

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

In the Matter of)
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)
FCC Seeks Comment Regarding Possible) CB Docket No. 11-72
Revision or Elimination of Rules Under the)
Regulatory Flexibility Act, 5 U.S.C. § 610)
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**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) *Public Notice*, which initiated a review of rules adopted in calendar year 2000.² The objective of the review is to determine whether certain rules should be continued without change, amended or rescinded to minimize any significant economic impact on a substantial number of small entities, consistent with the requirements of 5 U.S.C. § 610. Among other rules, the *Public Notice* identifies for review Section 76.65 of the Commission’s rules, which sets forth standards and complaint procedures concerning good faith retransmission consent negotiations,³ rules that govern technical and

¹ The National Association of Broadcasters is a 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.

² See FCC Seeks Comment Regarding Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C. § 610, *Public Notice*, DA No. 11-1333, CB Docket No. 11-72 (rel. Aug. 2, 2011) (“*Public Notice*”).

³ 47 C.F.R. § 76.65.

operational aspects of broadcast signal carriage on cable systems,⁴ and rules governing consumer information about cable service.⁵ As set forth below, under the five factors that the FCC must consider in its Section 610 analysis, these rules should be retained without change. There is a continuing need for each of these rules in their current form, and the rules already are tailored in a manner that minimizes economic impact on small entities.

I. The Current Good Faith Negotiation Standard and Complaint Procedures Serve the Public Interest and Should be Retained Under Section 610

A. The Section 610 Standard

To determine whether its rules should be continued without change, amended or rescinded under Section 610, the FCC considers the following factors:

- The continued need for the rule;
- The nature of complaints or comments received concerning the rule from the public;
- The complexity of the rule;
- The extent to which the rule overlaps, duplicates, or conflicts with other federal rules and, to the extent feasible, with state and local governmental rules; and
- The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.⁶

⁴ See, e.g., 47 C.F.R. §§76.1607, 76.1608, 76.1609, 76.1610, and 76.1616 (addressing such issues as a cable operator's obligation to notify must-carry stations of any change in the designation of its principal headend).

⁵ See, e.g., 47 C.F.R. §§76.1601- 76.1604; 76.1618-76.1622 (requiring subscriber notifications of changes in channel line-ups and other changes in service, billing that is "clear, concise and understandable," and other consumer protections).

⁶ See 47 U.S.C. §610(b)(1)-(5).

B. Adoption of Section 76.65 of the Commission's Rules and Subsequent Revision and Review

The Satellite Home Viewer Improvement Act of 1999 ("SHVIA") amended the Communications Act of 1934 to require broadcasters to negotiate in good faith with multichannel video programming distributors ("MVPDs") for retransmission consent,⁷ and required the Commission to adopt rules governing good faith negotiations within one year of SHVIA's enactment.⁸ While both SHVIA and FCC regulations implementing the statute obligated only broadcasters to negotiate in good faith and established a December 2004 sunset date, the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") required the Commission to extend its good faith negotiation requirements to MVPDs and established a new sunset date of December 2009.⁹ The Commission adopted reciprocal good faith negotiation obligations in June 2005.¹⁰ When satellite carriage of broadcast signals was again reauthorized in 2010, Congress further extended the good faith negotiation obligation through 2015.¹¹

C. The Good Faith Negotiation Rule Should be Retained

Numerous factors support retention of the FCC's good faith negotiation requirements. First, these rules implement an act of Congress, and do not in any way

⁷ See *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 ¶2 (2000) (citing 47 U.S.C. § 325(b)(3)(C)(2000)).

⁸ *Id.*

⁹ See Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809, §§ 101(a), 201 (2004).

¹⁰ *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339 (2005).

¹¹ See Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, § 202 (codified at 47 U.S.C. § 325(b)(3)(C)(ii)-(iii)).

overlap, duplicate, or conflict with other federal, state or local rules.¹² The factors that the Commission established to evaluate good faith negotiation complaints and the procedural steps set forth in the rule are not overly complex,¹³ so the rule should not be eliminated or modified on these grounds.

In addition, as noted above, while the original rule was promulgated in 2000, the rule was updated by the Commission in 2005, and multiple acts of Congress have extended both the application and expiration date of the rule. The entire system of retransmission consent, which is regulated exclusively through Section 76.65, also was re-evaluated as part of a comprehensive, Congressionally mandated Commission review.¹⁴ In the resulting report to Congress, the Commission recommended no changes to the well-functioning system of retransmission consent.¹⁵ Thus, unlike other rules that may have remained on the books for years with little scrutiny or evaluation, the good faith standards and procedures set forth in Section 76.65 have been frequently re-examined,¹⁶ which further supports retention of the rule in its current form.¹⁷

¹² See 5 U.S.C. § 610(b)(4)(requiring the Commission to consider “[t]he extent to which the rule overlaps, duplicates, or conflicts with other federal rules and, to the extent feasible, with state and local governmental rules”).

¹³ See 5 U.S.C. § 610(b)(3)(requiring the Commission to consider “[t]he complexity of the rule”).

¹⁴ See 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).

¹⁵ *Id.*

¹⁶ A pending Commission proceeding is focused primarily on yet another re-examination of the rule. See *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 25 FCC Rcd 2718 at ¶¶ 3, 8-12 (2011) (“*Retransmission Consent NPRM*”) (seeking comment on possible changes to “[p]rovide more guidance under the good faith negotiation requirements”). See also Comments of NAB in MB Docket No. 10-71 (filed May 27, 2011); Reply Comments of NAB in MB Docket No. 10-71 (filed Jun. 27, 2011). NAB hereby incorporates its comments in MB Docket No. 10-71 by reference thereto.

¹⁷ See 5 U.S.C. §610(b)(5) (the FCC must consider “the length of time since the rule has been evaluated”).

Because Section 76.65 has been frequently reviewed, revised and reaffirmed, the current rule already accounts for any technological, economic, or other factors that have changed in the area affected by the rule.¹⁸ While technology and marketplace developments have affected both broadcasters and MVPDs, the incentives to reach retransmission consent agreements remain strong.¹⁹ Television broadcast stations rely on these agreements to reach as many viewers as possible, and MVPDs use these agreements to develop and sell compelling programming packages that include local broadcast signals.

Now that the good faith rule has been made reciprocal, it serves a particularly important function for all broadcasters, and especially for smaller broadcast entities: the rule helps ensure that both broadcasters and MVPDs must play by the same rules and act fairly while negotiating retransmission consent agreements. As explained in the Final Regulatory Flexibility Analysis for the reciprocal good faith standard adopted in 2005, the FCC “believe[s] that Section 207 of the SHVERA will benefit small broadcast

¹⁸ *Id.* (the FCC also considers “the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule”).

¹⁹ See, e.g. Comments of NAB in MB Docket No. 10-71 (filed May 27, 2011) at 28-32; Reply Comments of NAB in MB Docket No. 10-71 (filed Jun. 27, 2011) at Section III.A. (discussing how the emergence of limited competition among MVPDs does not change broadcaster incentives to fairly negotiate retransmission consent agreements, particularly given the many marketplace changes affecting the broadcast industry’s bargaining position, including increasing consolidation in the MVPD industry at the national and regional levels, audience fragmentation, and increasing competition from hundreds of pay TV channels). See also Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 5-7 (May 27, 2011), attached to Comments of NAB in MB Docket No. 10-71 (filed May 27, 2011) as Attachment A (“*Eisenach May 2011 Declaration*”); Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* at 4-7 (Apr. 2010) attached as Appendix A to Opposition of the Broadcaster Associations, MB Docket No. 10-71 (filed May 18, 2010) (“*Eisenach May 2010 Declaration*”)(discussing how national MVPD concentration and regional clustering harms broadcasters’ bargaining position). See also *Eisenach May 2011 Declaration* at 8-10; Comments of CBS Corporation in MB Docket No. 10-71 at 12 (filed May 27, 2011) (presenting evidence of rising competition to television stations from other sources and low levels of concentration in the markets in which stations compete for viewers and advertisers).

stations. Since the imposition of the good faith negotiation obligation in 2000, broadcasters have had a good faith obligation without a corresponding obligation on the part of MVPDs. The proposed amendments to Section 76.65 will level the playing field.”²⁰

Today, these reciprocal good faith requirements are even more important for small broadcasters. At the national level, concentration in the MVPD market is considerably higher than it was a decade ago. For example, in 2002, the four largest MVPDs controlled 51.5% of the market (as measured by their share of MVPD subscribers). By the fourth quarter of 2010, the top four MVPDs controlled 68.5% of the market. During that same period, the market share of the top ten MVPDs rose from 67.4% to 89.9%.²¹ Concentration also is increasing at the regional level through cable system “clustering.”²² As NAB observed in response to the *Retransmission Consent NPRM*, broadcasters are often faced with the possibility that a failed negotiation with a particular cable company will cause the broadcaster to lose MVPD access to a large

²⁰ See *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339 at Appendix C, Section E (2005). See also 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 ¶ 44 (“as a general rule, the local television broadcaster and the MVPD negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side”).

²¹ See NAB Comments in MB Docket No. 10-71 at 30 (filed May 27, 2011) (citing *Eisenach May 2011 Declaration* at 6).

²² The number of clustered cable systems (cable systems under the same ownership serving the same local market area or region) serving over 500,000 subscribers rose from 29 in 2005, covering 29.8 million subscribers, to 36 at the end of 2008, covering 36.7 million subscribers. See NAB Comments in MB Docket No. 10-71 at 30 (filed May 27, 2011) (citing SNL Kagan, *Broadband Cable Financial Databook* (2009)).

percentage of households in a given market.²³ Because there are no restrictions on local, regional or national ownership of cable systems or caps on the number of households that can be served by a single MVPD, in many situations, a single MVPD controls a majority – and sometimes an overwhelming majority – of households in a local market. It is with this MVPD that a broadcaster must negotiate, notwithstanding that the broadcaster competes against an average of six stations per Designated Market Area and numerous other media outlets. There are many examples of “smaller” cable operators that enjoy significant shares of their local markets, which significantly enhances these operators’ bargaining positions vis-à-vis broadcasters in retransmission consent negotiations.²⁴

In addition, smaller broadcasters commonly find themselves negotiating against the largest MVPDs in the country.²⁵ For example, more than half of the cable subscribers in Designated Market Areas 101+ are served by one of the three largest cable MSOs, while only 6.5 percent of the television stations in these markets are

²³ See NAB Comments in MB Docket No. 10-71 at 28-29 (filed May 27, 2011).

²⁴ As an example of a “small” cable operator that controls a large share of a local market, Gray Television, Inc. recently noted that Mediacom Communications Corporation (“Mediacom”) controls systems serving approximately three-fourths of all cable subscribers in the Albany, Georgia DMA. See Comments of Gray Television, Inc., MB 10-71 at 3 (filed May 18, 2010). Even accounting for competition from MVPDs other than cable, the market shares of some small to middle-sized cable operators can be extremely high. CableOne, Inc. for example, serves 69% of all MVPD households in the Biloxi, Mississippi, DMA. Bright House Networks, LLC serves 50% of MVPD households in the Bakersfield, California, DMA, 59% of the Tampa, Florida, DMA, and 63% of the Orlando, Florida, DMA. Insight Communications Company, Inc. serves 53% of MVPD households in the Louisville, Kentucky, DMA. Suddenlink Communications serves 63% of MVPD households in the Victoria, Texas, DMA, 57% of the Parkersburg, West Virginia, DMA and 51% in the Alexandria, Louisiana DMA. Mediacom controls 49% of the MVPD market in the Cedar Rapids, Iowa, DMA, 46% in the Davenport, IA-Rock Island-Moline, Illinois DMA and 46% of the Des Moines, Iowa, DMA. See *MediaBiz: MediaCensus Competitive Intelligence/SNL Kagan, Video Market Share (Cable & DBS & Telco Video) by DMA—4th Quarter 2010*. (Note that “MVPD households” refers to households that subscribe to MVPD service, not homes passed.)

²⁵ See NAB Comments in MB Docket No. 10-71 at 31-32 and Attachment C (May 27, 2011).

owned by one of the top ten (by revenue) television station groups.²⁶ The good faith negotiation rule provides an important safeguard for the many small broadcasters negotiating for retransmission consent with large MVPDs.

To the extent that other commenters may propose modifications that would skew the good faith standard in MVPDs' favor, NAB submits that such changes would be harmful to the viewing public and broadcasters for the same reasons set forth in its pleadings responding to the *Retransmission Consent NPRM*. Given the public interest benefits of the good faith rule in its current form, Congressional and FCC review and revision of the rule during the years since it was initially adopted, and other 610(b) factors discussed above, the rule should be retained without modification.

II. The Consumer Protection Provisions and Rules Affecting Broadcast Signal Carriage Should Be Retained

Several rules being considered in the *Public Notice* are intended to ensure that consumers can make informed decisions about MVPD service. These provisions should be retained in order to promote their intended public interest goals. Consumers continue to need access to accurate information about their channel line-ups, potential deletions, and other service changes.²⁷ Given the need for such information, NAB has

²⁶ *Id.*

²⁷ See 47 C.F.R. §§76.1601 (requires prior notice of the deletion or repositioning of broadcast channels); 76.1602 (requires provision of written information to consumers concerning: products and services offered; prices, options and conditions for services; installation and service maintenance policies; usage instructions; channel positioning; billing and complaint procedures; and service quality complaint procedures); 76.1603 (requires notification of any changes to rates, services or channel positions); 76.1604 (requires notification if subscribers are subject to charges for changing service tiers); 76.1618 (requires notice of basic tier availability); 76.1619 (requires consumer bills to be "clear, concise and understandable" and establishes a 30-day window for responding to customer billing complaints); 76.1620 (requires provision of converter boxes where necessary to view broadcast signals); 76.1621 (requires the offering of

proposed (in response to the *Retransmission Consent NPRM*) that the FCC's rules requiring cable subscriber notice of changes in channel position or deletion be extended to other MVPDs.²⁸ Similarly, the "rules of the road" affecting cable carriage of broadcast signals,²⁹ such as the requirement to notify broadcast stations of the integration of cable systems in a manner that triggers a broadcaster's obligation to make a carriage election or changes in the designation of a system's principal headend, continue to meet the practical needs of both broadcasters and their MVPD partners. Absent this information, stations cannot make the appropriate elections or take other necessary steps to ensure that cable operators have access to broadcast signals. NAB knows of no duplication or overlap between these and other rules, no issues concerning the complexity of the rules, and no technological, economic or other factors that would obviate the need for these rules.

III. Conclusion

The good faith negotiation rule should be retained in its current form. Now that the rule imposes a reciprocal good faith bargaining requirement, the rule provides a balanced safeguard against potential abuses by negotiating parties, and is especially important for small broadcasters negotiating against MVPDs that enjoy significant

certain equipment); 76.1622 (requires a consumer education program on equipment compatibility).

²⁸ See NAB Comments in MB Docket No. 10-71 at 10-13 (filed May 27, 2011).

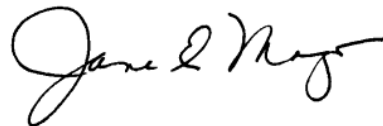
²⁹ See, e.g., 47 C.F.R. §§76.1607 (requires written notice to must-carry stations of changes to a system's principal headend); 76.1608 (where a cable system changes its technical configuration in a manner that integrates two separate systems into one, it must give 90 days' notice of such integration to affected stations that have made different carriage elections with respect to each system so that the station can make a uniform election); 76.1609 (within 60 days of providing service to 1,000 subscribers, a cable operator must file notice of same with the FCC and provide notice to stations that would be entitled to exercise exclusivity protection with regard to that operator); 76.1610 (requires filing of changes to operational information with the FCC on Form 324).

bargaining advantages because of their large local, regional, and/or national market shares. Eliminating the rule or revising it in a manner that tilts the “level” retransmission consent “playing field”³⁰ to favor the MVPD industry would harm broadcasters and their viewers, and would not meet the standards of Section 610. For the reasons set forth above, NAB also urges the Commission to retain the cable consumer protection rules and rules affecting cable carriage of broadcast signals identified in the *Public Notice*.

Respectfully submitted,

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³⁰ See 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 ¶ 44.