

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

In the Matter of)	
)	
Mediacom Communications Corporation,)	CSR-8233-C
)	
Complainant,)	
)	CSR-8234-M
v.)	
)	
Sinclair Broadcast Group, Inc.)	
)	
Defendant.)	

COMMENTS



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I. Introduction.

The American Cable Association (“ACA”) submits these Comments in support of Mediacom Communications Corporation’s (“Mediacom”) Retransmission Consent Complaint and Petition for an Emergency Order Granting Interim Carriage Rights against Sinclair Broadcast Group, Inc. (“Sinclair”).¹ To protect the interests of consumers and ensure the continued viability of small and medium-sized cable operators, ACA recommends that:

- The Commission permit cable operators to carry a broadcast station while a retransmission consent complaint is pending.
- The Commission examine broadcasters’ use of LMAs and similar agreements on retransmission consent negotiations.

In these comments, ACA also briefly addresses Sinclair’s Opposition.

American Cable Association. ACA has a substantial interest in this matter.

ACA represents more than 900 independent cable companies, including Mediacom.

ACA’s membership includes a variety of businesses – family-owned companies serving small towns and villages, multiple system operators serving predominantly rural markets in several states, and hundreds of companies in between. ACA members have invested heavily in rural and small town America, building or acquiring their systems to serve the unique needs of customers in these markets. More than half of ACA’s members serve fewer than 1,000 subscribers and typical density for most of the ACA members’ markets is 20 homes per mile, compared to hundreds of homes per mile in

¹ *In the Matter of Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Retransmission Consent Complaint, CSR-8233-C (filed Oct. 22, 2009) (“Complaint”); *In the Matter of Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Petition for an Emergency Order Granting Interim Carriage Rights, CSR-8234-M (filed Oct. 22, 2009) (“Petition”).

urban areas. ACA's members do not have significant market-share in any one designated market area (DMA), and they are not affiliated with any satellite-delivered programming.

ACA has long advocated for retransmission consent reform because of the vulnerability of ACA members in retransmission consent negotiations due to a lack of market power and inability to carry alternative broadcast signals.² As the Commission has noted, small and medium-sized cable operators are particularly vulnerable to the withdrawal of "must have" programming.³

II. The Commission should permit cable operators to carry a broadcast station while a retransmission consent complaint is pending.

During contested negotiations, cable operators may file complaints with the Commission over retransmission consent practices employed by broadcasters, but broadcasters hold the ultimate trump card – the ability to withdraw the right of cable operators to continue offering their signals to customers. An independent cable operator serving rural areas and small communities suffers significant harm by the loss of a major network, especially if a competing DBS provider carries that network. Therefore, while an operator may be able to bring an open-and-shut good faith complaint to the Commission, it cannot afford the loss of the signal while the complaint

² *American Cable Association Petition for Rulemaking, In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, MB Docket No. RM-11203 (filed Mar. 2, 2005); MB Docket No. RM-11203, Reply Comments of the American Cable Association (filed May 3, 2005); MB Docket No. RM-11203, American Cable Association, Notice of Ex Parte Presentation (filed May 23, 2005) *In the Matter of Implementation Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17791, Comments of the American Cable Association at 26 (filed Jan. 3, 2008) ("*ACA Program Access FNPRM Comments*").

³ *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶176 (2004) ("*News Corp. Order*").

is being adjudicated.

It is for these reasons that ACA previously asked the Commission to extend to all retransmission consent negotiations the conditions from the *News Corp./DirecTV Order* that permitted cable operators to continue carriage of Fox owned and operated stations during arbitration proceedings.⁴ This carriage condition worked effectively to bring about a semblance of balance to retransmission consent negotiations with a broadcaster, and also ensured that consumers were not disrupted by the sudden loss of a broadcast signal.⁵ The Commission has recognized the benefits of such a condition by extending the carriage condition to the Liberty/DirecTV merger.⁶ Moreover, the Commission sought comment in the Commission's program access proceeding on whether temporary stay orders would encourage parties to resolve disputes, and to make use of the Commission's complaint procedures when needed.⁷

ACA has stated on numerous occasions that the public interest benefits overwhelmingly favor granting a stay during the pendency of a retransmission consent complaint with the Commission.⁸ As Mediacom notes, grant of interim carriage relief is

⁴ *ACA Program Access FNPRM Comments* at 26.

⁵ *News Corp. Order*, ¶¶ 222, 223.

⁶ *In the Matter of News Corporation and the DirecTV Group, Inc. and Liberty Media Corporation*, Memorandum Opinion and Order, 23 FCC Rcd. 3265, ¶ 5 (2008).

⁷ *In the Matter of Implementation Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17,791, ¶ 137 (2007).

⁸ See, e.g., *In re the Matter of Baja Broadband Petition for Declaratory Ruling, Retransmission Consent Complaint, and Request for Stay*, CSR-6802-C, Comments of the American Cable Association (filed Oct. 16, 2008); *In re the Matter of Trust Cable TV, Inc. and Trust Cable of Mississippi Retransmission Consent Complaint, and Request for Stay*, CSR-6803-C, Comments of the American Cable Association (filed Oct. 16, 2008).

necessary to maintain the status quo, and prevent disruption of service to customers while significant issues are being considered and resolved by the Commission or a form of alternative dispute resolution.⁹

Maintaining the status quo while a retransmission consent complaint is pending with the Commission will advance the key public interest goal of avoiding temporary foreclosure and maintaining consumer access to “must have” programming. Often, independent cable operators see no other viable business option other than to accept the broadcasters’ proposed terms and conditions, no matter their unreasonableness. On the other hand, a stay would bring a measure of balance to retransmission consent negotiations, as it will restrict a broadcaster from threatening temporary foreclosure of its broadcast signal until the Commission considers the retransmission consent complaint. Moreover, maintaining the status quo will have no discernable negative effect on a broadcaster, whereas failure to order continued carriage may result in direct harm to consumers, especially in smaller and rural markets served by ACA members.

For the reasons above, the Commission should rule that cable operators may carry a broadcast signal during a pending complaint and grant Mediacom’s Petition.

III. The Commission should examine the impact of local market agreements and other similar agreements on retransmission consent negotiations.

The Commission should review local marketing agreements (“LMAs”) and similar agreements that broadcasters utilize and open a proceeding examining their impact on retransmission consent negotiations.

In implementing Section 325(b)(3)(C), the Commission established seven

⁹ *Petition*, ¶ 2.

objective standards and a totality of the circumstances test to determine good faith in retransmission consent negotiations.¹⁰ Under the totality of the circumstances test, the Commission intended to address conduct “sufficiently outrageous...as to breach a broadcaster's good faith negotiation obligation,” including “[c]onsiderations that are designed to frustrate the functioning of a competitive market.”¹¹ Moreover, the Commission noted that:

Conduct that is violative of national policies favoring competition -- that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market -- is not within the competitive marketplace considerations standard included in the statute.¹²

Through these LMAs and other transactions, broadcasters leverage their already significant market power by gaining effective control over multiple stations in a single DMA. As noted by Mediacom, a central characteristic of these agreements is the designation of one broadcaster to negotiate the terms of retransmission consent on behalf of two or more broadcast stations in a single DMA.¹³ Such agreements set the price for retransmission consent for one broadcaster and its direct horizontal competitor,¹⁴ leading to higher retransmission consent costs for cable operators and consumers. Therefore, to ensure that LMAs and similar agreements do not violate

¹⁰ 47 C.F.R. §§ 76.65(b)(1), (2).

¹¹ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445, ¶¶ 32, 58 (2000) (“*Good Faith Order*”) (emphasis added).

¹² *Id.*, ¶ 58.

¹³ *Complaint*, ¶ 30.

¹⁴ *Id.*, ¶ 50.

national policies favoring competition, the Commission should open a proceeding examining the impact of these agreements on retransmission consent negotiations.

IV. Sinclair's reference to recent ACA statements and comments.

Sinclair notes in its response to Mediacom's Complaint and Petition a recent ACA statement that broadcasters seek as much as "\$1.00 and up" per subscriber from cable operators and a recent ACA study that found that retransmission consent payments between 2008 and 2009 for small cable operators were projected to increase 271%.¹⁵ Sinclair's attempt to use these statements and numbers is both irrelevant and unpersuasive.

As the Commission has noted, proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station presumptively are not consistent with competitive marketplace considerations and the good faith negotiation requirement.¹⁶ Whether a proposal may be less than \$1.00 or less than a 271% year-over-year increase does not mean that the proposal was not sufficiently outrageous or an exercise of market power. Instead, the Commission should compare the rates broadcasters' charge major MSOs versus the rates broadcasters charge small and medium-sized cable providers in the same market.

¹⁵ *In the Matter of Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Retransmission Consent Complaint, CSR-8233-C, Opposition of Sinclair Broadcast Group, Inc., ¶ 31 (filed Nov. 5, 2009).

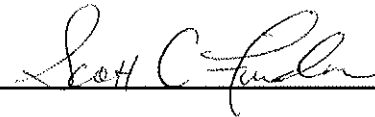
¹⁶ *Good Faith Order*, ¶ 58.

V. Conclusion

Broadcasters continue to leverage their significant market power and bad faith “negotiation” tactics to extract unreasonable retransmission consent terms and conditions from small and medium-sized cable operators. ACA urges the Commission to rule that cable operators may continue to carry broadcast signals during a pending complaint. Moreover, the Commission should also examine the impact of local marketing agreements and other similar agreements on retransmission consent negotiations.

Respectfully submitted,

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Certificate of Service

I, Alma Hoxha, paralegal with the law Firm of Cinnamon Mueller, hereby certifies that copies of the foregoing **Comments** were served via US mail on this 19th day of November, 2009 to the following:

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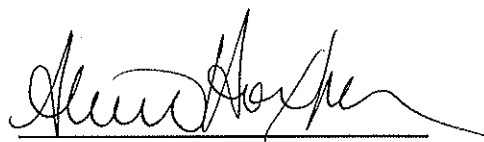
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