Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Status of Competition in the Market for	)	MB Docket No. 17-214
the Delivery of Video Programming	)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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To: The Commission

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)[1] replies to certain comments submitted in this proceeding on the status of competition in the market for the delivery of video programming. Specifically, NAB responds to those commenters rehashing unmeritorious arguments about retransmission consent and program exclusivity that do not withstand examination, that NAB has previously refuted and that the Commission declined to act upon just last year.

Predictably, several pay-TV interests repeat their complaints about the level of compensation that broadcasters obtain in free-market negotiations with multichannel video programming distributors (MVPDs). A number of these commenters, however, also complain about the "skyrocketing" or "exorbitant" increases in the price of non-broadcast programming, which has nothing to do with retransmission consent. In fact, total broadcast retransmission consent fees represented only 12.7 percent of total MVPD programming fees in 2016. Given that pay-TV providers have complained about negotiating with TV stations

[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 and other federal agencies, and the courts.

from *before* the time that broadcasters started receiving any significant cash compensation for the retransmission of their valuable signals, the FCC should take with a proverbial grain of salt MVPDs' tired claim that the retransmission consent system is "broken." Such claims are particularly hollow coming from consolidated pay-TV and broadband providers whose market capitalizations swamp those of even large broadcast TV station groups.

Pay-TV industry proposals to "fix" the retransmission consent system offered in this proceeding are repetitive, unmeritorious and/or contrary to statute. For example, the FCC does not have – and never has had – the authority to adopt MVPD proposals entailing the carriage of TV stations' signals without the broadcasters' consent. NAB also has previously refuted in detail MVPDs' erroneous arguments about negotiating for carriage of bundled programming during retransmission consent negotiations, and submitted an economic study demonstrating the benefits of program bundling, including lower prices, increased quantity and improved quality of video programming. And calls to eliminate the FCC's program exclusivity rules should be ignored, given that commenters evidently do not even understand what those rules actually provide, let alone their true effect in the marketplace.

As in previous proceedings, pay-TV commenters here ignore the concentrated nature of both the MVPD and broadband marketplace and the unconcentrated nature of the video programming marketplace. Pay-TV providers' repetitive claims about broadcasters' alleged excessive bargaining power in retransmission consent negotiations accordingly do not reflect the realities of competition in today's video marketplace. In sum, no commenter in this proceeding has presented any convincing basis for the Commission to reconsider the 2016 decision declining to alter the retransmission consent system in MVPDs' favor.

II. PAY-TV PROVIDERS' UNMERITORIOUS PROPOSALS FOR ALTERING THE RETRANSMISSION CONSENT SYSTEM DO NOT IMPROVE WITH AGE OR REPETITION

Several commenters lodge various complaints about retransmission consent, repeating arguments made in the good faith negotiation proceeding in 2015 and 2016. NAB has already refuted the pay TV industry's complaints in detail, and the FCC appropriately declined in July 2016 to change its existing rules or adopt new ones in response to those complaints.[2] That proceeding should be closed. Certainly nothing presented by commenters here should persuade the FCC to reconsider the pay-TV industry's exhaustively-examined arguments.

A. Pay-TV Providers' Complaints about the Burdens of Retransmission Consent Pre-Date the Payment of Significant Cash Compensation to Stations

Predictably, several pay-TV interests commenting here repeat their complaints about the level of compensation that broadcasters obtain in free-market negotiations with MVPDs. Their comments, however, follow the usual pattern of citing percentage increases in retransmission consent fees and failing to show that these fees are disproportionate compared to the carriage fees of non-broadcast networks or that broadcast stations' fees are excessive given their value to consumers.[3] Indeed, some MVPD commenters also made

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[2] *See* FCC Chairman Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, fcc.gov (July 14, 2016).

[3] *See, e.g.*, Comments of DISH Network, MB Docket No. 17-214, 4-5 (Oct. 10, 2017); Comments of Verizon, MB Docket No. 17-214, at 7 (Oct. 10, 2017); Comments of ITTA—The Voice of America's Broadband Providers, MB Docket No. 17-214, at 2 & n.4 (Oct. 10, 2017); Comments of INCOMPAS, MB Docket No. 17-214, at 5 (Oct. 10, 2017). In this regard, NAB finds it interesting that certain MVPDs insist that broadcast programming is "must-have" – and therefore presumably very valuable – yet then in the same breath assert that retransmission consent prices are "prohibitive" and not "rational." DISH Comments at 3, 5. These claims appear inconsistent.

claims about "exorbitant" increases in the price of non-broadcast programming,[4] with others accurately noting that retransmission consent fees are "just a portion" of their programming costs.[5] According to Kagan, total broadcast retransmission consent fees were only *12.7 percent* of total MVPD programming fees in 2016.[6] And during the 2016-2017 season, 48 of the 50 most watched TV series, counting total viewers, aired on broadcast television.[7] Viewed in these terms, the level of fees cannot be regarded as evidence of either excessive broadcaster market power or a "broken" retransmission consent system, as DISH, Verizon and others continue to claim.[8]

NAB observes, moreover, that the pay TV industry's long history of complaints about the costs of retransmission consent show its fundamental objection to negotiating with broadcasters at all. DISH has claimed since at least 2008 that the "astronomical growth" and "exponential increases" in retransmission consent fees show that the "system is broken."[9] Interestingly, many MVPDs made fallacious claims about the undue burdens of retransmission consent even when broadcasters were not receiving any significant cash compensation. In September 2005, the FCC reported to Congress that "cash still has not

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[4] ITTA Comments at 2, n.4. *See also* Comments of WTA—Advocates for Rural Broadband, MB Docket No. 17-214, at 2-3, 7 (Oct. 10, 2017) (asserting that both cable and broadcast programming costs are "skyrocketing" and increasing at "unreasonable" rates).

[5] INCOMPAS Comments at 5.

[6] "Multichannel Programming Fees as a % of Multichannel Video Revenues," database of Kagan, a media research group within S&P Global Market Intelligence (as of Oct. 17, 2017).

[7] Michael Schneider, *These Are the 100 Most-Watched TV Shows of the 2016-17 Season: Winners and Losers*, IndieWire (May 26, 2017). The only non-broadcast series cracking the top 50 were "The Walking Dead" on AMC and Monday Night Football on ESPN. Among the Top 100 most watched TV series in 2016-2017 (actually 102 series, counting ratings ties), only seven were on non-broadcast channels.

[8] DISH Comments at 3-4; Verizon Comments at 8; Comments of NTCA—The Rural Broadband Ass'n, MB Docket No. 17-214, at 2 (Oct. 10, 2017).

[9] DISH Network, *Ex Parte* Letter, Docket Nos. 99-363, 07-198, and 07-148 (Aug. 5, 2008).

emerged as a principal form of consideration for retransmission consent."[10] Despite this fact, MVPDs in 2004 and 2005 were complaining about broadcaster "abuse" of retransmission consent and urging Congress to eliminate it;[11] calling on the FCC to begin a rulemaking on retransmission consent because broadcasters had the audacity to make "demands for cash payments" and were "now more vigorously seeking 'cash for carriage'";[12] filing a rulemaking petition asking the FCC to change its rules because broadcasters were expected to demand substantial per subscriber fees "in the upcoming round of retransmission consent" negotiations;[13] and calling upon the FCC to urge Congress to reevaluate retransmission consent because so many TV stations were opting for it rather than must carry and complaining about the "sizable transaction costs of negotiating, concluding, and administering retransmission consent agreements with literally hundreds of broadcasters both large and small."[14] Given MVPDs' long-standing objections to broadcasters asking for cash compensation – or even electing retransmission consent at all – the FCC should reject MVPDs' continuing claims that the retransmission consent system is broken. It is, after all, a system MVPDs have opposed since its inception.

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[10] 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) (also finding that "[t]oday, virtually all retransmission consent agreements involve" the provision of "in-kind consideration to the broadcaster").

[11] Reply Comments of Cablevision Sys. Corp., MB Docket No. 04-207, at 2 (Aug. 13, 2004).

[12] Comments of Mediacom Commc'n Corp., RM-11203, at i (Apr. 18, 2005).

[13] American Cable Ass'n (ACA), Petition for Rulemaking, RM-11203, at 24 (Mar. 2, 2005).

[14] Reply Comments of Time Warner Cable Inc. (TWC), MB Docket No. 05-28, at 1, 3, 5 (Mar. 31, 2005). *Accord* TWC Reply Comments, MB Docket No. 04-207, at 11-12 (Aug. 13, 2004).

B. Various Arguments and Proposals Made by Pay-TV Operators About Retransmission Consent and Program Exclusivity Are Repetitive, Irrelevant, Incorrect or Contrary to Statute

Several MVPD commenters repeat their laundry list of proposals from the good-faith proceeding, which were intended to tilt retransmission consent negotiations decisively to favor pay-TV providers. For example, MVPDs again call for "standstills" that allow the retransmission of broadcast signals while negotiations are continuing, even without broadcasters' consent, and for the imposition of baseball-style arbitration.[15] The FCC cannot adopt these, or any other proposals involving the forced retransmission of broadcast signals,[16] as the FCC has correctly concluded that it "lacks authority" under Section 325(b)(1) of the Communications Act "to order carriage in the absence of a broadcaster's consent."[17] These MVPDs did not even try to explain how the FCC could adopt their proposals consistent with law.

Various pay-TV commenters again urge the FCC to restrict broadcasters from negotiating for carriage of affiliated programming (such as multicast channels or non-broadcast networks) as part of retransmission consent.[18] NAB has previously refuted myriad MVPD arguments about bundling, pointing out the legal, factual, practical and economic objections to their claims and proposals.[19] NAB also submitted an economic study

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[15] DISH Comments at 13-14; *see also* Verizon Comments at 12.

[16] *See, e.g.*, DISH Comments at 14 (arguing that FCC rules should require broadcasters to allow retransmission of their signals before so-called "marquee events").

[17] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2728 (2011) (stating that the statute "expressly prohibits the retransmission of a broadcast signal without the broadcaster's consent"). NAB previously explained in detail that forced retransmission violates the Act. *See, e.g.*, NAB, Written *Ex Parte* Communication, MB Docket Nos. 15-216 and 10-71 (Mar. 17, 2016).

[18] *See, e.g.*, Verizon Comments at 9; DISH Comments at 9; NTCA Comments at 9-10.

[19] *See, e.g.*, Reply Comments of NAB, MB Docket No. 15-216, at 28-41 (Jan. 14, 2016).

demonstrating the benefits of program bundling, including lower prices, increased quantity and improved quality of video programming, and concluding that the FCC "should continue to presume that bundled offers during retransmission consent negotiations are consistent with good faith bargaining."[20] Pay-TV commenters here have not presented any basis for the FCC to change its presumption that negotiating for carriage of affiliated programming is consistent with good faith bargaining.[21]

Certain commenters also repeat their strained argument that the FCC should alter its retransmission consent rules so as to promote broadband adoption.[22] NAB previously refuted this unconvincing argument.[23] Recent developments in the video marketplace, moreover, have further undercut these commenters' claims about the necessity of offering video services to promote broadband. As discussed in NAB's initial comments in this proceeding, pay TV providers are losing subscribers due to cord-cutters and cord-nevers,

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[20] Kevin Caves and Bruce Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, at 7, 26-34, 39 (Feb. 2016), attached to NAB Written *Ex Parte*, MB Docket Nos. 15-216, 10-71 (Feb. 16, 2016) (also finding that "bundling is extremely common in competitive markets, and generally has procompetitive effects") (Caves and Owen Study).

[21] NAB additionally notes the absurdity of massive companies such as Verizon calling for FCC intervention into the marketplace due to broadcasters' "forced" bundling. Verizon Comments at 6. Even large TV station groups, such as E.W. Scripps (with a market capitalization of $1.5 billion, as of October 17) or Nexstar (with a market cap of $2.8 billion), cannot "force" Verizon (with a market cap approaching $200 billion) into accepting contractual terms against its will.

[22] NTCA Comments at 3-5; INCOMPAS Comments at 3.

[23] NAB Written *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71, at 1-3 (Apr. 5, 2016) (NAB Apr. 2016 *Ex Parte*). The argument goes something like this – rising retransmission fees impede the ability of small MVPDs to offer competitive video programming services, which in turn discourages consumers from adopting broadband. But many other costs, such as rising prices for nonbroadcast channels and equipment for both providers and subscribers, are included in the offering of multichannel video services. The causal link between retransmission consent, MVPDs' ability to provide video services and consumers' inclination to subscribe to those services remains tenuous, at best. *Id*. at 2.

while broadband providers are adding them.[24] According to both Kagan and the Leichtman Research Group, broadband penetration now exceeds multichannel video penetration. As of the second quarter of 2017, about 18.4 percent of broadband households did not subscribe to any legacy multichannel offerings, up from 12.4 percent three years ago.[25] The realities of today's video marketplace give lie to claims that subscriptions to multichannel video and broadband services are substantially co-dependent or that consumers will not see the value of broadband services unless they also subscribe to multichannel video.

A couple of commenters here continue the MVPD industry's efforts to drag their retransmission consent complaints into the FCC's proceeding proposing to allow stations to voluntarily use the Next Generation broadcast TV standard.[26] NAB refuted MVPDs' transparent attempts in the Next Gen rulemaking to secure regulatory advantage in retransmission consent negotiations by, among other things, contending that broadcasters should not even be allowed to raise the possibility of carriage of Next Gen signals in private contractual negotiations.[27] NAB urges the FCC to reject MVPD proposals in its expected upcoming decision on Next Generation TV. After all, MVPDs nine years ago seized upon the digital TV transition as an excuse to limit broadcasters' retransmission consent rights, claiming that the digital transition was "at risk" due to predicted retransmission consent disputes during which consumers would lose access to broadcast programming via pay TV

[24] Comments of NAB, MB Docket No. 17-214, at 3-7 (Oct. 10, 2017) (NAB Comments).

[25] Tony Lenoir, *Broadband-only subs make up 18.4% of high-speed data homes in Q2'17*, Kagan, a media research group within S&P Global Market Intelligence (Aug. 24, 2017).

[26] *See* ITTA Comments at 5; WTA Comments at 8-11.

[27] *See, e.g.*, NAB Reply Comments, GN Docket No. 16-142, at 13-16 (June 8, 2017). This argument is akin to various proposals in the good faith proceeding, where MVPDs urged the FCC to conclude that broadcasters even asking to negotiate about various issues (*e.g.*, channel position and tier placement) during retransmission consent constituted bad faith negotiating. The FCC correctly declined to act upon those proposals.

operators “for days, weeks, or months immediately preceding and following the transition.”[28] Needless to say, this predicted parade of horribles did not materialize, and the digital TV transition was successfully completed, without FCC intervention into the retransmission consent marketplace on behalf of MVPDs. The FCC similarly has no need to intervene in retransmission consent negotiations merely because some broadcasters in the future will be transitioning to ATSC 3.0.

Finally, the FCC should ignore the non-meritorious, if not blatantly incorrect, arguments relating to program exclusivity. The Free State Foundation calls for sunsetting the FCC’s network nonduplication and syndicated exclusivity regulations, erroneously asserting that they “allow” TV stations to “block MVPDs who carry a network’s local broadcast affiliate on their channel lineups from importing programming from out-of-market sources.”[29] As NAB has explained many times, the FCC’s rules do not provide exclusivity, but only provide a forum for the efficient enforcement of program exclusivity agreements freely and privately negotiated between broadcasters and program suppliers.[30] Given that The Free State

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[28] DISH Network, *Ex Parte* Letter, Docket Nos. 99-363, 07-198, and 07-148, at 2 (Aug. 5, 2008). DISH and many other MVPDs asked the FCC to establish a lengthy “quiet period” around the DTV transition, during which broadcasters and MVPDs would be required to maintain the status quo regarding carriage of broadcasters’ signals, even if they were unable to reach a new agreement prior to the expiration of an existing retransmission agreement. In other words, under this proposal, broadcasters would have been forced to allow MVPDs to carry their signals in the absence of consent, contrary to Section 325(b)(1). *Id.*; *see also, e.g., Ex Parte* Letter of OPASTCO, NTCA, ITTA, RICA and WTA, Docket Nos. 98-120, 99-363, 07-198, 07-148, at 2 (Sept. 29, 2008); ACA, Notice of *Ex Parte* Presentation, Docket Nos. 03-185, 07-198, 07-294, 98-120, at 2 (Oct. 6, 2008); Mediacom Commc’n Corp., Notice of *Ex Parte* Communication, Docket Nos. 07-148, 07-29, 07-198, at 1 (Nov. 24, 2008); Charter Communications, *et al*., Notice of *Ex Parte* Presentation, Docket No. 07-148 (Sept. 4, 2008).

[29] Comments of The Free State Foundation, MB Docket No. 17-214, at 9 (Oct. 10, 2017).

[30] *See, e.g.*, Opposition of Broadcaster Ass’ns, MB Docket No. 10-71, at 23 (May 18, 2010).

Foundation's purposes include securing property rights, promoting free markets and making government more efficient,[31] it should – if it understood the FCC's rules – support them.

Verizon similarly mischaracterizes the FCC's network non-duplication and syndicated exclusivity rules. In calling for their elimination, Verizon mistakenly asserts that these "rules grant a broadcast station territorial rights to transmit network or syndicated programming."[32] As explained above, the FCC's rules do not grant exclusivity; in fact, the rules actually *limit and restrict* program exclusivity by limiting the geographic area in which local TV stations may enter into program exclusivity agreements with network and syndicated program suppliers.[33] Neither the Commission nor its rules provide or enforce program exclusivity provisions or arrangements not agreed to by program suppliers and local stations. Verizon's inability to correctly read and understand the FCC's rules is baffling.

Interestingly, Verizon also argues that the FCC's program exclusivity rules somehow "disadvantage[] MVPDs by making it easy for the broadcast station to enforce its contractual rights with a network or syndicator."[34] Complaints that FCC rules permit the efficient enforcement of freely negotiated contractual rights are not a valid reason for eliminating those rules. In any event, Verizon's arguments about the FCC's rules disadvantaging MVPDs – especially pay-TV and broadband providers as large as Verizon – ring hollow. Verizon strongly complains that, due to exclusivity arrangements, MVPDs have only one source (*i.e.*, the local TV station) for desirable broadcast programming.[35] But this argument says little of

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[31] *See* http://www.freestatefoundation.org

[32] Verizon Comments at 11.

[33] *See* 47 C.F.R. §§ 76.92; 76.101; 76.120. For a more complete discussion of the FCC's program exclusivity rules *see, e.g.*, Opposition of Broadcaster Ass'ns, MB Docket No. 10-71, at 22-25 and Appendix B (May 18, 2010).

[34] Verizon Comments at 11.

[35] Verizon Comments at 6, 11.

relevance about the FCC's exclusivity rules, as the "problem" identified by Verizon is not unique to broadcast programming. MVPDs have only one (legal) source for all types of desired programming. For example, if Verizon cannot reach agreement with HBO, AMC or TBS, it cannot carry popular programs such as "Game of Thrones," "The Walking Dead" or many sporting events including the recently-concluded Major League baseball playoffs. Verizon's true complaint seems to be that popular video programming is expensive and that it must pay "[l]arge programmers and other MVPDs" that "own much of the most popular content" to obtain carriage rights for that programming.[36] Eliminating the FCC's program exclusivity rules will not address the source of Verizon's discontent.

III. BROADCASTERS DO NOT POSSESS UNDUE MARKET POWER IN RETRANSMISSION CONSENT NEGOTIATIONS

As in previous FCC proceedings, pay TV providers' claims about broadcasters' alleged excessive bargaining power in retransmission consent negotiations ignore the concentrated nature of the MVPD and broadband marketplace and the unconcentrated nature of the video programming marketplace. While pay-TV providers face increased competition from over-the-top (OTT) video services and have lost subscribers due to cord cutting, over three-quarters of all TV households still subscribe to a traditional MVPD service.[37] The ten largest providers control a whopping 94.9 percent of the nationwide MVPD market (measured in terms of subscribers); the top four MVPDs control 80.2 percent of the nationwide market; and the three largest MVPDs control 67.7 percent of the market.[38] The broadband

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[36] *Id*. at 2.

[37] Based on Q2 2017 data, Kagan, a media research group within S&P Global Market Intelligence, estimates that 75.8 percent of TV households receive an MVPD service.

[38] Kagan, Q2 2017 data. In contrast, the FCC found in 2002 that the ten largest MVPDs controlled 84.4 percent of the MVPD market nationally and the top four providers controlled under 50.5 percent of the market. *Annual Assessment of the Status of Competition in the*

marketplace is similarly concentrated, with the ten largest providers controlling 92.1 percent of the nationwide market (measured in terms of subscribers); the top four broadband providers having 70.3 percent of the market; and the top three providers controlling 63.4 percent of the market.[39] Significantly, with only one exception, the largest MVPDs are also the largest broadband providers.[40]

In stark contrast to the "highly concentrated" downstream programming distribution markets, which have "little scope for competitive entry,"[41] the "upstream content markets are increasingly fragmented across a large and growing space of viewing options."[42] As documented in this and other proceedings, the exponential growth in the amount, variety and quality of video programming continues unabated.[43]

Market for the Delivery of Video Programming, Ninth Annual Report, 17 FCC Rcd 26901, 26958 (2002).

[39] Kagan, Q2 2017 data.

[40] *Id*. While a number of broadcast TV station groups have grown larger in recent years, they still do not approach the size of the consolidated MVPD and broadband providers. On October 17, for example, the market capitalization of AT&T/DirecTV was approximately $222 billion, Verizon's market cap was about $198 billion and Charter's market cap exceeded $93 billion, while the market caps of large TV stations groups (*e.g.*, E.W. Scripps, Gray, Nexstar, Sinclair and Tegna) ranged from just over $1 billion to just over $3 billion.

[41] Caves and Owen Study at 20, Heading B. *See also* David S. Evans, Chairman, Global Economics Group, *Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers*, White Paper at 37 (Aug. 29, 2017) (finding that households have "limited choices" for wired broadband providers and "for ones that also operate MVPDs," and that significant barriers will likely prevent entry) (Evans Competition White Paper).

[42] Caves and Owen Study at 13.

[43] *See, e.g.*, NAB Comments at 7; Comments of Comcast Corp. and NBCUniversal Media, MB Docket No. 17-214, at 8-9 (Oct. 10, 2017); Caves and Owen Study at 13-19. In this fragmented marketplace, claims that broadcast programming is uniquely "must have" are increasingly suspect. With so many more options for pay-TV providers today, any one channel or network is increasingly less vital for an MVPD offering dozens, if not hundreds, of channels.

This fragmentation in the video programming marketplace, combined with concentration in the distribution marketplace, gives consolidated pay-TV/broadband providers (1) "significant bargaining power" over video programmers, including local broadcast stations, whose advertising revenues depend on being available on as many platforms as possible and accessible to as many viewers as possible; and (2) "significant bargaining leverage over edge providers," including online video service providers, because they can "block edge providers from reaching a significant fraction of households."[44] Interestingly, Public Knowledge has described the competitive dynamics between video programmers and distributors more accurately than the pay-TV industry. Public Knowledge has correctly recognized that programmers "prefer to be carried" not just by one pay-TV provider "but by all MVPDs," including cable companies, DISH, DirecTV and any telecommunication video providers, even when they "overlap" in local markets. "Because programmers do not choose between competing distributors but instead typically do business with many of them at once, large distributors do not compete with one another for access to programming."[45]

Thus, rather than TV stations being able to play three or four "distributors against one another," as DISH claims,[46] in reality TV stations prefer to – indeed must – reach retransmission agreements with all major MVPDs to ensure their accessibility to as many

[44] Evans Competition White Paper at 5, 23-24; *accord* U.S. Dep't of Justice, Competitive Impact Statement at 5, 12-14, *U.S.A. v. Charter Communications, Inc. et al.*, Civil Action No. 1:16-cv-00759 (RCL) (D.D.C. May 10, 2016). *See also* Caves and Owen Study at 19 (given highly concentrated nature of the MVPD marketplace, a station's "failure to secure carriage with even a single MVPD could mean the difference between profit and loss").

[45] Comments of Public Knowledge, MB Docket No. 16-41, at 17-18 (Mar. 30, 2016).

[46] DISH Comments at 7.

viewers as possible.[47] As a 2016 economic study concluded, "MVPD distribution agreement[s]" are "'must have' input[s] from the broadcaster's point of view."[48] Local TV stations therefore do not have undue leverage over MVPDs in retransmission consent negotiations.[49]

IV. CONCLUSION

For all the reasons stated above and in many earlier NAB submissions, broadcast TV stations do not possess undue market power in the retransmission consent marketplace. Pay-TV and broadband providers in this proceeding have not shown any basis for the Commission to revisit its appropriate decision last year not to intervene in retransmission consent negotiations on MVPDs' behalf. Given MVPDs' long-standing objections to

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[47] DISH's contentions that broadcasters suffer little or no harm in retransmission disputes also are erroneous. *Id*. at 8. Obviously, a station's ratings and ad revenues suffer if its signal is not carried by a pay-TV provider with a substantial percentage of the local MVPD market, as well as not earning any retransmission fees from that provider. *See* Caves and Owen Study at 19. DISH's claim that MVPDs "bleed[] subscribers" to competing distributors during a retransmission dispute is unsupported by empirical evidence and questionable on its face, given the hefty early termination fees that MVPDs typically impose on consumers and the inconvenience of switching pay-TV providers.

[48] Caves and Owen Study at 19.

[49] Small MVPDs contend they lack the bargaining leverage over video programmers that large MVPDs possess, and that they cannot negotiate the favorable pricing for programming that large MVPDs can. *See, e.g.,* INCOMPAS Comments at 7-8. Thus, some small MVPD commenters believe they will be at a disadvantage in the video marketplace until they are afforded the same or similar favorable pricing for programming as that negotiated by large MVPDs. *Id*.; NTCA Comments at 12. NAB previously addressed these and related arguments made by small MVPDs. *See, e.g.,* NAB Apr. 2016 *Ex Parte* at 7-9. Here, NAB briefly observes that the FCC is ill equipped to effectively or rationally address questions of buying power and bargaining leverage inherent in every negotiation, whether for TV station signals, nonbroadcast programming or expensive equipment. Just like small MVPDs, small and medium-sized broadcasters have less negotiating leverage than larger station groups, including in retransmission consent negotiations with large pay-TV providers. Indeed, the need to better compete against and negotiate with consolidated MVPDs has pushed some TV station groups to increase in size. But broadcasters as a whole doubt that FCC intervention into retransmission consent negotiations will effectively address competitive disparities between small MVPDs and the multi-billion-dollar pay-TV/broadband companies that dominate the industry.

broadcasters requesting cash compensation – or even to electing retransmission consent rather than must carry – the FCC should remain highly skeptical of claims, particularly by the largest pay-TV and broadband providers, that government intervention favoring MVPDs is needed to "fix" the retransmission consent system.

Respectfully submitted,

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