

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 ) MB Docket No. 05-255  
Annual Assessment of the Status of )  
Competition in the Market for the )  
Delivery of Video Programming )

TO: The Commission

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits this reply to certain comments on the Commission’s *Notice of Inquiry* requesting data and information on the status of competition in the market for the delivery of video programming.<sup>2</sup> In this reply, NAB again refutes commenters’ repetitive complaints about the Commission’s well-established retransmission consent rules. As NAB and other broadcasters have previously shown, claims that the current retransmission consent regime unfairly disadvantages multichannel video programming distributors (“MVPDs”) and harms competition are unsubstantiated and misleading. Especially in light of the Commission’s recent conclusion that retransmission consent has fulfilled Congress’ purposes for enacting it and, indeed, benefits broadcasters, MVPDs and consumers, the Commission should reject these claims here. The Commission should similarly reject MVPD arguments about carriage and program exclusivity that are contrary to its localism goals. NAB also urges the Commission to be skeptical of the assertions of a single commenter about the allegedly low number of over-the-air television sets, when those numbers diverge widely from the

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<sup>1</sup> NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

<sup>2</sup> *Notice of Inquiry* in MB Docket No. 05-255, FCC 05-155 (rel. Aug. 12, 2005) (“*Notice*”).

results of several other studies estimating the number of over-the-air sets and the number of households dependent, solely or in part, on over-the-air broadcast television reception.

**I. The Commission Should Reject Repetitive And Groundless Claims That Retransmission Consent Harms Competition In The Video Marketplace.**

In its comments, the American Cable Association (“ACA”) reiterates previously asserted complaints about broadcasters and retransmission consent.<sup>3</sup> Not only have NAB and other broadcasters previously refuted these baseless complaints in detail,<sup>4</sup> the Commission itself recently concluded that the retransmission consent rules do not disadvantage MVPDs and that broadcasters, MVPDs and consumers all benefit from the retransmission consent process.<sup>5</sup>

As an initial matter, ACA’s complaints about the “spiraling” and “supra-competitive” retransmission consent fees that broadcasters “extract” from cable operators are puzzling at best. ACA Comments at 10-11. Just last month, the Commission reported that cable operators have in fact consistently refused to pay cash for retransmission consent. FCC Report at ¶¶ 10, 35. As a result, “virtually all retransmission consent agreements involve a cable operator providing in-kind consideration to the broadcaster,” and cash is not “a principal form of consideration for retransmission consent.”<sup>6</sup> Given that cable companies rarely pay cash for retransmission consent

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<sup>3</sup> See Comments of ACA in MB Docket No. 05-255 at 7-18 (filed Sept. 19, 2005) citing ACA Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93 and 76.102, Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity, RM No. 11203 (filed March 2, 2005) (“ACA Petition for Rulemaking”).

<sup>4</sup> See, e.g., NAB, *et al.*, Opposition to ACA Petition for Rulemaking, RM No. 11203 (filed April 18, 2005) (“NAB Opposition”); NAB, *et al.*, Reply to Comments to ACA Petition for Rulemaking, RM No. 11203 (filed May 3, 2005) (“NAB Reply”).

<sup>5</sup> FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) (“FCC Report”).

<sup>6</sup> FCC Report at ¶ 10. This in-kind consideration has included the carriage of affiliated nonbroadcast channels or other consideration, such as the purchase of advertising time, cross-promotions and carriage of local news channels. *Id.* at ¶ 35.

of local broadcast signals, the Commission should summarily reject claims that broadcasters' retransmission consent fee "demands" will "add \$2.50 - \$5.00 or more per month to basic cable rates" and "could easily cost smaller cable companies and their consumers more than an additional \$1 billion over the next 3 years." ACA Comments at 7-8. Even if broadcasters were able to obtain cash payments in return for carriage of their signals, this \$1 billion figure is fanciful at best. ACA's comments contain no data whatsoever substantiating this amount.<sup>7</sup>

Moreover, as NAB has previously pointed out, ACA members "want to have their cake and eat it too." NAB Reply at 7. In one breath, ACA argues that broadcasters are unreasonable in requesting cash payment for carriage of their local signals; in the next, ACA asserts that negotiating for carriage of additional programming services is also unreasonable.<sup>8</sup> In essence, ACA is repeating its argument that retransmission consent is somehow inherently invalid because broadcasters should give their content to cable systems without compensation in any form. There is, however, no legal, factual or policy reason that broadcasters – unique among programming suppliers – should be singled out not to receive compensation for the programming provided to

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<sup>7</sup> This \$1 billion figure also reflects a remarkable degree of inflation, as just last spring ACA claimed that broadcasters were demanding \$860 million for the next round of retransmission consent. *See* ACA Petition for Rulemaking at 24. NAB has already demonstrated that this \$860 million figure was wholly without foundation. *See* NAB Opposition at 11-12. And despite ACA's assertions, a General Accounting Office study did not find that retransmission consent has lead to higher cable rates. *See* GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 28-29; 43-44 (Oct. 2003).

<sup>8</sup> *See* ACA Comments at 10-12 (complaining about "bundling" and "tie-ins"). Echostar also objects to broadcasters trying to obtain carriage for additional programming, which, as discussed above, is rather ironic, given that broadcasters began to negotiate for carriage of additional program streams in direct response to cable operators' refusal to pay cash for retransmission consent of broadcast signals. *See* Comments of Echostar Satellite L.L.C. in MB Docket No. 05-255 at 8 (filed Sept. 19, 2005).

cable operators, especially given cable operators' increasing competition with broadcasters for local advertising revenue.<sup>9</sup>

ACA's comments also present an inaccurate picture of the video marketplace by contending that, in rural areas and smaller markets, "media conglomerates," motivated by "corporate greed," "exploit" medium and small cable operators by "squeez[ing] more and more pure profit" from them. ACA Comments at 8-11. As NAB has previously explained, this is not the case. *See* NAB Opposition at 3-6. In fact, a majority of cable subscribers in Designated Market Areas 100+ are served by one of the five largest cable MSOs, while only three percent of the television stations in these markets are owned by one of the top ten television station groups. *Id.* at 5 and Appendix A. The cable industry has also engaged in considerable consolidation and regional clustering in recent years (*see* Eleventh Annual Report at ¶¶ 15, 141), while, in contrast, a strict duopoly rule continues to limit broadcast television combinations in medium and small markets. Thus, in many instances in these 100+ markets, small broadcasters must deal with large nationally and regionally consolidated MVPDs in retransmission consent negotiations. And as the Commission itself has recognized, television broadcasters in small and medium markets are

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<sup>9</sup> Claims that MVPDs "must have" certain broadcast programming provide no support for ACA's complaints about broadcasters seeking compensation for carriage of their local signals. *See* ACA Comments at 7. After all, some non-broadcast programming (such as ESPN or CNN) may also be regarded as "must have" by MVPDs – and no one expects cable programmers to provide such nonbroadcast networks to cable operators without compensation. And despite the continuing popularity of many broadcast programs, competition to broadcast programming has grown to include nearly 400 national nonbroadcast networks. As a result, nonbroadcast networks have gained significant viewership and advertising revenue at the expense of broadcasters. *See* Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, FCC 05-13 at ¶¶ 14-15, 77 (rel. Feb. 4, 2005) ("Eleventh Annual Report"). Especially in light of these ever-increasing substitutes for traditional broadcast programming, ACA's assertions about the "must have" nature of broadcast programming provide no basis for finding that the retransmission consent rules are fundamentally unfair to MVPDs or harm competition in the video marketplace. *See* NAB Opposition at 3-4; 8-11.

currently facing severe financial pressures.<sup>10</sup> Thus, ACA's comments do not accurately depict competitive realities in medium and small television markets.<sup>11</sup>

In any event, the Commission's conclusions in its recent report to Congress demonstrate the absence of any reason to consider ACA's complaints here (or, indeed, in any other proceeding). Rather than harming competition in the video marketplace and unfairly disadvantaging MVPDs, the Commission concluded that retransmission consent has in fact fulfilled Congress' purposes for enacting it.<sup>12</sup> The Commission observed that the retransmission consent process benefits both broadcasters and MVPDs and, "[m]ost importantly, consumers."<sup>13</sup> Furthermore, the Commission stated that, "as a general rule, the local television broadcaster and the MVPD negotiate in the context of a level playing field in which the failure to resolve local

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<sup>10</sup> See *2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620, 13698 (2003). Low-rated network affiliated stations in these smaller markets are actually losing money, and even higher rated stations are suffering from declining profits.

<sup>11</sup> ACA has also misleadingly characterized the FCC's decision in its order approving the acquisition of DirecTV by News Corporation. See *Memorandum Opinion and Order* in MB Docket No. 03-124, 19 FCC Rcd 473 (2004) ("News Corp. Order"). ACA asserts that, in this order, the FCC recognized the "substantial market power" of "broadcast groups" and broadcasters' ability to unfairly disadvantage MVPDs by withholding or threatening to withhold their signals from MVPDs, especially medium and small cable operators. ACA Comments at 10-11. In fact, the portions of the News Corp. Order cited by ACA relate not to News Corporation's role as a broadcaster but its new role (after acquiring DirecTV) as an MVPD and, thus, its incentive and ability to withhold programming (such as regional sports and other programming) to disadvantage its MVPD competitors. See News Corp. Order at ¶¶ 176, 203, 204. Broadcast stations that are not affiliated with MVPDs would lack this incentive and ability to foreclose their programming from competing MVPDs.

<sup>12</sup> See FCC Report at ¶ 44 ("overall, the regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals").

<sup>13</sup> *Id.* Stations benefit from carriage arranged through retransmission consent because their programming and advertising are carried as part of the MVPDs' service, and MVPDs benefit because broadcasters' programming makes the MVPDs' offerings more appealing to consumers. "[C]onsumers benefit by having access to such programming via an MVPD." *Id.*

broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side.” FCC Report at ¶ 44. In light of these conclusions, there is no factual or legal basis for the Commission to find in this proceeding that the existing retransmission consent rules adversely affect competition in the video marketplace or harm consumers. Certainly ACA’s repetitive and unsubstantiated comments provide no such basis.

## **II. The Commission Should Reject Arguments About Carriage And Program Exclusivity That Are Contrary To Its Localism and Other Goals.**

In their comments, ACA and Echostar also make certain arguments contrary to the Commission’s and Congress’ well-established interest in localism and diversity. For example, ACA argues that small and medium-sized cable companies should be allowed to offer broadcast channels in standalone, optional packages, rather than on a basic tier distributed to all subscribers. ACA Comments at 17. The Commission clearly lacks the authority to permit this, as Congress has required cable operators to provide local broadcast signals “to every subscriber of a cable system.” 47 U.S.C. § 534(b)(7). Congress doubtless enacted this requirement due to its express concerns about cable subscribers retaining access to local, diverse information sources.<sup>14</sup> The Commission has similarly noted that cable systems typically do not provide local news and other local programming, except for the programming originated by broadcasters.<sup>15</sup> Moreover, requiring cable operators to provide local broadcast signals to all subscribers promotes the Commission’s diversity goals, as broadcast signals are the only channels on a cable system (except

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<sup>14</sup> See H.R. Rep. No. 628, 102d Cong., 2d Sess. at 56 (1992) (consumers who “rely on cable television for video services” should “not be deprived of the programs presented by their local television stations,” which include local news and information). In passing the 1992 Cable Television Consumer Protection and Competition Act requiring cable systems to carry local broadcast signals, Congress found that “[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services.” 47 U.S.C. § 521(a)(11) note.

<sup>15</sup> See, e.g., *Memorandum Opinion and Order on Reconsideration* in MM Docket Nos. 91-221 and 87-8, FCC 00-431 at ¶ 22 (2001).

for local access and PEG channels) that are not under the control of a single voice, the cable operator. For these reasons, permitting cable operators to place broadcast signals on an optional (and perhaps more expensive) programming tier, rather than providing those signals to all viewers, would undermine long-standing localism and diversity goals.

Echostar makes repetitive arguments about the well-established program exclusivity rules that similarly contradict the Commission's and Congress' localism goals.<sup>16</sup> NAB has previously explained that rules permitting television stations to preserve the exclusivity of programming in their local markets is essential to ensure the financial viability of local stations, to promote localism, and to enable broadcasters to fulfill their public service obligations.<sup>17</sup> Network affiliation and other program contracts that limit stations' rights to grant retransmission consent preserve local program exclusivity by preventing stations with duplicative programming from being imported by MVPDs into distant markets (thereby destroying both local program exclusivity and the audience and advertising base of local stations). Both Congress and the Commission have consistently respected and promoted stations' ability to obtain and enforce program exclusivity with respect to MVPDs by strictly limiting their importation of duplicative programming into local stations' markets.<sup>18</sup>

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<sup>16</sup> See Echostar Comments at 9-10 (objecting to the allegedly "anti-competitive" nature of network affiliation agreements that limit local stations' ability to grant retransmission consent for carriage of their signals outside their markets and about the influence of "third parties," such as networks or other programming suppliers, to "influence" broadcasters' exercise of their retransmission rights).

<sup>17</sup> See, e.g., NAB Opposition at 13-19; NAB Comments in MB Docket No. 05-28 at 5-11 (filed March 1, 2005).

<sup>18</sup> See, e.g., *Memorandum Opinion and Order* in Docket No. 19995, 56 FCC2d 210, 214 (1975); *Memorandum Opinion and Order* in MM Docket No. 92-259, 9 FCC Rcd 6723, 6746-47 (1994). See also 47 U.S.C. § 339(b) (extending network nonduplication, syndicated exclusivity and sports blackout rules to satellite retransmission).

Moreover, the Commission recently examined its network nonduplication and syndicated exclusivity rules and declined to recommend modifications to them, as urged by MVPDs. *See* FCC Report at ¶¶ 49-51. The Commission noted that Congress regarded these program exclusivity rules as “integral to achieving congressional objectives,” including the “continued availability” of “over-the-air television.” *Id.* at ¶ 50 and fn. 172. The Commission also noted its “long-standing policy favoring the provision of local broadcast service to communities,” and concluded that it would not be “in the public interest to interfere with contractual arrangements that broadcasters entered into for the very purpose of securing programming content that meets the needs and interests of their communities.” *Id.* at ¶ 50. Given these conclusions, Echostar’s comments provide no factual or legal basis for the Commission to find in this proceeding that the existing program exclusivity rules harm consumers or otherwise adversely affect the video marketplace.<sup>19</sup>

### **III. Other Studies Confirm NAB’s Estimates As To The Number Of Over-The-Air Television Sets.**

NAB has reported that approximately 73 million television sets in the U.S. are not connected to any MVPD service and receive all broadcast signals over-the-air. There are

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<sup>19</sup> Echostar also asks the FCC to “clarify” that the downconversion of broadcast high definition (“HD”) signals is not “material degradation” for purposes of satellite must-carry requirements. Echostar Comments at 21. This request is clearly contrary to settled law and policy. Congress required the Commission, when adopting regulations concerning satellite carriers’ carriage of local television signals, to issue regulations including “requirements on satellite carriers that are comparable to the requirements on cable operators under sections 534(b)(3) and (4).” 47 U.S.C. § 338(j). Section 534(b)(4) requires cable operators to carry the signals of local commercial television stations “without material degradation.” 47 U.S.C. § 534(b)(4). Thus, satellite carriers are prohibited from materially degrading the signals of the local commercial television stations (including the HD signals) they retransmit. While the FCC has yet to address pending petitions for reconsideration concerning the exact parameters of this material degradation prohibition in the context of cable, the principle is clear – satellite carriers will be subject to a “comparable” prohibition against the material degradation of the signals of local stations. And the FCC has already determined that “a broadcast signal delivered in HDTV must be carried” by the cable operator “in HDTV.” *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 2598, 2629 (2001).

approximately 45 million sets in the nearly 20.5 million households that rely solely on over-the-air broadcast television, and an additional 28 million sets in MVPD households remain unconnected to the MVPD service.<sup>20</sup> Other independent studies have confirmed these estimates. In June of this year, a Consumers Union (“CU”) and Consumer Federation of America (“CFA”) study found that approximately 80 million television sets are over-the-air.<sup>21</sup> In February 2005, the Government Accountability Office (“GAO”) found that 20.8 million households rely exclusively on over-the-air transmissions for their television viewing, and those households have about 44 million sets (2.1 sets per household). In addition, about one-third of satellite households and 16 percent of cable households have at least one television set that is not connected to cable or satellite but receives only over-the-air television signals.<sup>22</sup>

In stark contrast, the Consumer Electronics Association (“CEA”) states that only 32.7 million television sets in the U.S. are used for over-the-air television viewing.<sup>23</sup> Noting the consistency of the results reached by the studies of NAB, GAO and CU/CFA, the consumer groups observed that “the CEA estimate appears to diverge widely from other survey results in ways that cannot be explained.”<sup>24</sup> It seems that “CEA has significantly underestimated” the

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<sup>20</sup> See NAB Comments, MB Docket No. 05-255 at 2 (filed Sept. 19, 2005); Comments of NAB and Ass’n for Maximum Service Television, Inc., MB Docket No. 04-210 (filed Aug. 11, 2005).

<sup>21</sup> Consumers Union and Consumer Federation of America, *Estimating Consumer Costs of a Federally Mandated Digital TV Transition: Consumer Survey Results* at 1 (June 29, 2005) (“CU/CFA Study”).

<sup>22</sup> GAO, *Digital Broadcast Television Transition: Estimated Cost of Supporting Set-Top Boxes to Help Advance the DTV Transition*, GAO-05-258T at 7-9 (Feb. 17, 2005).

<sup>23</sup> Comments of CEA, MB Docket No. 05-255 at 6 (filed Sept. 19, 2005).

<sup>24</sup> CU/CFA Study at 6-7. In their survey, CU/CFA asked all over-the-air households, “when reporting the number of sets in their homes, to exclude sets that were used only for video/DVD watching, for video games, or were not used at all.” In questioning cable and satellite households, CU/CFA also “clearly distinguished between TV viewing using ‘connected’ sets and TV viewing on ‘unconnected’ sets via over-the-air signals using rooftop antennas or rabbit ears.” CU/CFA

number of over-the-air sets in the U.S. and, thus, the “impact of the DTV transition” on viewers who depend, solely or in part, upon free, over-the-air broadcast television reception for the delivery of video programming. CU/CFA Study at 7.

#### **IV. Conclusion**

For the reasons stated above, the Commission should reject repetitive and groundless claims by a few commenters that the existing retransmission consent and program exclusivity rules are anti-competitive and unfairly disadvantage MVPDs. Rather, as the Commission itself has recently found, these rules benefit broadcasters, MVPDs and consumers, and promote the Commission’s and Congress’ localism and diversity goals. The Commission should also be cautious of relying on low and divergent estimates about the number of over-the-air television sets in the U.S. so as not to understate the number of households dependent, solely or in part, on over-the-air broadcasting and, thus, underestimate the impact of the digital television transition on viewers.

Respectfully submitted,

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Study at 5. Thus, the vast differences in the estimates of the number of over-the-air television sets cannot be attributed to CU/CFA somehow counting millions of sets that are used for purposes other than receiving over-the-air signals.