

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:)	
)	
Implementation of the Satellite Home Viewer Improvement Act of 1999)	CS Docket No. 99-363
)	
Retransmission Consent Issues)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

**Henry L. Baumann
Benjamin F.P. Ivins
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5300**

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Counsel

TABLE OF CONTENTS

Executive Summary.....ii

I. The Consistent Election Requirement for Cable Systems
Does Not Apply to Retransmission Elections for Satellite
Carriers or Other Non-Cable MVPDs.....1

 A. The Commission Lacks Authority to Extend the
 Consistent Election Requirement Beyond Cable Systems.....1

 B. Even if the Commission Had the Power to Do So, There Would Be No
 Reason to Apply the Consistent Election Requirement to Other MVPDs.....3

II. Satellite Carriers Should Be Required to Give Advance Notice
of Intent to Commence Local-Into-Local Service.....3

EXECUTIVE SUMMARY

Congress enacted the SHVIA to *encourage*, not discourage, free market negotiations between programmers and MVPDs, including satellite carriers. The Commission lacks authority to hinder this goal by coercing broadcasters to make the identical election with respect to all MVPDs serving a given market. Congress expressly limited this so-called “consistent election” requirement to cable systems, and has not authorized the Commission to extend it to other MVPDs. Nor is there any reason to do so, given Congress’ strong preference for marketplace negotiations, rather than government fiat, as a way of resolving retransmission consent issues.

The Commission should, however, take minimal, purely procedural steps to encourage the efficient operation of the election process. Specifically, the Commission should require satellite carriers to give advance notice to all stations in a market before commencing retransmission of any broadcast station in that market, to permit all stations (whether carried or not) to take into account changes in their market that may result from such retransmission.

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The National Association of Broadcasters (“NAB”)¹ hereby submits its comments in response to Part III of the Commission’s Notice of Proposed Rulemaking (“NPRM”) in the above-captioned matter.

I. The Consistent Election Requirement for Cable Systems Does Not Apply to Retransmission Elections for Satellite Carriers or Other Non-Cable MVPDs

A. The Commission Lacks Authority to Extend the Consistent Election Requirement Beyond Cable Systems

In the 1992 Act, Congress created a “consistent election” obligation applicable, by its terms, *only* to cable system elections. 47 U.S.C. § 325(b)(3). Although Section 325(b) of the Communications Act generally applies to “cable system[s] or other multichannel video programming distributor[s],” Congress expressly chose to limit the consistent election requirement found in subsection (b)(3) to cable systems alone: “If there is more than one *cable*

¹ NAB is a nonprofit incorporated association that serves and represents America’s radio and television broadcast stations and networks.

system that services the same geographic area, a station’s election shall apply to all such *cable systems*.” 47 U.S.C. § 326(b)(3) (emphasis added). Consistent with that statutory directive, the Commission’s implementing rule is similarly limited to cable systems: “If one or more franchise areas served by a *cable system* overlaps with one or more franchise areas served by another *cable system*, television broadcast stations are required to make the same election for both cable systems.” 47 C.F.R. § 76.64 (emphasis added).

If Congress had intended to extend the consistent election requirement to all MVPDs, as opposed to just cable systems, it could have -- and would have -- done so explicitly. See United States v. Hanousek, 176 F.2d 116, 1121 (9th Cir. 1999) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). In enacting the Satellite Home Viewer Improvement Act (“SHVIA”), Congress tellingly did not extend the consistent election requirement to other MVPDs, nor did it empower the Commission to extend the requirement beyond broadcaster-cable elections. Instead, the SHVIA directs the Commission simply to revise its existing regulations to “(i) establish election time periods [for satellite carriers] . . .; and (ii) until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith” 47 U.S.C. § 325(b)(3)(C). Since Congress did not amend the Act to expand the scope of the consistent election requirement, even though it was well aware of the existence of non-cable MVPDs such as satellite carriers, that requirement continues to relate solely to cable systems. The Commission, therefore, lacks the authority to extend this limitation to a broadcaster’s satellite carrier elections.

**B. Even if the Commission Had the Power to Do So,
There Would Be No Reason to Apply the
Consistent Election Requirement to Other MVPDs**

Even if the Commission were empowered to extend the consistent election requirement beyond cable systems -- which it emphatically is not -- there would be no reason to do so. When Congress first made retransmission consent applicable to MVPDs in 1992, it made clear that it intended to “establish a marketplace for the disposition of the rights to retransmit broadcast signals,” *without “dictat[ing] the outcome of the ensuing marketplace negotiations.”* *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 2965, ¶ 178 (1993) (quoting Senate Report on 1992 Cable Act) (emphasis added). Although Congress made a decision to override marketplace bargaining in one specific respect -- by requiring stations to make “consistent elections” among cable systems as a way to encourage cable overbuilders -- it did *not* do so with respect to other MVPDs, even though other types of MVPDs (such as wireless cable) existed at that time. That is, Congress recognized in 1992 -- and again in 1999 when it left the Act intact in this respect -- that marketplace bargaining, rather than government-dictated outcomes, will best serve the public interest in all cases other than in the cable system-vs.-overbuilder context.

**II. Satellite Carriers Should Be Required to Give Advance
Notice of Intent to Commence Local-Into-Local Service**

In creating retransmission consent procedures in the cable system/broadcaster context, the Commission required cable systems to provide 60-days advance notice by certified mail of the commencement of carriage of a station.² Unlike the intrusive and highly substantive

² See 47 C.F.R. § 76.64(l): “A cable system commencing new operation is required to notify all local commercial and noncommercial broadcast stations of its intent to commence service. The cable operator must send such notification, by certified mail, at least 60 days prior to commencing cable service.”

consistent election requirement discussed above, the advance notice requirement is the type of procedural detail that has been properly entrusted to the Commission and that should be extended to the satellite carrier/broadcaster retransmission consent context.

Specifically, the Commission should require MVPDs, including satellite carriers, to provide 60 days advance notice to all stations in a given market of the MVPD's intent to carry any station in the market and the channel on which the station will be carried. Although carried stations will get advance notice in the normal course after the six-month tolling of the retransmission consent requirement, during the current tolling period, it is possible that neither carried nor non-carried stations will receive any advance notice that one or more local stations is about to be retransmitted. After the expiration of that six-month tolling period, but prior to the commencement of must-carry in 2002, non-carried stations will continue not to know that changes in viewing patterns and other disruptions to their market are about to occur. Notice to all stations in a market of an MVPD's plan to carry one or more local stations in the market will give stations the ability to take steps to ensure that local viewers will continue to have access to the station's signals and will allow them to make appropriate strategic business and marketing decisions. After must-carry goes into effect, advance notice will enable stations to determine whether they are entitled to insist on carriage and to pursue appropriate remedies if they are indeed so entitled.

This proposed notice requirement will impose only a minimal burden on MVPDs and is more than warranted by the potential disruption that their retransmission activity could cause in stations' local markets.

Conclusion

The Commission should encourage free and open negotiations in the retransmission consent process and should not stifle the ability of broadcasters and MVPDs to choose to enter into agreements tailored to their specific circumstances. The Commission should, however, create a strictly procedural notification requirement to ensure that all stations in a market have advance notice of an MVPD's plans to carry one or more stations in that market.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5300

Henry L. Baumann
Benjamin F.P. Ivins

Counsel