

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Amendment of Section 73.3555(e) of the) MB Docket No. 17-318
Commission’s Rules, National Television)
Multiple Ownership Rule)
)

To: The Commission

REPLY COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

Through these Reply Comments, Sinclair Broadcast Group, Inc. (“Sinclair”) responds in part to DISH Network L.L.C.’s (“DISH”) and the American Cable Association’s (“ACA”) specious assertion that failure to retain the 39 percent limit on national broadcast television ownership (the “National Cap”) would “further imbalance the playing field between broadcasters and distributors. . . .”¹ The balance between broadcasters and MVPDs currently tilts in favor of MVPDs who, unlike broadcasters, are not restrained by artificial limits on national ownership, such that the ten largest MVPDs have geographically broad or nationwide reach and account for approximately 95% of MVPD subscribers nationwide.² Allowing broadcasters to achieve the same geographically broad reach would not bestow upon them any undue bargaining advantage.

¹ Comments of DISH Network L.L.C., MB Docket No. 17-318 (filed Mar. 19, 2018) (“DISH Comments”) at 1; *see also* Comments of the American Cable Association, MB Docket No. 17-318 (filed Mar. 19, 2018) (“ACA Comments”) at 1-2. Limitation of these Reply Comments to DISH’s and ACA’s retransmission consent-related assertions do not constitute Sinclair’s acquiescence to other comments that advance positions inconsistent with those Sinclair set forth in its initial comments.

² *See* Applicants’ Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179 (Filed Aug. 22, 2017) (“Opposition”) at Exhibit E (Declaration of Gautam Gowrisankaran, Ph.D.) (“Gowrisankaran Decl.”) ¶ 27 and Ex. 9.

But even taking DISH's and the ACA's assertion at face value, it has no bearing on the Commission's analysis of whether the National Cap is necessary to promote competition, diversity or localism, the Commission's original justifications for the National Cap. Although DISH's comments superficially address localism, DISH fails to make any connection between localism and retransmission consent fees.³ DISH provides no support for its claim that eliminating the National Cap "will aggravate ... harms to localism without corresponding benefit," and fails to explain why changes to the local ownership rule make the National Cap "all the more important" (given that increased ownership within a DMA has no impact on national reach).⁴ For its part, the ACA does not even attempt to address competition, diversity or localism. In short, DISH's and the ACA's self-serving arguments have nothing to do with the public interest, and instead relate only to their own financial interests.

DISH and the ACA endeavor to conflate their private interest with the public interest, placing sole blame on broadcasters for breakdowns in retransmission consent negotiations and for MVPD decisions to increase subscription fees.⁵ But while DISH and the ACA speculate that increased broadcast consolidation may lead to more "blackouts," they neglect to mention that such blackouts are extremely rare and that, of the 39 blackouts that occurred in 2015 and 2016, 17 involved DISH.⁶ Those 17 DISH blackouts involved 17 different station owners and—contrary to their arguments that broadcast consolidation is to blame—most of those blackouts were with smaller broadcasters. Because a broadcaster clearly need not achieve nationwide

³ DISH Comments at 11-12.

⁴ *Id.*

⁵ *Id.* at 4-5; ACA Comments at 3-4.

⁶ See SNL Kagan, *Retrans Estimates 2015-2016*, at tab Publicly announced TV station retrans agreements and signal disruptions - Jan. 1, 2015 to Sept. 14, 2016 (Sept. 16, 2016).

reach to find itself in a negotiating impasse with DISH, DISH has failed to show how such blackouts would be likely to increase in the absence of the National Cap.

Moreover, DISH and the ACA are flatly incorrect to suggest that “blackouts” are uniquely harmful to MVPDs and that increased consolidation would lead to more frequent negotiation breakdowns. In reality, broadcasters of all sizes are highly motivated to reach retransmission consent agreements, as they are likely to suffer much larger losses of revenue from any retransmission consent dispute than an MVPD would.⁷ MVPDs—particularly the top ten that account for approximately 95% of subscribers nationwide—are typically in a much better position than broadcasters to absorb whatever small subscriber losses they suffer from a supply disruption.⁸ The market capitalizations of the four largest MVPDs range from \$18 billion to \$219 billion, far in excess of even the largest broadcasters at approximately \$3 billion. This, combined with the number of subscribers to whom MVPDs control access, means a broadcaster would suffer more on a relative basis in the event an MVPD stopped retransmitting its signals, giving MVPDs enormous bargaining leverage in negotiating retransmission consent agreements.⁹

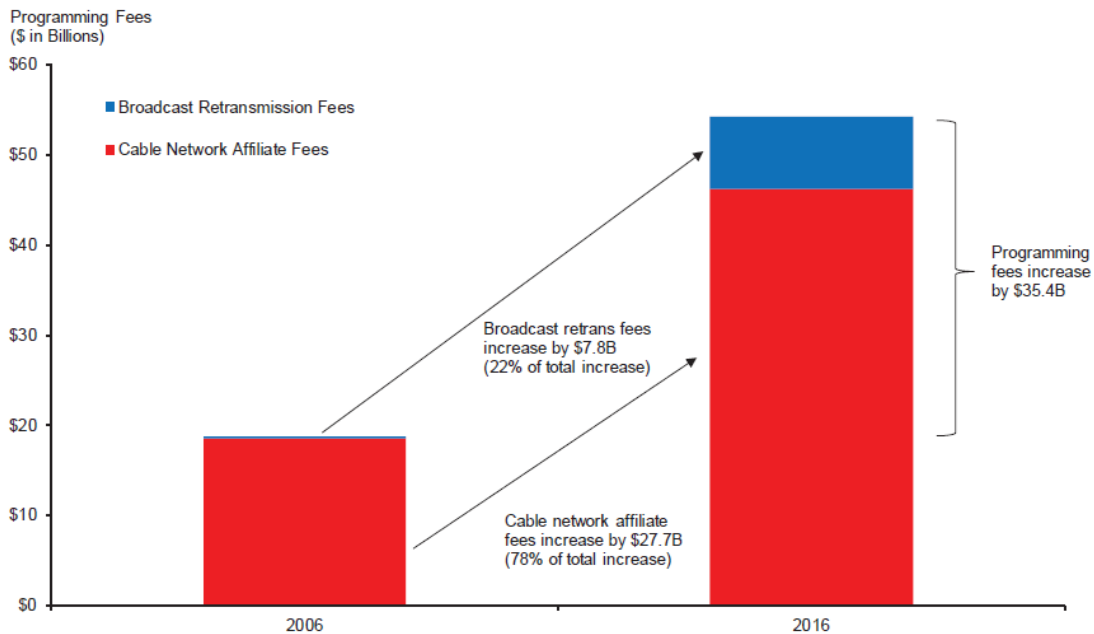
⁷ See Gowrisankaran Decl. ¶¶ 83-84.

⁸ For example, during the Time Warner Cable/CBS retransmission consent dispute, TWC claims to have lost 306 thousand subscribers, yet its revenues for that quarter increased by 2.9% to \$5.5 billion. Joe Flint, “Time Warner Cable loses 306,000 subscribers, cites fight with CBS,” L.A. Times, (Oct. 31, 2013), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warnercable-cbs-earns-20131031-story.html> (last visited Apr. 16, 2018).

⁹ According to Google Finance and annual reports, as of April 17, 2018, AT&T/DIRECTV had a market cap of \$219 billion and 2017 annual revenue of \$161 billion, Verizon had a market cap of \$197 billion and 2017 annual revenue of \$126 billion, Comcast had a market cap of \$156 billion and 2017 annual revenue of \$85 billion, Charter Communications had a market cap of \$73 billion and 2017 annual revenue of \$42 billion, and DISH had a market cap of \$18 billion and 2017 annual revenue of \$14 billion. In contrast, Sinclair had a market cap of \$3 billion and 2017 annual revenue of \$2.7 billion, and Nexstar had a market cap of \$3 billion and 2017 annual revenue of \$2.6 billion.

DISH and the ACA also unfairly insinuate that broadcasters are the main driver of increases in MVPD subscription fees. This ignores the facts that (1) the compensation that broadcasters receive on a ratings-adjusted basis remains far below that paid to a large number of cable networks (on a per-subscriber basis);¹⁰ and (2) retransmission consent fees account for only a small portion of the average MVPD’s subscription package price, as illustrated in the following chart:

**Increase in MVPD Programming Fees Due to
Cable Network Affiliate Fees and Retrans Fees
2006 – 2016**



Source: SNL Kagan Data

Note: Cable networks include regional cable networks, such as regional sports networks (RSNs) and local cable networks.

¹⁰ See Comments of Gray Television Group, Inc., MB Docket No. 15-216, at 15-16 (Dec. 1, 2015) (comparing estimated Big 4 station monthly per-subscriber fees of \$1.11 in 2015 to higher fees paid to, e.g., Fox News Channel (\$1.25), TNT (\$1.65), and ESPN (\$6.61)); *see also* Cork Gaines, *Cable and satellite TV customers pay more than \$9.00 per month for ESPN networks whether they watch them or not*, Business Insider (Mar. 7, 2017) (noting estimated ESPN per subscriber rate of \$7.21), <http://www.businessinsider.com/cable-satellite-tv-sub-fees-ESPN-networks-2017-3> (last visited Apr. 17, 2018).

At bottom, DISH's and the ACA's arguments principally rely on a distortion of the history and current state of the retransmission consent marketplace. DISH and ACA apparently never tire of perpetuating the myth that the percentage growth in retransmission consent revenues over the past decade demonstrates some form of market failure. DISH cites statistics showing increases in aggregate retransmission consent fees between 2006 and 2016. But, as usual, this one-sided history lesson ignores the fact that retransmission consent revenues started from an artificially low baseline, as broadcasters did not have a right to negotiate with cable systems for compensation until enactment of the 1992 Cable Act, and MVPDs did not pay broadcasters *any* cash compensation until 2005.¹¹ The fact is that fees are not unfair or increasing at unnatural rates, but are only slowly starting to resemble fair compensation based on the value of the content, as a free market system allows.

DISH and the ACA also rely on a repurposed econometric analysis¹² that is invalid and unreliable for the same reasons previously set forth by Sinclair and its economic expert, Gautam Gowrisankaran, Ph.D.¹³ Among other things, Dr. Gowrisankaran found that (1) DISH's experts failed to provide any theoretical or empirical justification for the conclusion that broadcast consolidation would result in upward pressure on retransmission consent fees, and (2) DISH's experts ignored the broader market context in which retransmission consent negotiations take

¹¹ Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, 106 Stat 1460 (1992) ("1992 Cable Act"); *see also* NERA Economic Consulting, Jeffrey A. Eisenach, Ph.D., *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, (July 2014), available at http://www.nera.com/content/dam/nera/publications/2014/PUB_Retransmission_Consent_0714.pdf ("NERA White Paper").

¹² DISH Comments at 7; ACA Comments at 5-6; Petition to Dismiss or Deny of DISH Network, L.L.C., MB Docket No. 17-179 (Aug. 17, 2017) ("DISH PTD"). DISH has not provided any of the data or code files that are necessary to test the accuracy or robustness of its experts' regressions.

¹³ *See* Opposition at 31-41; Gowrisankaran Decl. ¶ 57.

place.¹⁴ Among other flaws, DISH’s analysis of the relationship between broadcast group size and rates fails to control for a number of important variables affecting rates, including: the portfolio mix of stations (e.g., what percentage of the station group’s stations are Big-4 stations versus non-Big-4 stations); competition from cable networks; when a retransmission consent agreement was entered into (a recently entered agreement is likely to have higher rates); the stations’ cost of programming (which is very high and varies from station to station); length of term; and other rights negotiated in a retransmission consent agreement. It does not appear that DISH’s subsequent analysis of post-merger retransmission consent agreements remedies this failure.¹⁵

Even if one accepts the premise that, all else equal, there is a positive relationship between station group size and fees, DISH’s econometric study does not rebut the common-sense notion that any purported gains in bargaining leverage would necessarily plateau at a certain

¹⁴ *Id.* ¶ 57. As Dr. Gowrisankaran points out, DISH’s economic analysis fails to evaluate DISH’s purported concavity condition in the context of the full set of inputs to an MVPD’s surplus function, and without concavity of DISH’s surplus function, broadcast mergers will not *per se* result in upward pricing pressure. For example, the omission of cable networks, perhaps the largest input into an MVPD’s surplus function, risks an incorrect inference about the presence or magnitude of concavity. Dr. Gowrisankaran also refuted the assertion that within-DMA concavity (even if it existed) would translate into cross-DMA findings of concavity. *Id.* ¶¶ 63-66.

¹⁵ DISH Comments at 8 (citing Reply Declaration of Janusz A. Ordovery ¶ 19, attached as Exhibit C to Reply of DISH Network, L.L.C., MB Docket No. 17-179 (Aug. 29, 2017)). DISH complains that in all but one of the last ten broadcast mergers, “after-acquired clauses operated to cause a rate hike immediately upon consummation.” DISH Comments at 8. But MVPDs also negotiate for their own after-acquired clauses when they buy new systems, and those clauses include price and other terms that may favor the MVPD. In any event, it is not the Commission’s job to protect DISH from contractually agreed to obligations that it would prefer to avoid. *See Consent to Transfer Control of License Subsidiaries of Media General, Inc. from Shareholders of Media General, Inc. to Nexstar Media Group, Inc. et al, Memorandum Opinion and Order*, 32 FCC Rcd 183, 197 ¶ 36 (2016) (“[a]fter-acquired clauses are negotiated by the parties . . . and there is no apparent reason for the Commission to step in and deny one party the benefit of the negotiated bargain absent evidence of anticompetitive practices or wrongdoing not apparent here.”).

point, and their study fails to examine whether larger broadcasters have already reached that size within the confines of the 39% cap (which would, of course, moot their arguments against eliminating the National Cap). The relationship that the DISH study found is not relevant for this proceeding because the study uses annual revenues of \$500 million as the line of demarcation between “small” and “large” station groups, which is well below the annual revenues of a number of station groups that currently exist under the National Cap. Further, the relationship that DISH’s economic analysis estimates between station group size and fees “appears to be driven largely by the very smallest broadcast station groups” such that, “[i]f anything, DISH’s experts appear to find a difference in retrans fees between very small and somewhat small broadcast station groups.”¹⁶ Such a difference is not relevant in the context of this proceeding or to DISH’s and ACA’s claims that permitting larger station groups to exceed the National Cap will lead to increased fees.

In any event, even if elimination of the National Cap would in and of itself enable broadcasters to negotiate for higher retransmission consent fees than they otherwise could have (a speculative assumption, at best), neither DISH nor the ACA have explained *why* that result would be *per se* harmful to the public interest. Retransmission consent revenues are a crucial source of funding needed for local broadcast stations to maintain and expand their local programming, including local news. The purpose of the retransmission consent regime is to allow the marketplace, not the Commission, to determine whether retransmission fees are justified and, when they are, the appropriate amount of those fees.¹⁷ When fees are determined

¹⁶ *Id.* ¶¶ 85-87 (“DISH’s experts’ analysis of broadcaster group size and retrans fees are driven by a comparison of the retrans fees that DISH pays to certain very small (including many single-station) owners to substantially larger broadcast station groups.”).

¹⁷ S.Rep. No. 102-92, at 35-36 (1991), accompanying S.12, 102nd Cong. (1991) (“It is the Committee’s intention to establish a marketplace for the disposition of the rights to retransmit

by the give and take of the marketplace through good-faith negotiations,¹⁸ the public interest is served. And, contrary to DISH and ACA's suggestion otherwise, the retransmission consent marketplace has functioned generally well and served the public interest.¹⁹ It would therefore be inappropriate for the Commission to retain the National Cap based on the unsubstantiated rhetoric set forth in DISH's and the ACA's comments.

Conclusion

For the reasons detailed above and in Sinclair's March 19, 2018 comments in this proceeding, Sinclair urges the Commission to eliminate the National Cap. In the event the Commission retains a National Cap, Sinclair requests that the Commission do so in a manner consistent with its comments.

Respectfully submitted,

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broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.").

¹⁸ 47 C.F.R. § 76.65.

¹⁹ NERA White Paper at 1 ("By allowing television broadcasters to capture more of the value created by their programming, retransmission consent has generated a revenue stream that has contributed significantly to the overall health of the U.S. broadcasting industry specifically and the market for television content in general [A]llowing broadcasters to be compensated for their investments in programming is good economics and generates benefits for the entire digital video ecosystem.").