I am a concerned citizen that has been following the many changes coming over the television industry as a result of the advent of the Internet as a delivery mechanism for video. The present Public Notice seeks to examine the state of competition in the marketplace for the delivery of video with regards to three distinct categories: broadcast television stations, multichannel video programming distributors (MVPDs), and online video distributors (OVDs). In theory, individual broadcast stations compete with each other and with various other producers of programming for MVPDs, but distinguish themselves from MVPDs themselves primarily collectively, in the ability to pick up any broadcast signals available in an area with an antenna. This means that individual broadcast stations do not necessarily feel the need to compete with MVPDs themselves if their market conditions do not warrant it.

In previous filings with the commission, as well as in comments regarding the effort to update the nation's communications law, I have made clear my position that broadcast television has not only become wholly unmotivated to compete with MVPDs except in haggling over retransmission consent payments, it has become so dependent on them that many broadcast stations may have an interest in sabotaging broadcast's ability to compete with MVPDs in the name of protecting their retransmission consent payments, just as broadcast's ability to compete with MVPDs has become bolstered by the advent of OVDs that can be used to supplement it, and as calls have mounted for Congress or the commission to adopt a regulatory change that could completely obviate the concern of those stations. Because of this and numerous regulatory imbalances at the expense of broadcast, broadcast television, as distinguished from MVPDs, is, despite the advent of cord-cutting that should work to its advantage, in such bad shape that the Commission runs the risk of dealing it a potentially fatal blow with the incentive auctions it has scheduled for six months from now, despite the potentially vital role it could play in the video marketplace in the future, one potentially far greater than that filled by MVPDs as they are presently known.

This role is easy to overlook due to the level of hype surrounding the still-largely-nascent OVD market, the dominance of MVPD programmers in the areas where said role may most make itself felt, and the present inadequacy of broadcasters in filling that role caused by the aforementioned issues. It is tempting to conclude that the advent of the OVD potentially renders both broadcast television and MVPDs obsolete, and this seems to be the point NESN makes in arguing that OVDs effectively substitute for both on a technological basis if not on the basis of programming.[1] It is worth noting, however, that sports programming, including that which NESN provides, has been particularly slow to become available through OVD channels; it is only in the past year that ESPN has become available without a traditional MVPD subscription through the Sling TV service, and non-ESPN national sports services are still not available at all. The provision of local sports has been even slower to move to the Internet; very few teams' games are available for streaming within their local market even with an MVPD subscription, although some progress has been made on this front recently, as MLB teams with contracts with RSNs owned by Fox may have their games available for streaming to authenticated MVPD subscribers via the Fox Sports Go app starting next year.[2]

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[1] Comments of NESN in the matter of MB Docket 15-158 (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming), 21 Aug 2015, retrieved from http://apps.fcc.gov/ecfs/document/view?id=60001122516. (Hereafter, all comments of all parties are in the matter of MB 15-158 unless otherwise noted.)

[2] Ourand, John, and Eric Fisher, "MLB, Fox break impasse in streaming talks", SportsBusiness Journal, p4, retrieved from http://www.sportsbusinessdaily.com/Journal/Issues/2015/08/17/Media/MLB-streaming.aspx.

This is because, while a major impetus for cord-cutting has been an attempt to escape the high prices charged by sports networks and passed on to consumers by MVPDs, the volume of sports held exclusively by MVPD programmers may be the single biggest bulwark MVPDs have against cord-cutting.[3] For many years, even before most OVDs reached maturity or were even founded, the rights fees for sports programming have been shooting ever skyward, propelled by their ability to attract demographics valuable to advertisers and resistance to time-shifting that would allow bypassing ads. Cable networks, especially ESPN, have been winning many of these battles for sports rights, including some battles it would once have been unthinkable for them to even compete for, thanks to their ability to collect subscriber fees from MVPD subscribers on top of advertising revenue.[4]

I have argued that sports' ability to attract valuable advertising demographics is linked to its resistance to time-shifting, because a major reason those demographics are valuable is their relatively low consumption of linear television, partly spurred by those demographics' familiarity with alternative means of consuming video, and sports' live nature, the thing responsible for its resistance to time-shifting, also effectively attracts those demographics to linear television (or an online simulacrum thereof) over other methods of video delivery like few other types of content.[5] OVDs' great advantage and distinguishing feature compared to linear television, when they are not merely serving as a conduit for the delivery of linear television channels, is their lack of a set schedule that all consumers must adhere to in order to receive their desired content, but this is obviated in the case of live events that consumers feel obligated to consume at a set time anyway. I have argued that in these cases, linear television has a further *technological* advantage in that it is able to serve many consumers that wish to consume the same thing at the same time with a single signal, as opposed to Internet-based delivery which delivers content to each device one at a time regardless of how many people consume the same thing.[6]

This, then, is the main technological distinction between linear television and the Internet distribution paradigm, when applied to a device capable of receiving both: the Internet is successful at delivering a lot of content to a few people each, while linear television is successful at delivering some content to a lot of people each. Online video has achieved a position of dominance on smartphones and tablets, as noted by NESN, because of the inability for most smartphones and tablets to receive a linear television signal.[7] This is the value broadcast television has going forward that MVPD programmers do not: a broadcast signal is, at least in theory, capable of reaching any device that has a requisite antenna,

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[3] On this, see, e.g., Frank the Tank, "Happy New Year: Season Opening Quick Hits on Sports TV Rights, Sun Belt Expansion and the Illini Coaching Dumpster Fire", FRANK THE TANK'S SLANT, 3 Sep 2015, retrieved from http://frankthetank.me/2015/09/03/happy-new-year-season-opening-quick-hits-on-sports-tv-rights-sun-belt-expansion-and-the-illini-coaching-dumpster-fire/.

[4] See Reply Comments of Morgan Wick in the matter of MB Docket RM-11728 (Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors), 14 Oct 2014, pp. 2-5, retrieved from http://apps.fcc.gov/ecfs/document/view?id=60000973497.

[5] Wick, Morgan, "The Nexus of Television and Sports in Transition, Part IV: Pricking the Bubble", MorganWick.com, 9 May 2014, retrieved from http://sports.morganwick.com/2014/05/the-nexus-of-television-and-sports-in-transition-part-iv-pricking-the-bubble/. Regarding the value of advertising demographics, see Seidman, Robert, "FAQ: Do Total Viewers Matter?", TVbytheNumbers, 12 Dec 2009, retrieved from http://tvbythenumbers.zap2it.com/2009/12/12/faq-do-total-viewers-matter/36064/.

[6] See Reply Comments of Morgan Wick in the matter of MB Docket 14-50 (2014 Quadrennial Ownership Review), 8 Sep 2014, p14, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521829536.

[7] Comments of NESN, pp. 2-4.

whereas a non-satellite MVPD signal requires a device to be hooked up to the MVPD's network, which is not conducive to the mobility that is the hallmark of smartphones and tablets. In fact, this is possible today with the ATSC M/H standard – but few devices have the native capability to receive ATSC M/H signals without an add-on, consumer awareness is very poor, and adoption of the standard by stations is spotty. The ATSC 3.0 standard currently in development promises to resolve some of these problems by incorporating mobile compatibility into the standard at the start, but it is not clear whether it might prove to be too little too late for the industry to survive long enough to fill this role.[8]

One reason why ATSC M/H has mostly failed to achieve any of its goals and why ATSC 3.0 may prove to be too little too late has been the rather lukewarm support of the broadcast industry. The four major networks are owned by large conglomerates with significant interests in MVPD programming and, along with the rest of the broadcast industry, have demonstrated their determination to preserve their retransmission consent revenue at all costs, even if that means destroying the village in order to save it, as demonstrated by, among other things, their lukewarm support of ATSC 3.0.[9] Which brings me to my ongoing dispute with the National Association of Broadcasters and other broadcast interests over whether they are actually representing the best interests of the industry.

I made my opinions on most of the broadcast-industry regulations the commission seeks comment on, as well as how those regulations and others interact with other marketplace realities to affect the broadcast industry, clear in my comments on the Quadrennial Broadcast Ownership Review a year ago, and little has changed since then. I noted that, regardless of the degree to which broadcast stations compete with cable networks and MVPDs (and to a lesser extent online sources of video), competition among broadcast stations is still worth policing because of the effect that competition has on antenna-users who do not subscribe to an MVPD, regardless of what broadcasters seeking deregulation may claim.[10] I noted that the current rules regarding the number of broadcast stations one entity can own in a DMA are not only arbitrary but completely backwards, allowing entities to increase their reach in big markets where that increased reach can have the most effect while forcing stations to shut down when they can't circumvent the rules in small ones, and prioritizing the competition among the Big Four broadcast networks (which, as already established, have little interest in the health of broadcast television overall) over promoting innovation and competition from smaller networks or independent stations.[11] And I warned the commission of the consequences of going forward with commencing the incentive auction a mere three months before concluding the ownership review, a staggeringly irresponsible move that suggests the commission's priority is in crippling the broadcast industry as soon as possible before it realizes its own value and what's happening to it.[12] In most of these cases, I either disagreed with the position taken by broadcasters or took a position on an issue they did not even recognize, all while advocating for them.

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[8] Response of Morgan Wick to the House Committee on Energy and Commerce White Paper on Regulation of the Market for Video Content and Distribution, 23 Jan 2015, pp. 3-4, retrieved from http://morganwick.com/commactupdate.pdf.

[9] Jessell, Harry A., "ATSC 3.0: Lead, Follow Or Get Out Of The Way", TVNewsCheck, 14 Nov 2014, retrieved from http://www.tvnewscheck.com/article/80837/atsc-30-lead-follow-or-get-out-of-the-way.

[10] Reply Comments of Morgan Wick in the matter of MB Docket 14-50, pp. 12-13.

[11] Ibid., pp. 8-12.

[12] Ibid., pp. 17, 19; Comments of Morgan Wick in the matter of MB Docket 12-268 (Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions), 20 Feb 2015, p1, retrieved from http://apps.fcc.gov/ecfs/document/view?id=60001032100.

The National Association of Broadcasters correctly recognizes that the MVPD market is highly concentrated, especially on a local basis, and also considerably freer of regulation compared to broadcast stations. But its solution is to liberalize the rules regarding broadcast stations to match those of MVPDs, when the better outcome, both for consumers and the broadcast industry, would be to increase regulations on MVPDs to bring them to the level of broadcasters. It is disingenuous for NAB to recognize the negative impact to consumers of MVPD mergers and clustering and then ask to be allowed to do the same thing.[13] If broadcast stations were subject to the same lack of restraint from consolidation as MVPDs, local markets would be controlled by one or two large station owners with complete control over what would be available over-the-air in each market, destroying the value of localism and allowing one entity undue power over what content OTA-dependent households would be allowed to see. On the other hand, if MVPDs were as regulated as broadcasters they would likely have less capital and scale to maximize efficiency and promote investment, but would be forced to compete with many other MVPDs on price and selection, and would be forced to have a much more local focus that might improve customer service (which, in case you haven't heard, is not exactly something people love about them today). Obviously this comparison is disingenuous, as there are, as already acknowledged, several important differences between broadcast stations and MVPDs, and the true outcome is probably somewhere in the middle, with perhaps more of a tilt towards more regulation.

To some degree, NAB is correct to note that the combination of a broadcast station with a cable network does not truly represent vertical integration.[14] If one accepts NAB's premise that broadcasters are in competition with cable entities, though, it does represent horizontal integration, and a particularly pernicious form at that. As already mentioned, a programmer of a broadcast station that also owns a cable network has little incentive to place their best programming on their broadcast station if they can make more money by placing it on the cable network, and despite the evolution of the retransmission consent regime in recent years it remains the case that they can. This is most obvious at Disney, which time and again has demonstrated that it sees much more of an interest in placing sports programming on cable network ESPN than its broadcast network ABC.[15] This makes the programmer less inclined to support broadcasting in general, and if the programmer has a substantial presence in the broadcasting industry at large this can have a very destructive influence on the industry as a whole. The broadcast industry has become corrupted by entities with an interest in its neglect, something that would not necessarily be the case with pure horizontal integration of broadcast stations alone. In that sense, combinations of broadcast stations and cable networks almost constitute a form of *reverse* vertical integration: while normal vertical integration gives entities a competitive advantage, this is a form of integration that effectively encourages companies to put some entities at a *dis*advantage.

NAB claims that "ownership restrictions reduce economic incentives to invest in broadcasting in general," reducing the ability of broadcasters of all sizes and market presences to obtain capital, in an attempt to convince the commission that allowing owners to own more stations will somehow increase the number of station owners.[16] Of course, NAB may well be correct that the market is lacking in incentives to invest in broadcasting of any size, but that is due to various other issues such as the market

[13] Comments of the National Association of Broadcasters, 21 Aug 2015, pp. 15-26, retrieved from http://apps.fcc.gov/ecfs/document/view?id=60001122613.
[14] Ibid., p27.
[15] See, e.g., Reply Comments of Morgan Wick in the matter of MB Docket RM-11728, pp. 3-5.
[16] Comments of the National Association of Broadcasters, p28.

advantages of cable networks when it comes to acquiring programming, doubts about the long-term viability of the broadcasting industry caused by the incentive auction and broadcasters' reticence to embrace cord-cutting or any means of accessing their content that does not involve subscribing to an MVPD, and Commission rules interacting with other market realities to minimize the perceived value of any station that is not a Big Four affiliate. To the extent lack of scale is a problem, it is because of the broadcast industry's dependence on retransmission consent revenue that has placed a premium on leverage above all else.

Ideally, if a new entrant into the market cannot own a Big Four affiliate the next best thing is to own a station in a large market where they can reach a maximum of people with a minimum of investment, yet non-Big Four stations in large markets are precisely the sorts of stations that the commission's current local market limits allow to be consolidated with Big Four stations owned by larger station groups. By setting an arbitrary floor of eight "independent voices" in as many markets as possible but not taking other steps to assure that those "independent voices" actually present effective competition outside of preventing common ownership of the top four stations in the market, the commission effectively guarantees that in all but the very largest markets the number of "independent voices" will be *exactly* eight, probably with four of them holding the bottom four stations in the market. That's assuming the market can actually support eight independent voices, or even four different owners of Big Four stations, because when it can't the result has been circumvention of the rules through sharing arrangements. In those markets, the commission's attempt to promote competition has been carried out with blithe disregard for market realities and has done little or nothing to overcome them.[17] When the commission showed signs of cracking down on the use of sharing arrangements many station owners simply consolidated the stations onto a single signal, possibly circumventing the top-four rule in the process, either returning the signal to the FCC or selling its husk to someone likely to sell it in the incentive auction, reducing choice and doing nothing to promote competition. By creating a situation where small stations may actually be licensed to a fraction of a channel through the channel-sharing regime, the incentive auction will only further undermine the ownership rules and increase the advantages of large station owners.[18]

If the commission were truly interested in promoting new entrants into the broadcast space, it would adopt ownership rules that promoted competition in large markets rather than trying and failing to protect it in small ones.[19] It would repeal restrictions on content such as the E/I rules and the prohibition on "adult" content, outdated restrictions rooted in a time when broadcasters had much less if any competition, that prevent the adoption of programming models and the programming of certain types of content common on cable, and maybe even repeal the requirement for the "free" part of "free over-the-air". It would adopt a la carte rules that would allow broadcasters' greater penetration to once again overcome cable networks' access to subscription fees, without relying on retransmission consent, when it came to acquiring programming.[20] It would find a way to effectively police the use of sharing arrangements to circumvent ownership rules without attempting to play whack-a-mole with the circumvention method du jour or precluding the legitimate use of sharing arrangements to help a nascent station owner open or stay in business, or failing that, adopt ownership rules that

[17] Reply Comments of Morgan Wick in the matter of MB Docket 14-50, pp. 8-11.
[18] Ibid., pp. 17-19.
[19] My suggestion is in ibid., pp. 11-12.
[20] Reply Comments of Morgan Wick in the matter of MB Docket RM-11728, pp. 5-8.

disincentivized owners from using sharing arrangements to circumvent the rules without prohibiting them entirely.[21] It would use the incentive auction to correct the mistakes made in the digital transition by maximizing broadcasters' effective coverage and efficient use of spectrum in a way it never did then.[22] It would, coming out of the incentive auction, adopt ownership restrictions based on the size of spectrum or the number of channels rather than the fuzzy concept of a "station".[23] And it certainly would not rush into the incentive auction before completing the ownership review, or even before ATSC 3.0 was ready, would not adopt a variable band plan running the risk of crippling those broadcasters that continue operating, and would not take other steps that would have the effect of completely shutting out the possibility of any new stations starting business at all.

But then again, considering the commission seems to be doing exactly that without taking any of the other steps, perhaps the commission isn't interested in the arrival of new entrants into the broadcast industry, or even existing broadcasters' long-term survival, at all. Perhaps the incentive auction really is the commission's way of trying to dismantle it before anyone notices the consequences.

Morgan Wick
Venice, CA
September 21, 2015

[21] My suggestion is in the Reply Comments of Morgan Wick in the matter of MB Docket 14-50, pp. 3-5 and 11-12.
[22] Response of Morgan Wick, pp. 9-10 and sources cited in note 17 thereof.
[23] Reply Comments of Morgan Wick in the matter of MB Docket 14-50, pp. 18-19.