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

In the Matter of:	)	
	)	
Customer Rebates for Undelivered Video	)	
Programming During Blackouts	)	MB Docket No. 24-20
	)	
	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

I. INTRODUCTION

The National Association of Broadcasters (NAB)[1] submits these comments regarding the Commission's Notice seeking comment on a proposal to require cable operators and direct broadcast satellite (DBS) providers to give their subscribers rebates when those subscribers cannot access video programming on their multichannel platform due to contractual disputes with broadcasters or other program suppliers.[2] NAB does not take a position on whether the government should require cable, DBS, or other multichannel video programming distributors (MVPDs) to provide rebates. However, NAB urges the Commission to use the record in this proceeding to evaluate the veracity of pay TV claims in various settings that their proposed changes to laws or FCC rules – usually to hinder their broadcast television competitors – will enable them to reduce the rates they charge consumers. We also address

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[1] NAB is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *Customer Rebates for Undelivered Video Programming During Blackouts*, Notice of Proposed Rulemaking, MB Docket No. 24-20, FCC 24-2 (rel. Jan. 17, 2024) (Notice).

certain questions in the Notice about the reasons for disruptions in signal carriage on MVPD systems.

II. MVPDS' TRACK RECORD MAKES CLEAR THAT CONSUMER INTERESTS HAVE NO RELATIONSHIP TO THEIR CALLS FOR INCREASED REGULATION AND OTHER RESTRICTIONS ON BROADCASTERS

NAB observes that the very existence of a proceeding evaluating whether to require pay TV providers *not to charge consumers for services they are not providing* belies pay TV claims that increased broadcast regulation will improve outcomes for consumers. Pay TV providers have argued in numerous Commission proceedings and elsewhere that altering the legal and regulatory treatment of broadcasters, including retransmission consent, ownership limits, and even broadcast station transactions, will somehow result in them giving money back to their subscribers as a result.[3] Given that pay TV providers do not even "pass along"

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[3] *See, e.g.,* Letter from Mary Beth Murphy, NCTA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349 and 22-459 (Dec. 21, 2023); Letter from Mary Beth Murphy, NCTA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349 and 22-459 (Dec. 6, 2023); Letter from Mary Beth Murphy, NCTA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349 and 22-459 (Nov. 30, 2023); Comments of NCTA in MB Docket No. 22-459 (Mar. 6, 2023); Comments of NCTA in MB Docket No. 18-349 (Sept. 2, 2021); Comments of NCTA in MB Docket No. 18-349 (Apr. 19, 2019); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC MB Docket Nos. 18-349 and 22-459 (Dec. 20, 2023); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC MB Docket Nos. 18-349, 22-459, 23-405 (Dec. 6, 2023); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC MB Docket Nos. 18-349, 22-459 (Nov. 2, 2023); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 22-459 (Oct. 18, 2023); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 22-459 (Oct. 16, 2023); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 22-459 (Oct. 18, 2023); Reply Comments of ATVA, MB Docket Nos. 18-349, 22-459 (Mar. 20, 2023); Comments of ATVA, MB Docket Nos. 18-349, 22-459 (Mar. 3, 2023); Further Reply Comments of ATVA, MB Docket No. 18-349 (Oct. 2, 2021); Further Comments of ATVA, MB Docket No. 18-349 (Sept. 2, 2021); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71 (Mar. 18, 2021) (Chairwoman's Office Meeting); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71 (Mar. 18, 2021) (Bureau Meeting); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71 (Mar. 18, 2021) (Starks Office Meeting); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch,

the savings they receive when they are not paying for certain programming, it is unfathomable they would magically pass along any savings realized by improving their bargaining position via broadcast television stations through one-sided "reforms" to broadcast law and regulation. With multiple proceedings at more than one agency examining pay TV billing practices,[4] NAB

FCC, MB Docket Nos. 18-349, 10-71 (Mar. 18, 2021) (Carr Office Meeting); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71 (Mar. 17, 2021); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71, 15-216 (Feb. 5, 2021); Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 19-275 (Nov. 6, 2019); Comments of ATVA, MB Docket No. 18-349 (Apr. 19, 2019) (urging the Commission to retain its 1999 local television ownership rule and further expand the rule to cover multicast streams and low power television (LPTV) stations based on unsupported assertions that multicast and LPTV carriage of certain programming results in higher retransmission consent fees and higher consumer prices for MVPD service); *see also* Letter from Mary Beth Murphy, NCTA, to Marlene H. Dortch, FCC, MB Docket Nos. 03-185, 16-42, 22-261, 22-459 (Mar. 9, 2023) (opposing a proposal to open a new window for LPTV facilities changes until the Commission acts on NCTA's proposed changes to the local TV ownership rule to include LPTV stations); Letter from Radhika Bhat, NCTA, to Marlene H. Dortch, FCC, MB Docket No. 22-161 (Jun. 22, 2022) (urging FCC to impose conditions on proposed Standard General-TEGNA transaction); Comments of NCTA, MB Docket No. 19-30 (Mar. 18, 2019) (urging FCC to impose conditions on proposed Nexstar-Tribune transaction); Informal Objection of NCTA, File No. 0000214896 (June 20, 2023) (objecting to proposed sale of a single station). Countless proposals for additional regulation of retransmission consent have been filed by MVPDs, some of which were effectively seeking suspension of statutory provisions. *See, e.g.,* Establishment of a Digital Transition Quiet Period for Retransmission Consent, Petition for Expedited Rulemaking of Cequel Communications, LLC *et al.*, MB Docket No. 98-120 (Apr. 24, 2008) (urging the Commission to suspend MVPDs' statutory obligation to obtain retransmission consent for a period of time before and after the analog to digital television transition); Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent of Time Warner Cable *et al.*, MB Docket No. 10-71 (Mar. 9, 2010) (urging the Commission to require mandatory arbitration and "mandatory interim carriage" in the event of retransmission consent negotiating impasses). Obviously, the Commission cannot decide that the statutory obligation to obtain a broadcaster's consent for carriage of its signal can be suspended, but it appears that no call for additional broadcast regulation is too extreme for MVPDs. At the same time, MVPDs fought (and continue to fight) their decades-long battle to avoid any regulation of broadband. *See, e.g.,* Comments of NCTA, GN Docket No. 00-185 (Dec. 1, 2000); Comments of NCTA, WC Docket No. 23-320 (Dec. 14, 2023) (opposing common carrier regulation of broadband services in 2000 in 2023).

[4] *See, e.g., Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, Notice of Proposed Rulemaking, MB Docket No. 23-405, FCC 23-

urges the Commission not to rely on pay TV providers' hollow claims that any changes to broadcast regulation will reduce the likelihood of increases in the price of MVPD service, much less enable them to "pass savings on" to consumers.[5] Like early termination fees and other practices common among MVPDs, the refusal to provide rebates harms consumers, insulates MVPDs from the consequences of their own actions, and aids MVPDs in manufacturing disputes to create "evidence" of a supposedly "broken" system of retransmission consent.

III. THE PAY TV INDUSTRY'S STRATEGY OF ATTRACTING THE ATTENTION OF POLICYMAKERS INCENTIVIZES RETRANSMISSION CONSENT DISPUTES

NAB also wishes to address questions in the Notice regarding the reasons for what the Commission believes is an increase in the number of retransmission consent negotiating impasses that result in signal carriage disruptions on MVPD service.[6] As NAB discussed in two

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106 (rel. Dec. 14, 2023) (proposing to prohibit cable and DBS from imposing early termination fees or billing cycle fees on subscribers); *Trade Regulation Rule on Unfair or Deceptive Fees*, Notice of Proposed Rulemaking, No. R207011, 88 Fed. Reg. 77420 (2023); *All-In Pricing for Cable and Satellite Television Service*, Notice of Proposed Rulemaking, MB Docket No. 23-203, FCC No. 23-52 (rel. June 20, 2023).

[5] *See* Further Comments of ATVA, MB Docket No. 18-349 (Sept. 2, 2021) at 19 and Exhibit C (describing and attaching an article that allegedly demonstrates that "firms will pass through cost reductions" but with the qualifier that "the amount by which they are expected to do so depends on elasticities of supply and demand" and supplying no other evidence or even assertions that MVPDs will pass along cost savings that they claim would result from more broadcast regulation).

[6] Notice at ¶ 5 (asserting that there has been an increase in disruptions in signal carriage on pay TV platforms and seeking comment on the reasons for such increases). NAB has not independently analyzed whether there has been any increase in the number of negotiating impasses leading to signal carriage disruptions over the past ten years. Research conducted over several years demonstrates that such disruptions are extremely rare. *See* NAB Junk Fees Comments at 4, n. 11. The Notice also asks about the impact of streaming services, including live linear streaming services or virtual MVPDs (vMVPDs), on the success of carriage negotiations. *Id.* While NAB does not have information on whether the existence of vMVPD services affects the likelihood of carriage disputes on traditional pay TV platforms, we again encourage the Commission to explore the impact of vMVPD services on the Commission's

other recent filings, the leading cause of such disruptions, which remain rare, is the pay TV industry's desire to use consumers as pawns to push for a change in law. The pay TV industry shifted from a strategy of coordinated refusals to pay cash compensation for retransmission consent to relying on service disruptions as "evidence" of the need for changing retransmission consent laws and rules to give greater negotiating power to MVPDs.[7] NAB incorporates by reference its comments in two other pending proceedings that discuss MVPDs' strategy of creating negotiating impasses to draw the attention of policymakers and regulators as part of repeated attempts to obtain favorable modifications of retransmission consent laws and rules.[8] The best way to incentivize pay TV providers to remain at the negotiating table is allow the retransmission consent marketplace to function as Congress intended, without government intervening to place a thumb on the scale.[9] Any perceived opportunity to obtain changes to laws or rules that would further the pay TV industry's competitive advantages over broadcasters encourages MVPDs to generate negotiating impasses.

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public interest goals and the continued viability of television broadcasting by refreshing the record in its pending vMVPD proceeding. *See, e.g.,* Letter from Rick Kaplan, NAB, to Marlene H. Dortch, FCC Secretary, MB Docket No. 14-261 (Feb. 7, 2023).

[7] *See* Comments of NAB, MB Docket No. 23-405 (Feb. 5, 2024) (NAB Junk Fees Comments) at 2-5; Comments of NAB, MB Docket No. 23-427 (Feb. 26, 2024) at 8-10.

[8] *Id.*

[9] Notice at ¶5 ("Are there proposals we should consider to incentivize both broadcasters/ programmers and distributors to limit programming blackouts?"). The Notice also asks whether certain parties are more frequently involved in signal carriage disruptions. NAB has found that only two large national operators – DIRECTV and DISH – have been responsible for 89 percent of the very limited number of retransmission consent negotiating impasses from 2017 to 2023. NAB Analysis of SNL Kagan Retransmission Databases (Dec. 2023). (DIRECTV includes MVPD services provided by both AT&T U Verse and DIRECTV).

NAB knows of no evidence to support a view that changes in broadcast station ownership[10] have a role with respect to retransmission consent negotiations, particularly given that broadcast ownership remains heavily regulated by both antiquated limits on the reach one broadcast TV ownership group can have and the number of stations an owner can control in a given market.[11] Consolidation among MVPDs could certainly play a role since the pay TV industry is highly concentrated at the local, regional, and national levels and is not subject to any horizontal or vertical limitations. Pay TV filings describing the "challenges" faced by multibillion dollar behemoths like Charter Communications, Inc. negotiating retransmission consent with broadcasters lack any credibility, particularly when even larger broadcast owners are dwarfed by their MVPD counterparts.[12]

IV. CONCLUSION

NAB expresses no opinion on whether the government can or should mandate consumer rebates when MVPDs fail to provide programming a subscriber has paid for. But it should certainly look askance at claims by the pay TV industry that increased broadcast regulation will help anyone (other than the pay TV industry). NAB urges the Commission to

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[10] Notice at ¶ 5 ("Is increased consolidation in either the broadcaster or MVPD market leading to an increase in blackouts?").

[11] *See* 47 C.F.R. §73.3555(b), (e). *2018 Quadrennial Regulatory Review*, Report and Order, MB Docket No. 18-349, FCC 23-117 (Dec. 26, 2023), at ¶¶ 97-108 (adopting pay TV industry proposals to treat multicast and low power television stations as full power stations under the local television ownership rule). NAB knows of no commenter other than the pay TV industry that supported this rule change.

[12] For example, consider the market capitalizations of Charter Communications, Inc. ($40.13 billion) versus that of even the largest television broadcast groups such as Nexstar ($5.37 billion); TEGNA ($2.77 billion); or Gray Television ($556.54 million). Even a so-called "smaller" cable operator like ACA Connects member Cable One, Inc. has a $2.47 billion market capitalization. *See* Yahoo! Finance data as of March 6, 2024; *see also* About ACA Connects, *available at:* https://acaconnects.org/about/ (ACA Connects advocates for "small and medium-sized independent operators.").

continue to reject pay TV's calls for one-sided "reforms" in the context of retransmission consent,[13] and to consider the anti-competitive motivations of pay TV advocates seeking other broadcast regulations and restrictions.

Respectfully submitted,

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[13] *See, e.g., An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC Blog, Chairman Tom Wheeler (Jul. 14, 2016) (concluding a statutorily mandated review of the Commission's retransmission consent rules by stating that: "[b]ased on the staff's careful review of the record, it is clear that more rules in this area are not what we need at this point . . . So, today I announce that we will not proceed at this time to adopt additional rules governing good faith negotiations for retransmission consent.").