

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Public Notice on Interpretation of the Terms) MB Docket No. 12-83
"Multichannel Video Programming Distributor")
and "Channel" as Raised in Pending Program)
Access Complaint Proceeding)

**COMMENTS OF THE NATIONAL ASSOCIATION OF
BROADCASTERS**

I. Introduction

The National Association of Broadcasters (NAB)¹ respectfully submits these Comments in response to the above-captioned *Public Notice* ("*Notice*"). NAB agrees with the Commission's position that the resolution of the issues raised in the *Notice* could have "profound" and "far-reaching" implications.² For this reason, we urge the Commission to fully explore and understand the potential ramifications before reaching any conclusions.³

¹ NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission ("FCC" or the "Commission") and other federal agencies, and the courts.

² Opposition of FCC to Sky Angel's Petition for a Writ of Mandamus, *In re Sky Angel U.S., L.L.C.*, No. 12-1119 (filed April 5, 2012, D.C. Cir.) at 17.

³ NAB notes that because this proceeding is "restricted" for *ex parte* purposes, interested parties may not have discussions with the FCC to explore potential ramifications of any decision. At the very least, this proceeding should be "permit but disclose" to allow for full consideration of the issues.

It is important to consider how this proceeding fits with the well-established public policy goals that guide government action in the video marketplace. Simply put, the questions raised in the notice implicate rules and policies that “do not operate in a vacuum.”⁴ Rather, as the Commission has explained, all these rules “are part of a mosaic of other regulatory and statutory provisions (e.g., territorial exclusivity, copyright compulsory licensing, and mandatory carriage)” – that “implement key policy goals,” including localism and the compensation of rights holders for use of their property. Due to the “interplay among these various laws and rules,” the Commission should heed its own words and “careful[ly] examin[e]” all aspects of the “legal landscape” governing carriage of television signals before changing any piece of that landscape. *Id.*

In these initial Comments, NAB provides insights into some of the ramifications for broadcasters related to the questions in the *Notice*.

II. Deployment of Broadband Video Services Has the Potential to Benefit Consumers and Programming Providers, Including Broadcasters

Television broadcasters generally support the deployment of new and innovative Internet services, including broadband video services. Such services have the potential to enhance competition in the multichannel video program distributor (MVPD) marketplace. Increased competition is a long-standing public policy goal, one that can be a positive development for consumers, broadcasters and other program providers.⁵

⁴ Report of the FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, at ¶ 33 (Sept. 8, 2005) (“SHVERA Report”).

⁵ For this reason, NAB has long expressed support for policies to encourage such competition. See, e.g., Testimony of James Yager, Before the House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet (Nov. 9, 2005); Testimony of Gregory Schmidt, Before the House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet (April 20, 2005).

Greater platform choice, developed in a manner that respects the rights of content and signal providers, will provide benefits for consumers. For example, it is easy to see that consumers would benefit from development and deployment of new, competitive distribution platforms capable of customizing programming or bundling different varieties of services, including voice, Internet access and video services. Such customization may result in cost savings or increased access to programming of particular interest to the viewer.

Video programming providers, including broadcasters, may also benefit from the timely deployment of new video distribution platforms. The emergence of additional platforms for the distribution of video programming will provide programmers with additional outlets for reaching viewers and therefore with greater opportunities for success in the marketplace.⁶

Local television broadcasters specifically may also benefit from the emergence of new competitive MVPD services. New video distribution platforms represent other outlets for broadcast programming, including local news and information. These platforms can provide new opportunities for reaching more viewers and potentially increase advertising and retransmission consent revenues. Those revenues, in turn, can be used to enhance news, entertainment and public service programming – furthering the objective of localism. The emergence of another video distribution platform for carrying broadcast programming could also encourage greater innovation in

⁶ In economic terms, the emergence of new outlets and distribution platforms will allow broadcasters, by disseminating programming to a wider audience, to take advantage of economics of scale and reduce their average cost per viewer. J. Eisenach and K. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 6, attached to NAB Reply Comments in MB Docket No. 10-71 (filed June 27, 2011).

digital television programming, including multicast and high definition (“HD”) programming.

To achieve these public policy objectives, it is important that new services not be permitted to expropriate broadcast signals at will. Broadcasters must continue to have the right to control the distribution of their signals over the Internet and to obtain compensation from broadband video service providers seeking to retransmit such signals. With these rights in hand, local stations will be able to continue making the substantial investments needed to offer high-quality, costly programming, including news, and to enhance their HD, multicast, and other current and future service offerings. In the end, it is consumers that will benefit by receiving a greater variety of programming, including local programming, from broadcast stations via a broadband service provider.

III. Policies That Support Program Development, Innovation and Localism Must Apply in the Same Manner to All Those Retransmitting Broadcast Signals

Unlike other countries that offer only national television channels, the United States has succeeded in creating a rich and varied mix of *local* television outlets that give individual voices to more than 200 communities. The success of this system is based in large part on the partnership between broadcast networks and affiliated stations serving these communities. Network affiliated stations offer a unique mix of national programming provided by their network, local programming produced by the station, and a variety of syndicated programs acquired by the station. Both Congress

and the Commission have found that the network-affiliate partnership serves the public interest.⁷

This beneficial network-affiliate system and, indeed, local over-the-air TV stations can survive only by generating advertising revenue based on local viewership and retransmission consent revenues. In fact, a recent economic study concluded that, if retransmission consent rules were changed to inhibit or foreclose retransmission revenues, the median U.S. television station would “earn insufficient profits to cover its cost of capital.” And if this situation persisted for an extended period, about “half of all stations” (i.e., those below the median) “would potentially face shutdown.”⁸

If new technologies can evade retransmission consent and erode local viewership by overriding program exclusivity rights of local stations and offering the same programs on stations imported from other markets, the viability of local TV stations – and their ability to serve their local communities with high quality programming – could well be lost. This clearly was not Congress’ intent as it stated in adopting the Cable Television Consumer Protection and Competition Act of 1992:

While the Committee believes the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their

⁷ See, e.g., H.R. Rep. No. 100-887, pt. 2, at 20 (1988); *In re Competition, Rate Deregulation and the Commission’s Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962, 5037 (1990); *In re Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas*, Report, 2 FCC Rcd 1669, 1691 (1987). See also *SHVERA Report* at ¶ 50 (declining to endorse modifications to network non-duplication rule because FCC did “not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities”).

⁸ Eisenach and Caves, at 32-33.

chief competitors . . . which threatens the future of over-the-air broadcasting.⁹

Over the past decades, Congress and the Commission have adopted and maintained certain requirements on MVPDs to preserve localism and local station program exclusivity. These are the principles that underlie the policies of syndicated exclusivity, network non-duplication, must-carry and retransmission consent.¹⁰ Both for fairness to broadcasters, and to treat symmetrically those entities retransmitting their signals, these long-standing requirements that apply to “traditional” MVPDs such as cable and satellite operators must also apply in a comparable manner to new platforms that provide comparable video services.

Communications policy supports such a result. Such policy should seek to avoid giving some competitors special privileges not provided to other distributors, or requiring some to obtain retransmission consent but not others. Parity in treatment among competing multichannel video providers furthers the goal of fostering a competitive marketplace.¹¹ It is abundantly clear that in expanding the application of retransmission

⁹ S. Rep. No. 102-92, 1992 U.S.C.C.A.N. 1133, 1168 (1991).

¹⁰ The FCC has recognized the importance of the retransmission consent system and program exclusivity policies and recommended to Congress that no changes be made. *SHVERA Report* at ¶¶ 44, 86.

¹¹ See, e.g., *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33, *et al.* (rel. Sept. 23, 2005), at ¶ 1 (stating FCC “goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner”); *SHVERA Report* at ¶¶ 65, 75 (stating that regulatory parity is generally a “worthy goal”); *In re Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11501, 11530 (1998) (noting “Congress’s direction that the classification of a provider should not depend on the type of facilities used . . . [but] rather on the nature of the service being offered to customers”).

consent under the 1992 Cable Act, Congress intended that such consent must be obtained by any entity that retransmits a broadcaster's signal.

The Committee believes, based on the legislative history of [Section 325] that Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means.¹²

IV. Conclusion

Broadcasters see great potential in the development of broadband video services to increase competition in the MVPD marketplace, thereby benefiting consumers, broadcasters and other program providers. However, the deployment of such services must include long-standing policies that have successfully promoted competition and diversity in the video market for many years. The Commission's analysis of the issues raised in the *Notice* must take these considerations into account.

Respectfully submitted,

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¹² S. Rep. No. 102-92, U.S.C.C.A.N. at 1167 (emphasis supplied).