

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Commission Launches Modernization of Media Regulation Initiative)	MB Docket No. 17-105
)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014)	
)	
Totality of Circumstances Test)	MB Docket No. 15-216
)	
Amendment of the Commission's Rules Related to Retransmission Consent)	MB Docket No. 10-71
)	

COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

I. INTRODUCTION

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits these comments in response to the Public Notice in the above-captioned proceeding.² The Notice seeks comment regarding steps the Commission might take to enhance the public interest through the modification or repeal of various media regulations. NTCA appreciates the opportunity to suggest modifications to outdated rules that have not kept pace with technological and marketplace changes. These comments encourage the Commission to update rules to inject much-needed transparency and market forces into the antiquated retransmission consent regime.

¹ NTCA represents nearly 850 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. All of NTCA’s service provider members are full service rural local exchange carriers (“RLECs”) and broadband providers. Approximately 75 percent serve as multichannel video programming distributors (“MVPDs”) using a variety of technologies in sparsely populated, high-cost rural markets.

² *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, FCC 17-58 (rel. May 18, 2017) (“Notice”).

This could be accomplished by “right-sizing” the exemptions from network non-duplication and syndicated exclusivity rules to include all small MVPDs, and by allowing small MVPDs to gauge the market value of the programming they seek so that actual negotiations may take place.

II. COMMISSION RULES SHOULD BE UPDATED TO INJECT TRANSPARENCY AND MARKET FORCES INTO THE OUTDATED RETRANSMISSION CONSENT PROCESS

The records in various proceedings are replete with demonstrations of how outdated retransmission consent rules, a lack of transparency through mandatory non-disclosure provisions with no effective access to practical recourse for small providers,³ and toothless “good faith” requirements,⁴ have led to increased consumer blackouts,⁵ impediments to new entrants and competition in the MVPD market, a decline in the number of small MVPDs serving high-cost rural markets,⁶ and, given the recognized intrinsic link between video and advanced services,⁷ increased barriers to broadband investment and deployment.⁸ Rather than reexamine these facts in detail once more, and if comprehensive retransmission consent reform will not be forthcoming, the Commission should address these persistent infirmities through targeted rule updates designed to inject transparency and allow market forces to improve the dysfunctional retransmission consent process currently experienced by small MVPDs.

³ See, e.g., Joint Reply Comments Of The Networks For Competition And Choice Coalition – Incompas, ITTA, NTCA, And Public Knowledge – And The Open Technology Institute At New America, MB Docket No. 15-216 (fil. Jan. 14, 2016) (“Joint Replies”), at 23 – 26. See also, Comments of NTCA, MB Docket No. 16-247 (fil. Sept. 21, 2016) at 10.

⁴ See, e.g., Joint Replies at 13 – 18.

⁵ See, e.g., American Television Alliance (“ATVA”) *ex parte*, MB Docket Nos. 15-216, 10-71, 14-50, 09-182, 07-294, and 04-256 (fil. Feb. 17, 2017) at 1 – 2.

⁶ For example, between 2008 and 2012, nearly 800 small MVPDs left the market. See Testimony of Colleen Abdoulah, Before the Senate Committee on Commerce, Science & Transportation, Jul. 24, 2012.

⁷ *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*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180 (rel. Mar. 5, 2007), ¶ 62.

⁸ Joint Replies at 13 – 18.

A. Small MVPDs As Defined by the Commission Should Be Exempt from the Network Non-Duplication and Syndicated Exclusivity Regimes

As noted above, the record is replete with evidence that retransmission consent and related program access rules, designed nearly a quarter-century ago when technology and consumer and marketplace demands were markedly different, are now reducing consumer choice and impeding the deployment of advanced services. Even as more comprehensive reform should ultimately be considered, the Commission could ameliorate many of the harms of the outmoded rules with simple rule alterations that would go far to allow market forces, which the current rules effectively exclude, to factor into the retransmission consent process.

Sections 76.92 through 76.94 of the Commission's rules provide for network non-duplication,⁹ while §§ 76.101 through 76.105 provide for syndicated exclusivity.¹⁰ These antiquated rules prevent MVPDs from obtaining programming demanded by consumers from alternate sources beyond designated geographic zones. In other words, broadcasters' chokehold over programming is not a function of "the marketplace" but rather one of government fiat, providing them the unfettered ability to present "take-it-or-leave-it" offers to MVPDs in a "market" where the government sanctions a monopoly seller. In contrast, if market forces were allowed to operate, broadcasters' ability to demand rates with impunity would be greatly curtailed, if not eliminated, due to the ability of small MVPDs to obtain programming from previously unavailable sources.

The current situation is exacerbated by the fact that rural MVPDs, which operate in sparsely populated and high-cost areas, tend to be small operators. Currently, § 76.95 and § 76.101 of the Commission's rules exempt MVPDs serving fewer than 1,000 subscribers from

⁹ 47 C.F.R. §§ 76.92 – 76.94.

¹⁰ 47 C.F.R. §§ 76.101 – 76.105.

the non-duplication and syndicated exclusivity rules, respectively. To provide targeted relief for small business MVPDs that are otherwise most susceptible to the demands of monopoly sellers like the broadcasters, the rule should be clarified to ensure exemptions for all small MVPDs,¹¹ regardless of the technology used to deliver service to end users. Enabling small MVPDs to obtain programming from neighboring geographic areas and have options regarding price would inject a modicum of market forces into the retransmission consent process for those most vulnerable to the stranglehold on content created and perpetuated by government fiat today.

B. The Commission Should Facilitate the Transparency of Market Rates for Programming So That MVPDs May Engage in Meaningful Negotiations

Another persistent and significant barrier to the provision of video and broadband services by small MVPDs is the pervasive use by programmers of mandatory non-disclosure agreements.¹² The market – if one exists at all – cannot function in the absence of competition and transparency between buyers and sellers. Mandatory non-disclosure agreements demanded by content providers in contracts for programming prohibit rural MVPDs from disclosing the rates they pay, even to policymakers who may request this information. Most importantly, these agreements prevent rural MVPDs (and their consumers) from learning the true market value of video content. As 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. The lack of transparency also frustrates consumers unable to discern or understand what factors may be driving increases in their cable or IPTV services, for example.

¹¹ The Commission defines a “small cable company” at § 76.901(e) as a cable television operator that “serves a total of 400,000 or fewer subscribers,” and defines a “small cable operator” as “an operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000” at § 76.901(f).

¹² *See, e.g.*, NTCA, MB Docket No. 16-274 (fil. Sept. 21, 2016) at 10.

To facilitate transparency and enable competitive forces to factor into the marketplace, § 76.65 of the Commission's rules (which covers good faith and exclusive retransmission consent complaints) should be amended to require broadcasters utilizing public airwaves to publicly disclose, in an easily accessible manner, the lowest fee they will charge, prior to any volume discount. Put another way, if the claim of broadcasters is that the market is working, that notion should be put to the test by allowing all participants in the market to discern what the market actually is. This minimal alteration would help to infuse market forces into the retransmission negotiation process and serve as a helpful bridge until such time as more comprehensive reforms can be accomplished.

As an additional pro-market refinement, the rules should make clear that there is no barrier to the itemization of programming fees by channel on consumer bills. MVPDs should be able to offer consumers the ability to judge for themselves whether certain channels are worth paying for, and provide the option of whether or not to include specific channels, at the customer's option, as part of the programming package.

III. CONCLUSION

Small MVPDs have implored the Commission for years to update outmoded retransmission consent rules, which insulate broadcasters from market forces and permit them to engage in "take it or leave it" tactics that, while technically not permitted, are endemic and virtually impossible for small MVPDs to counter. The modest rule updates suggested above would take down outdated government-created barriers to the workings of market forces that preclude small MVPDs from negotiating for content from outside of their geographic area and capturing publicly the market value of programming. Pending more comprehensive

retransmission consent reform, these minor market-based rule changes would benefit customers in the rural, high-cost areas that are most costly to serve.

Respectfully submitted,



By: /s/ Stephen Pastorkovich
Stephen Pastorkovich
Vice President, Technology &
Business Development
4121 Wilson Boulevard, Suite 1000
Arlington, VA 22203

spastorkovich@ntca.org
703-351-2000 (Tel)

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