

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

In the Matter of )  
 )  
Promoting the Availability of Diverse and ) MB Docket No. 16-41  
Independent Sources of Video Programming )

**COMMENTS  
OF  
NTCA–THE RURAL BROADBAND ASSOCIATION**

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**I. INTRODUCTION AND SUMMARY**

NTCA–The Rural Broadband Association (“NTCA”)<sup>1</sup> hereby submits these comments in the above-captioned Federal Communications Commission (“Commission”) proceeding.<sup>2</sup> The Commission seeks comment on a proposal to prohibit certain practices some multichannel video programming distributors (MVPDs) use in their negotiations for carriage of video programming that may impede competition, diversity and innovation in the video marketplace. While NTCA supports the Commission’s specific proposals to prohibit inclusion of “unconditional” most favored nation (MFN) provisions and unreasonable alternative distribution method (ADM) provisions in carriage agreements between MVPDs and independent video programming vendors, it suggests that additional steps would further the Commission’s stated goal for this proceeding is to “to remove marketplace obstacles that

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<sup>1</sup> NTCA represents more than 800 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of rural communications services. All of NTCA’s service provider members are full service local exchange carriers and broadband providers, and many provide mobile wireless, video, satellite, and long distance and other competitive services in rural America, as well.

<sup>2</sup> *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, MB Docket No. 16-41 (Rel September 29, 2016). (NPRM)

may hinder independent programmers from reaching consumers.”<sup>3</sup> In particular, greater consumer access to independent programming and diversity programming is more likely to be achieved if the Commission also addresses agreements that require forced bundling (tying) of content and/or tiering of programming as these contractual provisions substantially undercut small MVPDs’ ability to offer diverse programming.

## **II. BACKGROUND**

A recent member survey found that 72 percent of NTCA’s members currently offer some type of video service to their customers, and another 17 percent of those who do not currently offer video intend to do so by year end 2018. IPTV is the most common delivery technology used by respondents, with 46 percent using legacy coaxial cable in at least some portion of their service territory.<sup>4</sup>

For NTCA members, the ability to offer access to video content is generally considered an essential component of the business case for broadband deployment (including upgrading of existing broadband plant) and a key driver of broadband adoption in rural areas. A viable video product is therefore an important component in promoting the long-term viability of most rural telecommunications providers. As noted above, IPTV is the most commonly deployed video delivery platform among NTCA members, and it is dependent upon much of the same network infrastructure as broadband Internet access services.

Any MVPD’s ability to successfully deploy video services requires access to

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<sup>3</sup> NPRM. ¶3.

<sup>4</sup> 2015 NTCA Broadband/Internet Availability Survey Report  
<http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2015ntcabroadbandsurveyreport.pdf>

content its subscribers desire under reasonable terms and conditions. Independent programming is often more closely aligned with the interests of rural subscribers than the bundled programming of large content providers. Rural consumers have a need for foreign language programming to fulfill the needs of immigrants and migrant workers and refugees. Rural MVPDs are also more likely than their urban counterparts to desire programming to serve a Native American population or that is focused on the challenges of farming and ranching or on other activities that are more prevalent in rural areas, such as hunting, fishing, camping and hiking. Religious programming serves a need in areas where a preferred place of worship may be inaccessible due to distance. Many rural communities also have an aging population that relies heavily on video for entertainment that may differ from younger, more urban populations. Small, rural MVPDs will offer programming their customers want and promote the diversity offered by independent providers, if offered the opportunity to do so. Unfortunately, NTCA's members are hampered in their efforts to tailor programming to the needs and interests of their rural communities due to the activities of a select few, but large and powerful, content providers and MVPDs,

### **III. FORCED BUNDLING/TYING OF PROGRAMMING HINDERS RURAL PROVIDERS' EFFORTS TO OFFER DIVERSE PROGRAMMING**

NTCA has consistently opposed the commonly employed practice of forced "tying" provisions under which programmers require MVPDs to purchase content they do not want in order to obtain the "must have" content that their subscribers demand.<sup>5</sup> Forced tying is one of the most prevalent and pernicious problems faced by rural MVPDs and only serves to drive up

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<sup>5</sup> See, e.g. Comments of the National Telecommunications Cooperative Association, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Notice of Inquiry*, MB Docket No. 07-269 (May 18, 2009).

the retail price of their service offerings. While the lineup of video programming that consumers demand changes little from year to year, the channel lineups in rural MVPDs' service tiers are growing ever larger and more expensive, due to the forced bundling practices of network program providers and local broadcasters. The FCC itself aptly recognized this problem years ago, yet it remains a common practice that harms rural consumers.<sup>6</sup>

Nearly all NTCA members who offer video (98.7%) report that major content providers require them to take content they would not otherwise offer for the right to carry “must have” content. Not only must NTCA members take the unwanted content, they must pay for it – as much as ten to fifteen dollars per month, per subscriber – a cost that is ultimately borne by the consumer.<sup>7</sup> A content aggregator for small MVPDs, the National Cable Television Cooperative (NCTC), reported that it has negotiated master agreements with nine of the largest media groups and those media groups require the bundling of 65 channels.<sup>8</sup> Network-

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<sup>6</sup> See, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, MB Docket No. 07-29, Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, MB Docket No. 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17862-17863, ¶120 (2007) (Program Access NPRM) (emphasis added) (stating that “we note that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.”).

<sup>7</sup> Programmers argue that they provide standalone offers for must-have channels that reflect real market value. See, e.g., Comments of NBC Universal, Inc and NBC Telemundo License Co., MB Docket No 07-198 at 39 (Jan. 4, 2008) and Comments of the ABC Television Affiliates Association, *et al*, MB Docket No. 15-216, p. 42 (Dec. 1, 2015). But those arguments are disingenuous. NTCA's members report that stand-alone programming is rarely offered and when it is, it is no less expensive than the tied programming and oftentimes, more expensive. See also, Comments of the American Cable Association (ACA), MB Docket No. 16-41, p. 17 (March 30 2016).

<sup>8</sup> See, Comments of ACA, pp. 14-15 (March 30, 2016).

owned and affiliated broadcast stations also force small, rural operators to multi-cast secondary channels that few consumers will watch, further driving up cost and congesting networks.

The practice of bundling impacts the diversity of programming offered to rural consumers. Seventy-four percent of NTCA members specifically state that bundling limits their ability to offer independent or other programming their subscribers may want. For one, it places capacity constraints on the network. For companies that are not fully digital, channels that are forcibly tied to marquee content take up operators' limited space and prevent them from carrying diverse programming, even if it would be more desirable. For those MVPDs who do not suffer from capacity constraints, bundling drives up the retail price point so high that the market cannot bear additional increases for unique programming. Cost increases must be carefully managed by each provider to ensure that prices remain in line with their competitors, if any, and are no higher than what their market will bear. Bundling keeps prices at the margins.

Overall, bundling requires MVPDs across the board to carry the same homogenized programming. Not only does it limit the ability of MVPDs to distinguish themselves on anything other than customer service, it limits the programming consumers have access to. The Commission should take this opportunity to address forced bundling to weaken the stranglehold large program providers have on consumers and increase programming diversity in the video marketplace.

#### **IV. TIERING REQUIREMENTS IN MVPD CONTRACTS LIMIT DIVERSITY AND SHOULD BE PROHIBITED**

Closely related to the practice of bundling of content by the large program providers

is the requirement that operators carry channels - including bundled channels forcibly tied to necessary content, which subscribers are not interested in - on the highly penetrated tiers. The requirement has increased the size and cost of the expanded basic tier.<sup>9</sup> Not only does it make it impossible for providers to tailor a low-cost tier specifically to their subscribers' interests, it drives up the size and cost of the basic tier, making the cost of additional diverse programming unaffordable for many consumers.

Programming agreements often either name the tier on which it must be carried (*e.g.*, expanded basic or the MVPD's most widely subscribed tier) or they name a minimum percentage of subscribers who must receive the programming. Members report that tiering requirements raise the retail price point so high that the market cannot bear the price increases for unique programming to be carried in widely subscribed tiers.

Independent networks, to the extent a MVPD can carry them, are usually found on the tiers that offer the most programming. These tiers are also the most expensive and have the lowest subscribership – not because viewers do not want the programming, but because the cost of services is too high due to the inflated basic tiers. Rural MVPDs should be free to create and market video programming tiers as they see fit to meet the demands of their subscribers. Prohibiting content programmers' use of forced tiering arrangements would encourage product differentiation and competition among video service providers in rural areas, while enabling consumers to access the diverse, independent content they desire at affordable rates.

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<sup>9</sup> The Commission found that expanded basic grew from 44 channels in 1995 to 160 channels in 2013 and the price to consumers increased from approximately \$22.00 to more than \$64.00 over the same period. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 29 FCC Rcd 5280 ¶19, Table 4 (2014).



**V. UNCONDITIONAL MOST FAVORED NATION CONTRACT PROVISION MFNS AND ALTERNATIVE DISTRIBUTION METHOD RESTRICTIONS SHOULD BE PROHIBITED**

NTCA supports proposals to restrict unconditional most favored nation clauses in contracts between program providers and MVPD and alternative distribution methodology restrictions. These expansive contract provisions benefit only the largest MPVDs to the detriment of program diversity, small providers and consumer choice.

A large number (35%) of NTCA members report they have been directly told by content providers that a MFN clause with another operator prevented the content provider from offering the small MVPD a better price. Unconditional MFN provisions entitle a MVPD to receive the best terms and conditions from another distribution agreement without obligating it to agree to the reciprocal obligations of the other distributor that were the consideration for such terms and conditions. As the Commission recognizes, these provisions unduly limit programmers' flexibility to develop creative ways to grow their business.<sup>10</sup> But it also limits small MVPDs in their ability to work with programmers to negotiate better prices or packages that meet the unique needs of their subscribers.

Similarly, restrictive ADM provisions in program carriage agreements limit consumer choice and the ability of small MVPDs to be creative with their offerings via incorporation of more diverse programming. The rising costs of video programming continue to strain the resources of rural operators. As costs increase, rural operators are required to seek additional ways to monetize their broadband networks, even at the expense of their linear video offerings. An increasing number of NTCA members are looking at over the top strategies to provide video to their subscribers. Video is being provided via the broadband network through arrangements

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<sup>10</sup> NPRM, ¶ 12.

with companies such as Roku and TiVo. As this market grows, it is imperative that the Commission scrutinize arrangements between content producers and large MVPDs that prevent small, rural MVPDs from gaining access to web-based content.

ADM provisions that prohibit independent video programming vendors from distributing programming to consumers over the Internet for a limited period after the programming's initial airing on a linear MVPD service should be deemed unreasonable, as the Commission proposes. However, current contracts may also control the content delivery mechanisms such that content may not be delivered via the Internet. This limits consumer choice and program diversity. Contract provisions that prevent MVPDs who pay for content from offering that content via innovative, alternative delivery mechanisms should be prohibited. The Commission should ensure that consumers in rural areas have access to all of the video content that the Internet has to offer.

## **VI. THE COMMISSION HAS THE LEGAL AUTHORITY AND CONGRESSIONAL DIRECTIVE TO ADOPT THE MEASURES PROPOSED**

Section 601 of the Cable Act tells the Commission to ensure the accessibility to and dissemination of the "widest possible" diversity of information sources and services to the public.<sup>11</sup> Currently, content is largely controlled by a handful of very large content providers who, in conjunction with large MVPDs, adopt contracts that, as described above, effectively "squeeze out" more diverse independent programming from smaller producers and make it virtually impossible for such sources of content to gain a greater audience. The Commission has the authority to offer relief under section 616(a) which tells it to

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<sup>11</sup> 47 U.S.C. §521

adopt rules “governing program carriage agreements and related practices between [MVPDs] and video programming vendors.”<sup>12</sup> This mandate from Congress offers the Commission sweeping authority to “stem and reduce the potential for abusive or anticompetitive actions. . . .”<sup>13</sup> Furthermore, the purpose of section 628 is to increase competition and diversity in the MVPD marketplace and it prohibits “a cable operator . . . or a satellite broadcast programming vendor [from engaging] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing . . . programming to subscribers or consumers.”<sup>14</sup> Adopting rules that remove contractual marketplace obstacles that hinder independent programmers from reaching consumers served by small providers directly advances Congress’ intent and stated goals.

The Commission holds further ancillary authority under sections 154(i) of the Act which calls upon it to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”<sup>15</sup> Furthermore, the Commission has previously asserted its ancillary authority to enhance consumers’ access to programming<sup>16</sup> and may do so to address the harms described *infra*.

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<sup>12</sup> 47 U.S.C. § 536(b).

<sup>13</sup> H.R. Rep. No. 102-628, 102d Cong. 2d Sess. at 27.

<sup>14</sup> 47 U.S.C. §548

<sup>15</sup> 47 U.S.C. § 154(i).

<sup>16</sup> *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, FCC 10-17, Paras 10-17 (rel. Jan 28, 2010) (relying on the Commission’s ancillary authority to establish standstill rules for program access disputes).

## VII. CONCLUSION

Small, rural MVPDs are continually stymied in their efforts to offer their subscribers affordable, diverse programming. Due to their small size, rural operators lack the negotiating leverage of large MVPDs and must accept unreasonable contractual provisions that prevent them from offering a product specifically tailored to the communities they serve. NTCA supports the Commission's efforts to restrict unconditional MFN and ADM provisions in contracts, but if the Commission's intent is to promote diversity in programming and the ability of independent program providers to gain an audience, it must do more. The Commission should also address unreasonable clauses in contracts between large content providers and small, rural operators that require the forced tying and/or tiering of programming.

Respectfully Submitted,



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