

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

In the Matter of )  
 )  
Annual Assessment of the Status of ) MB Docket No. 07-269  
Competition in the Market for the )  
Delivery of Video Programming )  
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**REPLY COMMENTS**



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## I. Introduction.

In its initial Comments, the American Cable Association (“ACA”) put forth evidence showing the challenges that smaller cable operators face in obtaining the right to retransmit the signals of broadcasters at fair and reasonable prices, terms, and conditions.<sup>1</sup> ACA files this Reply to highlight additional evidence demonstrating the broken retransmission consent marketplace. In addition, ACA underscores how programmers’ tiering and penetration requirements increase the cost of cable operators’ lowest priced tiers and reduce consumer choice. Finally, ACA adds to this record information about the public interest harms of video content providers coercing operators into accepting “closed Internet” business models.

**American Cable Association.** Small markets and rural areas across the country receive video, high-speed broadband, and phone services from more than 900 small and medium-sized independent operators represented by ACA.

ACA member operators range from family run businesses serving a single town, to multiple system operators with small systems in small markets. ACA member systems are located in all 50 states. More than half of ACA’s members serve fewer than 1,000 subscribers.

ACA’s membership is comprised of cable, phone, and fiber-to-the-home operators and municipalities, who deliver affordable basic and advanced services, such as high-definition television, next generation Internet access, and digital phone services

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<sup>1</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, MB Docket No. 07-269, Comments of the American Cable Association at 2 (filed July 29, 2009) (“ACA Comments”).

to more than 7 million households and businesses, some of whom have no other means of receiving these vital services.

These independent cable operators face unique challenges in providing competitive video, broadband, and telephony services to smaller and rural markets. Providing advanced services in smaller and rural markets is a costly and difficult undertaking in low-density markets, as the cost of system builds and upgrades cannot be spread among a large subscriber base.

**II. Broadcasters can secure unjustifiable increases in retransmission consent fees and discriminate against smaller operators.**

In its initial Comments, ACA described how broadcasters' retransmission consent practices harm video competition and broadband deployment – especially in the small markets and rural areas served by ACA members.<sup>2</sup> In particular, the Clarus Research Group (“CRG”) survey of ACA's membership revealed the extent that broadcasters demand unjustifiable increases in fees, discriminate in the prices charged based on an operator's size, and seek non-cash and in-kind compensation during retransmission consent “negotiations.” Since that filing, additional evidence has become public to further support these claims. Moreover, after reviewing the comments filed in this proceeding, it is readily apparent that the harmful effects of these retransmission consent practices extend well beyond ACA's membership.

**Unjustifiable Price Increases.** According to second quarter (April-June) 2009 financial reports of the publicly traded broadcasters, little has changed since ACA noted

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<sup>2</sup> *ACA Comments* at 4-11.

their astronomical first quarter (January-March) 2009 retransmission consent revenue gains.<sup>3</sup> The following is a sampling of the latest financial data:<sup>4</sup>

- **Gray Television, Inc.** Retransmission consent revenue up 394%.<sup>5</sup>
- **Journal Communications, Inc.** Retransmission consent revenue up 150%.<sup>6</sup>
- **Meredith Corporation.** Retransmission consent revenue up 75%.<sup>7</sup>
- **Nexstar Broadcasting Group.** Retransmission consent revenue up 68%.<sup>8</sup>

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<sup>3</sup> *ACA Comments* at 5-6.

<sup>4</sup> Other publicly traded broadcasting companies reported similarly positive second quarter retransmission consent revenues. See, e.g., Press Release, Belo Corporation, Television Company Belo Corp. (BLC) Reports Results for Second Quarter 2009, available at <http://www.belo.com/pressRelease.x2?release=20090731-1862.html> (“Retransmission revenue totaled \$11.4 million in the second quarter of 2009 and represents almost 8 percent of the Company’s total revenue. The Company expects to achieve approximately \$41 million in full year 2009 retransmission revenue.”) (last visited Aug. 28, 2009); Press Release, E.W. Scripps Co., Scripps Reports Second-Quarter Results, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=98686&p=irol-newsArticle&ID=1318965&highlight=> (“Other [revenue], which includes fees for carriage of the stations on cable systems, rose 41 percent to \$6.5 million.”) (last visited Aug. 28, 2009); and Press Release, Sinclair Broadcasting Group, Sinclair Report Second Quarter 2009 Results, available at [http://www.sbgj.net/site\\_mgr/temp/FINALT%20Q2%20%2009%20Press%20Release\\_srzq3lf2.shtml](http://www.sbgj.net/site_mgr/temp/FINALT%20Q2%20%2009%20Press%20Release_srzq3lf2.shtml) (“Revenues from retransmission consent agreements were \$23.6 million in the second quarter 2009 as compared to \$18.7 million in the second quarter 2008.”) (last visited Aug. 28, 2009).

<sup>5</sup> See Gray Television, Inc., Securities and Exchange Commission Form 10Q, available at <http://www.graycommunications.com/phoenix.zhtml?c=104784&p=irol-SECText&TEXT=aHR0cDovL2NjYm4uMTBrd2l6YXJkLmNvbS94bWwvZmlsaW5nLnhtbD9yZXBvPXRlbnmaXBhZ2U9NjQ1NTY3MiZhdHRhY2g9T04mc1hCUkw9MQ%3d%3d> (last visited Aug. 28, 2009).

<sup>6</sup> See Journal Communications, Inc., Securities and Exchange Commission Form 10Q, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=145779&p=irol-SECText&TEXT=aHR0cDovL2NjYm4uMTBrd2l6YXJkLmNvbS94bWwvZmlsaW5nLnhtbD9yZXBvPXRlbnmaXBhZ2U9NjQ0ODA1MiZhdHRhY2g9T04mc1hCUkw9MQ%3d%3d> (last visited Aug. 28, 2009).

<sup>7</sup> See Press Release, Meredith Corporation, Meredith Reports Fiscal 2009 and Fourth Quarter Results, available at [http://meredith.mediaroom.com/index.php?s=press\\_releases&item=499](http://meredith.mediaroom.com/index.php?s=press_releases&item=499) (“Revenues from retransmission fees more than doubled in fiscal 2009 from the year-ago period, and grew nearly 75 percent in the fiscal fourth quarter.”) (last visited Aug. 28, 2009).

<sup>8</sup> See Press Release, Nexstar Broadcasting Group, Inc., Nexstar Broadcasting Reports Second Quarter Revenue of \$62.2 Million Reflecting 56% Rise in Total Retransmission E-Media and Management Fee Revenue, available at [http://www.nexstar.tv/index.php?option=com\\_content&view=article&id=1161:nexstar-broadcasting-reports-second-quarter-revenue-of-622-million-reflecting-56-rise-in-total-retransmission-e-media-and-management-fee-revenue&catid=40:cat-newsarticles&Itemid=97](http://www.nexstar.tv/index.php?option=com_content&view=article&id=1161:nexstar-broadcasting-reports-second-quarter-revenue-of-622-million-reflecting-56-rise-in-total-retransmission-e-media-and-management-fee-revenue&catid=40:cat-newsarticles&Itemid=97) (“Second quarter retransmission consent

- **LIN TV Corporation.** Retransmission consent revenue up 67%.<sup>9</sup>

These unjustifiable increases in retransmission consent revenue provides further evidence of the market power broadcasters exploit through the broadcast exclusivity regulations – network non-duplication and syndicated exclusivity<sup>10</sup> – as well as through the contracts with their parent networks that ensure that they do not face competition from network affiliated stations from other markets. When dealing with small cable companies in particular, broadcasters abuse their market power to extract a “price” for retransmission consent that has no basis in a free market.

And respected market analysts believe it will only get worse for MVPDs. As noted by ACA in its initial Comments, SNL Kagan projects retransmission consent fees will increase to \$1.2 billion by 2011, more than double the \$500 million paid in 2008.<sup>11</sup> Univision Communications alone recently announced that it expects to bring in as much as \$175 million in additional subscriber fees for retransmission consent in 2009, and more than \$350 million in retransmission consent fees over the next three to five years.<sup>12</sup>

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revenues increased 68.1% to \$7.9 million....”) (last visited Aug. 28, 2009).

<sup>9</sup> See Press Release, LIN TV Corp., LIN TV Corp. Announces Second Quarter 2009 Results and the Completion of an Amended and Restated Credit Agreement, *available at* [http://www.lintv.com/investor/images/pdfs/quarterly\\_reports/Q2%202009%20Earnings%20Release%20-%20FINAL.pdf](http://www.lintv.com/investor/images/pdfs/quarterly_reports/Q2%202009%20Earnings%20Release%20-%20FINAL.pdf) (“Retransmission consent fees increased 67% in the second quarter of 2009, compared to the same period in 2008.”) (last visited Aug. 28, 2009).

<sup>10</sup> 47 C.F.R. §§ 76.92 – 76.95 (network non-duplication); 47 C.F.R. §§ 76.101 – 76.110 (syndicated exclusivity).

<sup>11</sup> ACA Comments at 5.

<sup>12</sup> Laura Martinez, *Univision Predicts \$350M in Retrans Revenue*, MULTICHANNEL NEWS (Aug. 26, 2009), *available at* <http://www.multichannel.com/article/328970-Univision-Predicts-350M-in-Retrans-Revenue.php> (last visited Aug. 28, 2009).

As OPASTCO stated in their comments, broadcaster demands for retransmission consent fees “can quickly become debilitating to many small MVPDs.”<sup>13</sup> Corroborating ACA’s concerns about exclusivity regulations, OPASTCO’s comments noted how current regulations permit broadcasters to block access to potentially lower cost alternative sources of broadcast programming from nearby markets.<sup>14</sup> The end result – many small video providers are prevented from accessing substitute programming that would allow the marketplace to dictate the “price” for retransmission consent.<sup>15</sup>

**Price discrimination.** Again, all but one of the broadcast groups above reported lower retransmission consent revenue gains by percentage than the **271%** percentage year-to-year increase in retransmission consent fees paid by small cable operators.<sup>16</sup> This is further evidence of the retransmission consent price discrimination faced by independent operators.

As ACA noted in its initial Comments, no argument can be made that small cable companies present any harmful competitive threat to stations owned by, or affiliated with, the major networks.<sup>17</sup> Moreover, as the Commission has observed, network stations can threaten the survival of small cable companies.<sup>18</sup> With major MSOs and

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<sup>13</sup> *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, MB Docket No. 07-269, Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies at 12 (filed July 29, 2009) (“*OPASTCO Comments*”) (citations omitted).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See *ACA Comments* at 5 (ACA members reported that total annual retransmission consent fees paid by their respective companies surged from an average of \$31,622 in 2008 to \$117,392 in 2009 – an overall **271%** increase from year-to-year.).

<sup>17</sup> *Id.* at 12.

<sup>18</sup> See, e.g., *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors*

DBS providing the bulk of the viewing audience, a broadcaster can withhold its signal from a small cable company with little, if any, downside. A small cable company is therefore forced to acquiesce to unjustifiable prices and terms that are extraordinarily higher than those of larger operators, for fear of losing subscribers to these bigger competitors.

In providing information about the extraordinary year-over-year increases in retransmission consent revenue reported by the broadcasters and the discrimination in price faced by its members, ACA is not suggesting that smaller operators should be able to obtain the rights to retransmit broadcasters' signals for free, an assertion often leveled against the ACA by the National Association of Broadcasters.<sup>19</sup> Rather, ACA believes the broadcasters' astonishing increases in retransmission consent revenue, when compared to the CRG survey results showing ACA's members' retransmission consent costs are increasing at an even greater rate,<sup>20</sup> sufficiently demonstrates that smaller operators are bearing the brunt of the broken retransmission consent regime, and validates ACA's call for the Commission to conduct a data-driven investigation into retransmission consent price discrimination.

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*and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶¶ 176, 202 (2004) (“[W]e agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings.”) (“[W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for ‘must have’ programming....”).

<sup>19</sup> See, e.g., *In the Matter of Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103, Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, RM No. 11203, National Association of Broadcasters Reply to Comments to American Cable Association Petition for Rulemaking at 7 (filed May 3, 2005) (“[Small cable operators] argue, in essence, that broadcasters should give their content to cable systems for free wherever the system wants it.”).

**III. Programmers drive up the cost of cable operators' lowest priced tiers and limit consumer choice by demanding tiering and penetration requirements for access.**

ACA members continue to report that satellite programmers demand tiering and penetration requirements as conditions for access to all of the most popular channels.<sup>21</sup>

These onerous requirements adversely affect consumers by driving up the cost of cable operators' lowest priced tiers and limiting consumer choice.

Programmers typically require carriage of a channel, or channels, on the first or second-most highly penetrated tiers. Essentially, this means that to obtain the right to distribute a channel to *any* customer, the cable operator must distribute the channel to nearly *all* customers. Programmers may also require distribution of a channel, or channels, to a high percentage of subscribers, typically 85% to 95%. Either way, the result is the same. These practices sharply restrict the flexibility of small operators to tailor their channel offerings, while at the same time significantly increasing the cost of cable. These costs are then passed on to consumers in the form of increased cable rates.

To address the harms of tiering and penetration obligations, the Commission should prohibit programmers from requiring, as a condition of access, the distribution of a channel, or channels, on a specific tier or to a required percentage of video customers. In addition to preventing a significant increase in cable rates, prohibiting

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<sup>20</sup> See *ACA Comments* at 5.

<sup>21</sup> See, e.g., *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 the American Cable Association at 14 (filed Jan. 3, 2008).

these practices would provide cable operators with the flexibility to offer consumers a much wider variety of programming packages.

#### **IV. Video content providers mandating per subscriber fees for access to web-based content.**

In another Commission proceeding, ACA has noted the coercive efforts of Walt Disney Company's ESPN to convince MVPDs that are also broadband providers to carry the Internet-based ESPN360 service, and pay a per subscriber fee for their entire subscriber base, regardless of customer interest in the service.<sup>22</sup> ESPN leverages their market power in the satellite programming market to lure operators to accept these deals. Moreover, ACA has commented on how ESPN refuses to make the ESPN360 service available for direct purchase to customers of cable operators who refuse to accept ESPN360's onerous prices, terms, and conditions. ACA has also outlined the substantial public interest harms that will result if the Commission does not place limitations on these "closed Internet" business models.<sup>23</sup>

The record corroborates ACA on these points. In their comments, OPASTCO describes how rural MVPDs are being required to pay an additional fee based on the number of broadband subscribers they serve in order to obtain "must have" video content from programmers – regardless of whether or not these customers subscribe to

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<sup>22</sup> *In the Matter of a National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51, 24 FCC Rcd. 4342 (2009), Comments of the American Cable Association at 5 (filed June 8, 2009) ("ACA National Broadband Plan NOI Comments"); *In the Matter of a National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51, 24 FCC Rcd. 4342 (2009), Reply Comments of the American Cable Association at 4-6 (filed July 21, 2009) ("ACA National Broadband Plan NOI Reply Comments").

<sup>23</sup> *ACA National Broadband Plan NOI Comments* at 3-7; *ACA National Broadband Plan NOI Reply Comments* at 4-6.

video services.<sup>24</sup> As OPASTCO notes, this practice “forces rural broadband providers to either absorb the additional costs or raise their broadband rates, neither [of] which benefits consumers.”<sup>25</sup>

The strategy of leveraging one’s market power in the satellite programming market to establish a gated Internet community that could be opened or closed to certain consumers is not a novel idea. In December 2008, media conglomerate Viacom threatened to deny Time Warner Cable broadband subscribers access to Viacom’s websites because Time Warner Cable refused to sign a programming deal with the owner of BET, MTV, and Nickelodeon.<sup>26</sup>

Regrettably, these “closed Internet” business models are cheered by some financial analysts. A few months ago, media analyst Richard Greenfield of Pali Research issued a research note encouraging Internet content owners to aggressively seek monthly fees from broadband access providers for their content and services,<sup>27</sup> like the Walt Disney Co.’s ESPN360, knowing these costs would be passed along to all consumers. ACA vigorously criticized the media analyst’s comments.<sup>28</sup> However, if the publicly traded media conglomerates and web giants can curry analysts’ favor by

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<sup>24</sup> *OPASTCO Comments* at 13.

<sup>25</sup> *Id.* at 14.

<sup>26</sup> David Chartier, *In dispute, Viacom threatens to pull shows “on TV and online”*, ARSTECHNICA (Jan. 2, 2009), available at <http://arstechnica.com/media/news/2009/01/in-dispute-viacom-threatens-to-pull-shows-on-tv-and-online.ars> (last visited Aug. 28, 2009).

<sup>27</sup> Richard Greenfield, *ACA Calls on FCC to Protect Cable Ops/Consumers from ESPN360-Like Services - We Firmly Disagree*, Pali Research Blog (June 11, 2009), available at <http://paliresearch.com/2009/06/11/aca-calls-on-fcc-to-protect-cable-opsconsumers-from-espn360-like-services-we-firmly-disagree/> (login required) (last visited Aug. 28, 2009).

<sup>28</sup> See Press Release, American Cable Association, *ACA Criticizes Influential Wall Street Analyst on Broadband Pricing*, available at <http://www.americancable.org/node/1376> (last visited Aug. 28, 2009).

pursuing these “closed Internet” business models, then we can certainly expect others will follow Disney’s lead and mandate per subscriber fees for their online content as part of their video programming deals with MVPDs.

The Commission must seek curbs on these “closed Internet” business models, as they will create significant public interest harms.

## **V. Conclusion**

Small and medium-sized operators continue to face difficulty obtaining broadcast programming at reasonable prices, terms and conditions, including unjustifiable price increases and price discrimination. Small and medium-sized operators also continue to face tiering and penetration requirements from programmers that increase cable costs, as well as hinder operators’ ability to offer consumers a wider variety of programming packages. The ability of video content providers to coerce operators into accepting “closed Internet” business models will also lead to significant public interest harms. The Commission should consider closely the impact of these practices, and should act where necessary.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**



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