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

In the Matter of:	)	
	)	
Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices	)	MB Docket No. 23-405
	)	

COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

I. INTRODUCTION

The National Association of Broadcasters (NAB)[1] submits these comments regarding the Commission's Notice seeking comment on a proposal to prohibit cable operators and direct broadcast satellite (DBS) providers from imposing early termination fees (ETFs) and billing cycle fees (BCFs) on subscribers.[2] Although NAB does not take a position on whether the Commission has the authority to (or should) regulate use of such fees by pay TV providers,[3] our comments below discuss how ETFs and other MVPD practices harm consumers; insulate MVPDs from the consequences of their own actions; and aid MVPDs in

[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] *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, Notice of Proposed Rulemaking, MB Docket No. 23-405, FCC 23-106 (rel. Dec. 14, 2023) (Notice). Under the proposed rules, cable and DBS providers would be prohibited from imposing "a fee for the early termination of a cable or DBS video service contract" and would be required to "grant subscribers a prorated credit or rebate for the remaining whole days in a monthly or periodic billing cycle after the cancellation of service." Notice at ¶¶ 7-8.

[3] The Notice seeks comment on several issues, including the Commission's legal authority to adopt the proposed regulations, whether the proposed rules would "have a positive impact on video service provider negotiations with broadcast stations and cable networks by allowing consumers more freedom to switch providers to obtain preferred programming," and whether the proposed rules would otherwise impact programming costs. *Id*. at ¶¶ 9, 23.

manufacturing "evidence" of a supposedly "broken" system through retransmission consent disputes, and all at the expense of consumers.

II. THE PAY TV INDUSTRY'S SHIFT FROM ARTIFICIALLY DEPRESSING THE VALUE OF BROADCAST SIGNALS TO A STRATEGY OF ATTRACTING THE ATTENTION OF POLICYMAKERS INCENTIVIZES RETRANSMISSION CONSENT DISPUTES

Pay TV providers have waged war on the system of retransmission consent since its inception. When Congress adopted retransmission consent as part of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Act), cable operators uniformly refused to pay cash compensation.[4] At least one major multiple system operator publicly stated that it would never provide monetary compensation for retransmission consent, signaling their competitors and effectively fixing the price of monetary retransmission consent compensation at zero.[5] Cable operators were more willing to offer broadcasters "in-kind" compensation, such as carriage of commonly owned non-broadcast networks or cross-promotion arrangements.[6] Dozens of non-broadcast networks were formed because of the

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[4] *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) (2005 SHVERA Report) at ¶ 10 and note 26, *citing* Ted Sherman, *Consumers Loom as Losers in Battle Between Cable, Broadcast Firms*, THE NEWARK STAR-LEDGER, Sept. 13, 1993 (after the 1992 Act established retransmission consent requirements, "[a]lmost every broadcaster initially demanded the cash [and] at the same time, nearly all cable operators said no, threatening to dump the on-air broadcast stations come Oct. 6. when the [retransmission consent] provision takes hold."); Mark Robichaux, *Tele-Communications Says It Will Fail to Meet Deadline on TV Stations' Fees*, THE WALL STREET JOURNAL, Aug. 18, 1993, at B8 ("Delays in meeting the October deadline have been caused in part by the face-off between TV stations demanding new cash fees and cable systems steadfastly refusing to pay.").

[5] *See* 2005 SHVERA Report at ¶ 10 and note 27, *citing* Michael Burgi, *TV Ratings Companies Brace for Retransmission Fallout*, MEDIA WEEK, Jun. 28, 1993 ("'we can foresee no circumstances where we would pay cash,' said Richard Aurelio, president of Time Warner Cable in New York, referring to the FCC retransmission consent decree …").

[6] 2005 SHVERA Report at ¶ 10.

pay TV industry's refusal to pay cash compensation for retransmission consent.[7] Virtually all pay TV providers continued their refusal to pay cash retransmission consent compensation for over a decade.[8]

When tactics that artificially depressed the cash value of broadcast signals to zero became less effective, the pay TV industry added new tools to its toolkit. Pay TV providers sought to draw attention to their "plight" of having to pay for something they repackage and resell to consumers through petitions for rulemaking and appeals to Congress.[9] Large MVPDs even have whined about the burden of simply having to negotiate with all those broadcasters that had the temerity to elect retransmission consent rather than must carry.[10] To further get the attention of policymakers, MVPDs then began to trumpet any time they reached an

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[7] *Id.*

[8] *See, e.g,* GAO, *Issues related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 43 (Oct. 2003) ("few retransmission consent agreements include cash payment for carriage of the local broadcast station"); SHVERA Report at ¶ 10 (observing in 2005 that, "cash still has not emerged as a principal form of consideration for retransmission consent. Today, virtually all retransmission consent agreements involve a cable operator providing in-kind consideration to the broadcaster.").

[9] *See, e.g.,* Establishment of a Digital Transition Quiet Period for Retransmission Consent, Petition for Expedited Rulemaking of Cequel Communications, LLC *et al.*, MB Docket No. 98-120 (Apr. 24, 2008); Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent of Time Warner Cable *et al.*, MB Docket No. 10-71 (Mar. 9, 2010); Amendments to the FCC's Good-Faith Bargaining Rules, Petition for Rulemaking of Block Communications, RM-11720 (May 6, 2014). When the pay TV industry is not filing petitions to change the retransmission consent system in its favor, it is filing comments complaining about retransmission consent in other FCC proceedings ranging from next generation television to broadcast ownership rules, to transactions involving multiple broadcast stations or even a single station.

[10] *See* Reply Comments of Time Warner Cable Inc. (TWC), MB Docket No. 05-28, at 1, 3, 5 (Mar. 31, 2005) (calling upon FCC to urge Congress to reevaluate retransmission consent because so many stations were opting for it rather than must carry, and complaining about the "transaction costs" of negotiating retransmission agreements with broadcasters "both large and small"). *Accord* TWC Reply Comments, MB Docket No. 04-207, at 11-12 (Aug. 13, 2004).

impasse in negotiations with a broadcaster, making impasses themselves an important arrow in their policy quiver.[11]

The pay TV industry's reliance on retransmission consent disputes to bolster its regulatory and legislative strategy creates significant incentives that harm consumers and broadcasters. Because negotiations require both parties to be truly willing to reach agreement, pay TV provider cries of an "increasing" number of disputes can easily become reality at their own doing. During the decades of periodic renewals of the Satellite Home Viewer Act (SHVA) and its successors, for example, there was a cyclical increase in

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[11] Although such disruptions are incredibly rare compared to the thousands of retransmission consent deals that are concluded without incident every year, pay TV providers regularly point to such disputes as evidence of a broken system in need of "reform." Multiple studies collectively examining the frequency of retransmission consent-related service interruptions over the course of a decade (2006-2015) found that interruptions in broadcast signal carriage affect a truly miniscule amount of total consumer viewing hours. For example, such service interruptions impacted, on average, only 0.01486 percent of television viewing hours annually from 2011-2015. *See* NAB Written Ex Parte Communication, MB Docket No. 15-216 (Feb. 8, 2016), attaching Mark R. Fratrik, Ph.D., BIA Kelsey, *Updated Analysis of Carriage Interruptions on Viewing Hours: 2011-2015* (Feb. 3, 2016). Three earlier studies made comparable findings. *See* Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, Empiris, LLC (March 2009) at 39-40, attached to NAB Reply Comments, MB Docket No. 07-269 (June 22, 2009) (retransmission consent disputes from 2006-2008 affected less than one one-hundredth of one percent of annual household television viewing hours); Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010) at 19-20, attached to Opposition of Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) (an update to the previous study showed that retransmission consent-related interruptions affected approximately one one-hundredth of one percent of annual television viewing hours); NAB Comments, MB Docket No. 10-71 at Attachment A, Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 30-31 (May 27, 2011) (share of total viewing hours affected by retransmission impasses remained approximately one one-hundredth of one percent, and also showing that retransmission negotiating impasses were not increasing in frequency or impact). Moreover, only two operators – DIRECTV and DISH – have been responsible for 89 percent of the very limited number of retransmission consent negotiating impasses from 2017 to 2023. NAB Analysis of SNL Kagan Retransmission Databases (Dec. 2023). (DIRECTV includes MVPD services provided by both AT&T U Verse and DIRECTV).

retransmission consent disputes in the months before the law expired.[12] Although Congress made elements of that law permanent in 2019, ending the cyclical renewals,[13] disruptions now appear to serve MVPDs' renewed efforts to obtain FCC intervention in the congressionally-established retransmission consent marketplace. As discussed below, the disruptions have a significant negative impact on consumers and broadcasters but are harmless – and perhaps even beneficial – to MVPDs.

III. EARLY TERMINATION FEES AND OTHER ANTI-CONSUMER PRACTICES INSULATE MVPDS FROM THE FINANCIAL CONSEQUENCES OF NEGOTIATING DISPUTES

During a dispute, consumers face immediate harm because they cannot access broadcast signals via their MVPD services. Consumers may decide they have had enough of disrupted access to their favorite programming, outages of their entire MVPD service, rising costs of service and/or other issues. But those that wish to terminate MVPD service often find themselves "locked in" by the prospect of paying hundreds of dollars in ETFs. For example, both DISH and DIRECTV charge subscribers an early termination fee of $20 per month remaining on their contract.[14] Depending on when a subscriber cancels their agreement, they

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[12] *See, e.g.,* Prepared Statement of Emily Barr, President and CEO, Graham Media Group and Television Board Chair, National Association of Broadcasters, 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.").

[13] Satellite Television Community Protection and Promotion Act of 2019, Pub. Law 116-94, 133 Stat. 2534, 3201-03 (2019).

[14] *See* DIRECTV, *DIRECTV Fee Schedule*, available at: https://www.directv.com/legal/directv-fee-schedule/ (last visited Jan. 25. 2024); DISH, *Flex24 Plan Agreement*, available at: https://wwwprod.dish.com/content/dam/dish/pdfs/service-agreements/oct-31-2023-

could face up to $480 in fees for a service they no longer wish to receive.[15] It therefore can be cost prohibitive as well as highly inconvenient for consumers to switch pay TV providers or to cancel their service in favor of over the air viewing. Because MVPDs generally do not have exceptions to their ETFs for cancellations due to a loss of programming, subscribers are forced to choose between staying with their MVPD and losing valued programming (for which they generally are still required to pay) or forking over hundreds of dollars in fees to access the programming elsewhere.

During retransmission consent impasses, broadcast stations also face immediate financial repercussions from reductions in ratings and ad revenues while their signals are not carried and the lack of retransmission consent compensation from that MVPD. Yet pay TV providers involved in disputes are in the short-term largely insulated from any economic harm and, instead, may reap benefits. They continue to sell programming packages to new consumers that advertise the availability of broadcast signals; continue to tack on "broadcast TV fees" to packages that are marketed as already including broadcast signals;[16] continue to charge subscribers for programming they do not receive;[17] and count on their subscribers not canceling service or switching providers because of iron-clad ETFs. And beyond raising the

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agreements/1a3-+FLEX24+Agreement+(Direct)+English+10.31.23.pdf (last visited Jan. 25, 2024).

[15] *Id*.

[16] *See, e.g.,* Letter from Rick Kaplan, NAB to Marlene Dortch, FCC, MB Docket Nos. 18-349, 22-459, 23-203, and 23-405 (Dec. 1, 2023) at Attachment D.

[17] *See, e.g.,* NAB Comments, MB Docket No. 23-203 (July 31, 2023) at 3 (observing the potential for consumer confusion where MVPDs do not discount or refund broadcast TV fees during retransmission consent disputes); Petition for Declaratory Ruling, Enforcement Order, and Further Relief of Crescent City, MB Docket No. 18-101 (April 4, 2018) (discussing Charter Communications' continued billing of a monthly broadcast TV fee even while certain broadcast programming was not available to Charter subscribers).

profile of the pay TV industry's favorite lobbying point, the disputes also may have a positive economic effect on MVPDs because they are not paying retransmission consent fees during the disputes, while still raking in "broadcast TV fees" from subscribers.

IV. CONCLUSION

Although the pay TV industry has opposed even the very concept of retransmission consent for decades, Congress has repeatedly declined to implement proposals that would serve only to benefit MVPDs in negotiations with broadcasters. Instead, various provisions in Congress' renewals of SHVA and its successors further underscored the importance of local broadcast signals.[18] The Commission has similarly declined to implement nearly every MVPD proposal relating to retransmission consent.[19] In short, the system of retransmission consent Congress established is in no need of "repairs" intended to tilt the system in the pay TV industry's favor.

NAB observes that ETFs and other MVPD practices harm consumers, insulate MVPDs from the consequences of their actions, and help fuel the ability of MVPDs to manufacture "evidence" of a supposedly broken system through retransmission consent disputes. NAB

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[18] *See, e.g.,* Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) Pub. L. No. 108-447, 118 Stat. 2809 (2004) (expanding protections for localism by prohibiting a satellite carrier from delivering a distant network signal to new subscribers if the satellite carrier is already making available local-into-local service); Satellite Television Community Protection and Promotion Act of 2019, Pub. Law 116-94, 133 Stat. 2534, 3201-03 (2019) (narrowing the DBS distant signal license and conditioning use of the revised license on a satellite carrier's delivery of local television broadcast signals to all 210 designated market areas).

[19] *See, e.g., 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 Commission'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.").

believes that consumers should be allowed to freely choose from among their available video programming options.

Respectfully submitted,

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