

Testimony of

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**Hearing on a Staff Draft of the Internet Protocol and
Broadband Services Legislation**

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Thank you, Mr. Chairman, for the opportunity to appear before the Subcommittee on Telecommunications and the Internet today. I am James Yager, Chief Executive Officer of Barrington Broadcasting Co., testifying on behalf of the National Association of Broadcasters (NAB). NAB is a nonprofit incorporated association of radio and television stations and broadcast networks, which serves and represents the American broadcasting industry.

The television broadcast industry is pleased to be testifying about the proposed legislation, which is intended to encourage the deployment of new and innovative Internet services such as broadband video services. Broadcasters see great promise in what this new video distribution platform will offer. Broadband video services have the clear potential to introduce much needed competition into the multichannel video programming distribution market. We generally see this as a positive development for consumers, broadcasters and other program providers.

As we embrace new technologies, however, it is vital that the legislation adopted continues to recognize the fundamental policy of localism that underlies our American broadcasting system and the importance of maintaining a robust system of local, over-the-air television. Congress, the Federal Communications Commission (FCC) and the courts have all explicitly recognized that public access to healthy, free over-the-air broadcasting is an important federal interest. For this reason, NAB submits that long-standing policies designed to promote localism, competition and diversity -- including carriage and retransmission consent for local broadcast signals and the protection of local program exclusivity -- must extend equally to all multichannel platforms. The proposed legislation needs to ensure that broadband video service providers are subject to requirements in these areas truly comparable to the requirements already

applicable to other multichannel video programming distributors (MVPDs), such as cable and satellite operators. As presently drafted, however, the legislation fails to ensure that these important policies apply to new broadband service providers in the same manner as they apply to other MVPDs. The legislation also opens the door to premature elimination of these still needed national policies. NAB urges that the legislation be amended to correct these specific, limited problems.

The Deployment of Broadband Video Services Has the Potential to Benefit Consumers and Programming Providers, Including Broadcasters.

Television broadcasters generally support efforts to speed the deployment of new and innovative Internet services, including broadband video services. Particularly in light of continuing consolidation and increasing national and regional competition in the cable industry,¹ a new video distribution platform offers great promise. Broadband video services have the clear potential to introduce much needed competition into the MVPD marketplace. We see this as a positive development for consumers, broadcasters and other program providers.

Consumers may benefit from the development and deployment of another, competitive distribution platform capable of bundling a variety of services, including voice, Internet access and video services. With regard to video services especially, past studies have shown that competition from satellite providers has not been effective in restraining price increases for cable television. For example, the General Accounting Office (GAO) found that cable rates in markets with competition from a provider using a wire technology (such as local telephone company) were about 15 percent lower than cable rates in similar markets without wire-based competition.

¹ 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, as Comcast and Time Warner are acquiring Adelphia’s systems.

Competition from satellite operators did result in improved quality and service, but did not result in a significant lowering of cable television rates.² The deployment of a new, competitive MVPD service may also benefit consumers by providing additional, diverse programming options.

Video programming providers, including broadcasters, may 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 with an additional outlet for reaching viewers and therefore with greater opportunities for success in the marketplace. Some cable programming networks and regional sports networks have recently expressed concern to the FCC that large, consolidated cable operators are increasingly able to exclude independent programming networks from their systems and, thus, from the marketplace.³ The rapid deployment of a competitive video distribution platform could help ameliorate such problems.

Local television broadcasters may 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 should be regarded as positive. The development of another video distribution platform for carrying broadcast programming would also encourage the development of innovative digital television programming, including multicast and high

² GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 9-11 (Oct. 2003). In 2004, the FCC reported, 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 averages for cable operators in communities without effective competition. Eleventh Annual Report, 20 FCC Rcd at 2773.

³ See, e.g., Petition to Deny of America Channel, LLC, MB Docket 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 05-192 (filed July 21, 2005).

definition (HD) programming. If local stations feel confident that their HD and multicast programming will be carried by broadband video providers, broadcasters will be encouraged to make the substantial investments needed to bring their multicast service plans to fruition. In the end, it is consumers that will benefit by receiving a greater variety of programming, including local programming, from multicasting broadcast stations via a broadband service provider.

Policies Necessary for Preserving Free, Over-the-Air Local Broadcasting Must Apply in the Same Manner to All MVPDs.

As NAB has testified in the past, our American television system is an important part of our national identity.⁴ Unlike other countries that offer only national television channels, the United States has succeeded in creating a rich and varied mix of *local* television outlets that give individual voices to more than 200 communities. But, local over-the-air TV stations – particularly those in smaller markets – can survive only by generating advertising revenue based on local viewership. If new technologies can erode local viewership by overriding program exclusivity rights of local stations and offering the same programs on stations imported from other markets, or effectively block their subscribers' access to local signals, the viability of local TV stations – and their ability to serve their local communities with high quality programming -- could be lost.

Over the past decades, Congress and the Federal Communications Commission have adopted and maintained certain requirements on MVPDs to preserve localism and local station program exclusivity. These are the principles that underlie the policies of syndicated exclusivity, network non-duplication, must-carry and retransmission consent.⁵ As Congress has recognized,

⁴ See Attachment, Testimony of Gregory Schmidt, Vice President of New Development and General Counsel for LIN Television Corporation, on behalf of NAB, before the House Commerce Committee, April 20, 2005 (NAB Testimony).

⁵ See NAB Testimony, pp. 3-10.

and the Supreme Court has upheld, preservation of our system of broadcasting is “an important governmental interest.”⁶

Earlier this year, NAB explained in other congressional testimony why must carry, retransmission consent and local program exclusivity are more necessary than ever to maintain our system of locally-based, free over-the-air broadcasting and why these policies should be applied to new technologies such as video over broadband.⁷ Since that time, the FCC has again recognized the importance of the retransmission consent and program exclusivity policies and recommended to Congress that no changes be made.⁸ NAB incorporates that testimony and reemphasizes here today that these long-standing requirements that apply to traditional MVPDs such as cable and satellite operators should apply in a comparable manner to new platforms that provide comparable video services.

The Proposed Legislation Fails to Apply Vital Regulatory Policies Comparably to Video Broadband Providers and Permits the FCC to Eliminate Long-Standing Policies Necessary to Preserve Our System of Broadcasting.

Section 304 of the proposed legislation purports to apply certain video regulations (including must carry, retransmission consent and program exclusivity) to broadband video service providers in a manner comparable to other MVPDs. As drafted, however, the legislation does not ensure that broadband video providers offering an MVPD service functionally equivalent to the services currently provided by cable and satellite operators will in fact be subject to comparable requirements. As drafted, the legislation prematurely gives the FCC broad discretion to eliminate, with regard to video broadband providers, long-standing policies

⁶ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-63 (1994).

⁷ NAB Testimony, pp. 2-12.

⁸ 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).

necessary to preserve our system of free, locally-based over-the-air broadcasting. It also may unintentionally grant authority to the FCC to undercut current statutory requirements on cable and satellite providers.

As an initial matter, NAB notes that Section 304(a)(1) of the legislation directs the FCC to “adopt for broadband video service providers comparable regulations as apply to” MVPDs in a variety of areas, including must carry and retransmission consent. This language would create a disparity in that certain requirements (such as must carry and retransmission consent) will only be regulatory requirements for video broadband service providers, while these are statutory obligations for cable operators.⁹ Regulatory requirements are clearly not comparable to statutory requirements. It could be argued that the FCC could waive such a regulatory requirement, while it may not, of course, waive any statutory requirement adopted by Congress. Thus, the FCC could possibly waive important policies such as must carry on the request of a video broadband provider without appropriate Congressional input, while Congressional action is clearly necessary to alter such requirements for a cable operator. This cannot be deemed to constitute “comparable” regulation. To correct this inconsistency in regulatory treatment, the legislation should make statutory for broadband video providers any requirement that is statutory for other MVPDs.

Another provision of the draft legislation is even more troubling. Section 304(a)(2) permits the FCC to eliminate any of the regulations applicable to broadband service providers (including must carry and related policies) adopted pursuant to Section 304(a)(1) of the

⁹ See 47 U.S.C. §§ 325, 534, 535.

legislation.¹⁰ This provision will give the FCC virtually unfettered authority to overturn policies that Congress has previously determined to be essential for preserving the benefits of free, over-the-air local broadcasting (especially for those who do not subscribe to an MVPD); for promoting widespread dissemination of information from a multiplicity of sources (particularly sources, such as broadcasters, not under the control of cable operators); and for promoting fair competition in the market for television programming.¹¹ While competition may eventually be sufficient to warrant some deregulatory modifications, it is not so evidently on the horizon that Congress should hand over its oversight of these important obligations to the FCC. To prevent the FCC from exercising this amount of undue discretion, the “quadrennial review” requirement in Section 304(a)(2) should be eliminated from the legislation.¹²

In addition, this legislation may unintentionally allow the FCC in the future to eliminate requirements such as must carry, retransmission consent and local program exclusivity even with regard to other MVPDs, such as cable operators. As cable operators continue to upgrade their facilities so they can offer broadband Internet services, two-way services and/or interactive services, they may arguably fall under the definition of a “broadband video service provider” in

¹⁰ Specifically, Section 304(a)(2) requires the FCC to review these regulations applicable to video broadband providers every four years and directs the FCC to eliminate those regulations to the extent the FCC determines they are no longer necessary as the result of economic competition.

¹¹ *See Turner*, 512 U.S. at 662-63 (finding that Congress adopted must carry to serve these three important governmental interests).

¹² NAB also notes that, in other contexts, quadrennial review requirements have not lead as expected to the elimination of regulations made unnecessary by increased competition, but has instead lead to extensive legal challenges of FCC actions and almost permanent legal uncertainty for communication service providers. For example, the FCC attempted, as statutorily required, to review the broadcast multiple ownership rules in 2002, but its revised rules were challenged in court. Most of these revised rules have consequently not gone into effect, but have been sent back to the FCC for further consideration and explanation. The FCC has not yet even begun this consideration of its 2002 review on remand, but is required by statute to conduct a new quadrennial review in 2006. There is no reason to believe that a quadrennial review process in the context of broadband service providers would operate any more efficiently or effectively.

Section 2(a). In such case, Section 304(a)(2), which permits the FCC to eliminate regulations adopted for broadband video service providers, would potentially allow the FCC to eliminate the long-standing requirements regarding must carry, retransmission consent and program exclusivity even for those providers traditionally regarded as cable operators. This loophole could therefore undercut express statutory requirements for must carry and retransmission consent that Congress adopted for cable operators in 1992 in order to preserve our system of free, locally-based television broadcasting. The legislation should be amended so that cable operators cannot simply recategorize themselves as broadband video service providers and thereby do an end run around long-standing policies that Congress and the Supreme Court have recognized as important.

Conclusion.

Broadcasters see great potential in the development of broadband video services to increase competition in the MVPD marketplace, thereby benefiting consumers, broadcasters and other program providers. However, in seeking to encourage the more rapid deployment of broadband video services, Congress should extend to this new multichannel platform long-standing policies that have successfully promoted competition and diversity in the video market for many years. As presently drafted, the proposed legislation fails to apply policies vital for the preservation of locally-based, free over-the-air broadcasting (including carriage and retransmission consent for local broadcast signals and local program exclusivity) to new broadband service providers in the same manner as they apply to other MVPDs. The legislation even permits the FCC unduly broad discretion to eliminate must carry and related policies that Congress has long believed were needed to maintain our system of television broadcasting.

NAB urges the Subcommittee to amend this legislation to correct these specific, limited problems.