

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

In the Matter of	)	
	)	
Promoting Innovation and Competition in	)	MB Docket No. 14-261
the Provision of Multichannel Video	)	
Programming Distribution Services	)	

To: The Commission

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

Tanya VanPool
Terry Ottina
NAB Research

Rick Kaplan
Jerianne Timmerman
Erin L. Dozier
Benjamin F.P. Ivins
Scott A. Goodwin
Washington, DC 20036
(202) 429-5430

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I. Introduction and Summary

The National Association of Broadcasters (“NAB”)¹ responds to the *Notice of Proposed Rulemaking* seeking comment on the Commission’s proposal to interpret the statutory term “multichannel video programming distributor” (“MVPD”) to include certain Internet-based (or online) video distributors (“OVDs”).² Specifically, the *Notice* proposes to include within the “scope” of this term services that “make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming.”³ The Commission also seeks

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 *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, MB Docket No. 14-261, FCC No. 14-210 (rel. Dec. 19, 2014) (“*Notice*”).

³ *Id.* at ¶ 1.

comment on some of the myriad issues arising from its proposal, including whether and how certain privileges and obligations under the Communications Act of 1934 (the “Act”) and FCC rules will apply to this subset of MVPDs.

NAB supports the Commission’s effort to modernize its rules to account for the rise of video programming distribution over the Internet. We anticipate that this effort can help foster a more competitive video distribution market that will provide consumers with additional alternatives to existing subscription video programming services like cable and direct broadcast satellite (“DBS”). Local broadcast stations want to assist the Commission in fostering a regulatory regime that both promotes video competition and maintains the pro-consumer values – including competition, localism and diversity – that will help ensure all Americans can continue to access the programming of their choice.

Even as video consumption habits have changed in the last decade, especially with the growth of time-shifted programming, on demand services like Netflix and Hulu and consumers’ desire to watch video content on a variety of devices, traditional TV viewing is still the dominant form of entertainment for American families. Content provided by local television stations – including the most popular network programming, syndicated programming and locally-produced content like news – remains at the core of the television experience.⁴

⁴ Broadcasters are continuously expanding online delivery, from local station websites and apps for smartphones and tablets to broadcast network offerings such as Hulu and CBS All-Access. Broadcast network programming is also made available through partnerships with numerous services including Amazon Prime, Google Play, iTunes, Netflix, and pay TV providers, to name a few.

To promote a level competitive playing field, the *Notice* concludes that any OVD falling within the MVPD definition should receive both the benefit and obligation of seeking retransmission consent from local broadcast stations, the same as any other MVPD competitor.⁵ NAB agrees with this conclusion. There is simply no question that, regardless of the technology used to distribute video programming, broadcasters have the right to control access to their signals.⁶ If implemented correctly, the extension of retransmission consent to these new services will ensure that OVDs have access to the most popular programming; broadcasters maintain the right to negotiate for fair compensation that enables substantial re-investments in high-quality, costly programming, including local news; and that a competitive balance is maintained among video distributors that choose to include broadcast signals among their offerings.

The *Notice* also makes clear that the Commission intends for the “pro-consumer values embodied in MVPD regulation [to] continue to be served” on the OVD platform.⁷ Those values should include not only the promotion of competitive alternatives to cable and satellite video services, but also the values that serve all Americans and have made our video programming system the envy of the world: localism and diversity.

Remarkably, Congressional and Commission policies fostering the provision of local news and information are virtually ignored in the *Notice*. It’s as if the Commission

⁵ *Notice* at ¶¶ 5, 50 (“... to the extent that an Internet-based distributor of video programming qualifies as an MVPD, it must receive the consent of the broadcaster before retransmitting the broadcaster’s signal.”).

⁶ 47 U.S.C. § 325(b); S. Rep. No. 102-92 at 34, reprinted in 1992 U.S.C.C.A.N. 1133, 1167 (1991) (“Congress’ intent” in adopting Section 325(b) of the Act “was to allow broadcasters to control the use of their signals *by anyone engaged in retransmission by whatever means*”)(emphasis added).

⁷ *Notice* at ¶ 3.

no longer views localism as one of its key policy objectives. For example, the *Notice* fails to discuss how the Commission's cable network nonduplication and syndicated exclusivity rules and similar Congressional enactments in the DBS context – which are essential to creating an environment where the concept of “local” can thrive – should translate to the OVD context. The Commission should carefully evaluate how to address and resolve potential harms to the system of local broadcasting that would result from an OVD's disregard for geographic limitations on signal distribution. The Commission must ensure that its expansion of the definition of MVPD does not inadvertently erode the ability of broadcasters to serve their local communities.

Similarly, to promote the value of diversity as well as localism, the Commission must consider the established public interest benefits of carriage obligations for emerging OVD services. The longstanding policies of both Congress and the Commission to promote competition, the continued availability of free, over-the-air television and a diversity of local commercial and non-commercial voices are intrinsic in the existing carriage requirements. The *Notice* fails to address how to maintain those benefits on new platforms. These public interest goals, however, are no less significant or relevant merely because a different technology may be used to offer subscription video services. The FCC cannot replace Congress's will with its own, nor can it simply wish these critical values away because it may find them inconvenient in its push to its next network revolution.

The Commission is correct that “innovation must be encouraged.”⁸ The development of competitive alternatives to cable and satellite will not only benefit

⁸ *Notice* at ¶ 3.

consumers but also has the potential to boost other industries, including broadcasting, which are continually seeking new ways to reach consumers. At the same time, however, the Commission should not underestimate the complexity of achieving this worthy goal. The implications of extending existing regulatory policies to rapidly developing Internet-delivered video programming services are not yet known, and this *Notice* leaves a number of critical issues unexplored. The comments that follow identify issues that affect the Commission's ability to achieve its policy goals and offer solutions to certain practical implementation problems that arise when applying basic MVPD requirements in the online context.

II. Retransmission Consent on OVD Platforms Will Expand Programming Choices and Foster Broadcaster Innovation and Local Service

The *Notice* observes that Section 325(b)(1)(A) of the Act provides that “[n]o cable system or other *multichannel video programming distributor* shall retransmit the signal of a broadcasting station, or any part thereof, except (A) with the express authority of the originating station...”⁹ As a result, “to the extent that an Internet-based distributor of video programming qualifies as an MVPD, it must receive the consent of the broadcaster before retransmitting the broadcaster’s signal.”¹⁰ The *Notice* also observes that Section 325 of the Act imposes an obligation to negotiate retransmission consent in good faith for both broadcasters¹¹ and MVPDs,¹² and seeks comment on how its

⁹ *Notice* at ¶ 50, citing 47 U.S.C. § 325(b)(1)(A) (emphasis added).

¹⁰ *Notice* at ¶ 50.

¹¹ *Notice* at ¶ 43, citing 47 U.S.C. § 325(b)(3)(C)(ii).

¹² *Notice* at ¶ 50, citing 47 U.S.C. § 325(b)(3)(C)(iii).

proposed interpretation of the term MVPD would impact the retransmission consent process.¹³

The Commission's recognition that OVDs must comply with the statutory requirement to obtain consent to retransmit broadcast signals under Section 325 is a positive step for OVDs, broadcasters and television viewers. Like other MVPDs, OVDs will benefit from the opportunity to negotiate in the marketplace for the right to retransmit broadcast signals.¹⁴ Carriage of broadcast signals can provide a unique complement to OVD packages that would otherwise lack market-specific content, such as local news, weather and sports. In addition to local content, broadcast signals contain a mix of syndicated and network content selected with a focus on the station's particular market, and national feeds are pre-empted where, for example, the coverage of local events—including local emergencies—should take precedence.¹⁵ A process that enables OVDs to lawfully negotiate for broadcast signals will undoubtedly contribute to the value and popularity of OVD offerings.

¹³ Notice at ¶¶ 43-45, 50-53.

¹⁴ See, e.g., *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Federal Communications Commission (rel. Sept. 8, 2005) ("SHVERA Report") at ¶ 44 ("both the broadcaster and MVPD benefit when carriage is arranged – the station benefits from carriage because its programming and advertising will be carried as part of the MVPD's service, and the MVPD benefits because the station's programming makes the MVPD's offerings more appealing to consumers.").

¹⁵ 47 C.F.R. § 73.658(e) (a local station's network affiliation agreement cannot prevent or hinder a station from: "(1)[r]ejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest, or (2) [s]ubstituting a program which, in the station's opinion, is of greater local or national importance").

Most importantly, significant consumer benefits will flow from the inclusion of subscription linear OVDs within the retransmission consent system.¹⁶ Consumers that subscribe to OVDs with a broadcast signal package will enjoy ease of access to broadcast signals (rather than switching from the OVD platform to over-the-air viewing). Such access will increase the quantity, quality and diversity of programming available to OVD subscribers.¹⁷ This approach also ensures that broadcasters, as Congress intended, will control the distribution of their signals and be able to negotiate for compensation from both OVDs and traditional MVPDs seeking to retransmit such signals. This control is fundamentally fair and enables local stations to make the substantial investments needed to maintain high-quality, costly programming,¹⁸ particularly local news;¹⁹ to enhance their HD, multicast, sports and other current and

¹⁶ See, e.g., SHVERA Report at ¶ 44 (observing that the most important benefit of the system of retransmission consent is that “consumers benefit by having access to [broadcast] programming via an MVPD.”).

¹⁷ See, e.g., Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* at Executive Summary (Apr. 2010), attached as Appendix A to Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) (“Opposition of the Broadcaster Associations”) (“retransmission consent is achieving Congress’ intended purpose of allowing broadcasters to receive an economically efficient level of compensation for the value of their signals,” and “this compensation ultimately benefits consumers by enriching the quantity, diversity, and quality of available programming, including local broadcast programming”).

¹⁸ See, e.g., Jeffrey A. Eisenach, Ph.D., *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content* (July 2014) (“NERA Study”) at ii, 28-30 (finding that “[r]etransmission consent compensation accounts for more than one-third of all spending on broadcast television programming, allowing broadcasters to increase program quality and compete more effectively with pay TV networks for high quality programming, including ... widely viewed sporting events such as NFL football games.”). Retransmission consent fees also have “resulted in a significant increase in spending on (and number of hours of) news and other public interest programming.” *Id.*

¹⁹ See NERA Study at 29-30 (the emergence of retransmission consent compensation coincided with a significant increase local news production by commercial broadcasters, from under four hours per weekday in 2003 to 5.5 hours in 2011); Jeffrey A. Eisenach and Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* (2011)

future service offerings;²⁰ and to compete fairly with platforms that use broadcast signals to grow their own businesses.

Application of the Commission's retransmission consent rules and good faith standards for retransmission consent negotiations involving broadcasters and OVDs may require some modifications to avoid undue burdens on the negotiating parties and to reflect certain legal, technical and operational differences between OVDs, cable and DBS. At the outset, the Commission should adopt rules that contemplate the commencement of OVD service in local markets, including a notification requirement that will allow broadcasters to know with whom they must negotiate in good faith for retransmission consent. Further, because OVD platforms are not governed by technical and operational rules prescribed by the Commission, it is important for broadcasters to be able to negotiate to ensure that their signals are secured from potential piracy, are accessed by OVD subscribers within the broadcaster's geographic market, and are not materially degraded. Accordingly, the Commission should adopt *per se* standards that permit broadcasters to avoid protracted negotiations with OVDs that are unwilling or unable to meet those minimum standards. Finally, because the statutory good faith standard applies only to negotiations for the right to retransmit broadcast signals, the

at 46-47 ("Economies of Scale Report"), Attachment A to Reply Decl. of Jeffrey A. Eisenach and Kevin W. Caves (Jun. 27, 2011) in NAB Reply Comments in MB Docket No. 10-71, at Appendix A (Jun. 27, 2011) (finding that retransmission consent revenues are directly responsible for increasing local news output by an average of 11 minutes per week for each commercial television station in the U.S.).

²⁰ See, e.g., NERA Study at ii, 31-33 (observing that "[r]etransmission consent helped to fund the changeover to high-definition programming and the launch of hundreds of new 'multi-cast' television services made possible by digital broadcasting technology, as well as the airing of major sports events on free-to-air television."). Retransmission fees also "have provided the financial capability for over-the-air broadcasters to invest in content and innovation and thus compete effectively in a highly competitive market for video content." *Id.*

Commission's good faith rules and complaint processes implementing the statute must remain confined to retransmission consent, and cannot be applied to negotiations between OVDs, broadcasters and others for the rights to copyrighted material within broadcasters' signals.

A. Mechanics of Market Entry and Proposed Notification Requirement

The Commission seeks comment on how its proposed interpretation of the term MVPD to include subscription linear OVD services will impact the retransmission consent process. There may be a wide range of different types of OVDs, even among those that offer "subscription linear" services. Some may not wish to operate on a locally-oriented basis or carry any local broadcast signals.²¹ For example, an OVD may wish to offer a nationwide service that does not include any broadcast signals. Perhaps such an offering may include a package of channels that are normally offered in the "extended" or "premium" tiers of cable or DBS service. In the case of an OVD that does not wish to carry *any* broadcast signals as part of its business model, it would not make sense to require that OVD to negotiate "in good faith" for something it does not want.

A "market entry" system analogous to the "carry-one, carry-all" requirement for DBS operators would appear to be the most effective mechanism for OVD providers. Under such a system, if an OVD plans to commence operations that involve carriage of any broadcast signal in a market, it would then be under an obligation to negotiate in good faith with all the broadcasters in that particular market. The OVD could not choose to negotiate with only a single station and refuse to negotiate with all others in the market. But at the same time, an OVD that commences service of any sort

²¹ Notice at ¶ 52.

anywhere in the country would not automatically be obligated to negotiate in good faith for retransmission consent with nearly 1,400 full-power commercial television broadcast stations.²² This “negotiate-with-one, negotiate-with-all” approach does not abrogate retransmission consent or the statutory good faith requirement, but applies a practical approach that will allow OVDs to enter markets at their own pace and negotiate with a more limited number of broadcasters that they can easily identify using FCC and/or commercial data.

As a practical matter, a market entry approach would enable OVDs to select the markets in which they wish to operate. Local broadcasters will need to know OVDs’ plans to meet *their* statutory obligations to negotiate in good faith. To address this, the Commission could establish a notification requirement similar to those in place for other MVPDs. Specifically, the Commission’s rules provide that any “cable system commencing new operation is required to notify all local commercial and noncommercial broadcasters of its intent to commence service.”²³ Likewise, a DBS provider is required to notify affected broadcasters of its “intention to launch local-into-local service” in a given market.²⁴ Both rules prescribe a 60-day notice requirement, a timeframe for a broadcaster response, method for notice delivery, and certain content that must be in

²² *Notice* at ¶ 51 (seeking comment on the impact of the obligation to negotiate in good faith on the resources of OVDs that qualify as MVPDs and whether a nationwide OVD would have to negotiate with “thousands of broadcasters throughout the nation”); *see also* FCC *Broadcast Station Totals as of December 31, 2014*, News Release (Jan. 7, 2015) (reporting that there are currently 1390 licensed commercial television stations in the U.S.).

²³ 47 C.F.R. § 76.64(k).

²⁴ 47 C.F.R. § 76.66(d)(2).

the notice.²⁵ This includes certain technical disclosures relevant to the broadcaster's ability to deliver its signal to the MVPD.²⁶ The rules also set forth steps that must be taken by any new television stations that may commence service, which may also be useful to adapt for the OVD context.²⁷

A similar notification requirement would facilitate retransmission consent negotiations between broadcasters and OVDs. The Commission should seek further comment regarding a notification requirement, including such issues as:

Timing. Cable and DBS operators must provide 60 days' prior notice of their plans to commence service, and broadcasters are required to respond to such notices within 30 days. However, the operations of cable and DBS are more uniform as a technical, legal, and business matter than OVD operations, which could vary greatly. The Commission should consider whether additional notice may be needed, and whether broadcasters would need additional time to respond.

Delivery. Sending a notice by certified mail is required for cable and DBS notices to broadcasters. This delivery method would likely be equally effective for OVD notices. The DBS rule specifies that the notification should go to "the address for such television licensee listed in the consolidated database system maintained by the Commission."²⁸ A similar approach should be used for OVDs.

²⁵ 47 C.F.R. § 76.64(k); 47 C.F.R. § 76.66(d)(2).

²⁶ A cable operator must state whether it can receive a signal of adequate quality from the station. 47 C.F.R. § 76.64(k). A DBS operator must specify the location of its local receive facility. 47 C.F.R. § 76.66(d)(2).

²⁷ 47 C.F.R. § 76.64(f)(4); 47 C.F.R. § 76.66 (d)(3).

²⁸ 47 C.F.R. § 76.66(2)(D)(ii).

Content. As discussed above, both the cable and DBS rules require certain content to be in the notice, and certain content to be in the broadcaster's response. For example, cable operators must inform a broadcaster whether its station's signal quality meets the standards for carriage; DBS operators must notify broadcasters of the location of their local receive facility. In addition, a number of technical and operational standards established by the Commission apply to cable and DBS services, which broadcasters can easily discern by reviewing FCC rules and/or publications of industry-wide standards-setting organizations.²⁹

In contrast, OVD services are not subject to a regulatory scheme that requires any uniform technical and other standards to be met. It is therefore particularly important that OVDs make relevant disclosures about the technical and operational parameters of their services. Accordingly, NAB proposes that OVDs be required to certify the following in their notices:

- (a) *Signal Security/Piracy.* The OVD has the technical and operational ability to prevent parties who are not subscribers to its service from accessing the broadcast signal;
- (b) *Geo-Matching.* The OVD will ensure that any television broadcast signal it retransmits will be geographically "matched" only with subscribers within the geographic area for which the broadcaster grants retransmission consent; and
- (c) *Material Degradation.* The OVD should certify that it will meet a material degradation standard comparable to those in place for cable and DBS.

* * *

²⁹ Many FCC technical rules affecting cable operators cross-reference standards established by the Society of Cable Telecommunications Engineers, the Consumer Electronics Association, and the Advanced Television Systems Committee.

Permitting OVDs to commence carriage of local broadcast signals on a market-by-market basis will avoid undue burdens on both OVDs and broadcasters, allow OVDs to enter local markets in a manner best suited to their particular business plans and avoid unnecessary interference in this nascent market. Additionally, the notification and certification requirements proposed above will foster timely and efficient retransmission consent negotiations.

B. Application of the Good Faith Standard in the OVD Context

As discussed above, many potential benefits for OVDs, broadcasters and consumers will flow from the Commission's determination that the obligations and privileges of retransmission consent—including good faith negotiation requirements³⁰—apply to certain OVDs. Many aspects of retransmission consent negotiations between broadcasters and existing MVPDs will be virtually identical in the OVD context. Below we discuss a few areas where there may be distinctions in the nature of the negotiations that should be reflected in the application of the good faith standard to broadcasters and OVDs that qualify as MVPDs.

Proposed Per Se Standards. The Commission acknowledges that there may be legitimate reasons for a cable programmer to hesitate to license its content to an OVD. Specifically, the Commission asks whether the program access rules adequately account for the possibility that “licensing programming to a particular [OVD] presents reasonable concerns about signal security and piracy” by “recognizing these concerns

³⁰ 47 U.S.C. § 325(b)(3)(C)(ii)-(iii); 47 C.F.R. § 76.65; *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 (2000).

as a legitimate reason for a cable-affiliated programmer to withhold programming from an MVPD.”³¹ Though the *Notice* does not seek comment on this issue in the context of retransmission consent, concerns about signal security and piracy certainly apply with equal force to the retransmission of broadcast signals. Unlike cable and DBS, which must abide by technical and operational standards in the Commission’s rules, OVDs’ business models and the “physical plant” supporting their operations may vary greatly. The technical and operational standards applicable to other MVPDs may not apply to most OVDs. Accordingly, matters such as signal security/piracy, geographic boundaries on retransmission consent, and signal degradation may all have to be negotiated by broadcaster and OVD parties.

To address this, the Commission should establish that it is *per se* consistent with the good faith negotiation requirement for a broadcaster to decline to engage in negotiations with an OVD that cannot or will not demonstrate it has the technical and operational ability to prevent parties who are not subscribers to its service from accessing (and possibly repurposing or reselling) television broadcast signals. Piracy and other forms of misappropriation are legitimate concerns for any rights holder, not just “cable-affiliated programmers.” Broadcasters should not be forced to negotiate with parties that cannot secure the broadcast signal and ensure that copyright licenses and retransmission consent rights are not abrogated.

Similarly, it should be *per se* consistent with the good faith requirement for broadcasters to decline to negotiate with an OVD that cannot or will not demonstrate its ability to limit retransmission of the broadcast signal to subscribers within a specified

³¹ *Notice* at ¶ 41.

geographic area (i.e., to match the geographic area in which the broadcaster is willing and able to grant retransmission consent). A broadcaster should not be expected to engage in protracted negotiations with a party unwilling or unable to limit carriage of its signal beyond the broadcaster's local market.

Additionally, if the Commission does not adopt a specific material degradation standard for OVDs, it should, at a minimum, hold that it is *per se* consistent with the good faith standard for a broadcaster to decline to engage in negotiations with an OVD that cannot or will not demonstrate its ability to retransmit broadcast signals without material degradation.

The Limits of Good Faith. The statutory obligations of MVPDs and broadcasters to negotiate in good faith for retransmission consent, and the Commission's rules implementing these obligations, apply *only* to negotiations over the carriage of a station's *signal*; not to the content included in the signal. Accordingly, in implementing good faith standards for OVDs, it must be made clear that while the good faith standards apply to negotiations for retransmission consent of broadcast signals, they do not apply to any other negotiations that may take place, such as negotiations for copyright clearances for upstream network or syndicated content, or even a station's own copyrighted material such as local news and public affairs content.

An OVD should not be able to file, for example, a good faith complaint with the Commission contending that any party "refus[ed] to put forth more than a single, unilateral proposal"³² for intellectual property rights *within* the broadcast signal. The prices, terms and conditions of copyright clearances that may be needed for an OVD to

³² 47 C.F.R. § 76.65(b)(iv).

carry a broadcast signal—which stand separate and apart from retransmission consent rights—can be set by the respective rights holders as they see fit. Simply put, the Section 325 good faith standard and Commission rules implementing it do not apply to copyright licensing negotiations.

III. The Commission Must Acknowledge the Entire Framework Developed by Congress to Ensure a Vibrant, Diverse and Competitive Video Marketplace

The *Notice* states that the Commission intends to balance the goals of encouraging innovation and other important public policies such as competition, consumer protection and public safety. To that end, the proposals in the *Notice* seek to ensure “that the rights and responsibilities of an MVPD are not jeopardized by changes in technology,” that the Commission’s “rules apply sensibly” and that the “pro-consumer values embodied in MVPD regulation will continue to be served.”³³ However, by omitting key aspects of the regulatory system applicable to existing MVPDs, the approach outlined in the *Notice* would fail to do this as a practical matter, leaving important consumer needs and expectations unmet. Among other gaps, the *Notice* does not discuss how the Congressional and Commission objective of fostering local news and information will be met absent some enforcement mechanism comparable to the program exclusivity rules for cable operators and unserved household restriction for DBS providers. Additionally, the *Notice* does not consider how the goals of competition, localism and diversity will be met absent any type of carriage requirement. NAB urges the Commission to take a closer look at certain requirements applicable to comparable

³³ *Notice* at ¶ 3.

services such as cable and DBS³⁴ and make the necessary adjustments to ensure that the goals underlying these requirements are met in the OVD context.

A. A Mechanism for Enforcing Exclusive Rights is Critical to Developing a Successful Local Broadcast Component to OVD Service

NAB has provided extensive comments on the importance of exclusivity enforcement to the viability of a locally-oriented system of television broadcasting in response to the Commission's further notice on its exclusivity rules,³⁵ and earlier requests for comment in the same proceeding.³⁶ We will not repeat those arguments here, but simply note that exclusivity is equally important in the OVD context as in the traditional MVPD context.³⁷

Because exclusivity provides an environment hospitable to broadcaster investment in local news, information and emergency journalism in particular, it is a

³⁴ Notice at ¶ 64 (seeking comment on how other regulations should account for OVDs that qualify as MVPDs and whether the Commission "should extend any cable or satellite-specific regulations to MVPDs more generally...").

³⁵ See *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014); NAB Comments in MB Docket No. 10-71 (Jun. 26, 2014) ("NAB Exclusivity Comments"); NAB Reply Comments in MB Docket No. 10-71 (Jul. 24, 2014) ("NAB Exclusivity Reply Comments").

³⁶ See *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Public Notice, 25 FCC Rcd 2731 (2010); *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, FCC 11-31 (rel. Mar. 3, 2011); Opposition of the Broadcaster Associations in MB Docket No. 10-71 (May 18, 2010) at 22-27 and Appendix B, "A Short History of the Program Exclusivity Rules"; Reply Comments of the Broadcaster Associations in MB Docket No. 10-71 (Jun. 3, 2010) at iv-v, 10-11 and 31-33; Comments of NAB in MB Docket No. 10-71 (May 27, 2011) at iv-v, 55-62 and Attachment D, "A Short History of the Program Exclusivity Rules"; Reply Comments of NAB in MB Docket No. 10-71 (Jun. 27, 2011) at 53-61 and Reply Decl. of Jeffrey A. Eisenach and Kevin W. Caves (June 27, 2011) at ¶¶ 28-31.

³⁷ Harms resulting from breaches in exclusivity by cable or DBS, while substantial, are at least limited to a cable franchise area or DBS operator's footprint. Exclusivity breaches by an OVD could result in unauthorized signal and program distribution worldwide, undermining the entire program distribution market.

critical consideration in addressing emerging OVD services. The FCC cannot turn its back on local communities. Certainly the Commission previously recognized that the “information needs of communities” remain critical in “a broadband age”³⁸—needs that cannot be met by the growing number of national cable networks, news or otherwise. If, however, the preservation of “local” is no longer enough, and if the Commission takes the rather dramatic step of eschewing exclusivity rules for OVD operations at this time, then, at the very least, it must make clear that such obligations will be applied in the event OVDs become eligible for compulsory copyright licenses in the future. Although compulsory licensing does not currently apply to OVDs,³⁹ it is essential that the Commission provide an efficient mechanism for the enforcement of exclusive rights negotiated in the marketplace if the rights of broadcasters and other content providers are abrogated by a system of compulsory licensing.

1. If OVDs Qualify for a Compulsory License, Effective Exclusivity Enforcement Becomes Even More Critical

As NAB discussed in previous filings, exclusivity rules are particularly critical to local broadcast television operations in light of the system of local and distant compulsory licenses for the carriage of content in broadcast signals, which currently do

³⁸ FCC, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* (2011) (“Information Needs of Communities”), available at http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

³⁹ *Notice* at ¶ 45 (observing that “an entity wishing to retransmit a broadcast signal also must obtain authorization to publicly perform the copyrighted works within the broadcast signal” and citing 17 U.S.C. §§ 106, 111; *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498, 2507 (2014)).

not apply for OVDs.⁴⁰ Regulatory exclusivity enforcement must be made part of the equation if changes to the legal landscape establish an OVD compulsory license.

Beyond promoting the development and preservation of local news and information, the FCC's exclusivity rules play a critical role within the legal landscape governing existing MVPDs—they help to balance against the tremendous benefits afforded cable and DBS operators under compulsory copyright licenses.⁴¹ Compulsory licensing is an exception to a copyright holder's exclusive right to decide whether or not to license at all and to negotiate all terms and conditions of that license.⁴² The

⁴⁰ The creation of compulsory licenses for OVDs would raise complex legal, technical and international treaty compliance issues. See *Satellite Television and Localism Act Section 302 Report: A Report of the Register of Copyrights* (Aug. 29, 2011) at 48-49 (opposing a license for Internet-based distributors in light of unanswered “questions about broadcast signal security and anti-piracy measures;” U.S. agreements with “several international trading partners that include provisions prohibiting statutory licensing for the Internet retransmission of broadcast content;” and the lack of market failure that would warrant the “application of a statutory license in this context”). See also *Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses*, Hearing before the House Comm. on the Judiciary, 111th Cong. (Feb. 25, 2009) (Statement of the Register of Copyrights, Marybeth Peters); *Satellite Home Viewer Extension and Reauthorization Act 109 Report: A Report of the Register of Copyrights* (June 2008) at 186-89.

⁴¹ See, e.g., NAB Exclusivity Comments at 4-5 (“statutory licenses abrogate copyright owners’ rights to control distribution of their copyrighted works pursuant to Section 106(3) of the Copyright Act”); *id.* at 50-57 (discussing how exclusivity operates as a counterweight to compulsory copyright licenses).

⁴² Congress recognizes that when establishing compulsory copyright licenses, it is “acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and that it therefore needs to act as narrowly as possible.” Intellectual Property and Communications Omnibus Reform Act of 1999, H.R. CONF. REP. 106-464 (1999) (containing Satellite Home Viewer Improvement Act, “SHVIA”) (“SHVIA Conference Report”) at 95. Distant signal licenses for DBS permit the “importation of distant or out-of-market network stations in derogation of the local stations’ exclusive right—bought and paid for in market-negotiated arrangements—to show the works in question,” which “undermines those market arrangements.” *Id.* at 93. Accordingly, the compulsory license, “which is to allow for a lifeline network television service to those homes beyond the reach of their local television stations,” only permits “distant network service to those homes which cannot receive the local network television stations.” *Id.*

compulsory copyright system allows cable and DBS to carry the highly-valued, copyrighted content within broadcast signals for free on a local basis and at government-established, sub-market rates on a distant basis, and eliminates MVPDs' transaction costs for such carriage.⁴³ Without these licenses, cable and DBS providers would be required to negotiate in the marketplace for all of the copyrighted content within broadcast signals. Exclusivity enforcement mechanisms partially mitigate this government-granted subsidy for cable and DBS providers.

If the Commission fails to adopt network nonduplication and syndicated exclusivity rules for OVD operations at this time (as appears contemplated by the *Notice*), the Commission at the very least must make clear that such obligations will be applied in the event OVDs become eligible for compulsory copyright licenses. The existence of mechanisms for the enforcement of exclusive rights negotiated in the marketplace becomes even more important in an environment where the rights of broadcasters and other content providers are abrogated by a system of compulsory licensing.

2. OVD Operations Must Not Abrogate Contractual Rights Freely Negotiated in the Marketplace

The *Notice* also seeks comment on whether network affiliate agreements affect a local station's ability to grant retransmission consent to OVDs.⁴⁴ This is, of course, a

⁴³ *Satellite Home Viewer Extension and Reauthorization Act 109 Report: A Report of the Register of Copyrights* (June 2008) at 70 (recommending the elimination of compulsory licenses for cable and DBS carriage of distant signals on grounds that record evidence shows "that the distant signal licenses set royalties at below-market levels" and stating that copyright owners should be permitted to "negotiate market rates for the carriage of programming retransmitted by MVPDs.").

⁴⁴ *Notice* at ¶ 53 (seeking comment on how "network affiliation agreements impact the carriage of broadcast stations" by OVDs, whether "existing network affiliation agreements limit or prohibit

matter of contractual rights between networks and affiliates. In general, these agreements permit stations to grant retransmission rights within certain geographic areas, which as NAB has explained, fosters localism. To the extent that a new platform such as OVD service is retransmitting the local signal, it should be subject to the same treatment, including with regard to geographic restrictions, as would any other retransmission of a broadcast signal.

The emergence of a new platform does not justify any government interference in market exclusivity broadcasters negotiate with their program suppliers. To the extent that any party may suggest that the Commission impede or restrict the ability of stations to negotiate these terms with program suppliers, such interference would harm localism and potentially drive programming to other platforms and away from the free broadcast platform, contrary to the public interest.⁴⁵ Particularly in this context, government interference would create harmful uncertainty.

B. The Public Interest Objectives of Carriage Requirements Are Equally Compelling in the OVD Context

The two primary MVPD services currently available to consumers—cable and DBS—are subject to a variety of public interest obligations that the Commission does not propose to apply to OVDs. For example, the *Notice* identifies nearly 30 different “pro-competitive, consumer-focused” obligations that apply to cable operators—ranging

local network stations’ ability to grant retransmission consent” to OVDs, and whether “limiting or prohibiting these provisions [would] harm localism.”).

⁴⁵ See, e.g., NAB Exclusivity Comments at 25-26; Declaration of Mark Israel and Allan Shampine of Compass Lexecon (Jun. 26, 2014)(attached to NAB Exclusivity Comments as Appendix B) (“Compass Lexecon Report”) at ¶ 57 (“If lack of exclusivity undermined the current business model, the result might be broadcast networks and distributors of syndicated content shifting additional content to pay distribution platforms.”).

from consumer privacy requirements, to political programming and candidate access, to mandatory carriage of broadcast stations—that, as proposed, might be inapplicable to OVDs.⁴⁶ The *Notice*’s discussion of the careful balancing of these important public interest obligations and consumer protections in the cable context highlights the importance of these issues for similar services.

The Commission should be particularly concerned about the public interest harms that will result if it does not impose any carriage obligations on OVDs.⁴⁷ By requiring carriage of commercial and noncommercial stations on cable, Congress sought to further important governmental interests in the continued availability of free over-the-air local television for viewers and promoting viewers’ access to information from diverse sources.⁴⁸ The U.S. Supreme Court recognized the importance of these two “interrelated interests” that Congress sought to advance in upholding the validity of the cable must carry requirements against a constitutional challenge.⁴⁹

⁴⁶ *Notice* at ¶ 76. Similarly, DBS providers are required to meet several public interest obligations, including: (i) the requirement to set-aside four percent of their channel capacity exclusively for noncommercial programming of an educational or informational nature; (ii) the political broadcasting requirements of Section 312(a)(7) of the Communications Act (granting candidates for federal office reasonable access to broadcasting stations), and Section 315 of the Act (granting equal opportunities to candidates at the lowest unit charge); and (iii) mandatory carriage of television broadcast stations in markets where they choose to carry any local station (i.e., “carry-one, carry-all”).

⁴⁷ At least one OVD has stated that it is willing to meet a must-carry requirement. See Letter to Marlene H. Dortch from Rebecca Rini, Counsel to FilmOn X, LLC (“FilmOn”) in MB Docket No. 12-83 (Oct. 17, 2014) (FilmOn intends to “offer its service consistent with all regulatory obligations” including honoring a local television station’s “right to elect must carry or retransmission consent” and providing “program exclusivity, emergency alerts and information, closed captioning, and equal employment opportunity”).

⁴⁸ *Turner Broadcasting System, Inc. v. FCC*, 520 US 180, 189-90 (1997) (“*Turner II*”).

⁴⁹ *Id.*

Years later, in adopting legislation that included the “carry-one, carry-all” requirement for DBS operators, Congress reasserted the importance of fostering localism through a carriage requirement, observing that “[i]t is well recognized that television broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities.”⁵⁰ Congress was concerned that, absent carriage obligations, certain stations would not be selected for DBS carriage, and that those stations would “face the same loss of viewership Congress previously found with respect to cable noncarriage.”⁵¹ Congress believed that its interest “in maintaining free over-the-air television [would] be undermined if local broadcasters are prevented from reaching viewers by either cable or satellite distribution systems.”⁵²

In adopting DBS carry-one, carry-all requirements, Congress cited the effectiveness of the cable must-carry requirement, observing that it had resulted in “the appearance of several emerging networks, which often serve underserved market segments.”⁵³ Congress also found that “[a]pplying a must-carry rule in markets which satellite carriers choose to serve benefits consumers and enhances competition with cable by allowing consumers the same range of choice in local programming they receive through cable service.” Congress stated that its carry-one, carry-all requirement for DBS was its best option, stating that there were “no narrower alternatives that would

⁵⁰ SHVIA Conference Report at 92.

⁵¹ *Id.* at 101, citing H.R. Rep. No. 102-628 at 51 (1992); S. Rep. No. 102-92 at 62 (1991).

⁵² SHVIA Conference Report at 101.

⁵³ *Id.*

achieve [its] goals.”⁵⁴ Empirical studies have confirmed Congress’ judgment, demonstrating that must carry has helped preserve independent voices for local audiences and is particularly vital in small and rural areas.⁵⁵

NAB recently reconfirmed through a survey of hundreds of television stations that must-carry stations offer unique, niche programming that is not always available on other television broadcast stations that serve larger audiences in a given market.⁵⁶ These stations distinguish themselves by offering content geared towards particular ethnic groups or foreign-language speakers residing in a given market, and many offer faith-based programming.⁵⁷ The absence of any type of carriage requirement, for example, may foreclose these niche and ethnic-focused stations from participating in the growing online video market. This action could, in turn, inhibit those stations’ advertising sales, putting downward pressure on their ability to invest in programming for underserved audiences in local markets.

⁵⁴ *Id.* at 101-102. See also *Satellite Broadcasting and Communications Ass’n v. FCC*, 275 F.3d 337 (4th Cir. 2001) (upholding carry-one, carry-all against a constitutional challenge).

⁵⁵ One study showed that non-network broadcast stations—those “most likely” not to be carried by cable systems in the absence of carriage requirements—increased their viewing shares after must carry. G.S. Ford, & J.D. Jackson, *Preserving Free Television? Some Empirical Evidence on the Efficacy of Must-Carry*, 13 J. MEDIA ECON 1, 12 (2000). Another study concluded that the “long-term viability of local broadcast stations in fragile small markets” was in question “without the umbrella protection of the must-carry rules.” M.Z. Yan, *Market Structure and Local Signal Carriage Decision in the Cable Television Industry: Results from Count Analysis*, 15 J. MEDIA ECON. 175, 189 (2002).

⁵⁶ Between August and October 2012, NAB conducted a survey via telephone and email to learn more about the number of stations that elect must carry and the programming offered by must carry stations. A total of 467 stations were surveyed, with 351 stations (or 75 percent) responding. The survey included all full-power commercial television stations not affiliated with “Big Four” broadcast networks (ABC, CBS, Fox, and NBC) because of the higher likelihood that these stations elect must carry with regard to at least some MVPDs.

⁵⁷ Among surveyed stations electing must carry with regard to all or some MVPDs, 67 percent offer faith-based programming, 39 percent offer foreign language programming, 27 percent offer local news and weather, and 23 percent offer local sports programming.

Concerns about diversity do not diminish in the context of Internet-delivered video. While there are vast numbers of voices available on the Web, the Commission should be mindful of two things: (1) a consumer's OVD experience will likely be isolated from other Web content (i.e., it will be a closed garden in a manner similar to cable service); and (2) it is very likely that consumers will use their OVD service as their primary TV viewing experience. By cutting out stations that service niche audiences from the developing OVD platform, the Commission would all but guarantee that those audiences will not find them elsewhere.

Given that the two most widely utilized MVPD platforms must meet mandatory carriage requirements, developing a truly technology-neutral regulatory regime obligates the Commission to address how OVDs should also meet these pro-consumer obligations.

IV. Conclusion

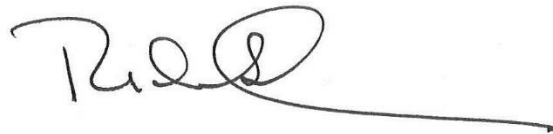
NAB supports the Commission's proposal to update its interpretation of the term "multichannel video programming distributor" to encompass entities that distribute linear video programming to subscribers via the Internet. This proposal will make clear that OVDs are subject to both the benefits and obligations of the retransmission consent regime, benefiting OVDs, broadcasters and local viewers. The Commission should adopt notification requirements similar to those that apply in the cable and DBS context to foster effective retransmission consent negotiations between OVDs and broadcasters. Such notification requirements should reflect differences in the operations of OVDs by requiring useful technical information, including an OVD's ability to provide signal security, maintain signal quality, and match its distribution to the

geographic limitations of a broadcasters' market. To ensure that the pro-consumer values of competition, diversity and localism are transferred to the OVD context, the Commission also should ensure that OVDs abide by program exclusivity and must carry requirements that apply to other MVPD services.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430

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

Rick Kaplan
Jerianne Timmerman
Erin L. Dozier
Benjamin F.P. Ivins
Scott A. Goodwin

Tanya VanPool
Terry Ottina
NAB Research

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