

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

In the Matter of)
)
Fostering Independent and Diverse Sources) MB Docket No. 24-115
of Video Programming)
)
)

REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF
BROADCASTERS
1 M St, SE
Washington, DC 20003
(202) 429-5430
Rick Kaplan
Jerianne Timmerman
Erin Dozier
Emily Gomes

July 8, 2024

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. PAY TV PROPOSALS REGARDING RETRANSMISSION CONSENT ARE UNLAWFUL
AND WILL NOT PROMOTE ANYTHING BUT PAY TV PROVIDERS 2

III. CONCLUSION 8

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

In the Matter of)	
)	
Fostering Independent and Diverse Sources of Video Programming)	MB Docket No. 24-115
)	
)	

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

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ submits these reply comments in the FCC’s proceeding concerning alleged obstacles independent programmers face in gaining carriage on multichannel video programming distributor (MVPD) and online platforms and proposing to prohibit certain terms in contractual agreements between MVPDs and independent programmers.² NAB takes no position on whether the Commission has the authority to adopt its proposed rule, or whether it should do so. Our reply comments are limited to addressing a handful of erroneous and misleading comments in the record suggesting that retransmission consent affects MVPDs’ ability to carry and/or compensate independent programmers and proposing related rule changes. As discussed further below, commenters mentioning this point have not demonstrated that there is any relationship between retransmission consent and MVPD carriage of independent programming. To the

¹ 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.

² *Fostering Independent and Diverse Sources of Video Programming*, Notice of Proposed Rulemaking, MB Docket No. 24-115 (rel. Apr. 19, 2024) (Notice).

extent that such commenters seek changes to the amount and/or type of compensation negotiated in retransmission consent agreements, the system of retransmission consent established by Congress does not authorize the Commission to regulate the prices, terms, or conditions of retransmission consent. Finally, even if the Commission had the authority to adopt such regulations, changes to retransmission consent would be irrelevant to pay TV operators' decisions whether to carry and/or compensate independent programmers.

II. PAY TV PROPOSALS REGARDING RETRANSMISSION CONSENT ARE UNLAWFUL AND WILL NOT PROMOTE ANYTHING BUT PAY TV PROVIDERS

Although most commenters focused on the central issues raised in the Notice, a few commenters incredibly allege – as if it were an involuntary reflex – that retransmission consent negotiations impact the ability of MVPDs to carry independent programming.³ Multi-billion dollar EchoStar contends that practices by certain “large programmers” including increases in retransmission consent rates,⁴ negotiations that involve multiple streams or channels of programming,⁵ and negotiations involving placement of content on EchoStar’s most popular programming packages strain its limited funds and bandwidth, reducing the resources it can devote to independent programmers.⁶ EchoStar, which bundles channels to resell to consumers, urges the Commission to adopt an “unbundling mandate” under which

³ See Comments of the American Television Alliance (ATVA), MB Docket No. 24-115 (Jun. 6, 2024) (ATVA Comments); Comments of FUSE, LLC, MB Docket No. 24-115 (Jun. 6, 2024) at 5-6 (FUSE Comments); Comments of ACA Connects, MB Docket No. 24-115 (Jun. 6, 2024) at 2-3 (ACA Connects Comments); Comments of Public Knowledge, MB Docket No. 24-115 (Jun. 6, 2024) at 9-10 (Public Knowledge Comments); Comments of EchoStar Corporation, MB Docket No. 24-115 (Jun. 6, 2024) (EchoStar Comments); Comments of NTCA—The Rural Broadband Ass’n (NTCA), MB Docket No. 24-115 (Jun. 6, 2024) at 3-4; Comments of Verizon, MB Docket No. 24-115 (Jun. 6, 2024) at 13-14.

⁴ EchoStar Comments at 2-3.

⁵ EchoStar Comments at 3-5.

⁶ EchoStar Comments at 4, 6.

programmers would be required to provide standalone offers for programming at “economically rational prices” and give MVPDs the ability to offer customers the option to make a la carte purchases of the programming.⁷ ACA Connects and the one-note ATVA make similar arguments and request that the Commission take action to limit the ability of programmers, including broadcasters, to negotiate carriage involving bundling, tiering, or penetration requirements.⁸ If it’s an FCC proceeding – even if it has nothing to do with broadcasting – this same cast of characters will inevitably implore the Commission to step in to regulate retransmission consent. And yes, it is almost amusing when the pay TV industry – also known as the broadband industry – runs to the FCC to seek rate regulation.

Proposals that the Commission restrict retransmission consent negotiations or agreements involving carriage of multiple channels or streams of programming, placement of programming on particular tiers/packages, or carriage to a particular number of MVPD subscribers are flatly prohibited by the Communications Act. As the Commission has repeatedly acknowledged, its role with respect to retransmission consent negotiations is extremely limited. The prices, terms, and conditions of retransmission consent agreements are intended by Congress to be established through arms-length, marketplace negotiations, subject only to a requirement that both broadcasters and MVPDs negotiate in good faith. The Commission has authority to adopt rules governing good faith negotiations and adjudicate complaints of violations of those rules,⁹ but that is the extent of its involvement in the retransmission consent negotiation process. As the Commission has observed, in directing it

⁷ EchoStar Comments at 6.

⁸ ACA Connects Comments at 2-3; ATVA Comments.

⁹ 47 C.F.R. § 76.65.

to adopt rules governing good faith negotiations, Congress did not “contemplate an intrusive role for the Commission with regard to retransmission consent” or “grant the Commission authority to impose a complex and intrusive regulatory regime” or “intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD.”¹⁰ The FCC’s limited role with respect to retransmission consent negotiations ensures that the resulting agreements reflect marketplace conditions and not government intervention, as Congress intended. The extensive intrusion into retransmission consent prices, terms, and conditions proposed by commenters are entirely contrary to the system Congress established.

Apparently, the pay TV industry believes that if it keeps arguing for the Commission to regulate retransmission consent negotiations and compensation – even unlawfully – the FCC will be so concussed by the sheer repetitiveness of the industry’s arguments that it will forget the law and accede to intrusive regulation significantly hampering broadcast TV stations. As NAB recently demonstrated in detail, the pay TV industry has long engaged in rent-seeking to impair their broadcaster competitors.¹¹ The Commission must recognize the rent-seeking behavior of the pay TV industry in this and innumerable other proceedings for what it is – a deliberate competitive strategy to use the Commission to advantage subscription video

¹⁰ *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, 5450, 5454-55 ¶¶ 13, 23 (2000) (“Good Faith Order”).

¹¹ Comments of NAB, GN Docket No. 24-119 (June 6, 2024) at 43-50 (describing the pay TV industry’s strategy to disadvantage their broadcast competition by urging the FCC to retain or increase restrictions on TV stations, and by opposing FCC actions that could benefit the broadcast industry, ranging from supporting stricter ownership rules, proposing onerous conditions on TV station transactions, attempting to burden and impede the TV industry’s transition to ATSC 3.0, objecting to proposed reforms of regulatory fee assessments, and, of course, calling for FCC and congressional changes to the retransmission consent regime).

services in the marketplace by increasing burdens on, and reducing the competitiveness of, the free over-the-air broadcast industry. The FCC should refrain from indulging this strategy, which not only harms broadcast TV stations and their services to local communities but also competition in the video marketplace more broadly.

Moreover, some commenter proposals already have been directly addressed by the Commission. With respect to the issue of issue of in-kind compensation or “bundling” raised by commenters, the Commission has 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” are presumptively consistent with the good faith standard.¹² A mandate that broadcasters offer content on a standalone basis flies in the face of this longstanding Commission precedent and Congressional intent. Commenters also have not demonstrated that they are “forced” to purchase programming bundles. If broadcasters were truly offering no option other than to carry multiple streams or channels of programming in retransmission consent negotiations, it would violate the existing good faith standard requiring parties to “put forth more than a single, unilateral proposal.”¹³ For these reasons and those discussed in

¹² Good Faith Order, 15 FCC Rcd at 5469 ¶ 56. 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”). Significantly, carriage of additional programming emerged as a leading form of compensation because of the pay TV industry’s uniform refusals to even consider monetary compensation from the inception of retransmission consent and for years after that. 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 ¶ 10 and notes 26-27.

¹³ 47 C.F.R. § 76.65(b)(iv).

NAB's previous filings in response to similar pay TV requests,¹⁴ the Commission should reject proposals to restrict broadcasters' ability to negotiate for carriage of more than one stream or channel of programming.

EchoStar also proposes that programmers including broadcasters should be required to allow MVPDs to resell individual channels on an a la carte basis. This proposal is beyond the scope of this proceeding and the Commission's authority and should be rejected.¹⁵ Developing an entirely new system of retransmission consent and/or mandatory carriage to permit a la carte offerings by MVPDs would require multiple statutory modifications,¹⁶ and EchoStar has not demonstrated that such changes would advance any public interest objective.

Even if the Commission had the authority to implement any of these proposals, commenters have not shown that any of their proposals will result in additional carriage of or compensation for any independent programming. There is simply no connection. MVPDs and their advocacy groups have made countless proposals to further regulate the broadcast industry, claiming such regulations will stem the tide of rising pay TV consumer prices.¹⁷ MVPDs never seem convinced, however, that regulation of the pay TV industry can result in consumer benefits, as evidenced by their opposition to Commission rules and proposals

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

¹⁵ NAB refuted a similar proposal made by DISH Network LLC in another proceeding earlier this year. See Reply Comments of NAB, MB Docket No. 24-20 (Apr. 8, 2024), *citing* Comments of DISH Network LLC, MB Docket No. 24-20 (Mar. 8, 2024) (DISH Comments) at 23.

¹⁶ Such an offering would require changes to at least the provisions of the Communications Act governing broadcast signal carriage, and likely others. See, e.g., 47 U.S.C. §§ 325, 338, 534, and 535.

¹⁷ See, e.g., NAB Reply Comments, MB Docket No. 23-405 (Mar. 5, 2024) at note 4 (listing various filings by NCTA – The Internet & Television Ass'n (NCTA) and ATVA proposing more stringent regulation of broadcasting).

including pricing transparency,¹⁸ bans on early termination and billing cycle fees,¹⁹ requiring rebates if MVPDs are not providing the programming a subscriber paid for,²⁰ or proposals in the instant proceeding.²¹

Pay TV claims that tilting the playing field in their favor vis-à-vis broadcasters will somehow benefit independent programmers ring hollow. The idea that any of the proposals advanced here would result in increased carriage of or compensation for independent programmers is just as unlikely as it is that MVPDs will “pass savings on” to consumers if they were paying less for retransmission consent.²² After all, the pay TV industry is known for its stellar customer service. The last time Consumer Reports surveyed customer satisfaction with

¹⁸ See, e.g., Comments of NCTA, MB Docket No. 23-203 (Jul. 31, 2023); Comments of ACA Connects, MB Docket No. 23-203 (Jul. 31, 2023); Comments of Verizon, MB Docket No. 23-203 (Jul. 31, 2023); Comments of DIRECTV, LLC, MB Docket No. 23-203 (Jul. 31, 2023) (each opposing adoption of an all-in pricing requirement).

¹⁹ Pay TV commenters even argued that these fees help consumers. See Comments of NCTA, MB Docket No. 23-405 (Feb. 5, 2024) at 3-9 (discussing how “discounted plans with ETFs are an advantageous choice for some consumers” and how “the Commission’s proposals would adversely impact consumers”); Comments of DISH Network LLC, MB Docket No. 23-405 (Feb. 5, 2024); Comments of DIRECTV, LLC, MB Docket No. 23-405 (Feb. 5, 2024) at 2-11. See also Comments of ACA Connects, MB Docket No. 23-405 (Feb. 5, 2024) at 5 (ACA Connects “[m]embers that use such fees do so in a way that is responsive to the preferences of their customers, who are often their family, friends, and neighbors”); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC MB Docket Nos. 18-349, 22-459, 23-405 (Dec. 6, 2023) (urging the Commission to inquire whether there are consumer benefits to early termination fees).

²⁰ See, e.g., Comments of NCTA, MB Docket No. 24-20 (Mar. 8, 2024); Comments of ATVA, MB Docket No. 24-20 (Mar. 8, 2024); Comments of NTCA—The Rural Broadband Ass’n (NTCA), MB Docket No. 24-20 (Mar. 8, 2024); Letter from Michael Nilsson, Counsel to ACA Connects (ACA) to Marlene H. Dortch, FCC Secretary, MB Docket No. 24-20 (Mar. 8, 2024); Comments of DISH Network LLC, MB Docket No. 24-20 (Mar. 8, 2024); Comments of Verizon, MB Docket No. 24-20 (Mar. 8, 2024) (each opposing FCC consumer rebate proposal).

²¹ See, e.g., Comments of NCTA, MB Docket No. 24-115 (Jun. 6, 2024) (NCTA Comments) (MFN and ADM provisions are pro-consumer practices and the FCC lacks authority to regulate them); ACA Connects Comments at 5-7 (the Commission’s proposals to ban MFN and ADM provisions are too broad and should exclude smaller cable operators).

²² See, e.g., Comments of NAB, MB Docket No. 24-20 (Mar. 8, 2024).

their bundled services (internet plus cable/satellite TV and/or telephone), “no bundle provider received a favorable Overall Satisfaction Score,” and “[e]very single provider received [Consumer Report’s] worst mark for value.”²³

Finally, NAB observes that several commenters make observations about the differences in regulatory treatment of traditional MVPD platforms and online video distributors (OVDs) or “virtual” MVPDs (vMVPDs).²⁴ NAB again urges the Commission to refresh the record in its proceeding concerning the regulatory status of vMVPDs.²⁵

III. CONCLUSION

NAB opposes proposals that would limit the ability of broadcasters and MVPDs to negotiate carriage of multiple channels or streams of programming, the tier/package placement of such programming, or the number of subscribers who view the programming.

²³ James Willcox, *Best and Worst Home Internet Providers*, Consumer Reports (June 10, 2024) (referencing 2022 survey on bundled services and discussing new survey on internet providers, which found that small ISPs, such as Greenlight Networks, EPB, Allo Fiber, Google Fiber, GoNetSpeed, and Sonic, had the top consumer ratings).

²⁴ NCTA Comments at 10 (“The proposed rules would hamstring MVPDs at a time when they are already losing subscribers to their online competitors, while leaving OVDs free to negotiate as they please...”); FUSE Comments at 4, 23-24 (urging the FCC to treat certain OVDs as MVPDs for purposes of Section 616 of the Act and related Commission rules); Letter to Marlene H. Dortch, Secretary, FCC, from Keith Leitch of One Ministries, Inc., MB Docket No. 24-115 (Jun. 18, 2024) (EchoStar claims it is concerned about independent programmers but refuses to carry independent television broadcast stations via its vMVPD service); Comments of 2042 Media USA, LLC, MB Docket No. 24-115 (Jun. 6, 2024) at 4-5 (asserting that if the proposed rules are not applied to both types of distributors, “the negative impact could very well outweigh the positive”); Comments of DIRECTV, LLC, MB Docket No. 24-115 (Jun. 6, 2024) at 3-7, 13-14 (multiple FCC rules and proposals are being imposed or proposed only for traditional MVPDs while OVDs remain unregulated and are growing quickly in terms of subscribership and content; such asymmetric regulation will distort the marketplace).

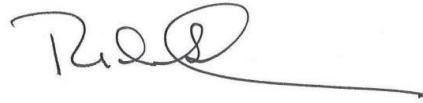
²⁵ *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2014); see, e.g., Letter to Marlene H. Dortch, FCC Secretary from Rick Kaplan, NAB, MB Docket No. 14-261 (Feb. 7, 2023).

None of these proposals would be lawful, nor have MVPDs demonstrated that they would improve carriage or compensation for independent programmers. Rather, like most pay TV industry proposals, they would shockingly only benefit pay TV.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1 M St, SE
Washington, DC 20003
(202) 429-5430

A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

Rick Kaplan
Jerianne Timmerman
Erin Dozier

July 8, 2024