

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

In the Matter of)
)
Annual Assessment of the Status of) MB Docket No. 07-269
Competition in the Market for the)
Delivery of Video Programming)

To: The Commission

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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EXECUTIVE SUMMARY

The National Association of Broadcasters (“NAB”) submits these comments in response to the Commission’s *Notices of Inquiry* requesting data and information on the status of competition in the market for the delivery of video programming through the period of June 30, 2009. In our comments, NAB responds to the Commission’s inquiries concerning consumer access to broadcast television services, developments in the broadcast television industry, and systems of retransmission consent and mandatory carriage. Here and in previous filings, NAB demonstrates that millions of American consumers continue to rely on free over-the-air broadcast television signals for their delivery of video programming. A disproportionately high number of households that rely exclusively on free broadcast signals for news, weather, emergency information and entertainment are low income and minority households.

We also discuss how, with the transition to digital television (“DTV”) now complete, local television broadcast stations are intensifying their efforts to substantially increase the value of digital television, specifically by developing and airing more high-definition (“HD”) and multicast programming, and identifying ways to deliver broadcast programming to viewers using handheld devices. With broadcasters investing substantial resources into these new initiatives despite challenging economic conditions, viewers can expect to enjoy more programming streams, an expanding array of HD content, and new ways of watching television. NAB notes, however, that some broadcasters have been frustrated in their efforts to reach cable and satellite households with their digital program offerings. Therefore, Commission rules and policies governing carriage of broadcast signals should be revised so that all

consumers, including those subscribing to cable and satellite, can access broadcasters' increasingly diverse multicast and HD content offered free over-the-air. Finally, NAB observes that the retransmission consent process is working as Congress intended, and helps ensure that consumers benefit from broadcasters' programming services, including these developing digital services.

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The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the Commission’s *Notices of Inquiry* requesting data and information on the status of competition in the market for the delivery of video programming through the period of June 30, 2009.² Through these *Notices*, the Commission again seeks comment on consumer access to broadcast television services and developments in the broadcast television industry, among many other inquiries. As NAB has shown through numerous filings, free over-the-air broadcast television signals remain the primary video programming delivery method for millions of American consumers. With the transition to digital television (“DTV”) now complete, local television broadcast stations are intensifying their efforts to substantially increase the value of digital television,

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free 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, 24 FCC Rcd 750 (2009) (“*Notice*”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, 24 FCC Rcd 4401 (2009) (“*Supplemental Notice*”).

specifically by developing and airing more high-definition (“HD”) and multicast programming, and identifying ways to deliver broadcast programming to viewers using handheld devices.

I. Current Data Show that Free Over-the-Air Broadcasting Plays a Significant Role in the Video Marketplace

The Commission seeks comment on the number of households relying solely on over-the-air broadcast television for programming, as well as the number of households subscribing to a multichannel video programming distributor (“MVPD”) that also rely on over-the-air service for one or more of their television sets not connected to MVPD service.³ Our most recent data shows that nearly 16 million households rely solely on over-the-air broadcast television, and there are approximately 35.1 million sets in those homes.⁴ An additional 16.7 million television sets in 11.8 million MVPD households remain unconnected to the MVPD service.⁵ Thus, a total of approximately 51.8 million television sets currently are not connected to any MVPD service and receive all broadcast signals over-the-air.⁶

Those households relying solely on over-the-air broadcasting are predominantly lower income.⁷ While nationwide approximately 14 percent of television households are broadcast-only, approximately 23.1 percent of television households with incomes under \$30,000 annually are broadcast-only. In contrast, only 4.9 percent of the households with annual incomes exceeding \$75,000 depend solely on over-the-air

³ Notice at ¶¶ 57-58; *Supplemental Notice* at ¶ 34.

⁴ See Knowledge Networks/Statistical Research, Inc., *Home Technology Monitor Ownership Survey* (Spring 2009); Nielsen Media Research, *Television Household Estimates* (2008-2009).

⁵ *Id.*

⁶ *Id.*

⁷ Notice at ¶ 58 (requesting demographic information on television households).

broadcasts to receive video programming.⁸ Thus, it is clear that the broadcast-only households in the United States include a disproportionate number of viewers who would be least able to afford a subscription television service.

It is also noteworthy that broadcast-only households include relatively greater numbers of racial/ethnic minorities. For example, while less than 12.3 percent of television households with a white head of household nationwide are broadcast-only, approximately 20.7 percent of African-American and 25.7 percent of Hispanic television households rely completely on over-the-air broadcasting.⁹

While today there are other sources of news and information, broadcast television stations remain a leading source of critical public safety information and local programming, even for those households that subscribe to an MVPD service. The Commission has repeatedly recognized the importance of access to broadcast news and emergency information.¹⁰ Acting as “life-line providers” in major disasters, over-the-air broadcasters provide a crucial communications link when other services, including MVPD services, are unavailable.¹¹

⁸ See *Home Technology Monitor Ownership Survey*, *supra* note 4.

⁹ *Id.*

¹⁰ See, e.g., *FCC Requires Public Interest Conditions for Certain Analog TV Terminations on February 17, 2009*, Public Notice, FCC 09-7 (Feb. 11, 2009) (establishing “enhanced nightlight” service to ensure that “viewers relying on over-the-air television do not lose access to local news, public affairs and emergency information before they are ready for the full power television transition to all-digital television service.”)

¹¹ See May, Albert L., *First Informers in the Disaster Zone, The Lessons of Katrina* (Washington D.C., The Aspen Institute, 2006), at 13-15 (showing how local television broadcasters prepared for disaster and turned to alternative mediums, including the Internet, to broadcast news from their reporters hunkered down in New Orleans during the storm).

In an era of increasing MVPD concentration,¹² the broadcast stations carried on MVPD systems also provide a guaranteed minimum of local and diverse voices for subscribers. As the Commission has explicitly recognized, most programming carried on any cable system is “either originated or selected by the cable system operator, who thereby ultimately controls the content of such programming.”¹³ Cable operators are gatekeepers with the incentive and ability to “silence the voice of competing speakers with a mere flick of the switch.”¹⁴ Congress has expressed similar concerns about cable subscribers retaining access to local diverse information sources.¹⁵ The Commission should continue to recognize the significant role that broadcasters play in the provision of local, diverse programming (as well as vital emergency information and alerts) to *all* television households, whether or not they subscribe to an MVPD service.

¹² As the Commission has observed, “relatively few consumers have a second wireline alternative” to cable service, and “[c]able operators continue to pursue a regional strategy of ‘clustering’ their systems.” See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 ¶¶ 9, 180 (2009) (“13th Annual Video Competition Report”). See also, Empiris, LLC, *The Economics Of Retransmission Consent*, Jeffrey A. Eisenach, Ph.D. (March 2009) at 18-21 (filed as Appendix A of NAB Reply Comments in MB Docket No. 07-269 on Jun. 22, 2009) (discussing increasing levels of national concentration and regional clustering in the MVPD industry) (“Eisenach Study”).

¹³ *Review of the Commission’s Regulations Governing Television Broadcasting*, Report & Order, 14 FCC Rcd 12903, 12953 (1999).

¹⁴ *Carriage of Digital Television Broadcast Signals*, Third Report and Order, 22 FCC Rcd 21064 (2007) at ¶ 50 (“Viewability Order”) (citing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 197 (1997) (internal quotes and citations omitted)).

¹⁵ See H.R. Rep. No. 628, 102d Cong., 2d Sess. at 56 (1992) (consumers who “rely on cable television for video services” should “not be deprived of the programs presented by their local television stations,” which include local news and information). In passing the 1992 Cable Television Consumer Protection and Competition Act requiring cable systems to carry local broadcast signals, Congress expressly found that “[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services.” 47 U.S.C. § 521(a)(11) note.

II. Broadcasters Are Increasing the Quality and Quantity of Diverse Digital Programming Available to Viewers

With the transition to digital television now complete, broadcasters are intensely focused on harnessing their creativity and innovation to offer more and better programming and services to their viewers. Today, despite the challenging economic environment, broadcasters across the country are fully engaged in expanding HD content, new delivery methods, and multicast programming to better serve their viewers and their communities.¹⁶

Expansion of HD Programming. Local broadcasters and networks have invested billions of dollars in HD content and technology. For example, the major broadcast networks now provide their most popular programming in HD. Indeed, the majority of primetime programming shown by the major television networks is in HD.¹⁷ Nearly every major sporting event aired by the networks, including almost every NFL game, NBA game, the NCAA Basketball Tournament, the Little League World Series, most major golf tournaments, major tennis tournaments and both the Winter and Summer Olympics, is broadcast in HD. Major network programs, including most scripted programs and many non-scripted “reality” programs, are shown in HD. And increasingly local broadcasters across the country are switching their local news

¹⁶ See *Supplemental Notice* at ¶ 11 (seeking comment on broadcaster HD offerings) and ¶ 35 (seeking comment on multicast offerings).

¹⁷ An increasing amount of daytime programming also is offered in HD, including such popular programs as ABC’s “The View” and “General Hospital” and “CBS’s “Sunday Morning.” Additional CBS daytime programs, including “The Early Show” and “Face the Nation,” are slated to switch to HD in 2010. See Glen Dickson, *High-Definition for ‘Hospital,’* BROADCASTING & CABLE (Apr. 6, 2009); Glen Dickson, *‘Sunday Morning’ to Dawn in Hi-Def,* BROADCASTING & CABLE (May 11, 2009).

programs to HD.¹⁸ Competitive pressures ensure that as one or two stations in a market convert to HD news production, other local stations will follow. For local stations, this represents a major investment in advanced television technology, including costs for new cameras, new video processing and storage equipment, updated studios and training. Broadcasters therefore remain concerned that subscribers to direct broadcast satellite (DBS) services are only able to access local broadcaster HD signals on a phased-in basis, rather than carriage of HD signals commencing on a “carry-one, carry-all” basis as provided by the governing statute.¹⁹

¹⁸ See, Deb McAdams, *Local News in HD: 155 Stations in 73 Designated Market Areas Are Doing Local News in High Definition*, TELEVISION BROADCAST (Feb. 3, 2009) available at: <http://www.televisionbroadcast.com/article/73994> (visited Jun. 30, 2009). Stations are increasingly equipping their studios to produce local HD content. See Michael Malone, *Special Report: Earl Arbuckle*, BROADCASTING & CABLE (Apr. 20, 2009) (half of all Fox owned and operated stations are equipped to produce HD local news); Glen Dickson, *Special Report: Raycom: Plenty of HD Work to Do*, BROADCASTING & CABLE (Mar. 30, 2009) (nearly half of all Raycom stations that produce local news are equipped for HD local newscasts). See also Glen Dickson, *Telairity Targets HD ENG Market*, BROADCASTING & CABLE (May 25, 2009) (Silicon Valley startup specializing in digital compression “sees a big opportunity in more stations converting their electronic newsgathering (ENG) operations to high-definition”).

¹⁹ See NAB Comments and Reply Comments, *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 00-96; *Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, CS Docket No. 00-96, CSR-5978-M (filed Jun. 4, 2008 and Jun. 19, 2008, respectively) (rules governing DBS carriage of both HD and SD signals should reflect the letter and spirit of the statutory “carry one, carry all” requirement; rules also should ensure viewability of broadcast signals by all DBS subscribers). See also *Written Testimony of K. James Yager*, NAB Television Board Chairman and CEO of Barrington Broadcasting, before the House Subcommittee on Communications, Technology, and the Internet at 34 (Feb. 24, 2009), available at: http://energycommerce.house.gov/Press_111/20090224/testimony_yager.pdf (Congress should accelerate from February 17, 2013, to December 31, 2010, the date by which DBS operators must retransmit local signals in HD if the station is broadcasting in HD).

Mobile DTV Trials. Broadcasters also are developing standards and technology that will give consumers new ways of watching digital broadcast content. As observed in the *Supplemental Notice*,²⁰ in 2007, several broadcasters formed the Open Mobile Video Coalition (“OMVC”), an alliance of U.S. commercial and public broadcasters whose mission is to accelerate the development and rollout of mobile DTV products and services.²¹ The OMVC is comprised of over 800 television broadcast stations, including public television stations and 16 of the top 20 television station groups. This broad membership affords the OMVC nationwide coverage, and its reach and membership continue to grow. Today, the OMVC reaches 103 million households, all of the top 50 Nielsen Designated Market Areas (“DMAs”), and 96 of the top 100 DMAs.²² The OMVC is committed to maximizing and developing the full potential of the digital television spectrum.

Early trials of mobile DTV technology included tests on the reception of handheld devices, and proved to be very successful.²³ In January 2009, the OMVC announced that 63 stations in 22 markets had signed on to a mobile DTV broadcasting launch set for summer 2009.²⁴ In trials currently taking place in the Washington, DC and New York

²⁰ *Supplemental Notice* at ¶ 39.

²¹ See *OMVC Web Site*, “About OMVC”, available at: <http://www.omvc.org/about%2Domvc/> (visited Jun. 30, 2009).

²² *Id.*

²³ See Alan Wolf, *Mobile DTV Field Trials Successful In Chicago, Denver, TWICE* (November 10, 2008). Handheld device signals were “clear and stable in most conditions,” including in devices traveling in cars at speeds up to 70 mph. *Id.*

²⁴ See OMVC, *OMVC Demonstrates Future of Mobile DTV and Details Initial Broadcaster Roll-Out Plans*, press release (Jan. 9, 2009). To showcase the consumer experience of Mobile DTV and the technical feasibility of the ATSC Mobile DTV Candidate Standard, the OMVC conducted a live demonstration on the opening day of the 2009 Consumer Electronics Show in Las Vegas. The demo involved multiple Las Vegas television stations broadcasting popular local and national TV programs,

markets,²⁵ broadcasters are delivering programming to prototype devices such as televisions in moving vehicles, cell phones, portable media players, laptop computers and navigation devices,²⁶ allowing viewers to enjoy more flexibility in when, where and how they view broadcast programming. As ION Chairman and CEO Brandon Burgess explains: “Digital technology lets us reach more homes, enables HD quality and new digital networks, as well as mobile reception . . . Among all these benefits, mobile DTV may prove to be the most significant in the long run, allowing broadcasters to think beyond the living room and bring live television and real time information to consumers wherever they may be.”²⁷ Together with partners in the broadcasting and consumer electronics industries, ION and OMVC yesterday held a demonstration on Capitol Hill featuring mobile DTV devices and services, HD programming and multicast content.²⁸

Multicasting on the Rise. Stations across the country in markets large and small are experimenting with new formats and other ideas for multicast television. This

including local sports and public affairs programming, to compliant devices produced by LG Electronics and Samsung Electronics, and using transmission equipment manufactured by Harris Corporation. *Id.* Further details of initial deployment were announced at this year’s NAB Show. See OMVC, *Broadcasters Target Washington, D.C. for Mobile Television Consumer Showcase*, press release (Apr. 20, 2009) (“Fox Television Stations’ WDCa-DT, Gannett Broadcasting’s WUSA-DT, ION Media Networks’ WPXW-DT, NBC Universal’s WRC-DT, PBS’ WHUT-DT and MHz Networks, Sinclair Broadcast Group’s operated WNUV-DT and National Datacast are initial participants. The coalition anticipates adding more stations to the trial in the near term.”).

²⁵ Greg Tarr, *63 TV Stations Pledge Mobile DTV Support*, TWICE (Jan. 26, 2009); Glen Dickson, *ION Broadcasts Mobile DTV in N.Y., D.C.*, BROADCASTING & CABLE (Jun. 29, 2009)(describing ION’s offering of HDTV, standard-definition and mobile DTV program streams via its local stations in the New York and Washington, D.C. markets).

²⁶ OMVC, *About Mobile DTV – Mobile DTV 101*, <http://www.omvc.org/about%2Dmobile%2Ddtv/mobile%2Ddtv%2D101/> (visited Jul. 1, 2009).

²⁷ Dickson, *supra* note 25.

²⁸ Glen Dickson, *ION, OMVC Organize DTV Showcase in D.C.: July 28 Event Will Show Off Mobile DTV to Congress*, BROADCASTING & CABLE (Jul. 22, 2009).

multicast programming includes news, weather, sports, religious, lifestyle, children's programming and programming targeted towards underserved demographic groups. Broadcasters are using their digital capacity to offer additional innovative programming to consumers. The following are illustrative examples:

- Station KNBC, Los Angeles, CA offers 24-hour local news programming on its digital subchannel. The content on the subchannel includes local weather reports, over 19 hours a day of "NewsRaw," a local news program that offers in-depth news stories that expand upon what is on the main channel and a backstage look into the KNBC newsroom, and "Yip-Yap," a children's program that features local children giving tours of their schools and local attractions in Southern California.²⁹
- Station WNBC-TV, New York, NY plans to begin multicasting a New York-centric news, lifestyle, and information channel called "New York Nonstop" later this year. The channel will broadcast local news and weather every fifteen minutes.³⁰
- NBC owned-and-operated stations, as well as many NBC affiliates, multicast "Universal Sports," which features Olympic-related sporting events.³¹
- Station WRAL, Raleigh, NC airs local news and public affairs programming 24 hours per day with shows like "Focal Point" and "WRAL Listens" on one of its digital subchannels.³²
- Station KTVB, Boise, ID, airs its "24/7" local news channel on a multicast channel.³³
- Station WFSB, Hartford, CT multicasts a local news and weather channel.³⁴

²⁹ Michael Malone, *KNBC Tries Kid Stuff: Tailored for Tykes, Yip Yap to debut on NewsRaw*, BROADCASTING & CABLE (May 11, 2008). See also LA TV Listing, NBC Los Angeles, available at http://www.nbclosangeles.com/station/tvsched/la_tv_listings.html?tvindex=-1 (visited Jul. 14, 2009).

³⁰ Daisy Whitney, *NBC Goes 'Nonstop' on Subchannel*, TELEVISION WEEK (March 9, 2009).

³¹ John Ourand and Tripp Mickel, *Universal Sports Gets Big Distribution Bump*, STREET & SMITH'S SPORTS BUSINESS JOURNAL at 20 (Feb. 16, 2009) available at <http://www.sportsbusinessjournal.com/article/61575>.

³² See *WRAL TV Schedule*, available at: http://www.wral.com/wral-tv/tv_schedule/ (visited Jul. 2, 2009).

³³ See *KTVB 24/7 Schedule*, Titan TV Basic Programming Guide available at: <http://ktvb.titantv.com/apg/basic.aspx?siteid=50003> (visited Jul. 2, 2009).

³⁴ See *WFSB TV Listings*, available at: <http://www.wfsb.com/tvlistings/index.html> (visited Jul. 2, 2009).

- Station KHQ, Spokane, WA has launched a multicast sports and weather channel, SWX, which features live high school and college sports, minor league sports, and motor sports. New SWX initiatives include a live broadcast from a studio located inside a popular local sports bar, where patrons can offer commentary on sporting events.³⁵
- Several stations, including Station WBOC-TV, Salisbury, MD, use multicast channels to offer network programming in smaller markets that do not have local stations affiliated with all of the major networks.³⁶

In addition to news, sports, and entertainment programming, niche programming—including multilingual content, children’s programming, and programming aimed at underserved demographic groups—has found a home on digital subchannels. LATV, based in Los Angeles, is a bilingual network channel distributed on digital multicast streams that offers music and entertainment programming for young Latino audiences.³⁷ Likewise, Mexical Network, which features Spanish-language news, sports, and entertainment programs, is operating on multiple broadcast digital subchannels across the United States.³⁸ MHz Networks, based in northern Virginia, programs 10 digital multicast channels in the Washington DC market, including channels that air Chinese, French, Japanese, Middle Eastern, Nigerian, Russian, South African, and Vietnamese news and information in a combination of English and foreign

³⁵ See Michael Malone, *KHQ ‘Zags’ When Others Zig*, BROADCASTING & CABLE (Jul. 25, 2009). Additional information on SWX is available at the channel’s website: www.swxrightnow.com.

³⁶ Station WBOC-TV offers CBS programming on its main channel and Fox programming on a multicast channel. Stations in several other markets also offer other “Big 4” network programming on their multicast channel, including stations in the following DMAs: Palm Springs, CA; El Centro/Yuma, CA; Bluefield/Beckley, WV; Bakersfield, CA; Bend, OR; Missoula, MT; Butte, MT; Great Falls, MT; and Helena, MT.

³⁷ Laura Martinez, *LATV Debuts in Sacramento; Adds Fourth Tribune Affiliate*, MULTICHANNEL NEWS (Dec. 15, 2008).

³⁸ *MEXICAL Television Network Debuts in Las Vegas*, Press Release (Oct. 1, 2008), available at <http://hispanic.com/blogs/yourpressreleases/archive/2008/10/06/mexical-television-network-debuts-in-las-vegas.aspx>.

languages.³⁹ Children's programming also is found among the new niche content available for free via multicasting. ION Media Networks multicasts Qubo, a 24-hour children's programming channel that focuses on literacy and values,⁴⁰ as well as Ion Life, which offers programming that focuses on, among other topics, health and fitness, interior design, and "green" living.⁴¹ Niche entertainment networks also are being distributed exclusively via multicast channels, including Retro TV Network, which airs classic primetime television from the 1950s – 80s, such as *Leave it to Beaver*, *Knight Rider*, and *Alfred Hitchcock Presents*,⁴² and This TV, which features MGM films and television series.⁴³

Local stations are airing HD and multicast programming to growing audiences in television markets across the country. Early reports indicate that, since the completion of the digital transition on June 12, viewership of multicast channels has significantly increased.⁴⁴ "Between viewer rescanning and the ubiquitous media accounts regarding digital television, so much light has been shed on multicast channels that many are

³⁹ See MHz Networks, *June 12 Digital Transition Ascends MHz Networks to Title of Largest Broadcaster in Washington, DC Metro*, press release (Jun. 1, 2009). See also, *MHz Networks Website, Broadcast in DC*, available at: <http://www.mhznetworks.org/mhzindc/broadcastindc/>.

⁴⁰ See About qubo, qubo.com, available at <http://www.qubo.com/about.asp> (visited Jul. 14, 2009).

⁴¹ See John Eggerton, *Ion Life Adding 8 Shows to 2009 Lineup*, BROADCASTING & CABLE, Feb. 2, 2009.

⁴² See RTV Shows, My Retro TV, available at <http://www.myretrotv.com/shows.html> (visited Jul. 13, 2009).

⁴³ See Ben Grossman, *MGM Oldies in New Digi-Channel*, BROADCASTING & CABLE, Jul. 27, 2008; Wayne Friedman, *This TV Enjoys 60% Clearance*, MEDIADAILYNEWS, Jan 26, 2009.

⁴⁴ See Michael Malone, *Digi-Channels Enjoy Brave New Post-DTV World*, BROADCASTING & CABLE (Jun. 20, 2009).

confident they can finally ring up substantial revenue for partner stations.”⁴⁵ Some digital multicast channels can bring more than \$1 million in revenue to a partnering station, prompting carriage by more stations, as well as the launching of new channels.⁴⁶ The Retro TV Network, for example, now boasts a total of 88 broadcast station affiliates, and LATV has 28 affiliates.⁴⁷ Urban Television Network, designed to attract African-American viewers with both entertainment and public interest programming, is in development,⁴⁸ and .2, an entertainment channel, is planned to launch in October 2009 to 20 local stations.⁴⁹ As these channels continue to prove their success, viewers can expect broadcasters to increase multicast offerings and provide a more attractive alternative to the increasing costs of cable and satellite programming.

III. The Retransmission Consent Regime Benefits Consumers by Helping Support and Ensure Consumer Access to Broadcast Programming

The Commission seeks comment on various issues related to must carry and retransmission consent.⁵⁰ As NAB has demonstrated through numerous filings, the market for consent to retransmit broadcast signals is functioning as Congress intended.⁵¹ Recent economic research shows that the marketplace structure

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ The RLJ Companies, *The RLJ Companies Founder Robert L. Johnson Outlines Preliminary Business and Programming Model for Urban Television Venture with ION Media Networks*, press release (Dec. 8, 2008).

⁴⁹ See Michael Malone, *Digi-Channels Enjoy Brave New Post-DTV World*, BROADCASTING & CABLE (Jun. 20, 2009).

⁵⁰ *Notice* at ¶ 37.

⁵¹ See, e.g., NAB Reply Comments in MB Docket No. 07-269 (filed Jun. 22, 2009); Letter from Erin L. Dozier, Associate General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC in MB Docket No. 07-198 (filed Dec. 5, 2008); NAB Reply Comments in MB Docket No. 07-198 at 5-10 (filed Feb. 12, 2008); NAB Comments in MB Docket No. 07-198 at 5-10 (filed Jan. 4, 2008).

engendered by the retransmission consent process is fair, balanced and a benefit to consumers.⁵² The system provides a market-based mechanism for broadcasters to obtain an economically efficient level of compensation for the value of their signals⁵³ – compensation that broadcasters use to support their programming services. Specifically, the retransmission consent process benefits television viewers by “enriching the quantity, diversity, and quality of available programming, including local programming.”⁵⁴ Proposals to modify the system are therefore misguided and would be harmful to consumers.⁵⁵

Thousands of agreements have been negotiated between broadcasters and MVPDs, and never once has a broadcaster been found to have failed to negotiate in good faith with an MVPD. NAB knows of only four “good faith” retransmission complaints decided on the merits by the agency. In the first case, the broadcaster was exonerated and the complaint denied, while the MVPD complainant (EchoStar) itself was found to have abused the Commission’s processes.⁵⁶ In the second case, the broadcaster was found not to have breached its obligation to negotiate in good faith, and the MVPD’s complaint was again denied, with the decision recognizing that “disagreement over the rates, terms and conditions of retransmission consent – even

⁵² Eisenach Study, Executive Summary.

⁵³ *Id.* at 41.

⁵⁴ *Id.* See also *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer and Reauthorization Act of 2004*, 2005 FCC LEXIS 4967, * 2-46 , ¶ 44 (Sep. 8, 2005) (finding that the retransmission consent process benefits consumers by giving them access to broadcast programming via MVPDs).

⁵⁵ *Id.*

⁵⁶ *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (Cable Bur. 2001).

fundamental disagreement – is not indicative of a lack of good faith.”⁵⁷ In the third case, the broadcast complainant prevailed, with the Media Bureau finding that the cable operator had “breached its duty to negotiate in good faith” with the television licensee.⁵⁸ In the most recent case, decided earlier this year, the Commission again found that the broadcaster did not fail to negotiate in good faith with the complainant MVPD.⁵⁹

As the Commission itself has concluded, the system of arms-length negotiations envisioned by Congress when it established retransmission consent is working and serving the public interest objectives as intended by Congress.⁶⁰ Accordingly, NAB urges the Commission to continue to resist the calls of MVPDs who seek government intervention to tilt the free-market retransmission consent regime in their favor.

In response to the Commission’s inquiry about alleged “agreements that require the carriage of nonbroadcast networks in exchange for the right to carry local broadcast stations”⁶¹ and the extent to which “broadcast station owners tie carriage of affiliated non-broadcast networks to carriage of their broadcast signals.”⁶² NAB notes, as we have explained in our previous filings, that broadcasters in retransmission negotiations do not coerce MVPDs to take “bundles” of affiliated programming on a “take-it-or-leave-

⁵⁷ *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, DA 07-3 at ¶¶ 6, 24 (Media Bur. rel. Jan. 4, 2007) (also noting that “[e]ven with good faith, impasse is possible” in marketplace retransmission negotiations).

⁵⁸ See *Letter from Steven F. Broeckaert, Media Bureau, to Jorge L. Bauermeister, Counsel for Choice Cable TV*, 22 FCC Rcd 4933 (2007).

⁵⁹ *ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, 24 FCC Rcd. 1645 (2009).

⁶⁰ See, e.g., *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer and Reauthorization Act of 2004*, 2005 FCC LEXIS 4967, * 2-46, ¶ 44 (Sep. 8, 2005).

⁶¹ *Notice* at ¶ 37.

⁶² *Supplemental Notice* at ¶ 36.

it” basis.⁶³ Some broadcasters offer to negotiate for carriage of additional programming as part of retransmission consent, but they do not “require” such carriage or engage in “tying.” It is standard industry practice for broadcasters with affiliated programming channels to offer to negotiate retransmission consent for the broadcast station separately.

As the Commission has recognized, Congress chose to allow the terms and conditions of carriage to be negotiated by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith. Indeed, the Commission has expressly determined that bargaining with MVPDs for carriage of affiliated programming, or for “channel positioning or tier placement rights” is presumptively consistent with the good faith negotiation requirement.⁶⁴ Under these circumstances, if the Commission were to “intrude in the negotiation of retransmission consent”⁶⁵ by forbidding broadcasters from negotiating for in-kind compensation such as the carriage of additional programming, placement of programming on particular channels or within certain packages, or compensation that is connected to such market factors as the number of viewers who will be able to access the content, the Commission would directly contravene its previous decisions and Congressional intent, as expressed in both the statutory language and legislative history of Section 325.⁶⁶ Accordingly, the Commission should

⁶³ See, e.g., NAB Reply Comments in MB Docket No. 07-198 at 5-10 (filed Feb. 12, 2008).

⁶⁴ See *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5469 (2000) (“*Good Faith Order*”); *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2613 (2001).

⁶⁵ *Good Faith Order*, 15 FCC Rcd at 5450.

⁶⁶ NAB Reply Comments in MB Docket No. 07-269 (filed Jun. 22, 2009) at 8-10 (citing S. Rep. No. 92, 102d Cong., 1st Sess. 1 (1991) at 36).

continue to ignore the calls of MVPDs who seek undue and unlawful governmental intervention into retransmission consent negotiations.

IV. Viewers Should Be Able to Access Freely New Broadcast Content and Services Via MVPDs

While some multicast channels are carried on MVPD systems, many broadcasters have been frustrated in their efforts to reach MVPD viewers with their multicast programming.⁶⁷ In turn, the clear public benefit of having more diverse programming available free to the public is also frustrated. Stripping the multicast streams from the basic broadcast signal and thus preventing the millions of consumers who subscribe to MVPDs from seeing those multicast streams undermines the economic viability of these diverse programming services. Similarly, consumers who have invested in HD sets should enjoy the benefit of watching television in HD simultaneously with the rollout of new HD content.⁶⁸ Especially in today's financially challenging marketplace, consumer access to multicast channels and HD content is more important than ever. NAB again urges the Commission to adopt rules and policies that will prevent operators from selectively choosing which free over-the-air content offered by local broadcast stations is carried on MVPD systems and from downgrading

⁶⁷ See, e.g., Letter from William L. Watson of Ion Media Networks to Marlene H. Dortch in CS Docket No. 98-120 (filed Jul. 11, 2008) (nascent multicast programming networks such as qubo (children's programming) and Ion Life (health and wellness programming) are available to very few MVPD subscribers); NAB *ex parte* in CS Docket No. 98-120, *Distortions, Myths and Misconceptions: The Cable Industry and the Multicast Debate* at 2-3 (filed Jun. 14, 2006).

⁶⁸ As the Commission has observed, its "prohibition against material degradation ensures that cable subscribers who invest in a HDTV are not denied the ability to view broadcast signals transmitted in this improved format." See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Further Notice of Proposed Rulemaking, CS Docket No. 98-120, 22 FCC Rcd 8803, at ¶ 5 (rel. May 4, 2007) ("*Second NPRM*").

that content.⁶⁹ Such policies would promote the important governmental interest in ensuring a vibrant over-the-air video broadcasting system offering diverse, high-quality content to viewers, and would prevent MVPDs from refusing to carry multicast and HD programming that competes with their subscription programming.⁷⁰

V. Conclusion

Free over-the-air broadcast television improves the quantity, quality and diversity of video programming available to all American television households. Indeed, millions of households rely exclusively on free broadcast signals for news, weather, emergency information and entertainment. A disproportionately high number of these include low income and minority households. Now that television broadcasting is a fully digital medium, viewers can expect to enjoy more broadcast programming streams, an expanding array of HD content, and the delivery of broadcast signals to portable handheld devices. The retransmission consent process helps ensure that consumers benefit from broadcasters' programming services, including these developing digital

⁶⁹ See Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120 (filed Apr. 21, 2005) (seeking reconsideration of the Commission's interpretation of mandatory carriage requirement as requiring only carriage of a single stream of broadcast programming); Petition for Reconsideration of NAB and the Association for Maximum Service Television, Inc., *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120 (filed Nov. 17, 2008) (seeking reconsideration of exemption to FCC's interpretation of the statutory material degradation standard for certain cable systems); Comments and Reply Comments of NAB, *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 00-96; *Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, CS Docket No. 00-96, CSR-5978-M (filed Jun. 4, 2008 and Jun. 19, 2008, respectively) (rules governing DBS carriage of both HD and SD signals should reflect the letter and spirit of the statutory "carry one, carry all" requirement; rules also should ensure viewability of broadcast signals by all DBS subscribers).

⁷⁰ See *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189-90, 201 (1997); *Viewability Order* at ¶¶ 49 - 51.

services. Some broadcasters, however, have been frustrated in their efforts to reach MVPD households with their digital program offerings. Therefore, Commission rules and policies governing carriage of broadcast signals should be revised so that they do not impede broadcasters' ability to offer multicast or HD content to MVPD households.

Respectfully submitted,

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