of NBCU networks ACA alleges is tied to USA Network.[8] Thus, small operators desiring to carry USA Network are not required to take the bundle ACA alleges is tied to it. In fact, none of the individual networks in ACA's bundle must be carried as a condition of carrying USA Network. More than half the operators carrying USA Network do not carry any of the networks in the ACA bundle.

Some systems and operators take only a single network from any given program supplier, but it is common to carry multiple networks from a program supplier. As I described in my earlier report, program suppliers often provide price incentives to encourage cable systems to carry additional networks. Using data provided by Viacom, Fox and NBCU, I was able to confirm that there are a few systems (or operators) carrying the programming choices described in ACA's Table 1. However, the data do not show that systems or operators were required to carry a particular set of networks as a condition for carrying another "desired" network, because most systems (or operators) carrying the "desired" network do not carry the allegedly tied bundle ACA describes. I have only investigated the alleged tying for the three program suppliers for which I have the suppliers' own data. However, I strongly suspect that a study of ACA's other alleged bundles would similarly conclude that the network bundles are not tied to the "desired" networks.

B. The Sale of Video Programming to MVPDs is not Concentrated

ACA provides data (its Table 6) intended to show that the sale of video programming to MVPDs is highly concentrated. Table 6 reportedly shows that conglomerates control at least 75 percent of the top 50 non-premium news and entertainment networks, ranked by number of subscribers. (ACA Comments, pp. 15-16.) ACA's conten-

8 If I had included the Olympics surcharge as another essential part of the bundle, the number of operators taking USA Network and the full alleged bundle of NBCU programming (excluding Comedy Central) would fall to 14.

tion is factually incorrect, and the data it presents show that the sale of video programming to MVPDs is relatively unconcentrated.

I assume that the five program suppliers which supposedly have a 75 percent share are Disney, NBC Universal, News Corp., Time Warner and Viacom. ACA's Table 6 identifies these program suppliers with 33 of the top 50 networks, or 66 percent. Even this figure is overstated, because it includes three networks (A&E, History and TV Guide) in which none of these five program suppliers has a controlling interest. Economists often use a measure called the Hirschman-Herfindahl Index ("HHI") to summarize the level of concentration.[9] The highest degree of concentration—one single seller—would have an HHI of 10,000. In their *Horizontal Merger Guidelines,* the U.S. Department of Justice and Federal Trade Commission characterize industries with HHIs below 1,000 as unconcentrated and those with HHIs between 1,000 and 1,800 as moderately concentrated. [10] Focusing only on the top 50 networks reported by ACA, the HHI associated with the network ownership is only 920, putting it in the unconcentrated range.[11] See Figure 1. Based on my experience with many industries, this indicates a fairly low level of concentration.

[9] HHI is calculated by squaring the share of each firm and then summing the squared shares. For instance, for firms with shares of 40, 30, 20 and 10 percent, respectively, the HHI would be (1,600 + 900 + 400 + 100) = 3,000.

[10] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines,* (revised April 8, 1997), Section 1.5.

[11] Each network in Figure 1 was "attributed" to a single owner, and each network in the top 50 was assigned the same 2 percent share. Most often, the attributed owner had a majority ownership in the network. In some cases, one owner was chosen from two owners with 50 percent shares. In such cases, ownership was attributed to the owner with the larger number of other networks. Networks for which no ownership information could be determined, and networks with no owner above 49 percent, were assumed to be owned independently. Following this procedure, and correcting ACA's ownership attribution errors, yields the attributable owners shown in Appendix 3 of my previous report.

Figure 1. Ownership Shares of Networks in ACA's "Top Fifty Channels"

	Number of Networks	Share (%)
A&E	2	4
Cablevision	1	2
Comcast	3	6
Cox	1	2
Crown Media	1	2
Discovery	3	6
Disney	5	10
E.W. Scripps	2	4
Fox	4	8
Landmark	1	2
Liberty Media	2	4
NBC Universal	6	12
NCS	2	4
Time Warner	7	14
Tribune	1	2
TV Guide	1	2
Viacom	8	16
Total	50	100
HHI		920

Sources: ACA Table 6; "Wholesale Packaging of Video Programming," Appendix 3.

A more complete picture of concentration in wholesale video programming sales takes into account the many nationally distributed basic cable networks outside the top 50.[12] As I showed in my previous report (Figure 14), the HHI indicating concentration of ownership measured by the number of networks, the measure ACA uses, is only 235. This and other measures of concentration, based on available data, show that no wholesale program supplier accounts for as much as 25 percent of the business, and that concentration levels are, at most, in the middle to low end of the moderately concentrated range.

[12] Video content not currently purchased by MVPDs, as well as content in other than standard video formats, may belong in the same relevant market as video programming content purchased by MVPDs, because it is possible that MVPDs could and would substitute some such content in the event that video prices increased.

Dish Network's Comments also argue that the sale of video programming at the wholesale level is concentrated.[13] Dish Network notes that each of the top 15 networks (ranked by prime time ratings) is "affiliated with one of the handful of major media companies." However, this "handful" includes seven different owners, each with (on average) about two of the top 15 networks.[14] This ownership pattern is not highly concentrated, and an analysis of audience shares taking into account networks outside the top 15 confirms this finding. (See Figure 14 of my previous report.)

Dish Network then presents (in its Table Two) the channels carried by the Time Warner-owned cable system in Beverly Hills, California in its "standard" package and remarks, "Excluding the local broadcast and PEG channels required by law to be carried, virtually all channels that populate basic cable offerings are owned and controlled by" a "handful of large cable companies and broadcasters."[15] Looking at Dish Network's Table Two, however, one finds that the 42 cable networks listed there are owned by 13 different entities.[16] Measuring concentration using the number of networks in the Beverly Hills Time-Warner cable system's "standard" package, as is suggested by Dish Network's comments, the HHI is 1,111, which indicates relatively low concentration. See Figure 2. As noted previously, a fuller picture of concentration in the sale of video programming to cable and satellite operators given in my previous report shows an industry structure consistent with a high degree of competition.

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13 In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-198, "Comments of Dish Network," January 4, 2008, p. 9.

14 Dish Network's list is incorrect at several points. Following the attribution rules described in footnote 11, the owners and their networks are A&E (History Channel), Discovery Holding Co. (Discovery Channel), Disney (Disney Channel, ESPN, Lifetime Television and Toon Disney), Fox (Fox News), NBCU (Sci Fi Channel and USA Network), Time Warner (TBS and TNT) and Viacom (Nickelodeon/Nick at Nite, MTV and Spike TV). Nickelodeon and Nick at Nite should be considered a single network.

15 "Comments of Dish Network," p. 9.

16 I have again applied the attribution rules described in footnote 11.

Figure 2. Ownership Shares of Networks in "Time Warner Cable Standard Cable Line-Up"

	Number of Networks	Share (%)
A&E	2	5
Cablevision	1	2
Comcast	3	7
Discovery	2	5
Disney	5	12
E.W. Scripps	2	5
Fox	5	12
Landmark	1	2
Liberty Media	1	2
NBC Universal	6	14
Time Warner	6	14
Univision	1	2
Viacom	7	17
Total	42	100
HHI		1,111

Sources: "Dish Network Comments," Table Two; "Wholesale Packaging of Video Programming," Appendix 3.

C. Conclusion

Neither ACA nor DISH Network provides data upon which the Commission can rely for the purpose of imposing regulation of wholesale bundling of programming sold to MVPDs. Contrary to ACA's claims, there is no evidence of all-or-nothing tying of network bundles to "desirable" cable networks. Contrary to ACA's and Dish Network's claims, the sale of cable networks to MVPDs is not highly concentrated.