

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

In the Matter of )  
 )  
Customer Rebates for Undelivered Video ) MB Docket No. 24-20  
Programming During Blackouts )  
 )  
 )

REPLY COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS

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April 8, 2024

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**I. INTRODUCTION AND SUMMARY**

The National Association of Broadcasters (NAB)<sup>1</sup> submits these reply comments regarding the FCC’s proposal to require cable operators and direct broadcast satellite (DBS) providers to give their subscribers rebates when those subscribers cannot access video programming on their multichannel platform due to contractual disputes with broadcasters or other program suppliers.<sup>2</sup> NAB’s initial comments did not take a position on whether the government should require multichannel video programming distributors (MVPDs) to provide rebates. However, we urged the Commission to carefully observe the lengths to which pay TV providers will go to withhold money from consumers. This is particularly important in light of the pay TV industry’s consistent whining about Congress supporting retransmission consent, as pay TV companies and their well-funded front groups argue that the Commission should effectively reduce retransmission consent rates so that pay TV companies (supposedly) can

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<sup>1</sup> NAB is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

<sup>2</sup> *Customer Rebates for Undelivered Video Programming During Blackouts*, Notice of Proposed Rulemaking, MB Docket No. 24-20, FCC 24-2 (rel. Jan. 17, 2024) (Notice).

reduce rates for consumers. The Commission should know by now that the pay TV industry will do whatever it can – including spending millions lobbying to avoid paying for content it repackages and resells to consumers – to line its pockets regardless of consumer welfare.

In these comments, NAB also corrects the record with respect to the frequency of disruptions in signal carriage on MVPD systems arising from retransmission consent negotiating impasses and addresses certain other pay TV proposals. The Commission – perhaps misled by the pay TV providers driving most of those disputes – claims incorrectly that disruptions have been rising. In fact, they only seem to increase when the federal government develops an interest in retransmission consent “reform.” That leaves the door open for pay TV companies to take a hard line in negotiations, keep the money consumers pay them for content they don’t receive, and use the fact of any disruptions they create to their lobbying advantage.

## **II. “IT’S TOO HARD TO DO, SO CAN YOU JUST LET US KEEP ALL THE MONEY?”<sup>3</sup>**

Every pay TV industry commenter opposes the FCC’s rebate proposal,<sup>4</sup> repeatedly objecting that it is “unworkable.”<sup>5</sup> Procedures to calculate rebates “do not exist,” would be

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<sup>3</sup> The authors took creative license by putting quotation marks around the heading of this section; indeed, it is truly just a paraphrase of the pay TV industry’s position.

<sup>4</sup> See Comments of NCTA – The Internet & Television Ass’n (NCTA), MB Docket No. 24-20 (Mar. 8, 2024) (NCTA Comments); Comments of the American Television Alliance (ATVA), MB Docket No. 24-20 (Mar. 8, 2024) (ATVA Comments); Comments of NTCA—The Rural Broadband Ass’n (NTCA), MB Docket No. 24-20 (Mar. 8, 2024) (NTCA Comments); Letter from Michael Nilsson, Counsel to ACA Connects—America’s Communications Ass’n (ACA) to Marlene H. Dortch, FCC Secretary, MB Docket No. 24-20 (Mar. 8, 2024) at 1 (documenting ex parte meetings where ACA discussed issues raised in comments filed by ATVA, of which it is a member); Comments of DISH Network LLC, MB Docket No. 24-20 (Mar. 8, 2024) (DISH Comments).

<sup>5</sup> NTCA Comments at 1; Verizon Comments at 13; DISH Comments at 20; NCTA Comments at 6.

“expensive and time-consuming,”<sup>6</sup> and “complex.”<sup>7</sup> Pay TV filers contend that, even though consumer bills do not reflect how much subscribers value, or do not value, specific channels (with the exception of a few premium channels), providers could not possibly offer rebates unless they reflect an individual subscriber’s valuation of each channel lost.<sup>8</sup> And despite many MVPDs’ practice of adding a broadcast TV fee or surcharge to consumers’ bills, MVPD commenters nonetheless oppose refunding a pro-rata portion of this fee (such as ten percent of the fee if one of ten broadcast channels is unavailable) because it is being a “blunt approach” that would “disregard the cost of individual channels.”<sup>9</sup> Rebates would assign “inherently arbitrary” values to lost programming,<sup>10</sup> would be “irrational”<sup>11</sup> and would “ignore [the] complexities”<sup>12</sup> of how consumers value and how MVPDs pay for programming. In other words, it’s absolutely fine for MVPDs to extract payments from consumers that do not reflect the value viewers place on particular channels, but beyond the pale to suggest that MVPDs ever refund payments to subscribers for channels paid for yet not received without such specific information.

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<sup>6</sup> NTCA Comments at 4-5.

<sup>7</sup> DISH Comments at 20.

<sup>8</sup> See, e.g., NCTA Comments at 5-6 (“It is not possible for a cable operator to know how much or how little a particular subscriber values a channel, and as such a value determination made by the cable operator would be inherently arbitrary.”); ATVA Comments at 7-8 (certain ATVA members offer credits to subscribers who request them, which “reflects the fact that customers value channels differently, and not everyone cares about any given blacked-out channel”); *id.* at 12 (“... individual subscribers value different parts of the bundle differently”).

<sup>9</sup> ATVA Comments at 12-13.

<sup>10</sup> NCTA Comments at 6.

<sup>11</sup> ATVA Comments at 12

<sup>12</sup> ATVA Comments at 12.

In sum, the pay TV industry’s central objection to the rebate proposal is that because it is just too hard to come up with a *perfect* rebate calculation, the best solution is for MVPDs to simply keep all the money (unless that consumer happens to subscribe to one of few MVPDs that has somehow discovered the magic formula and provides some form of rebate or credit and makes the time to affirmatively request that credit).<sup>13</sup> The Commission cannot take this position seriously. Moreover, these pay TV providers are the very same companies whose claims the Commission seems to credit, whether in transactions or rulemaking proceedings, that MVPDs would lower costs to consumers if they did not have to properly compensate broadcasters for carriage of their signals.

### **III. DATA DEMONSTRATE THAT DISRUPTIONS IN SERVICE ARE RARE AND HAVE NOT INCREASED IN RECENT YEARS**

NAB also wishes to correct the record with respect to purported “increases” in disruptions in signal carriage arising from retransmission consent negotiating impasses. As NAB explained in connection with the FCC’s proposal for reporting on negotiating impasses, contrary to assertions in the Notice,<sup>14</sup> the Reporting Notice,<sup>15</sup> and by pay TV filers<sup>16</sup> that the number of signal carriage disruptions has “increased dramatically,” disruptions are rare and are not on the rise. As shown by Kagan data below, there have been only 18 disruptions over

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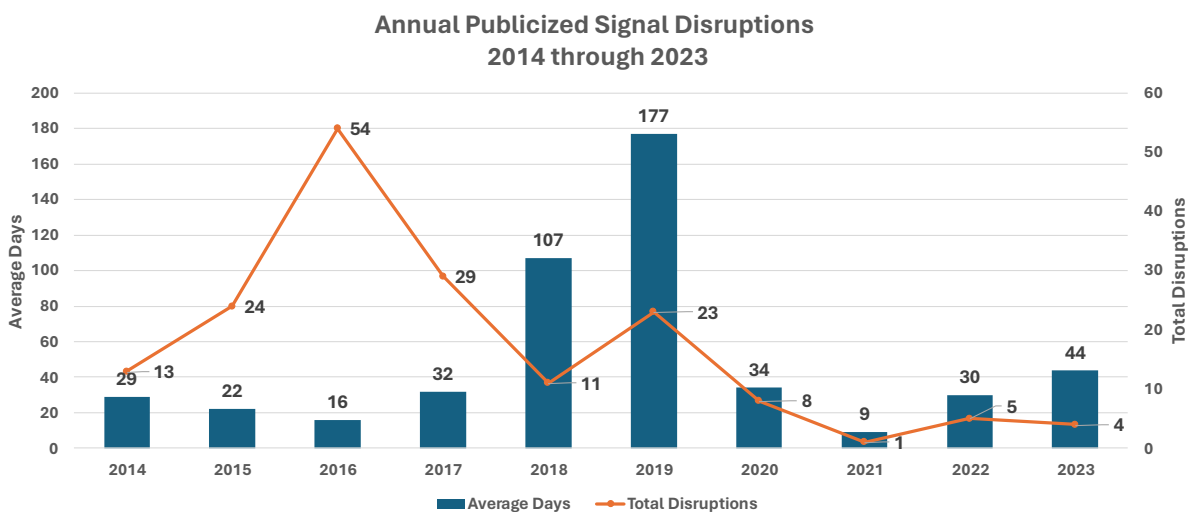
<sup>13</sup> The entire record in this proceeding has identified by name only three MVPDs that ever offer rebates or credits to subscribers, one of which “compensate[s] consumers in certain circumstances” and two others that give credits to “interested individuals or classes of subscribers, rather than all subscribers automatically.” ATVA Comments at 7.

<sup>14</sup> Notice at ¶¶ 3, 5.

<sup>15</sup> See also *Reporting Requirements for Commercial Television Broadcast Station Blackouts*, Notice of Proposed Rulemaking, MB Docket No. 23-427, FCC 23-115 (rel. Dec. 21, 2023) at ¶ 3 (Reporting Notice).

<sup>16</sup> See, e.g., DISH Comments at 21; Comments of the American Television Alliance (ATVA), MB Docket No. 23-427 (Feb. 26, 2024) (ATVA Reporting Comments) at 1. See also Comments of the New York State Department of Public Service, MB Docket No. 24-20 (Mar. 8, 2024) at 1.

the past four years from January 2020 – December 2023, or 4.5 disruptions per year. This is about the same frequency as was the case for the first 20 years of the retransmission consent regime according to data in the Reporting Notice (i.e., 81 disruptions over 20 years, or 4.05 disruptions per year).<sup>17</sup> The average length of disruptions also is *not* on the rise and has varied greatly over the past ten years, with no consistent direction up or down.



Annual publicized signal disruptions 2014 through year -to-date 2023											
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	
Avg. days outstanding	29	22	16	32	107	177	34	9	30	44	
Total disruptions	13	24	54	29	11	23	8	1	5	4	
As of December 1, 2023											
Sources: Industry data; Kagan estimates. Kagan, a part of S&P Global Market Intelligence.											
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<sup>17</sup> Reporting Notice at ¶ 3. NAB also questions whether the early years of the retransmission consent regime are even a valid period of comparison to the past decade. After all, the pay TV industry for years flatly refused to pay cash compensation to broadcasters for permission to carry their signals, and even as late as the mid-2000s, broadcasters still were not earning any significant fees for MVPD carriage of their valuable signals. FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) at ¶ 10. It was only with the emergence of cash compensation that the pay TV industry began to systematically lobby for changes to the retransmission consent regime and, thus, to have increased incentives to show that the regime needed “reform” by engaging in and publicizing negotiating impasses.

Notably, the only “dramatic” increases in disruptions, whether measured by frequency or length of time, have occurred when the Commission and/or Congress actively contemplate changes to the retransmission consent regime, and the pay TV industry’s incentives to show problems with the retransmission process accordingly increase. As shown above, there were a record high number of disruptions in 2016 (54 disruptions), when the Commission, as directed by Congress in the STELA Reauthorization Act of 2014, was evaluating whether to change the totality of the circumstances test in its retransmission consent good faith rules (and ultimately determined that it would not do so).<sup>18</sup> Similarly, the average length of disruptions was at its highest in 2019 (an average of 177 days), when Congress was deliberating a further extension of the Satellite Television Extension and Reauthorization Act (STELAR), the periodic reauthorization of which was seized upon by the pay TV industry as a legislative vehicle to lobby for changes to retransmission consent.<sup>19</sup>

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<sup>18</sup> See *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216 (rel. Sept. 2, 2015); *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC Blog, Chairman Tom Wheeler (Jul. 14, 2016) (concluding a statutorily mandated review of the FCC’s retransmission consent rules by stating that: “[b]ased on the staff’s careful review of the record, it is clear that more rules in this area are not what we need at this point . . . So, today I announce that we will not proceed at this time to adopt additional rules governing good faith negotiations for retransmission consent.”).

<sup>19</sup> See Comments of NAB, MB Docket No. 23-405 (Feb. 5, 2024) at 4-5, *citing* Prepared Statement of Emily Barr, President and CEO, Graham Media Group and Television Board Chair, NAB, Before the U.S. Senate Committee on Commerce, Science & Transportation (Oct. 23, 2019) (“Over the past five months alone as Congress has debated [the Satellite Television Extension and Reauthorization Act (STELAR)], AT&T-DIRECTV has been involved in 10 retransmission consent impasses with broadcast groups across the country impacting more than 179 stations. (By comparison, during this same period last year, AT&T-DIRECTV was involved in only one impasse and it affected only a single station.) These anti-consumer negotiating tactics are encouraged every five years by STELAR’s renewal.”).



#### IV. PAY TV PROPOSALS FOR CERTAIN RETRANSMISSION CONSENT “REFORMS” AND MODIFICATIONS TO THE FCC’S REBATE PROPOSAL ARE UNLAWFUL

In keeping with the pay TV industry’s previous retransmission consent lobbying, some commenters here advance proposals that would be patently contrary to the Communications Act of 1934 (Act) and/or other statutory provisions, that the Commission already has considered and rejected, or that otherwise do not make sense. In earlier proceedings, NAB refuted in detail a host of other unmeritorious MVPD proposals objecting to retransmission consent, which were similarly contrary to Section 325 of the Act, beyond the FCC’s authority to adopt, and/or specious.<sup>20</sup> This current round of flawed proposals is just more of the same.

For example, DISH urges the Commission to propose that it shall be per se evidence of “bad faith” for a broadcaster to require an MVPD to agree to carry other broadcast stations or “cable networks” as a condition of obtaining consent for carriage of the broadcasters’ primary signal, “without giving a real economic alternative to carrying just the primary signal(s).”<sup>21</sup> First, this proposal arguably already is addressed by the existing good faith standard requiring parties to “put forth more than a single, unilateral proposal.”<sup>22</sup> To the extent that DISH just wants to prohibit in-kind compensation, the Commission already has addressed this issue, having explicitly held that “[p]roposals for carriage conditioned on carriage of any other programming, such as a broadcaster’s digital signals, an affiliated cable programmer service, or another broadcast station in either the same or a different market” is presumptively

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<sup>20</sup> See, e.g., NAB Written Ex Parte Communication, MB Docket Nos. 15-216, 10-71 (Mar. 17, 2016).

<sup>21</sup> DISH Comments at 22, *citing* Comments of ATVA, MB Docket No. 15-216 (Dec. 1, 2015).

<sup>22</sup> 47 C.F.R. § 76.65(b)(iv).

consistent with the good faith standard.<sup>23</sup> For these reasons and those discussed in NAB's previous filings responding to this proposal when it was made by ATVA nearly ten years ago, the Commission should not revisit this proposal.<sup>24</sup> DISH also urges the FCC to propose that it is per se bad faith for broadcasters not to allow distant signals affiliated with the same network to be imported into its market during the time it is not being carried on local MVPDs if it has declined to grant an extension of a retransmission consent agreement (either by granting a waiver in the DBS context or declining to exercise its exclusive rights in the cable context).<sup>25</sup> But the adoption of any "penalties" for failing to grant retransmission consent would be completely contrary to Section 325 and Congressional intent, among many other legal and policy issues. Congress established a system of market-based negotiations for retransmission consent, subject only to an obligation by both parties to negotiate in good faith. A rule that requires broadcasters to waive other rights if they do not consent to carriage their signals would obviously coerce carriage and would be contrary to the core meaning of the requirement that MVPDs obtain a broadcaster's consent to carriage.

DISH additionally suggests that the Commission propose it is "per se bad faith" for a broadcaster to reject an MVPD's proposal to "pass through any channel on an a la carte basis."<sup>26</sup> Developing an entirely new system of retransmission consent as proposed by DISH

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<sup>23</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5471-72 (2000) (2000 Good Faith Order). See also S. Rep. No. 102-92, at 35-36 (1991) (in enacting the retransmission consent statute, Congress recognized that broadcasters may seek a range of monetary or in-kind compensation, including specifically "the right to program an additional channel on a cable system").

<sup>24</sup> See, e.g., Reply Comments of NAB, MB Docket No. 15-216 (Jan. 14, 2016) at 28-41.

<sup>25</sup> DISH Comments at 22-23.

<sup>26</sup> DISH Comments at 23.

cannot be accomplished through mere modifications to the FCC's good faith rules, and would require changes to Section 325 of the Act, as well as other statutory modifications.<sup>27</sup> DISH further fails to advance any public policy reason why the FCC should make such a proposal.

The Commission also should reject the unsupported contentions of some pay TV providers that broadcasters are "causing" disruptions in signal carriage,<sup>28</sup> that a rebate requirement will "increase" broadcaster "leverage" in retransmission consent negotiations,<sup>29</sup> or that a rebate requirement will result in more disruptions.<sup>30</sup> Broadcasters have every incentive to remain at the retransmission consent negotiating table and ensure that their signals are carried by as many MVPDs as possible in order to maximize their audiences. No MVPD has demonstrated, in the context of this or any other proceeding, that broadcasters have market power or that retransmission consent fees are the result of anything other than arms-length negotiations in the marketplace. The claim that behemoth MVPDs, including those with national footprints like DISH and DIRECTV, are unable to negotiate with broadcasters that face local and national ownership restrictions and are overwhelmingly smaller by any definition of the term lacks credibility.<sup>31</sup>

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<sup>27</sup> NAB notes that such a proposal would be inconsistent with cable operators' statutory obligations to offer broadcast channels as part of the basic tier, so it could only be applied with respect to a limited number of MVPDs. 47 U.S.C. § 543(b)(7)(A).

<sup>28</sup> ATVA Comments at 2-3; DISH Comments at 3.

<sup>29</sup> ATVA Comments at 8-10; DISH Comments at 3-11 and Exhibit 1.

<sup>30</sup> ATVA Comments at 10.

<sup>31</sup> Comments of NAB, MB Docket No. 24-20 (Mar. 8, 2024) at 6 and FTN 12 (discussing how even large broadcasters' market capitalizations are dwarfed by those of many MVPDs).

NTCA urges the Commission to adopt rules that would interfere with the prices, terms and conditions of retransmission consent, which would be contrary to Section 325.<sup>32</sup> The Commission has no authority to regulate retransmission consent compensation. NTCA also urges the Commission to require MVPDs to disclose the per subscriber cost of the channels that are the subject of the rebate “along with information about the price increase or other terms that are proposed and the source of the dispute” and to adopt rules overriding any confidentiality provisions in programming agreements.<sup>33</sup> NTCA made similar proposals in connection with the FCC’s impasse reporting requirement.<sup>34</sup> As NAB previously explained, the Commission has no authority to require the prices, terms, and conditions of retransmission consent proposals or agreements to be made public, or to declare provisions of privately negotiated contracts invalid by regulatory fiat.<sup>35</sup> In adopting its good faith negotiation requirements, the Commission explicitly held that parties need only provide reasons for rejecting any aspect of a retransmission consent proposal, and explicitly rejected the idea of parties supplying evidence or documentation, stating that “an information sharing or discovery mechanism” would be highly problematic because broadcasters and MVPDs “are competitors and the information involved would, in most instances, be competitively sensitive.”<sup>36</sup> Requiring the disclosure of such competitively sensitive material also would raise

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<sup>32</sup> NTCA Comments at 5 (“broadcasters should not receive any payment for the period of a blackout and should not be permitted to backdate agreed upon fees to any period before full service is restored”).

<sup>33</sup> NTCA Comments at 4-6.

<sup>34</sup> Comments of NTCA, MB Docket No. 23-427 (Feb. 26, 2024) at 4-5.

<sup>35</sup> NAB Reply Comments, MB Docket No. 23-427 (Mar. 26, 2024) at 6-7. See also Reply Comments of NCTA, MB Docket No. 23-427 (Mar. 26, 2024) at 3 (“the Commission should reject the suggestion that MVPDs report on retransmission consent rates and the details of particular negotiations”).

<sup>36</sup> 2000 Good Faith Order, 15 FCC Rcd 5464 and n. 100.

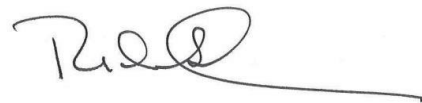
serious questions under the Trade Secrets Act.<sup>37</sup> The good faith rules already require the parties to provide reasons for rejecting any aspects of a retransmission consent offer, and NTCA provides no rationale as to why enforcement of this requirement is insufficient. The Commission should not consider NTCA's flawed proposals.

## V. CONCLUSION

NAB expresses no opinion on whether the government can or should mandate consumer rebates when MVPDs fail to provide programming for which a subscriber has paid. But it should certainly look askance at claims by the pay TV industry that increased broadcast regulation – which is ultimately rate regulation – will help anyone (other than the pay TV industry). NAB urges the Commission to continue to reject pay TV's calls for one-sided “reforms” in the context of retransmission consent, and to consider the anti-competitive motivations of pay TV advocates seeking other broadcast regulations and restrictions.

Respectfully submitted,

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<sup>37</sup> See Comments of NAB, MB Docket No. 15-216 (Dec. 1, 2015) at 45-46, *citing* 18 U.S.C. § 1905; *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015).