

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

In the Matter of )  
 ) MB Docket No. 05-311  
Implementation of Section 621(a)(1) of )  
the Cable Communications Policy Act of )  
1984 as amended by the Cable Television )  
Consumer Protection and Competition )  
Act of 1992 )

TO: The Commission

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits these comments in response to the Commission’s *Notice of Proposed Rulemaking* in this proceeding.<sup>2</sup> The *Notice* sought comment on how to ensure that local franchising authorities (“LFAs”) do not unreasonably refuse to award franchises for providing multichannel video programming services to competitive entrants. NAB agrees with the Commission that promoting competition in the multichannel video programming distribution (“MVPD”) market is an important governmental goal. Greater competition in local video programming markets across the country would benefit consumers and programming providers unaffiliated with increasingly consolidated cable operators, including broadcasters. For these reasons, NAB urges the Commission to use the authority it possesses under the Communications Act of 1934 to take appropriate steps to ensure that the local

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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 Proposed Rulemaking* in MB Docket No. 05-311, FCC 05-189 (rel. November 18, 2005) (“*Notice*”).

franchising process does not unreasonably impede the entry of new competitors into the MVPD marketplace.

**I. The Deployment Of Competitive MVPD Services Will Benefit Consumers And Programming Providers, Including Broadcasters.**

Television broadcasters support efforts to speed the deployment of new and innovative MVPD services. Particularly in light of massive consolidation, including increasing national and regional concentration, in the cable industry, a new video distribution platform offers great promise.<sup>3</sup> MVPD services offered over broadband networks have the clear potential to introduce much needed competition into the marketplace. NAB sees this as a positive development for cable programming providers unaffiliated with cable operators, broadcasters and, most importantly, consumers. As the Commission recognized, consumers will benefit from the development and deployment of another, competitive distribution platform offering multichannel video and a variety of other services, including voice and Internet access. *See Notice* at ¶ 1 (increased competition should lead to lower prices and more choices for consumers). For example, the General Accounting Office (“GAO”) has found that cable rates in markets with competition from a provider using a wire technology (such as a local telephone company) were about 15 percent lower than cable rates in similar markets without wire-based competition.<sup>4</sup> In 2004, in markets where cable operators faced effective competition from wireline overbuilders, the average monthly cable rate and price per channel were, respectively, 15.7 percent and 27.2 percent lower than those

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<sup>3</sup> In June 2004, the four largest cable operators served about 58 percent of all U.S. cable subscribers. Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2763 (2005) (“Eleventh Annual Report”). This consolidation will only increase in the future, assuming that Comcast’s and Time Warner’s acquisition of Adelphia is approved.

<sup>4</sup> GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 9-11 (Oct. 2003).

averages for cable operators in communities without effective competition. Eleventh Annual Report, 20 FCC Rcd at 2773.

Video programming providers will also benefit from the timely deployment of a new video distribution platform. The emergence of another platform for the distribution of video programming will provide programmers unaffiliated with cable operators with an additional outlet for reaching viewers and therefore with greater opportunities for success in the marketplace. A number of cable programming networks and regional sports networks have expressed concern to the Commission that large, consolidated cable operators are increasingly able to exclude independent programming networks from their systems and, thus, from the marketplace.<sup>5</sup> The rapid deployment of a competitive video distribution platform will ameliorate such problems, thereby benefiting consumers through additional, diverse programming options.

In its pending proceeding on cable ownership limits, the Commission inquired as to “whether there is a relationship between [cable] ownership limits” and the “ability of independent programmers to gain carriage from cable operators.”<sup>6</sup> The Commission can address these stated concerns about cable operators disfavoring unaffiliated programmers by promoting other ways for programmers unaffiliated with cable operators to reach viewers and succeed in the marketplace. Expanding opportunities for video programmers unaffiliated with cable operators will further Congress’ goals in passing the Cable Television Consumer Protection and Competition Act of 1992, and will “promot[e] the widespread dissemination of information from a multiplicity of

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<sup>5</sup> See, e.g., Petition to Deny of America Channel, LLC, MB Docket No. 05-192 (filed July 21, 2005); Petition of TCR Sports Broadcasting Holding, LLP to Impose Conditions Or, in the Alternative, to Deny Parts of the Proposed Transaction, MB Docket No. 05-192 (filed July 21, 2005).

<sup>6</sup> Second Further Notice of Proposed Rulemaking, *The Commission’s Cable Horizontal and Vertical Ownership Limits*, 20 FCC Rcd 9374 at ¶ 60 (2005).

sources,” including those not under the control of cable operators.<sup>7</sup> Especially given past challenges to the vertical and horizontal cable ownership limits, the Commission should act to enhance the ability of unaffiliated programming networks to reach viewers through means other than traditional cable operators.

Local television broadcasters will also similarly benefit from the emergence of another competitive MVPD service. A new video distribution platform will represent another outlet for broadcast programming, including local news and information. Given broadcasters’ dependence on advertising revenue (and thus on reaching as many viewers as possible), the expansion of our opportunities for reaching consumers must be regarded as positive. The development of another video distribution platform for carrying broadcast programming may also encourage the development of innovative digital television programming, including multicast and high definition (“HD”) programming. If new MVPDs emerge as viable platforms for carrying local stations’ HD and multicast programs, broadcasters will be encouraged to make the substantial investments needed to bring their multicast service plans to fruition.<sup>8</sup> In the end, it is consumers that will benefit by receiving a greater diversity of programming, including local programming, from multicasting broadcast stations and unaffiliated cable programmers via a competitive MVPD.

Consumers will also benefit from extending long-standing policies designed to promote localism, competition and diversity – including carriage and retransmission consent for local

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<sup>7</sup> *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997) (recognizing this as an important governmental interest). *See also* 47 U.S.C. § 521(a)(5) nt (vertically integrated cable operators “have the incentive and ability to favor their affiliated programmers,” which “could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems”).

<sup>8</sup> *See July 2005 Survey of Television Stations’ Multicasting Plans*, Comments of NAB in MB Docket No. 05-255 (filed Sept. 19, 2005) (survey showed that, among commercial television stations that were currently multicasting or planning to multicast, about 80 percent would be unlikely to provide such services if these services were not carried by the major cable systems in their markets).

broadcast signals and the protection of local program exclusivity – equally to the new multichannel platforms. Over the past decades, Congress and the Commission have adopted and maintained must-carry, retransmission consent and program exclusivity policies to preserve the viability of local television stations and their ability to serve their local communities with a high quality mix of network and local programming. As Congress has recognized, and the Supreme Court has affirmed, the preservation of our system of free, over-the-air local broadcasting is “an important governmental interest.”<sup>9</sup> To maintain a level playing field, the well-established carriage, retransmission consent and program exclusivity policies applicable to traditional multichannel video providers, such as cable operators, should apply in a comparable manner to all new platforms that provide comparable video services.<sup>10</sup>

## **II. The Commission Should Take Appropriate Steps To Promote The Timely Deployment of Competitive MVPD Services Across The Country.**

Given the clear benefits for consumers and programming providers from the development of competitive MVPD services, the Commission should act to ensure that the local franchising process does not unreasonably interfere with the ability of new entrants to offer these services in a timely manner. As discussed in detail in the *Notice*, the Commission possesses the requisite authority under Section 621(a)(1) of the Communications Act to take appropriate steps to assure

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<sup>9</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-63 (1994). The FCC has also recently reaffirmed the importance of the retransmission consent and program exclusivity policies, and recommended that no changes be made in these policies. Report of the 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).

<sup>10</sup> Extending these requirements applicable to traditional MVPDs to new multichannel video platforms would also promote the FCC’s “goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner.” *Report and Order and Notice of Proposed Rulemaking* in CC Docket No. 02-33, FCC 05-150 at ¶ 1 (rel. Sept. 23, 2005) (FCC established new regulatory framework for broadband Internet access services offered by wireline facilities-based providers to be consistent with the regulatory framework for broadband Internet access services offered via cable facilities).

that the local franchising process does not unreasonably impede new competitors from entering the MVPD marketplace.<sup>11</sup> Commission action in this area would also be entirely consistent with congressional intent in revising Section 621(a)(1) in 1992. In amending this section, Congress noted that “incumbent cable systems often wage legal battles to prevent cities from awarding second franchises.” Congress also explained the “clear” benefits to be derived “from competition between two cable systems” in local markets, and concluded that “local franchising authorities should be encouraged to grant second franchises.” S. Rep. No. 92, 102d Cong., 2d Sess. 13-14 (1991).

As the *Notice* (at ¶ 1) explicitly recognized, increased competition in the MVPD marketplace “is one of the primary goals of federal communications policy.”<sup>12</sup> Consistent with this clear congressional policy, the Commission should take appropriate steps to promote the timely deployment of competitive MVPD services in local markets across the country. These steps should include ensuring that local franchising processes do not unreasonably impede the offering of new and innovative MVPD services to consumers.

### **III. Conclusion**

Promoting competition in the multichannel video marketplace is an important governmental goal because enhanced competition would benefit consumers and programming providers unaffiliated with nationally and regionally consolidated cable operators, including broadcasters. The Commission should use the authority it possesses under the Communications

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<sup>11</sup> 47 U.S.C. § 541(a)(1) (a franchising authority “may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise”).

<sup>12</sup> *See also* 47 U.S.C. § 521(6) (one of the purposes of Title VI is to “promote competition in cable communications”); 47 U.S.C. § 157 nt (FCC “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” including “high-quality voice, data, graphics, and video”).

Act to ensure that the local franchising process does not unreasonably impede the entry of new competitors into local MVPD markets.

Respectfully submitted,

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BROADCASTERS**

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A handwritten signature in black ink that reads "Jerianne Timmerman". The signature is written in a cursive style with a horizontal line underneath it.

Marsha J. MacBride  
Jane E. Mago  
Jerianne Timmerman

February 13, 2006