Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

June 26, 2014

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. THE COMMISSION HAS THE AUTHORITY TO REFORM THE NETWORK NON-DUPLICATION AND SYNDICATED EXCLUSIVITY RULES 3

III. REFORMING THE RULES WILL RESULT IN LOWER CONSUMER RATES AND INCREASED BROADBAND INVESTMENT 5

IV. SMALL AND RURAL VIDEO PROVIDERS SHOULD HAVE THE OPTION TO RECEIVE LOWER PRICED BROADCAST CONTENT FROM NEIGHBORING MARKET AREAS 6

V. COMMISSION RULES SHOULD FACILITATE THE ABILITY OF RURAL MVPDS TO GAUGE MARKET RATES FOR PROGRAMMING 7

VI. THE COMMISSION SHOULD PROHIBIT PROGRAMMING VENDORS FROM REQUIRING RURAL MVPDS TO PAY FOR UNDESIRED PROGRAMMING IN ORDER TO GAIN ACCESS TO DESIRED PROGRAMMING 8

VII. THE COMMISSION SHOULD PROHIBIT MANDATORY BROADBAND TYING, WHERE SMALL AND RURAL MVPDs MUST PAY PER-SUBSCRIBER FEES FOR NON-VIDEO BROADBAND CUSTOMERS 9

VIII. CONCLUSION 10

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NTCA–The Rural Broadband Association[1] ("NTCA") hereby submits these comments in response to the Federal Communications Commission's ("Commission") Further Notice of Proposed Rulemaking ("FNPRM") in the above referenced docket. In its FNPRM, the Commission seeks comment on whether it should eliminate or modify its network non-duplication and syndicated exclusivity rules.

I. INTRODUCTION AND SUMMARY

NTCA's members have a vested interest in the outcome of this proceeding. The provision of video services a key to the ability of rural local exchange carriers ("RLECs") to deliver robust broadband services to consumers in high-cost areas. Access to video content at affordable rates and under reasonable terms and conditions is needed not only to generate greater video competition, but also to spur network investments in rural areas. A substantial majority of respondents to NTCA's most recent video survey,[2] nearly 77 percent, indicated that they

[1] NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and broadband providers, and many provide wireless, video, satellite, and/or long distance services as well.

[2] NTCA 2013 Broadband/Internet Availability Survey Report (released May 2014). http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2013ntcabroadbandsurveyreport.pdf

currently offer video services to customers.[3] Significantly, 98.6 percent of respondents – whether they currently provide video or not – stated that access to reasonably-priced programming is a significant barrier to the provision of video services. It is therefore unsurprising that 48.6 percent also named the challenges associated with making a business case for offering video services as a main impediment to the provision of these services. RLECs encounter inherent disadvantages serving high-cost, sparsely populated areas, and lack the scale and scope as compared to larger Multichannel Video Program Distributors ("MVPDs").

To address the inherent inequities in the current retransmission consent process, the Commission should revise its rules so that small and rural MVPDs have the option to receive broadcast content from neighboring MVPDs, lift the veil that shrouds retransmission consent prices in secrecy so that video providers can determine a fair market value for content, and address the tying arrangements that are common in the provision of video content. MVPDs should not be forced to take undesired programming to receive "must have" content, and mandatory broadband tying, the practice of requiring MVPDs to pay an additional fee based on the number of broadband subscribers they serve regardless of whether or not those customers subscribe to video services, should not be permitted. Furthermore, broadcasters should not be permitted to block their on-line content to the broadband subscribers of a video provider with which it is unable to reach a retransmission consent agreement. The Commission has the authority to reform the retransmission consent rules and should act to protect consumers from exponentially increasing video prices.

[3] Internet protocol television ("IPTV") was the most common delivery technology cited by respondents, at 80.3 percent. Legacy coaxial cable was used by 55 percent, while only 7.4 percent reported offering video via direct broadcast satellite. These figures total more than 100 percent as many respondents use more than one technology depending on the needs of their service areas.

II. THE COMMISSION HAS THE AUTHORITY TO REFORM THE NETWORK NON-DUPLICATION AND SYNDICATED EXCLUSIVITY RULES

The Commission has the authority and responsibility to reform retransmission consent rules without delay. As the Commission recognizes, Congress did not mandate that the Commission adopt the network non-duplication and syndicated exclusivity rules for cable.[4] In the plain text of section 325(b)(3)(A) of the Cable Act of 1992 ("Cable Act"), Congress instructed the Commission "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[5] This language imparts direct authority to the Commission to set, and, if necessary, revise, ground rules for a retransmission consent regime that will enable broadcasters and programmers to receive fair payment for their material, in a manner consistent with other legislative goals, including increased consumer access to video programming. The same section further instructed the Commission to account for "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier. . ." while ensuring that the retransmission consent regime does not conflict with the need "to ensure that the rates for the basic service tier are reasonable."[6] The text of section 325 expressly gives the Commission broad authority to adopt rules that protect the public interest as it relates to broadcasters' grant of retransmission consent rights to MVPDs.

The Commission's ability to address retransmission consent is further buttressed by ancillary authority conveyed through section 706 of the Telecommunications Act of 1996 ("1996 Act"). This section mandates that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" using

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[4] FNPRM, ¶ 56.

[5] 47 U.S.C. 325 (b)(3)(A).

[6] *Id.*

a variety of means, including the utilization of "methods that remove barriers to infrastructure investment."[7] Perceiving the linkage between video and broadband services, the Commission has used its ancillary authority under section 706 to modify rules related to video services in the past, specifically in the 2007 *Local Franchising Order*,[8] and later the same year in the *Multiple Dwelling Unit Order*.[9]

Notably, these precedents were set when the Commission had determined under Section 706 that broadband deployment *was* being deployed to all Americans in a reasonable and timely fashion. Subsequently, the Commission reversed that finding and concluded that deployment is *not* occurring in a reasonable and timely fashion, mostly in rural communities located throughout the country.[10] If this is the case, section 706 directs the Commission to "take *immediate action* to accelerate deployment"[11] of advanced services by removing barriers to infrastructure investment. Given the proven link between access to video content and broadband deployment, the antiquated retransmission consent regime is clearly a barrier that section 706 requires the Commission to remove without delay. By following the recommendations provided below, the Commission will spur competition in the video market, as required by the Cable Act of 1992, and will remove barriers to broadband investment and deployment as directed by section 706 of the 1996 Act.

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[7] 47 U.S.C. § 1302(a).

[8] MB Docket No. 05-311, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2007); *see also* ¶¶ 4, 13, 18, 41, 51-52, 64.

[9] MB Docket No. 07-51, 22 FCC Rcd 20235, 20257-20258, ¶ 47 (2007); *see also* ¶¶ 46, 52, 78.

[10] GN Docket Nos. 09-137, 09-51, 25 FCC Rcd 9556, 9574, ¶ 28 (2010). *See also*, GN Docket No. 10-159, 26 FCC Rcd 8008, 8035, ¶ 52 (2011).

[11] 47 U.S.C. § 1302(b) (2010) (emphasis added).

When Congress extended the Commission's regulations concerning network non-duplication and syndicated exclusivity to open video systems[12] and nationally distributed superstations by satellite carriers,[13] Congress indeed to place carriers on an equal footing with cable operators with respect to the availability of television program, not create a new statutory right or obligation.[14]

III. REFORMING THE RULES WILL RESULT IN LOWER CONSUMER RATES AND INCREASED BROADBAND INVESTMENT

The rules as they currently exist harm consumers. While the exclusivity rules were based on the Commission's concern that a cable system's duplication of local programming via the signals of distant stations was not a fair method of competition with broadcasters because of the real or perceived inferior bargaining power of broadcasters as compared to cable systems, the scales long ago tipped in favor of the broadcasters. Each broadcast station is "essential programming" for any MVPD and current rules dictate that a MVPD may get each from only one source – no matter the price. Retransmission of broadcast stations has become a cash cow for broadcasters, as they are insulated from market forces and competition.[15] The rules as they currently exist essentially require a small MVPD to pay whatever retransmission rates are demanded by the broadcast station within a given designated market area ("DMA"). The MVPD is not permitted to purchase programming from an alternative broadcast station in a neighboring DMA even if offered at a lower rate. These rules provide broadcasters with a "one-sided level of protection," and artificially-inflated bargaining leverage in retransmission consent negotiations.

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[12] 47 C.F.R. §§ 76.92, 76.151.

[13] 47 C.F.R. §§ 76.92, 76.151.

[14] *See*, discussion in FNPRM, ¶¶ 56, 57.

[15] NTCA's members report that broadcast stations are demanding 150 percent increases in retransmission consent fees.

The lack of competition leads to higher consumer rates and diminished broadband investment, and it is no longer justified.

IV. SMALL AND RURAL VIDEO PROVIDERS SHOULD HAVE THE OPTION TO RECEIVE LOWER PRICED BROADCAST CONTENT FROM NEIGHBORING MARKET AREAS

The current rules are especially harmful to small and rural video providers. These providers lack the scale and scope that command better prices. Small providers are in a much worse bargaining position than their brethren MVPDs and are believed to pay higher prices for network affiliated broadcast content.[16] While there are some exemptions to the exclusivity rules for certain small MVPDs, they are limited and should be expanded.[17] When distant signals are imported it is to the benefit of consumers who are able to view content that is more relevant to them.

The rules should be amended so that small and rural video providers may consider and receive lower programming rates from alternative broadcast stations in neighboring DMAs. Network and affiliate contractual provisions that preclude a local broadcaster from allowing its signal to be imported by a distant cable operator should be prohibited. This revision of the rules would create a competitive market for broadcast stations and impart no harm to consumers who

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16 In its filing with the Security and Exchange Commission on June 6, 2014, AT&T described the expected benefits of its merger with DirectTV, "[p]rogramming cost reductions are the most significant part of the expected cost synergies. At this time, AT&T's U-verse content costs represent approximately 60% of its subscriber video revenues. With the scale this transaction provides, we estimate AT&T's U-verse content costs after the completion of the transaction will be reduced by approximately 20% or more as compared with our forecasted standalone content costs." Under the terms of the $49 billion buyout agreement, AT&T will expand its service to an additional 15 million customers.

17 *See* Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010, MB Docket No. 10-148, FCC 10-194, Report and Order and Order on Reconsideration, ¶ 2 (rel. Nov. 23, 2010).

would still receive local content, whether from the historical DMA or a neighboring one.[18] MVPDs will seek to serve their consumers by offering the local content that is most desired, looking to other DMAs only when the price outweighs the perceived value. Broadcasters will necessarily lower their retransmission consent prices to a competitive rate to retain the consumers and advertising dollars. The market will work as it should.

V. COMMISSION RULES SHOULD FACILITATE THE ABILITY OF RURAL MVPDS TO GAUGE MARKET RATES FOR PROGRAMMING

As NTCA and others have previously noted,[19] mandatory non-disclosure agreements demanded by broadcasters and other content providers in contracts for programming prohibit small and rural MVPDs from disclosing the rates they pay, even to policymakers who may request this information. Similarly, these agreements prevent MVPDs from learning the true market value of video content.[20] As small and rural MVPDs cannot confirm that the price at which programming is being offered to them is even roughly comparable to what other MVPDs in the marketplace are paying for the same content, their ability to negotiate fair and reasonable rates is compromised from the outset. Therefore, the Commission should enable the market to function effectively by prohibiting the use of mandatory non-disclosure provisions, and it should

[18] This is especially important for consumers who live in DMAs that are centered in neighboring states, as it impairs their ability to receive in-state news content that may be more relevant to them.

[19] *See* comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), NTCA, the Independent Telephone and Telecommunications Alliance, the Western Telecommunications Alliance, and the Rural Independent Competitive Alliance, MB Docket No. 10-71 (fil. May 27, 2011), p. 16 ("Joint Retransmission Consent Comments").

[20] Research has been conducted indicating that small MVDPs endure price discrimination; *see*, *e.g.*, ACA comments, MB Docket No. 07-269 (fil. May 20, 2009), pp. 4-16. However, aggregate data is of limited use for small MVPDs seeking access to content under the current rules.

find a means to demand from content holders the information needed for the Commission to make informed decisions about the state of these markets.

VI. THE COMMISSION SHOULD PROHIBIT PROGRAMMING VENDORS FROM REQUIRING RURAL MVPDS TO PAY FOR UNDESIRED PROGRAMMING IN ORDER TO GAIN ACCESS TO DESIRED PROGRAMMING

NTCA has consistently opposed the commonly employed practice of forced tying in which programmers require MVPDs to purchase undesired content in order to obtain the content they actually want.[21] Forced tying is one of the most prevalent and pernicious problems faced by small and rural MVPDs. In practice, the only viable way that small and rural MVPDs may gain access to "must-have" programming is to agree to purchase unwanted programming, which drives up the retail price of their service offerings. Rural MVPDs have found that in order to provide customers with access to the 10 most requested channels, it is necessary to pay for and distribute as many as 120 to 125 additional programming channels.[22] 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 tying practices of network program providers and local broadcasters. The FCC itself aptly recognized this problem years ago, and noted how it affected small MPVDs in particular:

> "When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of

[21] Joint Retransmission Consent comments, p. 16.*; see also* OPASTCO, NTCA, RICA, and WTA *ex parte* letter, MB Docket No. 07-198 (fil. Aug. 15, 2008).

[22] NTCA comments, MB Docket No. 07-26 (fil. May 19, 2009), pp. 4-5; NTCA comments, MB Docket Nos. 07-29, 07-198 (fil. Jan 4, 2008), pp. 16-17.

> higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. We note that the competitive harm and adverse impact on consumers would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster or is affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a noncable MVPD or a nonaffiliated independent network. **Moreover, 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**."[23]

In short, forced tying unnecessarily increases smaller MVPDs' costs and prevents them from offering affordable service packages. This limits rural MVPDs' ability to effectively compete in the video services market and diminishes consumer choice. The Commission should therefore ban forced tying immediately.

VII. THE COMMISSION SHOULD PROHIBIT MANDATORY BROADBAND TYING, WHERE SMALL AND RURAL MVPDs MUST PAY PER-SUBSCRIBER FEES FOR NON-VIDEO BROADBAND CUSTOMERS

To obtain "must-have" video content, some content providers and broadcasters require MVPDs to pay an additional fee based on the number of broadband subscribers they serve, regardless of whether or not those customers subscribe to video services. This practice, commonly known as "broadband tying," amounts to a forced payment on a per-customer basis for access to online content (regardless of whether or not the customer views it), in addition to purchasing subscription video programming. Broadband tying goes well beyond the realm of any reasonable condition for access to traditional subscription video content. More recently, programmers have cut off access to their online content for customers of MVPDs with whom the

[23] MB Docket Nos. 07-29, 07-198, 22 FCC Rcd 17791, 17862-17863, ¶ 120 (2007) (emphasis added).

programmer is engaged in a retransmission consent dispute, ensuring that customers are "caught in the middle" and further illustrating the need to reform the imbalance in the current rules.

While parties may wish to negotiate packages that incorporate the optional tying of broadband content with subscription video programming, programmers that have engaged in broadband tying have typically done so in a "take-it-or-leave-it" manner that violates the Commission's "good faith" requirements. If an alternative is eventually offered by a programmer, the rates involved are so prohibitive as to effectively force the rural MVPD to accept the broadband tying or forgo the "must have" content.

Additionally, some programmers have required small and rural MVPDs to promote their web sites. Some also require MVPDs to submit payments for, and promote web sites to, broadband customers that not only do not subscribe to a carrier's video service, but are also located outside of the MVPD's video service territory.

Each of the practices described above is an unfair practice that forces small and rural broadband providers to either absorb the additional costs or raise their end-user rates for broadband, neither of which benefits rural consumers. At a time when the Commission has expressed concern in other contexts about how various market players leverage power to dictate terms of consumer access to online content, this dynamic can no longer be ignored and a fix here must be seen as part of any effective solution. Moreover, higher rates for broadband discourage broadband adoption, contrary to Commission goals. The Commission should therefore prohibit the use of mandatory broadband tying provisions in contracts for video content.

VIII. CONCLUSION

For the above mentioned reasons, the Commission should reform the retransmission consent rules so that video providers have the option to receive content from neighboring DMAs,

prohibit the use of non-disclosure agreements that prevent providers from learning the fair value of broadcast programming, and prohibit arrangements that tie desired broadcast programming to other video or on-line programming.

Respectfully submitted,

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