

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

In the Matter of)
)
Annual Assessment of the Status of) MB Docket No. 14-16
Competition in the Market for the)
Delivery of Video Programming)
)
)

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits these reply comments to address issues raised by other commenters regarding the *Notice of Inquiry* on the current status of competition in the market for the delivery of video programming.² NAB observes that commenters generally agree that broadcasting plays a critical role in the video marketplace. Overall, the record in this proceeding demonstrates that broadcast television stations are continuing to offer value to television viewers, are part of an unconcentrated video industry segment that is highly competitive,³ and are accessible via a broad range of devices of a consumer’s

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 14-16, FCC No. 14-8 (rel. Jan. 31, 2014) (“*Notice*”).

³ NAB Comments in MB Docket No. 14-16 (Mar. 21, 2014) at 13-22. By contrast, commenters observed that the cable industry remains highly concentrated and vertically integrated. See, e.g., Comments of ACA in MB Docket No. 14-16 (Mar. 21, 2014) at 4-6 (vertical integration is on the rise between cable operators and video programming vendors); Writers Guild of America Comments in MB Docket No. 14-16

choosing.⁴ These features make television broadcasting unique among many other services that make up the video marketplace. It is no wonder, then, that over-the-air reliance continues to rise.⁵

Indeed, multichannel video programming distributors (“MVPDs”) seem to share NAB’s view that broadcast television stations are a critical element of the packages they sell to their subscribers. Unfortunately, however, certain MVPD commenters continue to seek improper and unlawful government intervention into retransmission consent negotiations. As NAB has explained in the context of the retransmission consent proceeding, the Commission should disregard MVPDs’ requests for unlawful regulatory advantages in retransmission consent negotiations.

I. Retransmission Consent Fees Do Not Account for Escalating Consumer Pay TV Bills

Some commenters focus on rates paid for retransmission consent, contending that retransmission consent fees are “escalating,” “high,” or “too high.”⁶ These

(Mar. 21, 2014) at 25 (urging FCC to gather additional data about MVPD concentration in local markets because “[r]elying on national data alone may obscure the extent of local concentration.”).

⁴ Device interoperability continues to be a challenge for MVPDs, however. A coalition of multiple commenters complained that there continues to be “little competition in the market for devices that afford access to MVPD programming and services.” Comments of the AllVid Tech Company Alliance, CCIA, Consumer Action, National Consumers League and Public Knowledge in MB Docket No. 14-16 (Mar. 21, 2014) at 1.

⁵ See, e.g., NAB Comments in MB Docket No. 14-16 (Mar. 21, 2014) at 2-3. The Consumer Electronics Association (“CEA”) contends that “[r]eliance on over-the-air broadcasting to receive television content has been in decline since 2005.” Comments of the Consumer Electronics Association in MB Docket No. 14-16 (Mar. 21, 2014) at 10. As basis for this assertion, CEA cites its own phone survey suggesting that merely seven percent of Americans rely on over-the-air television. The Commission should be highly skeptical of CEA’s survey, especially in light of the group’s clear and unrelenting bias against the broadcast industry, and its aggressive push for reallocation of broadcast spectrum in a manner that will benefit its membership. By contrast, the *GfK Home Technology Monitor Survey* cited by NAB in our initial comments has been conducted for many years by an independent research firm, involves a survey of many more households, and provides far more reliable data. This study has for several years shown a statistically significant surge in over-the-air reliance. NAB Comments in MB Docket No. 14-16 (Mar. 21, 2014) at 2-3 (today, 19.3 percent of TV homes now rely on broadcast-only reception, an increase from 14 percent in 2010).

comments beg the question—high compared to what? The answer seems to be high compared to zero, which is what MVPDs likely prefer to pay for retransmission consent.

MVPD Subscriber Rates Are High. Are retransmission fees “too high” compared to what MVPDs are charging their customers? As NAB has explained in multiple filings, the cable industry’s long history of increasing subscriber fees well beyond the rate of inflation pre-dates by many years the emergence of cash compensation for operators’ retransmission of broadcast signals.⁷ For years, cable operators consistently refused to pay cash for retransmission consent of local broadcast signals.⁸ Nevertheless, the average monthly rate subscribers were charged for the combined basic and expanded-basic tiers of service between 1997 and 2002 rose by 40 percent in just a five-year period.⁹ Because cable operators did not pay retransmission consent fees during this time period, it is clear that such increases in cable subscriber rates were unrelated to retransmission consent.¹⁰

⁶ Comments of AT&T in MB Docket No. 14-16 (Mar. 21, 2014) at 3-4 (“retransmission fees have gone through the proverbial roof”); Comments of CenturyLink in MB Docket No. 14-16 (Mar. 21, 2014) at 4 (FCC should change its rules to “rein in escalating retransmission consent fees” because this is the “single most significant issue from a cost standpoint that CenturyLink faces”); Comments of Verizon in MB Docket No. 14-16 (Mar. 21, 2014) at 10-11.

⁷ See, e.g., Supplemental Comments of NAB in MB Docket No. 10-71 (May 29, 2013) (“NAB Supplemental Comments”) at 18-19 & n. 50; Decl. of Jeffrey A. Eisenach and Kevin W. Caves, at 2, 11, 32, Attachment A to NAB Comments, MB Docket No. 10-71 (May 27, 2011) (Declaration) at 11.

⁸ 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 (as of 2005, cash still had “not emerged as a principal form of consideration for retransmission consent”).

⁹ See NAB Comments, MB Docket No. 10-71 (May 27, 2011) (NAB Retransmission Consent Comments) at 42.

¹⁰ Indeed, rising cable rates can be found over any time period regardless of any particular trends relating to retransmission consent. According to the FCC’s most recent report on cable prices, the average price of expanded basic service grew at a compound annual rate of 6.1 percent over the 17-year period from 1995-2012, compared to a 2.4 percent annual increase in general inflation as measured by the Consumer Price Index over the same period. Report on Cable Industry Prices, DA 13-1319 (MB June 7, 2013) at ¶ 16.

Rates Paid to Nonbroadcast Programmers are High. Retransmission consent fees also are not “high” compared to what MVPDs are paying for other programming services—including programming that is considerably *less popular* among viewers and therefore generating less economic value for MVPDs. A recent analyst report examining both the history of programming fees paid by MVPDs from 2006-2013 and projected growth confirms that “the fees paid by multichannel operators to [regional sports networks] alone *well exceed* those we estimate are paid to broadcast stations. The fees paid to basic cable networks *dwarf* the fees paid for broadcast stations. Together, our figures show that broadcast retrans fees will be just 12.6% of the fees paid to basic cable networks and [regional sports networks] in 2017...”¹¹ The report cites several cable networks that are paid a higher rate per subscriber than broadcast stations, despite considerably lower ratings.¹² As other analysts have previously observed, television broadcast stations “capture[] 35% of the audience, [but] get[] 7% of programming fees.”¹³

An examination of cable revenue similarly shows that broadcast retransmission fees are highly unlikely to be a major driver of consumer subscription fees. One estimate by *Multichannel News* found that only *two cents* of every dollar of cable revenue go to broadcast retransmission consent fees, while *20 cents* of every dollar go to cable programming fees.¹⁴ More recent SNL Kagan data show that retransmission consent fees are equivalent to only 2.7 percent of the cable industry’s *video-only*

¹¹ Robin Flynn, *Putting Retrans Fees in Perspective Following FCC’s Recent Retrans Ruling*, SNL Kagan (Apr. 14, 2014) (emphasis added).

¹² *Id.*

¹³ See also Diana Marszalek, *Ryvicker: Stations Losing \$10.4B In Retrans*, TVNewsCheck (Sept. 18, 2013) (quoting Wells Fargo analyst Marci Ryvicker).

¹⁴ *Where Your Cable Dollar Goes*, Multichannel News (Mar. 28, 2011) at 10-11.

revenues (and would be a considerably smaller percentage of total revenues).¹⁵ Thus, contrary to the claims of MVPDs, the blame for rising pay TV rates does not rest with broadcasters' retransmission consent compensation.¹⁶

Retransmission Fees Will Not Change Consumer Rates. More importantly, as NAB has discussed in detail in the Commission's retransmission consent proceeding, there is no statutory basis for regulating retransmission consent rates, nor is there any statutory basis for adopting any regulations of retransmission consent based on the fees paid for retransmission consent. Congress did not intend for the Commission to regulate the prices, terms or conditions of retransmission consent. Rather, the system established by Congress permits the Commission only to set forth and enforce reciprocal standards governing good faith negotiations.

Although some MVPDs continue to erroneously contend that Section 325(b)(3)(A) is somehow a basis for regulating the prices, terms or conditions of retransmission consent,¹⁷ NAB has refuted this claim in multiple previous filings in the Commission's retransmission consent proceeding. Specifically, we have explained that this section is: (i) not a basis for regulating retransmission consent under basic principles of statutory construction;¹⁸ (ii) irrelevant with regard to most MVPDs, which either are not subject to basic tier rate regulation in the first place (e.g., direct broadcast

¹⁵ NAB Supplemental Comments at 4-5, citing © 2013 SNL Kagan, a division of SNL Financial LC, estimates.

¹⁶ Previous studies in the retransmission consent docket have confirmed that retransmission consent fees are not responsible for rising consumer rates for MVPD service. See, e.g., Declaration at 11-12.

¹⁷ See, e.g., Verizon Comments in MB Docket No. 14-16 (Mar. 21, 2014) at 12 (citing 47 U.S.C. § 325(b)(3)(A) (referencing cable rate regulation authority)).

¹⁸ Opposition of the Broadcaster Associations in MB Docket No. 10-71 (filed May 18, 2010) at 69-71 ("Opposition"); Letter from Erin L. Dozier of NAB to Marlene H. Dortch, FCC Secretary (filed Aug. 26, 2010 in MB Docket No. 10-71) ("NAB Aug. 26, 2010 Ex Parte") at 3; Reply Comments of NAB in MB Docket No. 10-71 (Jun. 27, 2011) ("NAB 2011 Reply Comments") at 20-23.

satellite) or have now been found to be subject to effective competition;¹⁹ and (iii) irrelevant as a practical matter unless the Commission starts regulating the rates actually charged by MVPDs to consumers, because controlling the prices of inputs into MVPD service would not require MVPDs to change consumer rates.²⁰ Pay television providers' continued invocation of the FCC's ancillary authority as a source of authority for regulating the retransmission consent marketplace is similarly unavailing, as NAB has also explained since 2010.²¹

II. Other Retransmission Consent-Related Proposals Advanced by MVPDs Are Beyond the Scope of This Proceeding and the Commission's Authority

Likewise, as the Commission has repeatedly held, it does not have the authority to adopt such measures as mandatory interim carriage²² (which NTCA, AT&T and Verizon again advocate in their comments here),²³ or mandatory arbitration/mediation²⁴ (which NTCA again requests).²⁵ Two commenters contend that the Commission should “analyze possible avenues for repealing or mitigating” the requirement that television

¹⁹ Opposition at 30-32; NAB Aug. 26, 2010 Ex Parte at 3; NAB Supplemental Comments at 5 (“with increasingly rare exceptions, retail cable rates are not regulated by the Commission or by local authorities”).

²⁰ NAB Aug. 26, 2010 Ex Parte at 3; Comments of NAB in MB Docket No. 10-71 (May 18, 2011) (“NAB 2011 Comments”) at 41-42 (“only regulation of MVPD retail rates would ensure a reduction in subscriber rates”); NAB 2011 Reply Comments at 45-47; NAB Supplemental Comments at 5 (“[i]n the absence of some binding requirements, there is no assurance that any savings would be passed on to consumers”).

²¹ See, e.g., Opposition at 72; Reply Comments of the Broadcaster Associations in MB Docket No. 10-71 (June 3, 2010) at 3-5.

²² *Amendment of Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2727-28 ¶ 18 & n.6 (2011).

²³ See Comments of NTCA in MB Docket No. 14-16 (Mar. 21, 2014) at 9; Comments of AT&T in MB Docket No. 14-16 (Mar. 21, 2014) at 6; Verizon Comments in MB Docket No. 14-16 (Mar. 21, 2014) at 12.

²⁴ *Amendment of Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2727-28 ¶ 18 & n.6 (2011).

²⁵ See Comments of NTCA in MB Docket No. 14-16 (Mar. 21, 2014) at 9.

broadcast stations be placed on the basic tier.²⁶ This is yet another request that the Commission simply disregard governing statutory provisions. Section 623(b)(7)(A) of the Communications Act requires cable operators to include television broadcast stations in the basic tier that they offer to all cable subscribers.²⁷ This is not an FCC rule or regulation, and the Commission does not have the authority to adopt regulations that would be directly contrary to this unambiguous statutory requirement.²⁸ Congress included this requirement in the Cable Television Consumer Protection and Competition Act of 1992 as part of a broader effort to ensure that television broadcasting continues to play its vital role in serving the public interest. Congress determined that “absent legislative action, the free local off-air broadcast system is endangered, thereby threatening diversity of choice not only for cable subscribers, but also for those who do not subscribe to cable.”²⁹ The sound public policy objectives underlying the statutory basic tier requirement remain valid today.

Finally, Verizon urges the FCC to adopt a new regulation that would limit television station owners’ ability to fully control video content on their websites.³⁰ Verizon argues that the Commission should find broadcasters in violation of their duty to negotiate retransmission consent in good faith if they limit access to online video

²⁶ Comments of WTA-Advocates for Rural Broadband in MB Docket No. 14-16 (Mar. 21, 2014) at 6. See also CenturyLink Comments at 7.

²⁷ 47 U.S.C. § 543(b)(7)(A).

²⁸ *Louisiana Public Service Com’n v. F.C.C.*, 476 U.S. 355, 374-375 (1986) (“An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress . . . As we so often admonish, only Congress can rewrite the Communications Act”); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

²⁹ S. REP. 102-92, 43, 1992 U.S.C.C.A.N. 1133, 1176.

³⁰ Verizon Comments in MB Docket No. 14-16 (Mar. 21, 2014) at 12.

content. NAB finds it surprising that a party that has devoted itself so completely to limiting the FCC's authority to regulate the Internet would call for such a rule.³¹ As NAB explained in connection with a similar proposal by Time Warner Cable, Inc., the availability of video content on websites operated by video content providers is not—and should not be—regulated by the Commission or any other entity.³² Broadcasters are not under any legal or regulatory obligation to provide online content. Offering this content allows many broadcasters to connect with their local communities and individual viewers in unique ways.³³ But the contention that broadcasters—and only broadcasters—should be penalized for seeking to control their digital rights is simply wrong on its face.

III. Conclusion

As NAB has emphasized throughout the retransmission consent proceeding, the viability of local broadcast stations and their continued local service are closely tied to their ability to negotiate for fair value and carriage of their signals through the retransmission consent process. We reiterate the above points in response to comments that continue to seek improper and unlawful intrusion into the Congressionally-established system of retransmission consent. NAB continues to urge the Commission to thoroughly examine the video marketplace, with a particular focus on the impact of local and regional consolidation among MVPDs and changes in the ways

³¹ See, e.g., Comments of Verizon at 86, GN Docket No. 09-191 (Preserving the Open Internet) (Jan. 14, 2010); Reply Comments of Verizon at 81, GN Docket No. 09-191 (Preserving the Open Internet) (Apr. 26, 2010). Indeed, Verizon appealed the FCC's *2010 Open Internet Order* to the U.S. Court of Appeals for the D.C. Circuit, which led to remand of several aspects of the Order. *Verizon v. F.C.C.*, 740 F.3d 623 (2014).

³² See Ex Parte Letter of NAB in MB Docket No. 10-71 (Nov. 15, 2013). There, NAB observed that video content “may—or may not—be available via the Internet under a wide range of prices, terms and conditions” and that video content providers typically set the terms for access to their content.

³³ See, e.g., NAB Comments in MB Docket No. 14-16 (Mar. 21, 2014) at 10-11.

that MVPDs are competing with broadcasters in certain markets, such as the market for local advertising dollars.

Respectfully submitted,

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