Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

I. Introduction

The National Association of Broadcasters ("NAB")[1] respectfully submits these Reply Comments in response to the above-captioned *Public Notice* ("*Notice*").

In its comments in this proceeding, NAB generally supported the deployment of new and innovative internet and broadband video services, but insisted such services cannot be permitted to expropriate broadcast signals at will, absent any right or ability by broadcasters to control the distribution of their signals over the internet or to obtain compensation from broadband video providers seeking to exploit such signals. Such a result would seriously undermine the purpose of retransmission consent and the ability

[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.

of broadcasters to fulfill their public service obligations. Nothing presented in the opening comments suggests there should be a different result.

II. Fundamental Fairness Requires That OVDs Follow Retransmission Consent and Exclusivity Rules

Congress has mandated that "broadcasters [must be allowed] to control the use of their signals by anyone engaged in retransmission by whatever means." [2] The opening comments in this proceeding confirm NAB's view that online video distributors ("OVDs") should not be permitted to use broadcast signals without permission and should be subject to program exclusivity requirements.[3] Several parties suggest, for example, that regulatory parity should be an important principle.[4] NAB agrees that parity is desirable, and we believe that applying the same basic principles for retransmission consent and exclusivity to both new and traditional providers is a necessary element in creating the appropriate parity.[5] Retransmission consent and program exclusivity rules are marketplace mechanisms that enforce private contractual

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[2] S. Rep. No. 92-102, 1992 U.S.C.C.A.N. 1133, 1167 (1991).

[3] The American Cable Association ("ACA") makes vague references to "far reaching and disruptive consequences" that allegedly would result from imposing on OVDs program carriage and retransmission consent requirements, but provides no further elaboration. *See* Comments of ACA filed 5/14/12 at 29. Cablevision observes that "OVDs operate free of . . . must carry, must buy . . . program carriage rules . . . that further limit cable operator discretion.", but also fails to explain why these rules should not apply to OVDs. Comments of Cablevision Systems Corp. ("Cablevision") filed 5/14/12 at 2.

[4] *See, e.g.*, Comments of Verizon filed 5/14/12 at 13; Comments of Time Warner Cable, Inc., filed 5/14/12 at 1-2; Comments of DIRECTV LLC filed 5/14/12 at 14-15.

[5] *See* Comments of Public Knowledge filed 5/14/12 at 13 ("a 'principal goal' of the 1992 Cable Act was 'to encourage competition from alternative and new technologies' by extending like treatment (e.g., under program access rules, and for retransmission consent purposes) to like services") (cites omitted).

and signal rights. They assure fair and equitable treatment for broadcasters with respect to those desiring to exploit broadcast signals for commercial gains.

Generalized contentions that OVDs should have a special status as "small, start-up companies" are misplaced and should not lead to a different conclusion.[6] Verizon provides a list of over-the-top video services, among them Netflix, Hulu Plus, Amazon Prime, Apple, Crucible, VUDU, YouTube, and Vimeo as well as its own recent joint venture with Redbox.[7] Many of these OVDs are multi-million dollar or multi-billion dollar companies that clearly have the wherewithal to compete effectively in the video marketplace. In Google's Comments filed in the Commission's *Annual Assessment of the Status of Competition in the Market For the Delivery of Video Programming*, it stated that "recent data shows that the total U.S. internet audience engaged in more than 5.1 billion [online video] viewing sessions during April 2011, with 172 million U.S. internet users watching online video content during the same period."[8] Verizon, citing Cisco data, tells us that "over-the-top, IP-based video . . . will account for over 50% of consumer internet traffic by the end of this year."[9] And, a report by Parks Associates

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[6] *See e.g.*, Comments of Computer & Communications Industry Association ("CCIA") filed 5/14/12 at 11; Comments of Open Internet Coalition ("OIC") filed 5/14/12 at 2 (" . . . nascent, edge-based internet applications . . . should not be subject to legacy rules applicable to cable operators and other MVPDs.")

[7] Verizon Comments at 7, 11.

[8] Comments of Google, Inc. (June 8, 2011) in MB Docket No. 07-269, cited in Cablevision Comments at 18 n. 59.

[9] Verizon Comments at 10.

stated that nearly 13% of U.S. broadband homes have a device facilitating OTT viewing and predicts that 14 million units will be sold in 2012.[10]

Citing additional data demonstrating the phenomenal growth of OVDs, DIRECTV correctly concludes that: "non-traditional MVPDs have gone from mere curiosities to emerging competitors in a very short period of time and continue to develop rapidly as the speed and ability of broadband infrastructures improves. In these circumstances, it is appropriate to apply core regulatory rights and responsibilities to both traditional and non-traditional MVPDs." [11] Clearly, the online video industry is fully capable of dealing with both the logistics and financing of negotiating with broadcasters over the use of their signals.[12]

The Commission should also be concerned, as both the Affiliate Associations and Public Knowledge point out, that not requiring OVDs to follow signal carriage and program exclusivity rules would invite efforts by traditional MVPDs to circumvent those rules. Public Knowledge states that the ability to shift categories "would wreak havoc with the Commission's ability to oversee the MVPD market . . . and MVPDs would have an incentive to engineer their systems inefficiently, just to qualify for, or fall outside of, particular rules." [13] The Affiliate Associations express a similar concern that cable and satellite companies could "attempt to avoid the retransmission consent requirements

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[10] Goetzl, David, "OTT TV Numbers Rising," Media Post News, 2/14/12.

[11] DIRECTV, LLC Comments at 16.

[12] DIRECTV further opines that "a relatively small number of new MVPDs" would be created by expanding the definition as proposed and that "it would not impose an undue burden upon those obligated to deal with them . . . ." *Id.* at 2.

[13] Comments of Public Knowledge filed May 14, 2012 at 16.

simply by creating affiliated entities and/or entering into contractual arrangements with third parties for the delivery of programming via an internet service provider or wireless broadband." [14]

The Comments of Verizon and Time Warner in fact demonstrate that the ability to engage in such circumvention is precisely what they seek. Verizon insists that "a provider offering an over-the-top, IP-based service should not be considered an MVPD even if that same provider may be an MVPD for purposes of other, separate services it offers." [15] Similarly, Time Warner Cable urges the Commission "to hold that facilities-based providers of broadband internet access do not become MVPDs when they or their affiliates offer a comparable 'over the top' video service to their internet access subscribers (alongside other online content offerings)." [16]

Creating even the potential, much less an invitation, to engage in such circumvention cannot be countenanced. As the Affiliate Associations correctly conclude, creating an environment in which companies are able to pick and choose among regulations will produce asymmetrical results contrary to the public interest.[17] NAB agrees with DIRECTV that there is no logical basis for favoring some competitors over others by allowing new entrants to claim the advantages of a regulatory structure

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[14] Comments of ABC, CBS and NBC Television Network Affiliates Associations ("Affiliate Associations) filed May 14, 2012 at 16-17.

[15] Verizon Comments at 13.

[16] Time Warner Cable Comments at 8.

[17] Affiliate Association Comments at 17.

without complying with core obligations.[18] This is particularly true in the application of signal carriage and program exclusivity rules.

III. Fulfillment of U.S. Free Trade Agreement Obligations Compel that Retransmission Consent Be Applied to OVDs

MPAA advises that one consideration needing to be taken into account in this proceeding is "the requirement to comply with commitments made in assorted free trade agreements."[19] NAB agrees.

An examination of the free trade agreements the United States has with eighteen countries reveals that it has committed to assuring that it will not "permit the retransmission of television signals (whether terrestrial, cable or satellite) on the Internet without the authorization of the right holder or rights holders of the content of the signal and, if any of the signal." (emphasis supplied).[20]

To assure that this country honors these free trade commitments, the Commission must interpret the term MVPD in such a way that broadcasters have the ability to permit (or withhold) the retransmission of their signals by OVDs over the

[18] DIRECTV Comments at 14-15.

[19] Comments of the Motion Picture Association of America filed 5/14/12 at 6.

[20] *See*, *e.g.*, U.S.-Australian Free Trade Agreement, Article 17.4:10(b); U.S.-Bahrain Free Trade Agreement, Article 14.4:10(b); U.S.-CAFTA-DR Free Trade Agreement, Article 15.5:10(b); U.S.-Korea Free Trade Agreement, Article 18.4:10(b). The Korea Free Trade Agreement contains a footnote "clarifying" that "retransmission within a party's territory, over a closed, defined subscriber network that is not accessible from outside of the Party's territory, does not constitute retransmission on the Internet." The Free Trade Agreements can be viewed at http://www.ustr.gov/trade-agreements/free-trade-agreements.

internet. This is necessary "to ensure sufficient signal security to prevent piracy . . . and the danger of disrupting existing market negotiations based on private licensing."[21]

IV. Conclusion

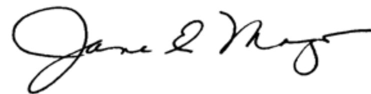
Signal carriage and local program exclusivity rules must be applied to OVD broadband service providers in the same manner as they apply to other MVPDs. These providers are not small, nascent, start-up companies; they have the wherewithal to compete. Moreover, a contrary conclusion could encourage existing MVPDs to create separate OVD subsidiaries and attempt to circumvent MVPD requirements altogether. Signal carriage and program exclusivity rules are marketplace mechanisms that enforce private contractual and signal rights to assure broadcasters receive fair and equitable treatment by those desiring to exploit their signals. There are no legal or policy justifications to exempt program distributors desiring to retransmit broadcast signals over the Internet from these requirements. Leaving broadcasters unable to control Internet distribution of their signals and without the means to negotiate for fair compensation for use of their signals would contradict Congress' mandate that "anyone engaged in retransmission consent by whatever means" obtain a station's consent, and would seriously undermine stations' ability to fulfill their public service obligations.

[21] MPAA Comments at 7.

Finally, fulfillment of U.S. free trade agreement obligations compel that retransmission consent applies to OVDs.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS



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