

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

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



COMMENTS

Matthew M. Polka
President and CEO
Ross J. Lieberman
Vice President – Regulatory Affairs
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Christopher C. Cinnamon
Nicole E. Paolini-Subramanya
Scott C. Friedman
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for the American Cable
Association

January 3, 2008

TABLE OF CONTENTS

SUMMARY	IV
I. INTRODUCTION	1
II. THE WHOLESALE MARKET FOR PROGRAMMING AND RETRANSMISSION CONSENT FROM THE PERSPECTIVE OF SMALL AND MEDIUM-SIZED CABLE COMPANIES.	5
A. Programmers and broadcasters routinely require carriage of affiliated channels through tying and bundling.	5
1. Small and medium-sized cable companies face tying and bundling as conditions of access to nearly all popular satellite channels.	5
2. Small and medium-sized cable companies face tying and bundling in nearly all retransmission consent transactions with programmer- affiliated stations.	7
3. Small and medium-sized cable companies face tying arrangements in many retransmission consent transactions with major affiliate groups.	8
4. Tying and bundling arrangements involve a substantial number of channels distributed by small and medium-sized cable companies.	9
5. Wholesale tying and bundling proliferate all levels of service.	11
6. Wholesale tying and bundling substantially increase the cost of cable.	12
7. Most standalone channel “offers” are illusory; they are priced to coerce purchase of the bundle.	13
B. Programmers and broadcasters routinely use tiering and distribution obligations to restrict how channels can be offered at retail.	14
C. Small and medium-sized cable companies face widespread price discrimination.	17
III. IN MARKETS SERVED BY SMALL AND MEDIUM-SIZED CABLE COMPANIES, THE WHOLESALE PRACTICES OF PROGRAMMERS AND BROADCASTERS RESULT IN SUBSTANTIAL PUBLIC INTEREST HARMS.	18
A. Wholesale programming and retransmission consent practices harm the public interest in greater choice and program diversity.	18

B.	Wholesale programming and retransmission consent practices harm the public interest by substantially increasing the cost of cable.	19
C.	Wholesale programming and retransmission consent practices harm video competition.	19
D.	Wholesale programming and retransmission consent practices impede broadband deployment.	20
IV.	TO MITIGATE PUBLIC INTEREST HARMS AND TO ADVANCE KEY POLICY GOALS, THE COMMISSION SHOULD AMEND ITS REGULATIONS GOVERNING PROGRAM ACCESS AND RETRANSMISSION CONSENT.	20
A.	Proposed adjustments to program access regulations.	21
1.	The program access regulations should apply to all satellite cable programming vendors.	21
2.	The program access regulations should obligate programmers to offer each channel on a standalone basis on reasonable rates, terms and conditions.	22
3.	The program access regulations should prohibit programmers from conditioning access to a channel on tiering or distribution obligations.	22
4.	The program access regulations should prohibit non-cost-based price discrimination.	23
5.	Adjustments to program access complaint procedures.	23
B.	Proposed amendments to the retransmission consent regulations.	24
1.	The retransmission consent regulations should obligate broadcasters to offer each channel on a standalone basis on reasonable rates, terms and conditions.	24
2.	The retransmission consent regulations should prohibit broadcasters from conditioning access to a channel on tiering or distribution obligations.	25
3.	The retransmission consent regulations should prohibit non-cost-based price discrimination.	25
4.	Adjustments to retransmission consent complaint procedures.	26
V.	CHANNEL LINEUPS SHOWING HOW SMALL AND MEDIUM-SIZED CABLE COMPANIES WOULD OFFER MORE CHOICE, VALUE, AND FLEXIBILITY... ..	27
VI.	CONCLUSION.	43

Tables and Appendices

Table 1.	Tying and Bundling – Satellite Channels	6
Table 2.	Tying and Bundling – Retransmission Consent	7
Table 3.	System Level Impact of Satellite Channel Tying and Bundling	10
Table 4.	System Level Impact of Retransmission Consent Tying and Bundling	10
Table 5.	Aggregate System Level Impact of Tying and Bundling.....	10
Table 6.	Top Fifty Channels.....	15
Appendix 1.	Proposed Regulations.....	44
Appendix 2.	Commission Authority	47

SUMMARY

These comments address the following four areas:

- The current wholesale market for satellite programming and retransmission consent from the perspective of small and medium-sized cable companies.
- Harms caused by current wholesale practices of programmers and broadcasters.
- Minor adjustments to Commission regulations that would mitigate harms of current wholesale practices.
- Specific examples of how small and medium-sized cable companies would provide consumers a variety of innovative channel offerings, if the Commission adjusted its regulations as requested here.

ACA members face widespread wholesale tying, bundling, distribution restrictions, and price discrimination. In preparing these comments, we asked a representative sample of ACA members to provide information about the wholesale programming and retransmission consent market and the impact of those transactions on their retail offerings. ACA members surveyed describe three groups of wholesale practices that sharply restrict how channels are packaged, offered, and priced at retail:

- Tying and bundling;
- Tiering and distribution obligations; and
- Non-cost-based price discrimination.

Tying and bundling. The data provided by ACA members shows how wholesale tying and bundling profoundly shape the channel offerings of small and medium-sized cable companies. Across the ACA members surveyed, in satellite programming transactions, the rights to distribute 13 of the most powerful channels are tied to or bundled with obligations to distribute at least 60 other channels. In

retransmission consent, the rights to distribute the four major broadcast networks are tied or bundled with at least 35 other channels. On average, 30% of the channels carried on expanded basic and 45% of the channels carried on digital tiers are carried under tying or bundling arrangements imposed as conditions of access to desired channels. These tying and bundling practices have resulted in the increasingly bloated, increasingly costly, increasingly standardized expanded basic tier. And it gets worse. Programmers and broadcasters have extended tying and bundling practices to digital tiers, HD tiers, and VOD content. For small and medium-sized cable companies, wholesale tying and bundling stuffs channels, content, and cost on all levels of service.

Certain programmers will claim that they routinely offer channels on a standalone basis. For ACA members, these offers are illusory. Programmers and broadcasters set standalone prices unreasonably high to coerce purchase of their bundle. In the words of one ACA member:

Consolidation of programmers has led to more multi-network deals, such as ESPN, Disney, Viacom and Turner network families. Either channels are directly tied or the economic penalty for not carrying them forces bundled carriage.

Tiering and distribution obligations. Tiering and distribution obligations compound the harmful effects of tying and bundling. Programmers and broadcasters routinely condition access to channels on the distribution of those channels to most or all of a cable operator's customers. Tiering and distribution obligations are most often "Take it or leave it." If a cable operator wants to distribute a popular channel to *any* customer, it must distribute the channel to nearly *all* customers. Programmers have replicated this practice on digital tiers and HD tiers, leading to the emergence of increasingly crowded and costly "Digital Basic" tiers and "HD Basic" tiers. These practices, combined with tying and bundling, sharply restrict the flexibility of ACA

members to tailor their channel offerings, while at the same time significantly increasing the cost of cable. In the words of one ACA member:

What we find objectionable about wholesale practices are requirements of nearly all of the major programmers to have their channels at 80% to 95% penetrations levels.

Price discrimination. Another widespread wholesale practice adds further cost pressure – price discrimination. ACA members estimate that programmers charge them per-subscriber license fees approximately 30% higher than the license fees paid by the major MSOs. The difference has nothing to do with cost, and everything to do with market power. With no basis in cost, this wholesale practice amounts to pure price discrimination – powerful conglomerates squeezing more profit out of smaller distributors and their customers. The same discrimination occurs in retransmission consent as broadcasters target vulnerable small systems for retransmission consent fees many times what major MSOs pay.

For small and medium-sized cable companies, these three groups of wholesale practices – tying and bundling, tiering and distribution restrictions, and price discrimination are predominant aspects of the wholesale programming market.

Current wholesale programming and retransmission consent practices cause substantial public interest harms. In the markets served by small and medium-sized cable operators, current wholesale programming and retransmission consent practices harm the public interest in at least four ways: (i) reducing choice and program diversity for consumers; (ii) increasing costs for consumers; (iii) reducing video competition; and (iv) impeding broadband deployment.

Adjustments to program access and retransmission consent regulations will help mitigate the public interest harms of current wholesale practices. Minor

adjustments to program access and retransmission consent regulations would foster an exciting new world of choice and flexibility at the retail level. ACA's proposed regulations have three main components:

- Programmers and broadcasters would be obligated to offer channels on a standalone basis on reasonable rates, terms and conditions. This would not prohibit programmers and broadcasters from selling channels in bundles; they would just need to offer channels individually too.
- Programmers and broadcasters could not condition access to any channel on the obligation to distribute the channel on a specific tier or to a required percentage of subscribers. This would not prohibit programmers and broadcasters from offering incentives for wider distribution, so long as differences in rates, terms and conditions were reasonable.
- Aggrieved MVPDs could seek redress through the existing program access and retransmission consent complaint processes. Programmers and broadcasters could not unilaterally withdraw a channel while a complaint is pending. Additional procedural rules would apply for small and medium-sized cable companies.

By adopting the regulations proposed here, the Commission will help foster an exciting new era of retail choice and flexibility. For this proceeding, we asked ACA members how they would offer channels to their customers if they were not constrained by the current wholesale practices. They responded with an impressive array of offerings not currently available due to wholesale restrictions. Innovative offerings include:

- Moving high-priced sports channels to separate tiers.
- Offering certain high-priced channels on a standalone basis.
- Allowing customers to customize channels within packages.
- Offering increasingly costly network broadcast stations on an optional tier.
- Offering a robust expanded basic package better tailored to local markets.
- Offering a wide variety of smaller, lower-cost, channel packages.

The ranges of choices would vary depending on a number of factors, including system size, technology, and the operator's insight into its particular markets. Unfortunately, due to the current wholesale practices of programmers and broadcasters, ACA members can offer almost none of the retail options described above.

These changes do not mean a regulated a la carte regime. Current technology costs make a la carte a financial impossibility for ACA member systems, the business model is entirely unproven, and no lawful basis exists for imposing regulated a la carte. Moreover, ACA members report that many customers prefer a basic or expanded basic package with a variety of channels at a reasonable price. At the core of the problem are the wholesale practices that prevent cable operators, especially small and medium-sized cable operators, from offering more choices and better value.

Given the incentive and ability of powerful programmers and broadcasters to use wholesale practices to reduce choice and raise costs at retail, the marketplace needs some help from the Commission. The record in this proceeding will provide ample basis for the Commission to act.

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

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

COMMENTS



I. INTRODUCTION

These comments address the following four areas:

- The current wholesale market for satellite programming and retransmission consent from the perspective of small and medium-sized cable companies.
- The harms caused by current wholesale practices of programmers and broadcasters.
- The minor adjustments to Commission regulations that would mitigate the harms of current wholesale practices.
- Sample channel lineups from small and medium-sized cable companies showing how they would offer consumers a diverse variety of innovative channel offerings, if the Commission adjusted its regulations as requested here.

In short, these comments demonstrate how the problems with choice and cost at retail spring from the wholesale practices of powerful programmers and broadcasters.

Positive change will require Commission action.

In preparing these comments, we asked a representative sample of ACA members to provide information about the wholesale programming and retransmission consent market. The sample covers hundreds of cable systems operated by a wide variety of companies, ranging from third-generation family-owned businesses operating single cable systems to medium-sized cable companies operating systems in several states. We asked companies to report their experiences in obtaining distribution rights for satellite channels and broadcast channels and the impact of those transactions on their retail offerings.

The responses reveal widespread tying, bundling, distribution restrictions, and price discrimination. The responses show how the wholesale practices of powerful media conglomerates sharply restrict retail choices while substantially increasing retail costs. In turn, these wholesale programming and retransmission consent practices harm video competition and impede broadband deployment.

Current wholesale practices harm the public interest and conflict with key communications policy goals. The Commission should act to alleviate these harms. These comments propose limited adjustments to existing regulations. The regulations would, in a restrained and measured manner, begin to mitigate the harms of current wholesale practices and help foster an exciting new era of innovation and choice.

We organize these comments as follows:

- Section II describes in detail current wholesale programming and retransmission consent practices from the perspective of ACA members.
- Section III explains how current wholesale practices cause substantial public interest harms.
- Section IV describes the proposed regulations. Appendix 1 contains the text of the regulations. Appendix 2 summarizes Commission authority to adopt the regulations.

- Section V contains eight examples of how different ACA members would offer programming if current wholesale practices were reformed. These channel lineups show how ACA members are prepared to offer consumers more choice, value, and control.

A note about retaliation by programmers and broadcasters. Nearly all programming and retransmission consent contracts contain strict nondisclosure terms imposed by the programmer or broadcaster. In responding to the Commission's questions concerning wholesale practices, ACA members fear the risk of retaliation by certain programming suppliers. Conglomerates like Viacom, Disney, Fox, NBC Universal, and others have many weapons, both overt and subtle, with which to hurt smaller distributors. No small cable company alone can support a fight against any of these companies. Consequently, these comments must remain guarded in reporting certain information.

The specific information ACA members cannot disclose for fear of retaliation is readily available from programmers and broadcasters. The Commission should request this information, especially fees for purported standalone channel offerings compared to fees for bundles. Similarly, the Commission should obtain information concerning the differences in fees that programmers and broadcasters charged small and medium-sized cable companies compared to the fees paid by large MSOs and DBS providers. If programmers and broadcasters resist, the Commission has authority under Section 403 to investigate and demand disclosure of this information.¹

The American Cable Association. ACA represents over 1,100 small and medium-sized cable companies. This constituency includes an incredible variety of businesses – family-owned companies serving small towns and villages, multiple

¹ 47 U.S.C. § 403 (“The Commission shall have full authority and power at any time to institute an inquiry...concerning which any question may arise under any of the provisions of this chapter....”).

system operators serving predominantly rural markets in several states, and hundreds of companies in between. All of these diverse companies share four characteristics important here:

- Each company must purchase most of their satellite programming from a small group of media conglomerates.
- Each company must negotiate with major networks or affiliate groups for retransmission consent.
- Each company faces contractual restrictions that often eliminate flexibility in how local cable systems can package and distribute programming.
- Each company pays substantially higher programming rates solely because of non-cost-based price discrimination.

As a result, ACA members are well-positioned to describe for the Commission the harms of current wholesale programming and retransmission consent practices and what the Commission needs to do to rectify these problems.

II. THE WHOLESALE MARKET FOR PROGRAMMING AND RETRANSMISSION CONSENT FROM THE PERSPECTIVE OF SMALL AND MEDIUM-SIZED CABLE COMPANIES.

ACA members surveyed describe three groups of wholesale practices that sharply restrict how channels are packaged, offered, and priced at retail. These are:

- Tying and bundling;
- Tiering and distribution obligations; and
- Non-cost-based price discrimination.

The following sections describe these wholesale practices and their effects on small and medium-sized cable companies.

A. Programmers and broadcasters routinely require carriage of affiliated channels through tying and bundling.

The data collected for these comments demonstrates the incentive and ability of media conglomerates to use control over “must have” programming to require distribution of, and payment for, affiliated channels. ACA members report that tying and bundling arrangements involve many of the channels carried on their cable systems. These occur in transactions for desired satellite channels and in retransmission consent for many network broadcast stations. Tying and bundling has resulted in increasingly bloated, increasingly costly, increasingly standardized expanded basic tiers. ACA members report that major programmers have extended these practices to all types of channels and content – digital channels, HD channels, VOD offerings, even Internet content, further loading cable systems with channels and related costs.

1. Small and medium-sized cable companies face tying and bundling as conditions of access to nearly all popular satellite channels.

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 summarizes the range of satellite channel tying and bundling arrangements reported by ACA members.

Table 1 – Tying and Bundling – Satellite Channels

Owner	Desired Channel	Tied/Bundled Channels	Owner	Desired Channel	Tied/Bundled Channels
Disney	Disney Channel	ABC Family SoapNet Toon Disney ESPN Channels	NBC Universal	USA	MSNBC CNBC Sci Fi Comedy Central Bravo Olympics surcharge
Disney	ESPN	ESPN2 ESPN News ESPN Classic ESPN 360 (Internet) ESPNU	NBC Universal	USA HD	Chiller Sleuth
Disney	Disney Channel HD	ABC Family HD Toon Disney HD ESPN News HD	News Corp.	Fox Sports	National Geographic Fox Soccer Fox Business Fox Sports College Fox Reality Fuel Big 10 Network Fox Movie Channel
Disney	ESPN2	ESPN News ESPN Classic	Scripps	Food Channel	HGTV DIY Fine Living
Disney	ESPN2HD	ESPNU	Time Warner	CNN	Headline News TBS TNT WTBS
Disney/Hearst	Lifetime	Lifetime Real Women Lifetime Movies	Time Warner	TNT HD	Court TV Boomerang
Disney/Hearst / NBC Universal	A&E	History Channel Biography History International Military Channel	Viacom	MTV	TV Land CMT VH1 Nickelodeon Noggin VH1 Soul CMT Pure Country MTV Jam
Liberty Media	Discovery	FitTV Animal Planet TLC Travel BBC America Discovery Kids Science Channel Discovery Channel Discovery Health Discovery Home	Viacom	Nickelodeon	TV Land CMT MTV VH1 Spike Noggin GAS NickToons TV MTV2 MTV Hits VH1 Classic
Liberty Media	Animal Planet	TLC			

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. The tied and bundled channels include many channels stuffed into expanded basic, many other channels carried on digital tiers, some HD channels, and even programmer-controlled subscription Internet content.

2. Small and medium-sized cable companies face tying and bundling in nearly all retransmission consent transactions with programmer-affiliated stations.

For small and medium-sized cable companies, tying and bundling arrangements are the rule when dealing with stations affiliated with satellite programmers. Table 2 summarizes the range of retransmission consent tying and bundling arrangements imposed on ACA members.

Table 2 – Tying and Bundling – Retransmission Consent

Owner	Desired Channel	Tied/Bundled Channels	Owner	Desired Channel	Tied/Bundled Channels
Disney	ABC O&O	ABC News Now SoapNet Toon Disney Channel ESPN News ESPN Classic ESPNU ESPN2 HD ESPN 360 (Internet) ABC Broadband (Internet)	News Corp	Fox O&O	Fuel Speed Nat Geo Fox Reality Fox Movie Fox Soccer Fox News Fox Business Big 10 Network FX MyNetworkTV
Hearst-Argyle	ABC NBC CBS	Lifetime Movie Network Lifetime Real Women	Scripps	ABC NBC	Fine Living GAC
NBC Universal	NBC O&O	Bravo MSNBC CNBC Universal HD Olympics surcharge Sci Fi	CBS (post-Viacom spin off)	CBS O&O	CSTV CW
Tribune	CW	WGN	Viacom (pre-CBS spin off)	CBS O&O	Logo Nicktoons Spike VH1

As shown, across the ACA members surveyed, contracts for the distribution of stations owned by or affiliated with the four major networks, are tied to or bundled with obligations to distribute at least other 35 other channels. Once again, the tied or bundled channels include many channels that have been forced onto expanded basic, other channels carried on digital tiers, some HD channels, and subscription Internet services. This is not surprising – when dealing with Disney, Fox, NBC Universal, or Hearst-Argyle, the retransmission consent tying and bundling arrangements often involve the same channels that are tied or bundled in satellite programming transactions. These companies increase distribution of less desired (or *undesired*) channels either at contract renewal for one of their flagship satellite channels or through retransmission consent for a “Big Four” network.

3. Small and medium-sized cable companies face tying arrangements in many retransmission consent transactions with major affiliate groups.

ACA members report widespread retransmission consent tying of another variety when dealing with major affiliate groups like Sinclair, Nexstar, and LIN Broadcasting. These large affiliate groups increasingly tie retransmission consent to carriage of other broadcast channels. Two practices are common.

First, several affiliate groups, including Sinclair and LIN, have duopolies, owning two Big Four affiliates or a Big Four affiliate and an independent station in the same market.² ACA members report these broadcasters routinely tie together retransmission consent for multiple stations – on a “take it or leave it” basis. Then the broadcasters

² Sinclair operates or has an agreement with fifty-seven broadcast stations in thirty-four markets. This includes duopolies in twenty markets, where Sinclair operates at least two broadcast stations or operates one broadcast station and has a marketing agreement with another. Sinclair Broadcast Group, at <http://www.sbg.net/business/all.shtml> (last visited Jan. 3, 2008). LIN operates twenty-nine broadcast stations in seventeen markets, including ten markets where Lin operates at least two broadcast stations. Lin TV Corp., at <http://www.lintv.com/about/television.html> (last visited Jan. 3, 2008).

demand ever-escalating fees for all of the tied stations, regardless of ratings or demand.³

Second, companies like Nexstar have developed “virtual” duopolies through agreements with other affiliate groups. Nexstar, through agreements with Mission Broadcasting, handles retransmission consent for two network affiliates in several markets, including Amarillo, Joplin, and Wichita Falls.⁴ ACA members report that Nexstar invariably ties retransmission consent for both stations with lockstep, “take it or leave it” prices, terms and conditions.

When evaluating the harm of retransmission consent tying, the Commission needs to know that the practice extends beyond broadcasters affiliated with satellite channels. Powerful affiliate groups like Nexstar, Sinclair, and LIN use the power of retransmission consent to tie carriage of, and payment for, other broadcast channels, especially when dealing with small and medium-sized cable companies.

4. Tying and bundling arrangements involve a substantial number of channels distributed by small and medium-sized cable companies.

To better understand the impact of tying and bundling, ACA asked members to report the numbers and percentages of tied and bundled channels on individual cable systems. The responses show that tying and bundling arrangements involve a substantial number of channels carried on ACA member cable systems. The three

³ Nexstar and Sinclair both reported major increases in retransmission consent revenues in 2006. Nexstar reported a revenue increase from \$2.8 million in 2005 to \$13.7 million in 2006. Sinclair reported \$25.4 million in retransmission consent revenues in 2006 and expects \$53 million in 2007. Charles B. Goldfarb, *CRS Report for Congress, Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, at 34 and 53 (July 9, 2007) (“*CRS Retransmission Consent Report*”).

⁴ Nexstar operates duopolies or virtual duopolies in seventeen broadcast markets. Nexstar Broadcast Group, at <http://www.nexstar.tv/stations.html> (last visited Jan. 3, 2008).

tables that follow show the system-level impact of satellite channel tying and bundling, retransmission consent tying and bundling, and the aggregate impact of both.

Table 3 – System Level Impact of Satellite Channel Tying and Bundling

Tier	Numbers of tied/bundled channels carried	Average number of tied/bundled channels carried	Percentage of tied/bundled channels carried	Average percentage of tied/bundled channels carried
Expanded Basic	Up to 29	10	Up to 40%	21%
Digital tiers	Up to 32	16	Up to 75%	39%

Table 4 – System Level Impact of Retransmission Consent Tying and Bundling

Tier	Numbers of tied/bundled channels carried	Average number of tied/bundled channels carried	Percentage of tied/bundled channels carried	Average percentage of tied/bundled channels carried
Expanded Basic	Up to 29	5	Up to 18%	11%
Digital tiers	Up to 25	6	Up to 52%	13%

Table 5 – Aggregate System Level Impact of Tying and Bundling

Tier	Numbers of tied/bundled channels carried	Average number of tied/bundled channels carried	Percentage of tied/bundled channels carried	Average percentage of tied/bundled channels carried
Expanded Basic	Up to 48	15	Up to 58%	30%
Digital tiers	Up to 50	22	Up to 76%	45%

This data demonstrates the major impact of wholesale tying and bundling on retail offerings. For some smaller cable systems, more than half of their channel lineups consist of channels tied or bundled to carriage of “must have” satellite programming and one or more of the four national broadcast networks. On average, 30% of channels carried on expanded basic and 45% of channels carried on digital tiers are carried under tying or bundling arrangements imposed as conditions of access to desired channels. In short, wholesale tying and bundling profoundly affect the retail offerings of small and medium-sized cable operators.

5. Wholesale tying and bundling proliferate all levels of service.

ACA members want the Commission to know the following: Wholesale tying and bundling impact all aspects of their businesses. The following comments of ACA members describe how programmers have extended tying and bundling to all types of content transactions:⁵

To get HD simulcasts of standard def channels or to get VOD programming from linear channels, we are required to launch additional expanded basic or digital channels.

* * *

To add [one Liberty Media-controlled HD channel], we are required to carry four additional [Liberty Media-controlled] HD channels.

* * *

To carry [one Time Warner-controlled HD channel], we have to add [a Time Warner-controlled channel] as an expanded basic channel.

* * *

To carry [one or two HD channels] from NBCU, we would first have to add [a new, untested, NBCU – controlled channel], a channel we don't want, on all digital systems, then commit to carry all four HD services, rather than the one or two we want.

* * *

In addition to tying of linear channels, increasingly we see tying of VOD programming content to channels (i.e. in order to get valuable VOD content we have to give distribution to their other networks).

* * *

We had to move [one Viacom-controlled music channel] to expanded basic (and pay an additional fee) along with launching [three Viacom-controlled channels] to get the Viacom VOD content. We have to launch [one Disney-controlled channel] to get ESPN/Disney VOD content.

* * *

Disney/ESPN is seeking to tie carriage of their channels to distribution of [affiliated subscription Internet content] on our broadband service.

⁵ We have omitted specific channel names due to ACA members' concern over programmer retaliation.

In summary, the expanded basic tier is the most obvious example of a service tier overloaded with channels and costs from wholesale tying and bundling. But it has not stopped there. Programmers and broadcasters have extended their tying and bundling practices to digital tiers, HD tiers, and VOD content. For small and medium-sized cable companies, wholesale tying and bundling increasingly shape all retail video offerings.

6. Wholesale tying and bundling substantially increase the cost of cable.

Choice is one part of the tying and bundling problem, the other is cost. One hundred percent of ACA members surveyed said that wholesale tying and bundling raise the cost of their expanded basic tiers and digital tiers. Not only must ACA members distribute many additional channels as conditions of access to desired channels, but they must also pay monthly per-subscriber license fees or retransmission consent fees for each additional channel. In many cases, tying and bundling adds several dollars per subscriber per month to the wholesale cost of basic, expanded basic and digital tiers, all for channels the cable operator might otherwise not want to carry. As the Commission has repeatedly recognized, these programming and retransmission consent costs are ultimately borne by consumers.⁶

⁶ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17,791, ¶ 120 (2007) (“*Program Access Order and NPRM*”) (“When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming....the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates.”); *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, ¶ 209 (2004) (“*News Corp. Order*”) (“If News Corp. can secure carriage of more cable networks and charge higher fees for such carriage, these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates.”).

7. Most standalone channel “offers” are illusory; they are priced to coerce purchase of the bundle.

Certain programmers will tell the Commission that their channels are routinely offered for sale to ACA members on a standalone basis. At best, this is a half-truth. What’s missing from programmers’ claims? The *prices* they demand for their standalone “offers.” For ACA members, programmers set standalone prices unreasonably high to coerce purchase of the bundle.

The following comments of ACA members show how standalone wholesale “offers” are illusory:⁷

Programmers’ [standalone] rates are almost four times higher than the entire bundle price.

* * *

Viacom requires us to carry [four Viacom-controlled channels] on analog and [a fifth Viacom-controlled channel] on digital. The [standalone] prices are many times higher than the bundled prices.

* * *

Major programmers structure prices to force carriage of other affiliated services of the programmer.

* * *

Consolidation of programmers has led to more multi-network deals, such as ESPN, Disney, Viacom and Turner network families. Either channels are directly tied or the economic penalty for not carrying them forces bundled carriage.

As these statements attest, the Commission should view with deep skepticism any programmer claims of a “choice” to purchase channels on a standalone basis. ACA members experience no choice. Instead they must purchase and distribute ever-expanding bundles.

⁷ We have omitted specific channel names due to ACA members’ concern over programmer retaliation.

Tying and bundling comprise one set of wholesale programming practices that reduces choice and increases cost at the retail level. Exacerbating these harms are tiering and distribution obligations. We turn to those next.

B. Programmers and broadcasters routinely use tiering and distribution obligations to restrict how channels can be offered at retail.

ACA members report that programmers and broadcasters nearly always impose tiering and distribution obligations as conditions of access to channels. Here we refer to contractual mandates requiring carriage of channels on specific tiers or distribution of channels to a large percentage of subscribers.

Programmers typically impose distribution obligations in one of two ways. One practice is to require carriage of a channel, or channels, on the first or second most highly penetrated tiers. 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. A second approach is to require distribution of a channel, or channels, to a high percentage of subscribers, typically 85% to 95%. The results are the same – carriage on basic or expanded basic. A few variations exist, and programmers have extended the practice to digital tiers and HD tiers. The same practice occurs in retransmission consent. Network stations refuse to grant retransmission consent unless the cable operator distributes their broadcast channel to 100% of subscribers. Channels tied to retransmission consent typically come with similar distribution obligations.

ACA explained these wholesale practices, and their consequences, in comments filed in 2004.⁸ That analysis focused on what we termed the “Top 50 Channels,” and

⁸ *Inquiry Concerning A La Carte Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Comments of the American Cable Association at 3-4 and 8-14 (July 12, 2004) (“*ACA Programming Inquiry Comments*”).

described how access to most of the Top 50 Channels was conditioned upon distribution to nearly all subscribers. We update that analysis for this proceeding.

As reported by Kagan, Table 6 depicts the Top Fifty Channels and their owners.⁹

Table 6. Top Fifty Channels¹⁰

Owner	Channel	Owner	Channel
Disney	Disney Channel	Viacom	MTV
Disney	ESPN	Viacom	Nickelodeon
Disney	ESPN 2	Viacom	Spike
Disney	ABC Family	Viacom	TV Land
Disney/Hearst	Lifetime	Viacom	VH1
Disney/Hearst/NBCU	A&E	Viacom	Comedy Central
Disney/Hearst/NBCU/ News Corp.	History	Viacom	BET
NBC Universal	CNBC	Viacom	CMT
NBC Universal	MSNBC	Liberty Media	Animal Planet
NBC Universal	Sci fi	Liberty Media	Discovery
NBC Universal	USA	Liberty Media	TLC
NBC Universal	Bravo	Comcast	Golf
NBC Universal	Oxygen	Comcast	Versus
News Corp.	Fox News	Comcast	E!
News Corp.	Fox Sports	Comcast	QVC
News Corp.	FX	Scripps	HGTV
News Corp.	Speed	Scripps	Food
News Corp.	TV Guide	Rainbow	AMC
Time Warner	CNN	Tribune	WGN
Time Warner	Headline News	NCS Corp.	C-Span I
Time Warner	TBS	NCS Corp.	C-Span II
Time Warner	TOON	Crown Media	Hallmark
Time Warner	Court TV	Landmark Comm.	The Weather Channel
Time Warner	TCM	IAC/InterActiveCorp.	HSN
Time Warner	TNT	Cox	Travel

Two common attributes of these channels are important for this proceeding – the concentration of ownership and the ubiquitous reach. Concerning ownership, five

⁹ *Network Census: December 31, 2006* (Kagan Cable Program Investor), January 31, 2007 at 13 (“2006 Kagan Network Census”).

¹⁰ Table 6 organizes the Top 50 channels by ownership and does not rank the channels by number of subscribing households.

conglomerates control at least 75% of the news and entertainment channels in the Top 50. This demonstrates how powerful companies use one “must have” channel like ESPN, Fox Sports, or Nickelodeon to obtain wide distribution of affiliated channels, regardless of demand, or lack thereof. The Kagan report further shows that 32 of the channels are delivered to virtually every cable or satellite household.¹¹ This ubiquitous reach begs the question: *Why do cable operators deliver these channels to all or nearly all MVPD households?*

For small and medium-sized cable operators, the answer is this: They have no choice. As a condition of access, the programmer requires carriage on basic or expanded basic. Take it or leave it.

The following comments from ACA members describe how tiering and distribution obligations prevent them from offering a wider variety of packages:

What we find objectionable about wholesale practices are requirements of nearly all of the major programmers to have their channels at 80% to 95% penetrations levels.

* * *

Major programmers refuse to allow placement of their channels on digital tiers.

* * *

The biggest issue is being required to carry channels on analog/expanded basic. There are many channels that we conceivably want to carry on digital tiers, but just not on expanded basic.

* * *

We’re trying to add more HD programming, but almost every channel is tied to something else or has level of service requirements.

For small and medium-sized cable companies, “take it or leave it” tying, bundling, tiering and distribution obligations are “business as usual” when dealing with powerful

¹¹ 2006 Kagan Network Census at 13.

programmers and broadcasters. These wholesale practices combine to increase costs and reduce choices. Another common wholesale practice adds further cost pressure – price discrimination. We turn to that next.

C. Small and medium-sized cable companies face widespread price discrimination.

As reported previously to the Commission, ACA members estimate that programmers charge them per-subscriber license fees approximately 30% higher than the per-subscriber license fees paid by the major MSOs.¹² This price discrimination has nothing to do with cost, and everything to do with market power.

When a satellite programmer delivers a channel to two different headends, one owned by a major MSO like Time Warner, and the other one owned by a small cable company, there is no discernable cost difference. Program production and acquisition costs are sunk. Delivery costs do not vary – the headends receive the signals from the same satellite. Administration costs are no different. In most cases, the smaller operator pays programming fees through the National Cable Television Cooperative (“NCTC”), and programmers are paid directly, and on time, by NCTC.

Without a basis in cost, this wholesale practice amounts to pure price discrimination – powerful conglomerates squeezing more profit out of smaller distributors and their customers. As recognized by the Congressional Research Service’s recent report on retransmission consent, the same discrimination occurs in

¹² *ACA Programming Inquiry Comments* at 39; *Symposium on the Commission’s Inquiry Concerning A La Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Testimony of Ben Hooks at 9 (July 29, 2004).

retransmission consent as broadcasters target vulnerable small systems for substantially higher retransmission consent fees.¹³

For small and medium-sized cable companies, tying and bundling, tier and distribution restrictions, and price discrimination, pervade the wholesale programming market. In the next section, we describe the public interest harms caused by these practices.

III. IN MARKETS SERVED BY SMALL AND MEDIUM-SIZED CABLE COMPANIES, THE WHOLESALE PRACTICES OF PROGRAMMERS AND BROADCASTERS RESULT IN SUBSTANTIAL PUBLIC INTEREST HARMS.

The wholesale programming and retransmission consent practices described above harm the public interest and conflict with key communications policy goals in a least four ways: (i) reducing choice and program diversity; (ii) increasing costs for cable; (iii) reducing competition; and (iv) impeding broadband deployment.

A. Wholesale programming and retransmission consent practices harm the public interest in greater choice and program diversity.

Tying, bundling, tiering and distribution restrictions all combine to harm the public interest of greater choice and program diversity. Consider the innovative channel offerings contained in Section V. These provide examples of how ACA members would offer more choices to consumers, if they could. But the ability of ACA members to deliver more choices and more diverse program offerings has become subjugated to profit-driven mandates from the headquarters of media conglomerates. This denies consumers a much wider and diverse range of programming choices.

¹³ CRS Retransmission Consent Report at, (“[B]roadcasters increasingly are using the statutory retransmission consent requirement to demand cash payment from small cable companies who could lose subscribers to the satellite providers and new telephone entrants if they reach an impasse with the broadcaster and can no longer carry the local broadcast signals.”).

B. Wholesale programming and retransmission consent practices harm the public interest by substantially increasing the cost of cable.

Current wholesale practices conflict with the key communications policy goal of reducing the cost of video service for consumers. As 100% of the ACA members surveyed attested, tying and bundling, tiering and penetration requirements, and price discrimination all combine to increase the cost of cable. Policymakers have repeatedly expressed concern about the rate of increase in cable rates. As shown in these comments, for small and medium-sized cable companies, wholesale programming and retransmission consent practices are at the core of the problem. To address concerns about retail costs, policymakers must focus on wholesale practices.

C. Wholesale programming and retransmission consent practices harm video competition.

Current wholesale programming practices harm the ability of small and medium-size cable companies to compete. This occurs in at least two ways – by impeding competition through innovative service offerings and by impeding competition on price.

Many ACA members want to compete with innovative service offerings by, for example, offering smaller packages of programming more tailored to their local markets. In some markets, this would bring a competitive advantage compared to the nationally programmed DBS providers. Current wholesale programming practices prevent this, impeding ACA members' ability to compete with differentiated service offerings.

Second, many small and medium-sized cable companies are lean, efficient, and well-managed, positioning the companies to compete on price. But wholesale programming practices prevent that too. Price discrimination combined with tying, bundling, tiering and distribution obligations all raise the wholesale cost of cable and undercut the ability of smaller companies to compete on price. Video competition suffers.

D. Wholesale programming and retransmission consent practices impede broadband deployment.

Current wholesale programming practices conflict with the important policy goal of accelerating broadband deployment. As described by ACA members, wholesale programming practices raise their costs and harm their ability to compete. These effects combine to erode resources available for the substantial capital and operating costs necessary to deploy broadband. This consequence is particularly harmful for very small, rural cable systems where upgrading to provide broadband poses, at best, a significant financial challenge. The ever-escalating pressure on cost and bandwidth from programmers and broadcasters can delay and even prevent very small systems from upgrading to provide broadband.

From the record in this proceeding, the Commission will find ample justification to act. To preserve and promote more diverse programming choices, more lower cost video options, more video competition, and to accelerate broadband deployment, the Commission must address through regulations the harmful wholesale practices that proliferate the video marketplace.

IV. TO MITIGATE PUBLIC INTEREST HARMS AND TO ADVANCE KEY POLICY GOALS, THE COMMISSION SHOULD AMEND ITS REGULATIONS GOVERNING PROGRAM ACCESS AND RETRANSMISSION CONSENT.

We describe below the substantive and procedural adjustments to Commission regulations that would alleviate, in a restrained and measured manner, at least some of the harms of current wholesale practices. First, however, we want to emphasize one step the Commission should not take.

The Commission should not prohibit programmers or broadcasters from offering bundles of channels at wholesale. An outright prohibition on bundling

threatens to be overbroad. The sale of bundles of channels can result in efficient transactions that provide programmers, distributors and consumers with desired content at reasonable prices. The problem is that programmers and broadcasters often refuse to sell individual channels on a standalone basis. Or if they do, the rates are set unreasonably high so as to coerce purchase of the bundle. Ensuring that MVPDs can obtain channels on a standalone basis at reasonable prices, while allowing programmers to sell bundles as they chose, would open up a significant measure of flexibility and choice, without imposing unnecessary restrictions on wholesale offerings.

We turn now to the steps the Commission should take - adjusting its program access and retransmission consent regulations to address the harm of current wholesale practices.

A. Proposed adjustments to program access regulations.

Concerning satellite-delivered programming, to alleviate the public interest harms caused by current wholesale practices, the Commission should adopt the five substantive and procedural adjustments to 47 C.F.R §§ 76.1001 - 76.1003 described below.

1. The program access regulations should apply to all satellite cable programming vendors.

To reach some of the largest and most powerful media conglomerates, like Disney, Viacom, and NBC Universal, the Commission must expand the scope of 47 C.F.R §§ 76.1001 and 76.1002 to apply to all satellite cable programming vendors, not just those in which a cable operator has an attributable interest. As we have seen in merger undertakings by News Corp., extending program access regulations to Fox has benefited distributors and consumers by constraining, at least to some degree, the ability of Fox to abuse its market power over “must have” programming. At the same

time, by all accounts, extending the program access regulations to Fox has not resulted in any appreciable harm to the programmer. To the contrary, News Corp. has posted record revenues and income since agreeing to program access and retransmission consent conditions.¹⁴ And for the other adjustments proposed below to have meaningful results, they must apply to all satellite programmers.

2. The program access regulations should obligate programmers to offer each channel on a standalone basis on reasonable rates, terms and conditions.

To address the harms of tying and bundling, the Commission should prohibit programmers from refusing to offer any channel on a standalone basis on reasonable rates, terms and conditions. This change would create a realistic option for MVPDs to purchase channels other than in bundles mandated by programmers. At the same time, programmers would remain free to offer programming in bundles and charge different rates for channels purchased on a standalone basis, so long as those rates were reasonable.

3. The program access regulations should prohibit programmers from conditioning access to a channel on tiering or distribution obligations.

To address the harms of tiering and distribution obligations, the Commission should prohibit programmers from requiring, as a condition of access, the distribution of a channel on a specific tier or to a required percentage of MVPD customers. This change would enable MVPDs to offer a much wider variety of program packages at retail. Programmers could charge different rates for different distribution levels, so long as the rates were reasonable.

¹⁴ See Press Release, News Corp., News Corp. Reports Record Full Year Operating Income of \$4.45 Billion; Growth of 15% over Fiscal 2006, *available at* <http://www.newscorp.com/news/index.html>.

4. The program access regulations should prohibit non-cost-based price discrimination.

To address the harm of price discrimination against smaller MVPDs, the Commission should prohibit volume-based price differences, unless those differences are genuinely cost-based. This change would target the widespread practice of charging smaller distributors substantially more for programming and retransmission consent, solely because they are small. Where a wholesale price differential is not cost-based, it represents abuse of market power that increases costs for consumers. The Commission should constrain this conduct.

5. Adjustments to program access complaint procedures.

To effectuate the intent of the substantive regulations described above, the Commission should incorporate three changes to the program access complaint procedures. First, while a complaint is pending, the MVPD should be entitled to carry the channel at issue under the terms of the agreement in place at the time of the complaint. Second, a bargaining agent like the National Cable Television Cooperative should be able to bring complaints on behalf of its members. Finally, in complaints alleging that rates, terms or conditions were unreasonable, the programmer would bear the burden of proof.

The first two changes codify procedural conditions from the *News Corp. Order* that have worked effectively to bring a measure of balance to negotiations with a powerful programmer.¹⁵ Other programmers including Time Warner and Comcast have

¹⁵ *News Corp. Order*, ¶¶ 175, 176 (“[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 such as RSNs following News Corp.’s acquisition of control of DirecTV.”).

assented to these conditions.¹⁶ Liberty Media even volunteered for them.¹⁷ No programmer can now claim that these changes would cause any significant harm. The third change recognizes that in a proceeding challenging the reasonableness of a rate, term or condition, the programmer possesses most information relevant to reasonableness – including cost information and rates charged others. In the interest of more efficient administration of complaints, the burden of proof should be allocated to the least-cost information-provider. In this case, that is the programmer.

B. Proposed amendments to the retransmission consent regulations.

The adjustments to the retransmission consent regulations align with those proposed for the program access regulations.

1. The retransmission consent regulations should obligate broadcasters to offer each channel on a standalone basis on reasonable rates, terms and conditions.

To address the harms of retransmission consent tying and bundling, the Commission should establish that the refusal to offer channels on a standalone basis is a failure to negotiate in good faith. As with the proposed changes to the program access regulations, this change will establish in the context of retransmission consent an option for an MVPD to purchase one or more otherwise tied or bundled channels on a standalone basis. Broadcasters would remain free to offer programming in bundles and to offer different rates for standalone channels, so long as those rates were reasonable.

¹⁶ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors and Transferors, Comcast Corporation and Time Warner Inc., Assignees and Transferees*, Memorandum Opinion and Order, 21 FCC Rcd 8203, app. B (2006).

¹⁷ *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, Consolidated Application for Authority to Transfer Control, MB Docket No. 07-18, at 22-24 (Jan. 29, 2007).

2. The retransmission consent regulations should prohibit broadcasters from conditioning access to a channel on tiering or distribution obligations.

To address the harms of retransmission consent tiering and distribution obligations, the Commission should establish that the refusal to allow a cable operator to offer a broadcast channel on any tier of service is a failure to negotiate in good faith. Cable operators not subject to effective competition would still be obligated by law to offer broadcast channels on basic.¹⁸ But systems subject to effective competition should have the flexibility to offer increasingly costly network broadcast stations on a separate tier.¹⁹ Broadcasters would be entitled to offer incentives for greater distribution and to charge different rates for different distribution levels, so long as the rates were reasonable.

3. The retransmission consent regulations should prohibit non-cost-based price discrimination.

To address the harm of price discrimination against smaller distributors, the Commission should prohibit volume-based price differences in retransmission consent fees, unless those differences are cost-based. This change would target the growing practice of charging smaller distributors substantially higher fees for retransmission consent, solely because they are small. Where a wholesale price differential is not cost-based, it represents abuse of market power that increases costs for consumers. The Commission should constrain this conduct.

¹⁸ 47 U.S.C. § 543(b)(7)(a).

¹⁹ *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 192 (D.C. Cir., 1995) (47 U.S.C. § 543 (b)(7) does not apply to cable systems subject to effective competition).

4. Adjustments to retransmission consent complaint procedures.

To effectuate the intent of the substantive regulations set forth above, the Commission should incorporate three changes to the retransmission consent complaint procedures: First, while a complaint is pending, the MVPD could continue to carry the broadcast station at issue under the terms of the agreement in place at the time of the complaint. Second, a bargaining agent would be able to bring complaints on behalf of its constituency. Finally, in complaints alleging that rates, terms or conditions were unreasonable, the broadcaster would bear the burden of proof.

The first two changes codify procedural conditions from the *News Corp. Order* that have worked effectively to bring a measure of balance to retransmission consent negotiations with a powerful broadcaster.²⁰ The third change recognizes that in a proceeding challenging the reasonableness of a rate, term or condition, the broadcaster will possess most information relevant to reasonableness – including cost information and rates charged others. In the interests of efficient administration of complaints, the burden of proof should be allocated to the least-cost information-provider. In this case, that is the broadcaster.

With these regulations in place, ACA members could begin to develop a much wider variety of retail offerings, providing customers with more choice, value, and flexibility. The next section contains examples of how ACA members would like to offer programming at retail.

²⁰ *News Corp. Order*, ¶¶ 222, 223.

V. CHANNEL LINEUPS SHOWING HOW SMALL AND MEDIUM-SIZED CABLE COMPANIES WOULD OFFER MORE CHOICE, VALUE, AND FLEXIBILITY.

In preparing these comments, we asked ACA members to provide examples of the channel lineups they would offer if current wholesale programming and retransmission consent practices were reformed. We asked them to assume they could purchase channels on a standalone basis and that they would not be subject to tiering or distribution obligations. In response, we received an impressive array of diverse and innovative channel offerings.

Eight examples from eight different small or medium-sized cable companies follow. The lineups include several examples of expanded basic “on a diet,” a robust tier of containing a variety of channels, trimmed of accumulated bloat and cost. Other operators would add smaller packages. Another operator would offer the highest cost channels on a standalone basis. The range and variety of these channel offerings demonstrate a new world of consumer choice that would result from proper regulation of wholesale programming and retransmission consent practices.

ACA Member Sample Channel Lineup #1 – Four analog packages. The channel lineup on the following page was submitted by a third-generation family-owned cable company operating one small cable system. It shows a 44-channel analog channel lineup offered in four packages – a Broadcast Basic Tier, a small Expanded Basic Tier, a larger Expanded Basic Plus Tier, and a Sports Tier. In this cable operator’s market, consumers are particularly cost-sensitive. Offering two levels of expanded basic and moving high-priced sports channels to a separate tier would better serve the customer base, and could be accomplished on the current analog level of service. Current wholesale practices prevent the company from offering these choices.

ACA MEMBER
Sample Channel Line-up #1*

Basic Tier
ABC
CBS
NBC
PBS
UPN
IND
IND
IND
HSN
QVC
Local Time - Weather
Local Information

Expanded Basic - Plus
AMC
CNN
Fox News
FX
MSNBC
Trinity
EWTN
Hallmark
Court TV
Home + Garden
Discovery
Lifetime
E!
Food Network

Expanded Basic Tier
CNN
Fox News
MSNBC
AMC
Trinity
EWTN
Hallmark
Court TV
HGTV
E!

Sports Tier
ESPN
ESPN2
USA
WTBS
TNT
NFL
Comcast Sportsnet
Versus

* Pricing depends on wholesale fees.

ACA Member Sample Channel Lineup #2 – Seven analog and digital

packages. The channel lineup on the following page was submitted by a small cable company operating several predominantly rural systems. It shows a 65-channel lineup of analog and digital channels, grouped into seven packages, each containing channels likely to appeal to different segments of the cable operator's customer base. These include a Broadcast Tier, Entertainment Tier, Sports Tier, News Tier and more. After the Broadcast Tier, a customer could purchase one or more of the additional packages. Current wholesale practices prevent the company from offering these choices.

**ACA MEMBER
Sample Channel Line-up #2***

Broadcast Tier
ABC
CBS
NBC
Fox
Independent
PBS

Limited Basic Tier
Local Channel
Educational Access
Government Access
QVC
HSN
CSPAN
CSPAN2
INSP
TBN
The Weather Channel

Expanded Basic Core Tier
WGN
TV Guide
Lifetime
TNT
USA
TBS
Disney
Nick
Discovery

Sports Tier
Golf Channel
ESPN
ESPN2
Fox Sports
VS
Speed

Entertainment Tier
E!
FX
BET
Sci Fi
History
HGTV
CMT
VH1
MTV
Spike
Comedy
TCM
AMC
Family
TV Land
A&E
Game Show
Court
TLC
Animal Planet
Travel
Food
Hallmark

News Tier
Fox News
CNN
Headline News
CNBC
MSNBC

Variety Tier
SoapNet
Oxygen
G4
Bravo
Toon
National Geographic

* Pricing depends on license fees.

ACA Member Sample Channel Lineup #3 – Nine digital packages. The channel lineup on the following page submitted by a small family-owned company operating three cable systems in one state. It assumes an all digital cable system offering about 100 channels. The operator would group these channels into nine packages, including Kids, Science and Educational, Music, Movies, Sports, and others. The company would offer incentives for customers to purchase multiple packages, but there would be no requirement to purchase any package other than Broadcast Basic. Current wholesale practices prevent the cable operator from offering these choices.

**ACA MEMBER
Sample Channel Lineup #3***

**BROADCAST BASIC PLUS
LOCAL
ABC
CBS
NBC
FOX
PBS
GUIDE CHANNEL
3 ANGELS
TBN TRINITY
QVC
INSPIRATIONAL LIFE
WEATHER CHANNEL
DMX MUSIC - 37 CHANNELS

KIDS
NICKELODEAN
THE DISNEY CHANNEL
CARTOON NETWORK
TOON DISNEY
DICSCOVERY KIDS
NICKTOONS
GAS
NOGGIN

SCIENCE & EDUCATIONAL
BIOGRAPHY
HISTORY CHANNEL
DISCOVERY
DISCOVERY TIMES
DISCOVERY HEALTH
DISCOVERY HOME
DISCOVERY SCIENCE
MILITARY CHANNEL
HISTORY INTERNATIONAL
TLC
ANIMAL PLANET

LIFESTYLE
HGTV
FOOD NETWORK
LIFETIME
WOMEN'S ENTERTAINMENT
STYLE
GSN
BRAVO
TRAVEL CHANNEL
WEALTH TV
RFD TV
AMERICAN LIFE TV
G4 TV

MUSIC
GAC
CMT
CMT PURE
MTV
MTV 2
MTV HITS
VH1
VH1 CLASSICS
VH1 ROCK
VH1 SOUL
FUSE

NEWS & INFORMATION
FOX NEWS CHANNEL
CNN
HEADLINE NEWS
CNBC
C-SPAN
C-SPAN 2
COURT TV
BLOOMBURG

MOVIES
AMC
FXM: FOX MOVIE
INDEPENDENT FILM
LIFETIME MOVIE
SUNDANCE CHANNEL
ENCORE MUTLI PLEX

VARIETY
TBS
WGN
TNT
FX
USA
A&E
ABC FAMILY
SPIKE TV
SCI-FI
E! ENTERTAINMENT
HALLMARK
TV LAND
SLEUTH
COMEDY CENTRAL
BBC AMERICA

SPORTS
ESPN
ESPN2
ESPN CLASSICS
ESPN NEWS
FOX SPORTS MIDWEST
FOX SPORTS WORLD
GOLF CHANNEL
SPEED CHANNEL
VERSUS
OUTDOOR CHANNEL

**Broadcast Basic Required

* Requires an all-digital system. Pricing depends on wholesale.

ACA Member Sample Channel Lineup #4 – Nine digital packages. The channel line up on the following page was submitted by a small cable company in the process of upgrading some of its systems to all-digital. Here, the cable operator would group the 130 channels into nine packages, including Family, Music and Movies, Sports, Kids, and others. The company would move the highest-priced channels like ESPN, USA, Turner and Fox Sports to a “Premium” package. This model envisions that customers would not have to purchase any tier other than Limited Basic. Current wholesale practices require nearly all subscribers to receive the highest-priced channels on expanded basic and prevent the cable operator from creating several of the proposed tiers.

**ACA MEMBER
Sample Channel Line-up #4***

Limited Basic
TBN
Local Access
ABC
NBC
Ind
CBS
QVC Network
PBS
CW
PBS
FOX
Home Shopping Network
CSPAN
TVW
PAX
TV Guide Channel
Univision
Inspirational
Independent
Cable Market
Independent
Jewelry TV
Pentagon Channel
C-Span2

Expanded Basic
CNBC
Fox News Channel
MSNBC
CNN
CNN Headline News
Disney
American Movie Classics
Sci-Fi
The Weather Channel
Court TV
TBS
Oxygen
Lifetime
A&E
Bravo
Comedy Central
SpikeTV
MTV
E! Entertainment
FX

Family
WGN
TV Land
ABC Family
Home & Garden
Travel
History
Discovery
The Learning Channel
Animal Planet
Nickelodeon
Cartoon
Country Music TV
Great American Country
National Geographic
Northwest Cable NEWS
Food Network
Black Ent. TV
Hallmark Network

Variety
AZN Television
G4
SoapNet
GSN
Womens Entertainment
BBC Americas
Style
DIY
Fine Living
Lifetime Real Women

Movie and Music
Turner Classic Movies
Hallmark Movie Channel
Lifetime Movie Net
Independent Film
FXM
Video Hits 1
MTV 2
MTV Hits
MTV Espanol
VH1 Classic Rock
VH1 Soul
VH1 Country
MTV Jams
Fuse

Kids
Toon Disney
Noggin
Nick Games & Sports
Nick Toons
Discovery Kids
Sprout
EWTN
BYU-TV

Sports
CSTV
Tennis Channel
Versus
ESPNU
Golf Channel
Speed Channel
Outdoor Life
Outdoor Channel
NFL Network
ESPNNews
ESPN Classics
Fox Soccer Channel
Fox Col Sports (Atlantic)
Fox Col Sports (Pacific)
Fox Col Sports (Central)

Premium
Turner
USA
ESPN
ESPN2
Fox Sports

Learn
FIT TV
Discovery Home Channel
Discovery en Espanol
Biography Channel
History Intl
The Science Channel
Discovery Times
Discovery Health
Bloomberg
Military Channel

* Tier pricing depends on license fees.

ACA Member Sample Channel Lineup #5 and #6 – Eleven digital and HD packages. Channel lineup #5 was submitted by the operator of a single system and channel lineup #6 was submitted by a medium-sized cable company operating several systems. Both companies are in the process of transitioning to all-digital systems. The operators would group the approximately 140 channels offered into eleven small packages, including Children, Religious, News, “IQTV,” Movies, Sports, and others, along with multiple HD packages. Channel lineup #5 would add VOD, premium channels and pay-per-view sports. These models envision that customers would not have to purchase any tier other than “Foundation” or “Basic Plus.” Current wholesale practices prohibit operators from offering these choices.

**ACA MEMBER
Sample Channel Lineup #5***

Foundation
 ABC Network or Affiliate
 CBS Network or Affiliate
 NBC Network or Affiliate
 FOX Network or Affiliate
 PBS Network or Affiliate
 Independent Station
 Local Origination
 Weather Channel
 WGN
 TBS Superstation
 CW Network
 Headline News
 ESPNNews
 USA Network
 TNT
 Spike
 FX
 ABC Family
 Soapnet
 Comedy Central
 Bravo
 A&E
 Court TV
 BET
 Game Show Network
 Hallmark Channel
 TV Land
 RFD TV
 HSN
 QVC

News
 CNN
 FOX News
 CNBC
 MSNBC
 Fox Business Chan.
 CSPAN
 CSPAN2
 CSPAN3
 Bloomberg TV

Movies
 AMC
 TCM
 Fox Movie Channel
 Lifetime Movie Net
 Fox Movie Channel
 Sci-Fi

LifeStyle
 HGTV
 Style
 Food Network
 Travel Channel
 E! Entertainment
 Discovery Home
 Discovery Health
 Lifetime
 WE
 Oxygen

Sports
 ESPN
 ESPN2
 FOX Sports Net
 SportSouth
 Big Ten Network
 ESPN U
 CSTV
 NFL Network
 Golf Channel
 Sportsman Channel
 Speed Channel
 Tennis Channel
 Outdoor Channel
 Fox Soccer Channel
 Fox Atlantic
 Fox Central
 Fox Pacific

Children
 Disney
 Nickelodeon
 Cartoon Network
 Toon Disney
 Discovery Kids
 Noggin
 Nick GAS
 Boomerang
 Nicktoons

IQTV
 Discovery Ch
 Nat Geo
 Animal Planet
 TLC
 History Channel
 History International
 Biography
 Discovery Times
 Discovery Science
 BBC America
 G4 Tech
 Military Channel
 DIY

Music
 CMT
 GAC
 VH1 Country
 VH1 Classic
 VH1
 VH1 Soul
 MTV
 MTV2
 MTV Jams
 MTV Hits
 Music Choice

Religious
 TBN
 EWTN
 INSP
 Gospel Music
 FamilyNet
 DayStar
 Church Channel
 Golden Eagle Broad.
 3ABN
 BYU

Premium Channels
 (Price varies/service)
 HBO Multiplex
 Cinemax Multiplex
 Showtime Multiplex
 Starz Multiplex

PPV Sports Pkgs
 (Price varies/pkg.)
 ESPN Gameplan
 ESPN Full Court
 MLB Extra Innings
 NHL Center Ice
 NBA League Pass
 Event PPV

HD Foundation
 All HD simulcasts of
 foundation channels

HD Select **Price varies/channel**
 As customers select genre packages,
 HD Select will populate with HD simulcasts
 of networks from those packages.

VOD **Price varies/program**
 On demand programs will be available if
 customer subscribes to genre package that
 contains the corresponding network.

* Assumes an all-digital system. Pricing depends on wholesale rates.

ACA MEMBER
Sample Channel Lineup #6*

Basic Plus Tiers
Local Channel
NBC
CW
FOX
MNT
ION
PBS
WGN
Campus Station
Municipal Station
CBS
Community Channel
ABC
School District Station
TV Guide Network
C-SPAN
C-SPAN2/Gavel to Gavel
Independent

HD Lifestyle
Discovery HD
Discovery Health HD
Food Network HD
HGTV HD
TLC HD
Wealth TV HD

HD Family
Cartoon Network HD
Disney HD
Nickelodeon HD
Toon Disney HD

HD Movies
Fox Movie Network HD
HDNet Movies
MGM HD

Entertainment Tier
A&E
AMC
BBC America
BET
Bravo
CMT
Comedy Central
E!
Fox Movie Network
Fuse
FX
GAC
Independent Film Channel
Lifetime Movie Network
MTV
MTV Hits
MTV2
Oxygen
Sci-Fi
Spike TV
TNT
Turner Classic Movies
VH-1
VH-1 Classic

Lifestyle
AZN Television
Discovery Health
Discovery Home
DIY
Food Network
G4
Game Show Network
HGTV
HSN
Lifetime
SOAPnet
Style
Travel Channel
Univision
WE

Family Tier
3ABN
ABC Family
AmericanLife TV
Animal Planet
Boomerang
BYU TV
Cartoon Network
Church Channel
Daystar TV
Discovery Channel
Discovery Kids
Disney Channel
EWTN
FamilyNet
Gospel Music Channel
I-Lifetv
INSP
Military Channel
National Geo
Nick Toons
Nickelodeon
Nickelodeon GAS
Noggin
PBS Kids Sprout
TBN
TBS
The Science Channel
TLC
TOON Disney
TV Land
USA

HD Entertainment
Anime HD
HD Theater
HDNet
National Geo HD
TNT HD
Universal HD
USA HD

Sports Tier
ESPN
ESPN2
FCS Atlantic
FCS Central
FCS Pacific
FOX Soccer Channel
FOX Sports Net
Fuel TV
NFL Network
OLN
Speed
Tennis Channel
The Golf Channel
The Outdoor Channel
The Sportsman Channel

News and Information Tier
Biography
CNBC
CNN
CNN International
Court TV
C-SPAN 2
Discovery Times
ESPNews
FOX News Channel
Headline News
History Channel
History Int'l
MSNBC
Pentagon Channel
Weather Channel

HD Sports
ESPN HD
ESPN2 HD
FSN NW HD
NFL Network HD
Outdoor Channel HD

* Requires an all-digital system. Pricing would depend on wholesale rates and no tiering or penetration restrictions.

ACA Member Sample Channel Lineup #7 – Seven digital packages, including an optional pay broadcast tier, a no-cost basic tier, and custom channel choices. The channel lineup on the following page was submitted by a small cable company operating several systems. The company is in the process of upgrading some of the systems to all-digital. This operator would offer its approximately 120 channels in seven packages including an Entertainment, Movie, Sports, and more. Customers could purchase any of the packages.

This operator would like to offer additional levels of flexibility beyond that. First, the operator would offer an optional tier with the four major broadcast networks. This operator believes that the escalating cost of retransmission consent warrants moving these stations off of basic and giving consumers a choice to purchase them or not, just like DBS. At the same time, the operator would offer at no additional charge all must carry channels to all customers that purchase any other package. The operator would also allow customers to customize some of their packages. For example, within certain packages, customers would be able to select fewer channels at a lower cost. Current wholesale practices prohibit nearly all of the flexible offerings proposed by this operator.

ACA MEMBER
Sample Channel Line-up #7 *

Optional (Price depends on broadcaster fees)
Broadcast Tier One
ABC
CBS
NBC
FOX

Free to everyone
Broadcast Tier Two
PBS
UPN
CW
Paxon
Other Local MC
QVC
HSN
Shop NBC
Religious Nets
Local Community Channels
CNN Headline
Weather Channel

Pick 5 or take all
General Entertainment
Lifetime
FX
USA
TNT
TBS
CNN
Fox News
CNBC
Discovery
A&E
History
MTV

Pick 5 or take all
Movie Package
AMC
TCM
Fox Movies
Sundance
International Movies
LMN

Pick 5 or take all
Sports Tier Pack
ESPN
Comcast Sports Net
Regional Fox
NFL
Regional Sports
YES
NBA
Versus
Golf
ESPNU
CSTV

Kids/Family
Disney
Cartoon
Nick

Pick 5 or take all
Entertainment
TV Land
E!
Style
SoapNet
Bravo
Speed
Outdoor
SportsmanChannel
Learning
Travel
Food
Animal Planet
National Geo
HGTV
Spike
BET
VH1
CMT

* Assumes an all-digital system. Pricing depends on wholesale license fees.

ACA Member Sample Channel Lineup #8 – Twelve digital packages plus standalone channels. The final example was submitted by a medium-sized cable company serving smaller markets in several states. This operator would group its approximately 130 channels into 12 packages, including Broadcast, Faith & Values, Family, Hispanic, Music, Sports and more. This operator would also offer the highest-cost channels, Disney, ESPN, Fox Sports, TNT, TBS and USA on a standalone basis. Customers could purchase any mix of six or more packages plus any number of standalone channels. Current wholesale practices prohibit nearly all of the flexible offerings proposed by this operator.

ACA MEMBER Sample Channel Lineup #8*

BROADCAST
ABC
CBS
FOX
NBC
PBS
CW
MY NETWORKS
INDEPENDENTS

FAITH & VALUES
BYU
Three Angels Network
FamilyNet
INSP
TBN

FAMILY
Boomerang
Discovery Kids
Toon Disney
Nick Toons
Cartoon
Hallmark
NICK
ABC FAMILY

HISPANIC
Boomerang (SAP)
La Familia
Puma TV
Latin TV
CNN Espanol
Toon Disney (SAP)
Cine Mexicano
Telemundo
Fox Sports Espanol
Mun2
ESPN Deportes

A LA CARTE
DISNEY
WTBS
USA
TNT
ESPN2
FOX REG SPORTS
ESPN

**

LIFESTYLE
WE
Travel
Food Network
Style
HGTV
Oxygen
GSN
Bravo
LIFETIME

MOVIES
Fox Movie Channel
TCM
LMN
AMC

MUSIC
BET Jazz
Great American Country
CMT
VH-1
Music Choice
MTV
MTV2

NEWS & INFORMATION
TV Guide
HSN
QVC
CNN HN
C-SPAN2
C-SPAN
TWC
MSNBC
FOX NEWS
CNBC
CNN
Court

SCIENCE & EDUCATION
Animal Planet
Discovery Health
Discovery Science
Discovery Military Channel
Biography
History International
National Geographic
HISTORY
TLC
DISCOVERY

SPORTS
Fox College Sports Atlantic
Fox College Sports Central
Fox College Sports Pacific
Outdoor Channel
ESPNEWS
ESPN Classic
Fuel
Fox Soccer Channel
Golf
Versus
TVG
Speed Channel

VARIETY
WGN
TV LAND
SCI-FI
A&E
FX

ENTERTAINMENT
E!
BET
SoapNet
Comedy
SPIKE

HD version of network included in pack, if available. Additional equipment may be required.

* Requires an all-digital system. Package pricing depends on license fees.

** A La Carte pricing depends on standalone license fees.

These channel lineups demonstrate that ACA members want to offer consumers a wide range of choices, allowing more control over cost and content. The range of choices would vary depending on a number of factors, including system size, technology, and the operator's insight into its particular markets. Unfortunately, due to the current wholesale practices of programmers and broadcasters, ACA members can offer almost none of the retail options described above. For this to happen, the Commission must act.

VI. CONCLUSION

As shown in these comments, current wholesale programming and retransmission consent practices result in substantial public interest harms that are within the Commission's authority to regulate. To foster more choice, better value, more competition, and to promote broadband deployment, the Commission should adopt the wholesale programming and retransmission consent regulations proposed by ACA.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: 

Matthew M. Polka
President and CEO
Ross J. Lieberman
Vice President – Regulatory Affairs
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Christopher C. Cinnamon
Nicole E. Paolini-Subramanya
Scott C. Friedman
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for the American Cable Association

APPENDIX 1 Proposed Regulations

*Deletion of strikethrough text to the following section:

47 C.F.R. § 76.1001. Unfair practices generally. No cable operator, satellite cable programming vendor ~~in which a cable operator has an attributable interest~~, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

*Deletion of strikethrough text and addition of underlined text to the following sections:

47 C.F.R. § 76.1002. Specific Unfair Practices Prohibited.

* * *

(b) Discrimination in prices, terms or conditions. No satellite cable programming vendor ~~in which a cable operator has an attributable interest~~, or satellite broadcast programming vendor, shall discriminate in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors. Nothing in this subsection, however, shall preclude:

* * *

(3) The establishment of different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor, so long as volume-related price differences are cost-based; or

~~Note: Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership.~~

* * *

47 C.F.R. § 76.1002. Specific Unfair Practices Prohibited. (cont.)

(g) No satellite cable programming vendor or satellite broadcast programming vendor shall refuse to sell any satellite cable programming channel on a standalone basis. Prices, terms and conditions for standalone channel offerings shall be reasonable. These regulations shall not restrict a satellite cable programming vendor or satellite broadcast programming vendor from also selling channels in bundles or packages.

(h) No satellite cable programming vendor or satellite broadcast programming vendor shall prohibit an MVPD from distributing any channel or channel package on: (i) any MVPD service tier; or (ii) below a specified percentage of an MVPD's subscribers. Nothing in these regulations shall restrict a satellite cable programming vendor or satellite broadcast programming vendor from offering incentives for distribution on a specific MVPD tier or above a specified percentage of an MVPD's subscribers, so long as any differences in prices, terms, and conditions are reasonable, taking into account the extent of an MVPD's distribution of the channel or channel package.

47 C.F.R. § 76.1003. Program Access Proceedings.

* * *

(i) Other procedural provisions:

(1) During the pendency of a complaint under this section involving one or more satellite cable programming channels or satellite broadcast programming channels carried by an MVPD, the MVPD shall be permitted to continue distribution of the channel or channels under the same prices, terms and conditions that were in effect at the time of the complaint.

(2) A buying group may bring a complaint under this section on behalf of one or more small cable companies and shall have all rights and obligations of a party as set forth under this section.

(3) For complaints alleging that a satellite cable programming vendor or satellite broadcast programming vendor has refused to offer channels or channel packages on reasonable prices, terms and conditions in violation of Section 47 C.F.R 76.1002, the satellite cable programming vendor or satellite broadcast programming vendor shall bear the burden of proving that is prices, terms and conditions are reasonable.

47 C.F.R. § 76.65. Good faith and exclusive retransmission consent complaints.

* * *

(b) Good faith negotiation.

(3) Additional standards applicable to broadcast television stations:

The following actions or practices violate a broadcast television station's duty to negotiate retransmission consent agreements in good faith:

(i) The refusal to offer retransmission consent for any broadcast channel on a standalone basis. Prices, terms and conditions for standalone channel offerings shall be reasonable. These regulations shall not restrict a broadcast television station offering retransmission consent in bundles or packages with other broadcast channels or satellite cable programming channels.

(ii) Except where required by law, the refusal to allow an MVPD to distribute a broadcast channel: (A) on any MVPD service tier; or (B) below a minimum percentage of an MVPD's subscribers. Nothing in these regulations shall restrict a broadcast television station from offering incentives for distribution on a specific MVPD tier or to a minimum percentage of an MVPD's subscribers, so long as the prices, terms, and conditions are reasonable, taking into account the extent of an MVPD's distribution of the channel or channel package.

(iii) The establishment of different prices attributable to the number of subscribers served by the distributor, unless such price differences are cost-based.

* * *

(d) Burden of proof. In any complaint proceeding brought under this section, the burden of proof as to the existence of a violation shall be on the complainant. For complaints alleging that a television broadcast station has refused to offer a channel on reasonable prices, terms and conditions, the television broadcast station shall bear the burden of proving that its prices, terms and conditions are reasonable. In all other complaints, brought under this section, the burden of proof as to the existence of a violation shall be on the complainant.

* * *

(g) During the pendency of a complaint by an MVPD under this section involving a television broadcast station carried by the complainant, the television broadcast station shall allow continued distribution of the station by the MVPD under the same prices, terms and conditions in effect at the time of the filing of the complaint.

APPENDIX 2 Commission Authority

The Communications Act gives the Commission authority to regulate wholesale practices of programmers and broadcast stations as proposed in these comments. We discuss below Commission jurisdiction over (i) vertically-integrated programmers, (ii) non-vertically integrated programmers, and (iii) broadcasters.

1. Authority to regulate wholesale practices of vertically-integrated programmers.

The Communications Act expressly grants the Commission jurisdiction over the wholesale programming practices of vertically-integrated programmers. Section 628(b) of the Communications Act provides:

It shall be unlawful for a...satellite cable programming vendor in which a cable operator has an attributable interest to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.²¹

Section 628(c) requires the Commission to promulgate regulations under this provision in order to:

[P]romote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies....²²

Under this provision, the Commission has already implemented regulations governing the practices of vertically-integrated programming providers.²³

²¹ 47 U.S.C. § 548(b).

²² 47 U.S.C. § 548(c).

²³ See 47 C.F.R. §§ 76.1000 – 76.1004.

As shown in these comments, the regulations require adjustment to address wholesale programming practices of programmers, both vertically-integrated and non-vertically-integrated. Section 628 provides the Commission with the authority to address these practices in so far as vertically-integrated programmers are involved.

2. Authority to regulate wholesale practices of non-vertically integrated programmers.

The Communications Act provides the Commission with express jurisdiction over non-vertically integrated programmers. Section 616(a) of the Cable Act²⁴ provides:

The Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors....²⁵

This jurisdiction provides a basis for adopting the non-vertically integrated programmer regulations proposed here.

In addition, the Communications Act provides the Commission with several sources of ancillary jurisdiction to regulate the wholesale programming practices of non-vertically integrated programmers. The Commission may exercise ancillary jurisdiction when:

- (i) The Commission's general jurisdictional grant under Title I covers the regulated subject; and
- (ii) The regulations are reasonably ancillary to the Commission's effective performance of its statutorily-mandated responsibilities.²⁶

²⁴ 47 U.S.C. § 536.

²⁵ 47 U.S.C. § 536(a).

²⁶ *American Library Association, et al. v. FCC*, 406 F.3d 689, 691-692 (D.C. Cir. 2005); *In the Matter of IP-Enabled Services*, Report and Order, 22 FCC Rcd. 11275, ¶ 22 (2007).

Both these conditions are met in the case of regulation of the wholesale programming practices of non-vertically integrated programmers.

The Commission’s general jurisdictional grant under Title I covers all programming distributed on an interstate basis. Section 154 of the Communications Act mandates that the Commission “execute and enforce the provisions of [Chapter 5 of the Communications Act].”²⁷ Under the Commission’s general jurisdictional grant in Section 152(a) of the Act, the provisions of Chapter 5 of the Communications Act “apply to all interstate...communication by wire or radio...and to all persons engaged ...in such communication...(emphasis added).”²⁸

As an initial matter, the Supreme Court has held that Section 152(a) of the Communications Act is broad enough to encompass entities, like non-vertically integrated programmers, which are not otherwise expressly addressed in the Act.²⁹ This is because Section 152(a) “is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act’s other provisions governing common carriers and broadcasters apply....”³⁰ Thus, the jurisdictional question is not whether non-vertically integrated programmers are expressly covered under the Act, but

²⁷ 47 U.S.C. § 151. See also 47 U.S.C. § 154(i) (the Commission may “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions....”) and 47 U.S.C. § 303(r) (the Commission may make “such rules and regulations and...restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions of this chapter....”).

²⁸ 47 U.S.C. § 152(a).

²⁹ *U.S. v. Southwestern Cable Co., et al.*, 392 U.S. 157, 172-173 (1968) (“*Southwestern*”) (“Nothing in the language of § 152(a), in the surrounding language, or in the Act’s history or purposes limits the Commission’s authority to those activities and forms of communication that are specifically described by the Act’s other provisions....Similarly, the legislative history indicates that the Commission was given ‘regulatory power over all forms of electrical communication....’ ...We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over ‘all interstate...communication by wire or radio.’”) (citations omitted).

³⁰ See *U.S. v. Midwest Video Corp.*, 406 U.S. 649, 660 (1972), *citing Southwestern* at 172-173.

whether their programming is “interstate communication by wire or radio.” It is. The Supreme Court settled this question forty years ago.³¹ Moreover, the Commission itself has noted:

Federal Courts have consistently recognized that [Section 154(i) of the Act] give[s] the Commission broad authority to take actions that are not specifically encompassed within any statutory provisions but that are reasonably necessary to advance the purposes of the Act.”³²

Accordingly, Title I gives the Commission ample general jurisdiction over the non-vertically integrated programmers and their programming.³³

Regulation of the wholesale programming practices of non-vertically integrated programmers is reasonably ancillary to the effective performance of the Commission’s various responsibilities. Regulating the wholesale terms and conditions for non-vertically integrated programming is reasonably ancillary to the effective performance of the Commission’s various responsibilities under the Communications Act. These include:

Section 601(4): “[To] assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”³⁴

³¹ *Southwestern* at 169. For the same reason, the Commission has jurisdiction over broadcast programming on a cable system, “even where...signals emanate from stations located within the same State in which the CATV system operates.” *Id.*

³² *In the Matter of Continental Airlines*, Memorandum Opinion and Order, 21 FCC Rcd. 13201, 13217 n.112 (2006). Under Section 154(i) of the Communications Act, the Commission must “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions....” 47 U.S.C. § 154(i). Similarly, Section 201(b) of the Communications Act (47 U.S.C. § 201(b) provides that the Commission “may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.” And Section 303(r) (47 U.S.C. § 303(r) provides that the Commission may “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter...”

³³ See also *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) citing 47 U.S.C. §§ 151 and 201 (“Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act...and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of the Act....”).

As these comments show, the wholesale practices of non-vertically integrated programmers sharply restrict the ability of small and medium-sized cable companies to provide diverse channel offerings.³⁵ Accordingly, Section 601(4) of the Communications Act gives the Commission an independent basis on which to exercise ancillary jurisdiction over the wholesale practices of non-vertically integrated programmers.

Section 601(6): “[To] promote competition in cable communications...”³⁶

As these comments show, the wholesale programming practices of non-vertically integrated programmers impede small and medium-sized cable companies’ ability to compete with DBS and other large MVPDs.³⁷ Accordingly, Section 601(6) of the Communications Act gives the Commission an independent basis on which to exercise ancillary jurisdiction.

Section 706. “[T]o encourage the provision of new technologies and services to the public.”³⁸

As these Comments show, the wholesale programming practices of non-vertically integrated programming can impede the ability of some small cable systems to deploy

³⁴ 47 U.S.C. § 521(4).

³⁵ See Section II of these comments.

³⁶ 47 U.S.C. § 521(6).

³⁷ See Section II of these comments.

³⁸ 47 U.S.C. § 157(a).

broadband.³⁹ Accordingly, Section 706(a) of the Communications Act gives the Commission an independent basis on which to exercise ancillary jurisdiction.⁴⁰

In summary, the Communications Act gives the Commission ample authority to assert its ancillary jurisdiction over non-vertically integrated programmers.

3. Authority to regulate retransmission consent practices of broadcasters.

The Communications Act's mandate that the Commission require broadcasters to negotiate in good faith for retransmission consent provides the Commission with express jurisdiction over the retransmission consent practices at issue in this proceeding.⁴¹ As described in these comments, the retransmission consent demands that broadcast groups make on small and medium-sized cable companies are not based on competitive marketplace considerations.⁴² To the contrary, these terms and conditions are a direct consequence of the unequal bargaining power that these conglomerates wield over small and medium-sized cable companies.

In summary, Commission has authority to regulate wholesale practices of programmers and broadcasters and adopt ACA's proposed substantive and procedural adjustments to Commission regulations.

³⁹ See Section III(D) of these comments.

⁴⁰ See *In the Matters of Review of the Emergency Alert System*, Second Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 13275, ¶ 48 (2007) (asserting ancillary jurisdiction over wireline video providers under Sections 624(g) and 706 of the Communications Act).

⁴¹ See 47 U.S.C. § 325(b)(3)(C)(ii).