

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

In the Matter of)
)
)
Annual Assessment of the Status of) MB Docket No. 12-203
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 in connection with the Commission’s proceeding to gather data and information on the status of competition in the market for the delivery of video programming.²

In our initial comments, NAB discussed rising consumer reliance on over-the-air broadcast television services, increased investment in and production of local news programming, growing multicast and HD options, and other significant industry developments and innovations. We briefly discussed the importance of modernizing ownership regulations to permit broadcasters to attract capital and create competitive ownership structures. We also noted the importance of the system of retransmission consent to broadcasting’s continued ability to deliver the news, information and entertainment that viewers expect.

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and also 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. 12-203, FCC No. 12-80 (rel. July 20, 2012) (“*Notice*”).

In these reply comments, NAB responds to the initial comments of certain multichannel video programming distributors (“MVPDs”), who seek to alter the current playing field to gain further advantages in retransmission consent negotiations with broadcasters. While NAB has more fully addressed these same proposals as part of the FCC’s ongoing retransmission consent proceeding, we reply here to correct the factual and legal inaccuracies in the record. Because the MVPD’s proposals for change would not advance the public interest, NAB again urges the Commission not to adopt such proposals.

I. Network Nonduplication/Syndicated Exclusivity Rules Promote Localism

Some commenters contend that the FCC’s network nonduplication and syndicated exclusivity rules should be eliminated or modified so that distant signals could be temporarily imported in the event of an impasse in retransmission consent negotiations.³ Proposals that would interfere with privately negotiated exclusivity contracts between broadcasters and networks or syndicators also would harm the public interest.

As a threshold matter, as NAB has explained in previous filings, these rules do not actually create any exclusive rights.⁴ Rather, they provide a means for parties to exclusive contracts to efficiently enforce their rights. In fact, the FCC’s rules actually

³ See, e.g., Comments of Verizon in MB Docket No. 12-203 (filed Sept. 10, 2012) at 17-18 (“Verizon Comments”); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association in MB Docket No. 12-203 (filed Sept. 10, 2012) at 11 (“OPASTCO Comments”). See also Comments of DIRECTV in MB Docket No. 12-203 (filed Sept. 10, 2012) at 19 (“DIRECTV Comments”) (good faith rules should require broadcasters to allow temporary importation of distant signals in the event of an impasse); Comments of CenturyLink in MB Docket No. 12-203 (filed Sept. 19, 2012) at 5 (“CenturyLink Comments”).

⁴ See NAB Comments in MB Docket No. 10-71 at 55-62 (filed May 27, 2011); NAB Reply Comments in MB Docket No. 10-71 at 53-61 (filed Jun. 27, 2011).

limit and restrict program exclusivity by limiting the geographic area in which television stations may enter into program exclusivity agreements with network and syndicated program suppliers.

Allowing MVPDs to import from distant markets signals carrying duplicative network and syndicated programming would also harm viewers by undermining local stations' economic base for producing local news and information – including critical emergency information.⁵ Specifically, limiting broadcasters' ability to enter into and/or enforce exclusive contracts would jeopardize stations' advertising revenues because the lack of program exclusivity in a market makes television stations less attractive to advertisers. Without sufficient advertising revenue streams, local stations cannot afford to invest in valued informational and entertainment programming. Both local stations and their viewers would be severely harmed if MVPDs can undermine stations' exclusivity rights by importing distant stations' signals.

II. Mandating Interim Carriage Or Arbitration Would Be Unlawful

Some commenters reiterate arguments that have been repeatedly considered and rejected by the Commission, such as proposals for “standstills” (during which broadcast signals would continue to be carried by MVPDs even in the absence of an agreement) and mandatory arbitration.⁶ As NAB has observed in the retransmission consent proceeding and the instant proceeding, the system of retransmission consent is functioning effectively, with rare interruptions in service.⁷ Moreover, as the FCC has

⁵ *Id.*

⁶ See, e.g., Verizon Comments at 18 (advocating a mandatory standstill and mediation/arbitration requirements); OPASTCO Comments at 12 (advocating a standstill provision).

⁷ See NAB Comments in MB Docket No. 10-71 at 8 (filed May 27, 2011); Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 25-32 (May 27, 2011) attached to NAB Comments in MB Docket No. 10-71 as Attachment A.

previously concluded, the agency does not have the authority to implement such changes to the system of retransmission consent under applicable law.⁸ In reaching this conclusion, the FCC observed that requiring interim carriage was directly contrary to both the plain language of Section 325 and Congressional intent.⁹ Similarly, it found that mandatory binding dispute resolution procedures “would be inconsistent with both Section 325 of the Act, in which Congress opted for retransmission consent negotiations to be handled by private parties subject to certain requirements, and with the Administrative Dispute Resolution Act (ADRA).”¹⁰

III. Retransmission Consent Negotiations Involving More than One Station Promote Efficient, Fairer and More Successful Negotiations

NAB also has previously addressed claims of commenters who contend that negotiations for retransmission consent involving more than one station should be prohibited or otherwise regulated.¹¹ Such negotiations create efficiencies and help level the playing field for broadcasters negotiating against MVPDs, especially those controlling high percentages of viewers in local markets.

As NAB discussed in its initial comments, the broadcast industry is much more decentralized and unconcentrated than the MVPD industry.¹² Significantly, several commenters proceedings concur with NAB’s assessment that the MVPD market is characterized by high horizontal concentration at the national, regional, and local levels,

⁸ See *Amendment of the Commission’s Rules Related to Retransmission Consent*, 26 FCC Rcd 2718, 2728-29, ¶ 18 (2011) (FCC concludes that it lacks “authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations”).

⁹ *Id.*

¹⁰ *Id.*

¹¹ OPASTCO Comments at 12; DIRECTV Comments at 19 (joint negotiations and approval rights should trigger attribution); CenturyLink Comments at 5; Comments of the American Cable Association in MB Docket No. 12-203 (filed Sept. 10, 2012) at 14-19.

¹² NAB Comments in MB Docket No. 12-203 at 14-19.

as well as significant vertical integration.¹³ As a result, broadcasters are frequently negotiating with MVPDs that have significant national and regional footprints.¹⁴ The fact that some broadcasters are engaged in joint negotiations can reduce transaction costs and generate other efficiencies.¹⁵ Moreover, as NAB has previously shown, stations involved in joint arrangements are in fact *less likely* to be involved in negotiations that result in carriage interruptions.¹⁶

¹³ See, e.g., Comments of Public Knowledge in MB Docket No. 12-203 (filed Sept. 10, 2012) at 5 (“regardless of how the ‘market’ is defined, it is clear that traditional MVPDs—in particular, cable systems—still possess significant market power”); Verizon Comments at 14 (“incumbent cable operators continue to extend the benefits of their former monopoly franchises”). See also, Letter dated Aug. 9, 2012 from Kevin G. Rupy on behalf of Competitive Access to Content to Marlene H. Dortch (filed Aug. 9, 2012 in MB Docket No. 12-68) at Attachment, pp. 4-5 (“Although cable’s dominant national market share is diminishing, several factors point to an increased incentive and ability to act anti-competitively, particularly as a result of cable’s continuing outsized regional market share . . .”); Reply Comments of AT&T in MB Docket No. 12-68 (filed Jul. 23, 2012) (“cable operators remain dominant in most, if not virtually all, video distribution markets”); Reply Comments of American Public Power Association in MB Docket No. 12-68 (filed Jul. 23, 2012) (“the large multi-system operators continue to dominate the video marketplace” and “the extent to which the major vertically-integrated MVPD’s control the most popular video programming – has changed very little since 2007.”); Comments of CenturyLink in MB Docket No. 12-68 (filed Jun. 22, 2012) at i, 6-10 (“Four of the five largest cable operators are vertically-integrated with satellite-delivered programming vendors and continue to be the dominant presence in the MVPD market, six of the top twenty most popular national networks based on prime time ratings are affiliated with these same cable operators, and more than half of all regional sports networks are affiliated with these same four cable operators.”).

¹⁴ See NAB Comments in MB Docket No. 12-203 at 14 (discussing national horizontal concentration, which shows that in 2002, the ten largest MVPDs controlled 67.4 percent of the MVPD market nationally compared to 91.3 percent today); *id.* at 14-16 (discussing high concentration in local markets); NAB Reply Comments in MB Docket No. 10-71 at 48-50 (filed Jun. 27, 2011) (discussing broadcaster negotiations with cable operators with large local market share). See also Comments of Writers’ Guild of America West in MB Docket No. 12-203 (filed Sept. 10, 2012) at 9 (observing that “[c]oncentration in the MVPD market helps explain why cable prices continue to rise faster than the consumer price index (CPI)” and citing data that show cable prices increased 5.4 percent in 2010 while CPI increased only 1.6 percent over the same period); Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 11-12 (May 27, 2011) attached to NAB Comments in MB Docket No. 10-71 as Attachment A (during the period from 2000 to 2009, “average cable prices have consistently outpaced general inflation. Retransmission consent fees, which were at zero throughout most of the period, clearly were not responsible for the divergence.”).

¹⁵ NAB Reply Comments in MB Docket No. 10-71 at 47-53 (filed Jun. 27, 2011)(if anything, joint arrangements likely lower stations’ operating costs, which would tend to place *downward* pressure on retransmission consent compensation).

¹⁶ *Id.* at 50-51. See also Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves, attached to NAB Reply Comments in MB Docket No. 10-71, as Appendix A (filed Jun. 27, 2011) ¶¶ 24-25.

IV. Conclusion

Contrary to the claims of MVPD commenters, retransmission consent continues to increase the quantity, quality, and diversity of programming available to all American television viewers, whether they watch over-the-air, via pay TV, or online. Modifying the retransmission consent regime in the manner proposed by MVPDs would further tip the scales in their favor, hindering broadcasters' ability to negotiate for the value of their signals, secure advertising, and invest resources in programming and services that meet the needs and interests of local viewers. The growth of multicast programming streams, high definition content, local news, and delivery of signals to mobile devices discussed in NAB's initial comments comes at a price. NAB urges the Commission not to impede further innovation and expansion of broadcast services through modifications to the network nonduplication, syndicated exclusivity, or retransmission consent rules, as proposed by television stations' competitors in the video marketplace.

Respectfully submitted,

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