



November 5, 2015

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Ex Parte Letter, MB Docket No. 15-216

Dear Ms. Dortch:

In this letter, the National Association of Broadcasters (NAB) responds to NTCA's and Incompas's futile attempt to resurrect the legitimacy of their survey in which they polled their members to gauge their feelings about paying for the programming that they resell to consumers for profit.¹ To be clear, NAB was not merely "attempt[ing] to discount"² their survey when we submitted our letter in this docket last week. Rather, NAB exposed the in-house poll as self-serving propaganda masquerading as rigorous evidence of a marketplace failure.³

Nothing in NTCA's and Incompas's latest letter defending the survey provides any reason for the Commission to trust the "data" contained within, nor does it address our arguments that the survey was designed to solicit heavily biased responses. Their letter does not address, for example, how the language in the survey was very likely drafted to produce strong anti-broadcaster results. Notably, NTCA/Incompas still fail to include the actual survey questions, which would likely show they were intended to produce the most politically advantageous responses.

NTCA/Incompas's vague claim that the survey was "structured under the guidance of an economist to maximize the integrity and reliability of the data received"⁴ attempts to prop up

¹ See Letter from Jill Canfield, NTCA, and Angie Kronenberg, Incompas (formally COMPTTEL), in MB Docket No. 15-216 (filed Nov. 2, 2015) ("NTCA/Incompas Nov. 2 Letter").

² *Id.* at 1.

³ See Letter from Rick Kaplan, NAB, in MB Docket Nos. 10-71, 15-216 (filed Oct. 28, 2015), attaching the NTCA/Incompas survey. NAB submitted NTCA/Incompas's survey one week after it was released to the press. NTCA/Incompas filed their survey with the FCC the next day, likely as a panicked response to our filing.

⁴ NTCA/Incompas Nov. 2 Letter at 1.

1771 N Street NW
Washington DC 20036 2800
Phone 202 429 5300

their flimsy survey with some air of legitimacy, but the Commission should not be fooled. It is telling that NTCA/Incompas fail to identify this “economist” and that the unnamed economist does not take ownership of the survey results. This phantom economist is more likely a red herring designed to distract the Commission from the fact that the survey was not constructed in a quantitatively meaningful way. Indeed, the survey, “like a Persian cat with its fur shaved, is alarmingly pale and thin.”⁵

NTCA/Incompas admit that their survey was designed with a “purpose” in mind – to quantify “to some extent the anecdotal information” regarding their members’ “difficulties obtaining access to video content” and to influence Washington policymakers.⁶ Of course, absolutely nothing in the survey actually shows that their members were not able to access video programming from broadcasters. The “results” at best indicate that their members do not like the fact that broadcasters ask for and obtain compensation in return for access to their signals, as Congress explicitly allows.

The organizations also repeat their specious argument that the FCC should tilt the scales in their members’ favor during retransmission consent negotiations because there is a “direct link between the offering of video programming and broadband adoption rates.”⁷ First, if there happens to be such a link, nothing in their ex parte filing(s) establishes it. Their argument is apparently based on the survey result reporting that 52 percent of their members “experienced an uptick in broadband adoption in the markets in which they provide video service.”⁸ This result is, of course, entirely unsurprising when one considers that broadband adoption rates have been increasing throughout the country.⁹ It does not establish, as NTCA/Incompas claim, some kind of causal link between the availability of video services and broadband adoption any more so than the results establish a causal link between potato chip consumption and availability of video programming. And, most importantly, it does not provide substantiation for any argument that elimination of broadcast programming specifically by NTCA/Incompas’s members would reduce broadband adoption rates.

Second, even if video services overall are somehow a major driver of broadband adoption, how does that lead to the conclusion that the Commission should intrude into the retransmission consent marketplace and enact rules effectively regulating only broadcast programming prices? The purported link between video services generally and broadband adoption does not suggest a specific retransmission consent marketplace failure; if anything, that marketplace is a success, as broadcasters and MVPDs reach deal after deal to provide broadcast signals to pay TV subscribers. Also, if video services are as vital to broadband adoption as NTCA/Incompas claim, then the prices charged by all video

⁵ *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992) (Posner. J.)

⁶ NTCA/Incompas Nov. 2 Letter at 1-2.

⁷ *Id.* at 1.

⁸ See Ex Parte Notice from Jill Canfield, NTCA, in MB Docket No. 15-216, Attached Survey at 2 (filed Oct. 29, 2015).

⁹ See FCC’s “2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment,” in GN Docket No. 14-126, at 54-58 (rel. Feb. 4, 2015).

programmers (not just broadcasters) should be *de facto* regulated and the Commission should prevent MVPDs from charging consumers for video services above and beyond what those MVPDs pay the programming providers that invest heavily to make their content so attractive to consumers. If broadband adoption is now the paramount goal, then under NTCA's and Incompas's own logic, the Commission should regulate consumer subscription video rates across the nation to promote higher broadband adoption.¹⁰

Finally, NTCA and Incompas reprise their tired and empty claim that rising prices demonstrate a market failure¹¹ (likely a controversial argument among their pay TV brethren who have collectively increased consumer bills at a pace much higher than inflation for decades). No rational observer of the media marketplace could conclude that broadcasters face less competition for eyeballs today than they did when Congress adopted a retransmission consent right in 1992. NTCA/Incompas members are merely lamenting the fact that after decades of building highly profitable businesses that have no inherent public interest value and that sell to consumers content they did not create, broadcasters and other programmers are pushing back and negotiating for payments that finally reflect marketplace value. NTCA's and Incompas's claim is particularly rich when they continue to benefit from the most significant marketplace failure in the MPVD context – outrageously priced set-top boxes.

The bottom line is that this latest missive from these MVPD organizations says little or nothing that the pay TV industry hasn't already said over the past decade, none of which improves with repetition or demonstrates that the FCC needs to modify its rules to benefit pay TV providers. This silly survey, along with any number of apparently manufactured retransmission consent disputes, should lead the Commission to not only deny the laundry list of pay TV interventionist requests, but also to close the good faith proceeding promptly so as to avoid more unnecessary consumer disruptions and a general waste of taxpayer dollars. NAB is dismayed that NTCA and Incompas found the language in our previous letter "inflammatory," but we will not sit quietly and watch while pay TV distributors and their lobbyists litter the record with shoddy surveys and other "data" falsely characterized as rigorous analytics.

Respectfully submitted,



Rick Kaplan
Executive Vice President and General Counsel
Legal and Regulatory Affairs

¹⁰ NAB observes that the Commission, however, has adopted policies that will, if anything, cause MVPDs' video services to increase in price. See *Amendment to the Commission's Rules Concerning Effective Competition, Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015).

¹¹ NTCA/Incompas Nov. 2 Letter at 2.