

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

In the Matter of)
)
Annual Assessment of the Status of) MB Docket No. 16-247
Competition in the Market for the)
Delivery of Video Programming)

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)¹ replies to certain comments submitted in this proceeding requesting data and information on the status of competition in the market for the delivery of video programming through December 31, 2015.² Specifically, NAB briefly responds to those commenters rehashing unmeritorious arguments about the retransmission consent marketplace that previously have been rejected.

I. THE COMMISSION HAS ALREADY CORRECTLY DETERMINED THAT THE CURRENT RETRANSMISSION CONSENT GOOD FAITH FRAMEWORK DOES NOT NEED TO BE ALTERED

In July 2016, Chairman Wheeler published a blog post definitively stating that “it is clear that more rules in [the retransmission consent] area are not what we need at this point.”³ As the Chairman noted, any attempt to cherry-pick specific retransmission consent

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 *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, MB Docket No. 16-247, DA No. 16-896 (Aug. 5, 2016) (*Notice*).

³ Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC.gov (July 14, 2016).

provisions for additional regulation “could limit future inquiries” into alleged good faith violations, and he recognized that “[m]any broadcasters and MVPDs take [their] responsibility [to consumers] seriously and conclude hundreds of retransmission consent deals without interruption.”⁴ This decision may have displeased multichannel video programming distributors (MVPDs) that hoped to gain a competitive edge in negotiations with broadcasters, but it accurately reflects the dynamics of the current video programming marketplace. In contrast, attempts by some commenters in the present video competition proceeding to resurrect retransmission consent “reform” efforts rely on a biased and inaccurate view of the marketplace. The Commission should ignore their unmeritorious arguments.

A. The Retransmission Consent Marketplace Overall Works as Congress and the FCC Intended

As Chairman Wheeler recognized, and contrary to the arguments a few commenters now raise,⁵ the retransmission consent marketplace functions without negotiation impasses in the vast majority of cases. Nearly every retransmission consent agreement negotiated between broadcasters and pay TV providers from January 2013 through November 2015 was completed without brinksmanship or service disruptions.⁶ According to BIA/Kelsey’s update of earlier NAB studies analyzing retransmission consent-related service interruptions, these

⁴ *Id.*

⁵ See Comments of ITTA – The Voice of Mid-Size Communications Companies, MB Docket No. 16-247 (Sept. 21, 2016) (ITTA Comments); see also Comments of NTCA—The Rural Broadband Association, MB Docket No. 16-247 (Sept. 21, 2016) (NTCA Comments).

⁶ See, e.g., Comments of Nexstar Broadcasting, Inc., MB Docket No. 15-216, at 5-7 (Dec. 1, 2015) (from January 2013 through November 2015, only about 1 percent of all 15,000 retransmission consent negotiations led to temporary service disruptions).

disruptions impacted, on average, only 0.01486% of total television viewing hours annually during the period 2011-2015.⁷

Yet, just as in the recent retransmission consent proceeding, some pay TV providers point to “facts,” without providing any context, supposedly showing that Commission action is needed. For instance, ITTA points to the year-over-year percentage increase in retransmission fees as evidence of a failed marketplace,⁸ but neglects to acknowledge that broadcasters only began successfully negotiating for monetary compensation for their signals within the last ten years.⁹ An increase from zero to anything in that length of time is a steep percentage increase. NTCA and ITTA both argue that nondisclosure agreements (NDAs) between programmers and MVPDs make it difficult to negotiate with broadcasters, and suggest the Commission require broadcasters to disclose “the lowest fee they will charge, prior to any volume discount,”¹⁰ without admitting that in many instances the pay TV provider is the party insisting on signing a NDA. They also repeat the old chestnut of pay TV complaints that bundling – now referred to exclusively as “tying” – harms MVPD and broadband competition,¹¹ ignoring that the Commission considers bundling proposals presumptively consistent with the good faith negotiation requirement¹² and that economists and antitrust

⁷ BIA Kelsey, *Updated Analysis of Carriage Interruption on Viewing Hours: 2011-2015*, at 2 (Feb. 3, 2016), attached to Ex Parte Letter of NAB, MB Docket No. 15-216 (Feb. 8, 2016).

⁸ See ITTA Comments at 4.

⁹ See, e.g., 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 ¶ 10 (Sept. 8, 2005) (noting that as of 2005, “cash still ha[d] not emerged as a principal form of consideration for retransmission consent,” and “virtually all” retransmission agreements still involved the provision of “in-kind consideration to the broadcaster.”).

¹⁰ See NTCA Comments at 10; see also ITTA Comments at 6.

¹¹ See ITTA Comments at 5; see also NTCA Comments at 8-9.

¹² See *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, 5469 (2000).

practitioners agree that “bundling is extremely common in competitive markets, and generally has procompetitive effects.”¹³

Ultimately, no commenter provides any evidence suggesting that broadcasters are *unfairly* compensated for their signals, that broadcasters receive retransmission fees disproportionate compared to the carriage fees of non-broadcast networks, or that the rates paid to broadcast stations are excessive in light of their ratings. Despite MVPD protestations, the retransmission consent rates paid by MVPDs do not reflect a “coercive” market power possessed by broadcasters, but rather reflect a more accurate assessment of the fair market value – certainly more accurate than the previous retransmission fees of zero – that broadcast stations add to pay TV providers’ video offerings.

B. The Video Marketplace Continues to See Increased MVPD Consolidation and an Explosion in Programming Options for Consumers, Leading to Greater Competition and Market Pressure on Broadcasters

By now it is a cliché to observe that we are currently in the “Golden Age” – or even the “Platinum Age” – of television. Today’s video programming marketplace is more competitive and diverse than ever before. Consumers enjoy unprecedented choice, and the number of scripted series and programming channels continue to expand.¹⁴ Content providers, including broadcasters, are under great and growing pressure to reach as many consumers as

¹³ Kevin W. Caves and Bruce M. Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, at ¶ 36 (Feb. 2016), attached to Ex Parte Letter of NAB, MB Docket Nos. 15-216, 10-71 (Feb. 16, 2016) (Caves and Owen Study).

¹⁴ According to a study by FX Networks, in 2015 there were 409 scripted original series, up from 211 in 2009 and 181 in 2002, not counting news, sports, reality, movies, specials, daytime or children’s programming. Lisa de Moraes, *FX Study: Record 409 Scripted Series on TV in 2015*, Deadline (Dec. 16, 2015), available at <http://deadline.com/2015/12/tv-study-record-number-scripted-series-fx-1201668200/> (FX Study); see also Tim Goodan, *TCA Journal No. 6: Welcome To the Platinum Age of Television – And Good Luck With That*, The Hollywood Reporter (Aug. 9, 2015) (finding that there are more than 1,700 total shows on television in primetime, from 8 to 11 p.m., not counting sports, news or late night shows), available at <http://www.hollywoodreporter.com/bastard-machine/golden-age-tv-best-tv-814146>).

possible.¹⁵ Indeed, NCTA noted in its comments that “[t]raditional program networks increasingly compete against emerging digital content networks.”¹⁶ As of 2015, any lingering notion that any particular programming or channel was “must have” for distributors had gone the way of the world with only three broadcast networks.

While “upstream content markets are increasingly fragmented across a large and growing space of viewing options,”¹⁷ downstream distribution markets are “highly concentrated, with little scope for competitive entry.”¹⁸ A 2015 analysis of MVPD consolidation proclaimed the era of “Eat or Be Eaten,” noting that

While there are about 660 cable operators and 5,208 cable systems in the United States, more than 80% of the nation’s 116 million TV households are represented by the top eight MVPDs.¹⁹

As AT&T acknowledged in its comments, AT&T/DirecTV’s total subscriber count totaled 25.3 million at the end of the second quarter of 2016,²⁰ a figure that exceeds by more than a

¹⁵ As the FX Study also found, in 2002 more than 73% of original scripted series premiered on broadcast TV. By 2011, the number of original scripted series on basic and premium cable, as well as over-the-top providers like Netflix, passed the total number being produced by broadcast networks. In 2015, broadcast TV accounted for only 36% of original scripted series on TV.

¹⁶ Comments of NCTA – The Internet & Television Association, MB Docket No. 16-247, at 10 (Sept. 21, 2016) (NCTA Comments); see also Patrick Kulp, *Netflix is spending \$5 billion on programming, and it’s going to spend even more*, Mashable (July 15, 2015) (reporting on a Netflix announcement that it planned to spend nearly \$5 billion in 2016 on original series, documentaries, stand-up comedy and original feature films), available at <http://mashable.com/2015/07/15/netflix-earnings-shows/#.OqIFFQwskqj>.

¹⁷ Caves and Owen Study at ¶ 18.

¹⁸ *Id.* at p. 20, Heading B.

¹⁹ Mike Farrell, *Eat or Be Eaten*, Multichannel News (Aug. 17, 2015). According to 2015 SNL Kagan data, following the merger of Charter, Time Warner and Bright House, the top ten MVPDs would control a whopping 94% of the nationwide MVPD market (measured in terms of subscribers) and the top three alone would “control two-thirds of the video delivery universe.” Tony Lenoir, *AT&T, Comcast pro forma Charter control 66% of US video market based on MediaCensus Q2 ’15 data*, SNL Kagan (Sept. 1, 2015).

²⁰ Comments of AT&T, MB Docket No. 16-247, at 5 (Sept. 21, 2016); see also NCTA Comments at 8.

million the subscribership of the top 25 MVPDs *combined* in 1985.²¹ Given these marketplace developments, program providers, including broadcasters, lack market power over increasingly consolidated MVPDs. As Marci Ryvicker, an analyst at Wells Fargo, recently stated:

Our view is that distribution at this point trumps content. Content is so fragmented. You can watch Netflix, you can watch Amazon, Hulu, but you need your broadband pipe and there are only a few suppliers of that.²²

Commenters lamenting the competitive challenges facing small MVPDs fail to acknowledge that hundreds of small broadcasters are struggling to negotiate carriage agreements with large, consolidated MVPDs – or even struggling to survive in today’s hyper-competitive video marketplace. A review of the evidence shows that programming providers, including broadcasters, do not possess undue market power over distributors and cannot afford to make take-it-or-leave-it demands in negotiations with MVPDs that control access to most consumers. As the head of the Antitrust Division of the U.S. Department of Justice observed last fall, both established programming networks and newer over-the-top programming providers such as Netflix depend on MVPDs “to deliver their content” and to “enable them to sell ads or obtain subscribers,” and thus, MVPDs “are essential gatekeepers to what customers watch and how they watch it.”²³

²¹ See Mike Farrell, *Eat or Be Eaten*, Multichannel News (Aug. 17, 2015).

²² Shalini Ramachadran, *Big Media’s Fortunes Wane as Cable Operators Prosper*, Wall Street Journal (Feb. 16, 2016) available at www.wsj.com/articles/big-medias-fortunes-wane-as-cable-operators-prosper-1455655802.

²³ Assistant Attorney General William Baer, Keynote Address at the Future of Video Competition and Regulation Conference, Duke Law School (Oct. 9, 2015), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-keynote-address-future-video-competition>.

II. CONCLUSION

For all the reasons stated above and in many previous NAB submissions, the retransmission consent marketplace does not unduly favor broadcast stations, let alone constitute a failed marketplace, as certain MPVDs continue erroneously to claim. When Chairman Wheeler concluded earlier this year that the FCC should not change its retransmission consent good faith negotiating standards, this decision appropriately reflected today's video programming marketplace. The Commission should not now rely on the skewed marketplace pictures some MVPDs draw in their attempts to resuscitate arguments that already have been rejected.

Respectfully submitted,

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October 24, 2016