

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

In the Matter of)
)
The Status of Competition in the Market for the) MB Docket No. 16-247
Delivery of Video Programming)

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

September 21, 2016

Table of Contents

EXECUTIVE SUMMARY	i
I. INTRODUCTION	1
II. NTCA SURVEYS OF ITS MEMBERSHIP CONFIRM THAT THE ABILITY TO OFFER QUALITY VIDEO SERVICES IS VIEWED AS AN ESSENTIAL COMPONENT OF THE BUSINESS CASE FOR BROADBAND DEPLOYMENT AND A KEY DRIVER OF BROADBAND ADOPTION IN RURAL AREAS.....	3
III THE COMMISSION HAS THE LEGAL AUTHORITY AND A CONGRESSIONAL DIRECTIVE TO REFORM ITS PROGRAM ACCESS RULES	5
IV. THERE ARE SEVERAL REFORMS TO THE COMMISSION’S PROGRAM ACCESS RULES THAT WILL SPUR BOTH GREATER COMPETITION IN THE MVPD MARKET AS WELL AS PROMOTE BROADBAND ADOPTION IN RLEC SERVICE AREAS	8
A. The Commission Should Facilitate the Ability Of Rural MVPDs To Gauge Market Rates For Programming.....	10
B. The Commission Should Prohibit Programming Vendors From Requiring Rural MVPDs To Pay For Undesired Programming In Order To Gain Access To Desired Programming	10
C. The Commission Should Prohibit Mandatory Broadband Tying, Where Rural MVPDs Must Pay Per-Subscriber Fees For Non-Video Broadband Customers ...	11
D. The Commission Should Prohibit Programming Vendors From Requiring Rural MVPDs To Pay For Undesired Programming In Order To Gain Access To Desired Programming	13
V. THE COMMISSION SHOULD MONITOR THE MARKET FOR “OVER THE TOP” WEB-BASED VIDEO SERVICES TO ENSURE THAT EXCLUSIVE ARRANGEMENTS DO NOT PREVENT RURAL MVPDS AND BROADBAND PROVIDERS FROM GAINING ACCESS TO CERTAIN WEB-BASED VIDEO CONTENT	14
VI. CONCLUSION.....	14

Appendix A: NTCA 2015 Retransmission Consent Survey

EXECUTIVE SUMMARY

For RLECs, the ability to offer quality video services is 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. Customers are often incentivized to obtain both video and broadband services when they are offered in a bundle of services at a discount. Consequently, factors that impede the provision of affordable video services in RLEC service areas adversely affect broadband deployment and adoption as well.

Therefore, 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 broadband investment in rural service areas. Even as an overwhelming majority of small rural carriers offer video services to consumers, 96 percent of respondents to a recent NTCA survey of members indicate that access to reasonably-priced programming is a significant barrier to the provision of such services.

Consequently, the Commission should take a number of steps outlined below to facilitate the availability of programming at affordable rates and under reasonable terms and conditions to rural MVPDs. This is not only within the Commission's authority granted by the Cable Act, but it is also part of the Commission's responsibility to encourage further deployment of broadband.

Reforms undertaken by the Commission should include measures to facilitate rural MVPDs' ability to gauge market rates for programming, and prohibit programmers from forcing small MVPDs and consumers to purchase unwanted programming in order to access desired content. Similarly, the Commission should prohibit mandatory broadband tying, where

rural MVPDs are forced to pay per-subscriber fees for non-video broadband customers. In addition, programmers should not be permitted to require rural MVPDs to place content in specific service tiers. Finally, the Commission should monitor the market for “over the top” video services to ensure that exclusive arrangements do not prevent rural MPVDs and broadband providers from gaining access to web-based video content.

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I. INTRODUCTION

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits these comments in the above-captioned Federal Communications Commission (“Commission”) proceeding.² The Public Notice solicits data and information to update the Seventeenth Report on Video Competition to Congress.

NTCA periodically canvasses its members regarding video and broadband services and a discussion of three of its most recent surveys is included below. The ability of NTCA members’ multichannel video programming distributor (“MVPD”) subsidiaries to offer an affordable video service to their voice and/or broadband subscribers is vital to competition in the video space and also drives the adoption of broadband service. Thus NTCA offers below several suggestions for changes to the Commission’s program access rules that will improve small MVPDs’ ability to

¹ NTCA represents nearly 900 rural rate-of-return regulated local exchange carriers (RLECs). All of NTCA’s members are full service local exchange carriers and broadband providers, and many also provide wireless, video, satellite, and/or long distance services.

² Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of *Video Programming*, MB Docket No. 16-247, Public Notice, DA 16-896 (rel. Aug. 5, 2016) (“Public Notice”).

compete on a level playing field and offer their subscribers an affordable video service with access to the content they demand.

The Commission itself several years ago recognized the link between video distribution and broadband adoption.³ Yet as NTCA’s surveys and other data show, the ever-rising price of content continues to present significant challenges despite the Commission’s clear statutory authority to reform its broken program access and retransmission consent rules. Indeed, despite the affirmation in the STELA Reauthorization Act (“STELAR”) as to the Commission’s broad authority to implement changes under Section 325 of the Communications Act,⁴ the Commission chose to take no action.⁵ The result of such inaction on any program access or retransmission consent rules is higher video service rates for rural consumers and a failure on the part of the Commission to fulfill its responsibilities under Section 706 of the Telecommunications Act of 1996 to advance broadband deployment. NTCA offers below several suggestions that should place MVPDs on a level playing field with broadcasters and end once and for all the practices of content “tying” and “tiering” that only serve to drive up rural video subscribers’ rates.

³ *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, ¶62 (rel. Mar. 5, 2007) (“Local Franchising Order”).

⁴ Public Law No. 113-200, 128 Stat. 2059 (2014).

⁵ *An Update of Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC Blog (Jul. 14, 2016), available at: <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules>.

II. NTCA SURVEYS OF ITS MEMBERSHIP CONFIRM THAT QUALITY VIDEO SERVICES ARE VIEWED AS IMPORTANT COMPONENTS OF THE BUSINESS CASE FOR BROADBAND DEPLOYMENT AND A KEY DRIVER OF BROADBAND ADOPTION IN RURAL AREAS

NTCA conducted a Broadband/Internet Availability and Video Services survey of its membership in the spring of 2016, seeking data as of the end of 2015.⁶ NTCA also conducted in 2015 a survey of its membership specifically concerning retransmission consent fees paid to broadcasters⁷ and in 2015 conducted a joint survey with INCOMPAS with respect to the experience of the combined membership negotiating with broadcasters and other entities for content.⁸

With respect to the Broadband/Internet Availability and Video Services survey, seventy-two percent of survey respondents indicated that they currently offer video services to their customers. Significantly, 96 percent of respondents – whether they currently provide video or not – stated that access to reasonably-priced programming is a *significant* barrier to the deployment of video services. It is therefore unsurprising that 59 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. Furthermore, 73 percent identified the difficulty of competing with other video providers as a major impediment and this is due in large part to the inherent disadvantages RLECs encounter serving high-cost, sparsely populated areas, having

⁶ Figures are derived from a survey NTCA sent to its membership in the spring of 2016 and released July 2016. The survey received 131 responses, a rate of approximately 22 percent. <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2015ntcabroadbandsurveyreport.pdf>

⁷ See Appendix A.

⁸ Figures are derived from a survey NTCA and INCOMPAS completed in September 2015. http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/NTCA_2015VideoCompetitionSurvey.pdf

a lack of scale and scope as compared to larger MVPDs and finding it increasingly difficult to access programming at reasonable rates.

Internet protocol television (“IPTV”) was listed as the most common delivery technology used by respondents, at 88 percent. Legacy coaxial cable was used by 46 percent of respondents. These figures total more than 100 percent as many respondents use more than one technology depending on the needs of their service areas.

With respect to the 2015 retransmission consent survey, just over 80 percent of survey respondents reported having been given “take it or leave it” offers from broadcasters. Nearly 94 percent reported that increases in retransmission consent fees left them with no choice but to pass on the increased costs to subscribers in the form of increased rates, with the overall increase attributable to increased expenditures for retransmission consent averaging \$5.78 per month.

In addition, in a separate joint survey conducted in 2015 with INCOMPAS, nearly one-fourth of NTCA’s members reported that 90% or more of their service area cannot receive an over the air broadcast signal and must pay to receive local news, weather or sports. This fact further underscores that broadcast content is indeed “must have” content for small MVPDs and underscores the need to address rising retransmission consent rates and broadcasters negotiation tactics that drive up rural consumers’ rates.

For all of NTCA’s members, the ability to offer quality video services is 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 video strategy is therefore an important component to 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. Furthermore, customers are often incented to obtain both video and broadband services when they are offered in a bundle of services at a discount. Consequently, factors that impede the provision of affordable video services in RLEC service areas adversely affect broadband deployment and adoption as well.

Any MVPD's ability to successfully deploy video services requires access to desirable content under reasonable terms and conditions. A variety of behaviors and strategies employed by programmers and broadcasters make it particularly difficult, however, for small rural carriers in particular to offer content in competitive retail packages that reflect what their subscribers want and can afford. The Commission can help enhance consumer choice, and encourage additional broadband adoption and deployment, by reforming retransmission consent rules and taking other actions to ensure access to content as outlined below. For example, Commission action is also needed to correct various anticompetitive behaviors by content providers, such as forced tying and tiering. Programmers also engage in unfair bargaining tactics, such as the inclusion of mandatory non-disclosure provisions in contracts and threatening that "must have" content will be withheld during the re-negotiation process. The Commission should address the outdated retransmission consent regime and take steps to mitigate content providers' use of unfair bargaining practices that threaten the viability of rural video providers.

III. THE COMMISSION HAS THE LEGAL AUTHORITY AND A CONGRESSIONAL DIRECTIVE TO REFORM ITS PROGRAM ACCESS RULES

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.”⁹ This language sets forth direct and unmistakable 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 authority to “govern” is of little meaning if such actions are not within the Commission’s authority. Moreover, Section 325 also 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.”¹⁰ In short, the text of section 325 is explicit in its direction to Commission to protect the public interest with respect to broadcasters’ grant of retransmission consent rights to MVPDs.

The Commission has additional authority as part of its obligation to ensure that broadcast licensees act in furtherance of “the public interest, convenience, and necessity.”¹¹ Behaviors that prevent MVPDs from providing consumers with signals that are broadcast over the public airwaves under reasonable terms and conditions, and that lead to blackouts, are clearly contrary to the public interest. This is especially the case, as explained more fully above, when such behaviors also impede the deployment of broadband infrastructure.

⁹ 47 U.S.C. § 325(b)(3)(A).

¹⁰ *Id.*

¹¹ 47 U.S.C. § 309(a).

The Commission holds further ancillary authority under sections 303(r) and 4(i) of the Act. Section 303(r) instructs the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions”¹² of Title III of the Act. The Commission’s authority is also elucidated in section 4(i), calling 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.”¹³ Furthermore, the Commission has previously asserted its ancillary authority to enhance consumers’ access to programming.¹⁴

The Commission’s ability to address content provider practices that hinder broadband deployment is further buttressed by ancillary authority conveyed through section 706. This section mandates that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” using a variety of means, including the utilization of “methods that remove barriers to infrastructure investment.”¹⁵ 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,

¹² 47 U.S.C. § 303(r). *See also*, *Cellco P’ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

¹³ 47 U.S.C. § 154(i).

¹⁴ Review of the Commission’s Program Access Rules and Examination of Programming *Tying Arrangements*, First Report and Order, FCC 10-17, ¶¶ 71-72 (rel. Jan. 28, 2010) (“*2010 Program Access Order*”) (relying on the Commission’s ancillary authority to establish standstill rules for program access disputes).

¹⁵ 47 U.S.C. § 1302(a).

specifically in the 2007 *Local Franchising Order*,¹⁶ and later the same year in the *Multiple Dwelling Unit Order*.¹⁷

Notably, these precedents were set when the Commission had determined under section 706 that broadband was actually being deployed to all Americans in a reasonable and timely fashion. Subsequently, the Commission reversed that finding and has concluded in recent years that deployment is not occurring in a reasonable and timely fashion, mostly in rural communities located throughout the country. In this case, section 706 directs the Commission to “take *immediate action* to accelerate deployment” 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.

IV. THERE ARE SEVERAL REFORMS TO THE COMMISSION’S PROGRAM ACCESS RULES THAT WILL SPUR BOTH GREATER COMPETITION IN THE MVPD MARKET AS WELL AS PROMOTE BROADBAND ADOPTION IN RLEC SERVICE AREAS

As discussed in Section II, *supra*, NTCA’s members overwhelmingly agree that difficulty obtaining access to “must have” programming at affordable rates and under reasonable terms and conditions is the most significant obstacle they face when attempting to provide or expand video services to their rural communities. Forced “tying” and “tiering” arrangements, and the

¹⁶ Local Franchising Order, ¶ 62.

¹⁷ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189, ¶47 (rel. Nov. 13, 2017) (“Multiple Dwelling Unit Order”).

outdated and broken retransmission consent process, among other factors, impede RLECs' ability to offer the video content that consumers desire at affordable rates. This ultimately harms competition and reduces consumer choice in rural service areas.

Also, as NTCA and others have previously noted,¹⁸ access to video content at affordable rates and under reasonable terms and conditions spurs rural broadband investment. This is because when RLECs offer video and broadband Internet access services together, rural consumers' adoption of broadband increases. The Commission long ago recognized the link between a provider's ability to offer video service and to deploy broadband networks.¹⁹ This assessment has been reinforced by state regulators.²⁰

Unfortunately, the barriers encountered by RLECs that offer video service result in limits to consumer choice and higher prices, which dissuade customers from subscribing to rural carriers' video services. This, in turn, impedes broadband investment and adoption, as well as video competition and consumer choice. Therefore, the Commission can and should use this proceeding to thoroughly investigate anti-competitive practices of video programming vendors and take certain steps to improve MVPDs' access to video content at affordable rates and under reasonable terms and conditions.

¹⁸ 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), pp. 12-18, 24-25 (Joint Retransmission Consent comments).

¹⁹ Local Franchising Order, ¶ 62.

²⁰ *Resolution on Fair and Non-Discriminatory Access to Content*, National Association of Regulatory Utility Commissioners (adopted Feb. 16, 2011), available at <http://www.naruc.org/Resolutions/Resolution%20on%20Fair%20and%20Non%20Discriminatory%20Access%20to%20Content.pdf>.

A. The Commission Should Facilitate the Ability Of Rural MVPDs To Gauge Market Rates For Programming

One significant barrier to the provision of video and broadband services by small MVPDs is the pervasive use by programmers of mandatory non-disclosure agreements. 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 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.

To facilitate transparency and enable competitive forces to police behavior in the marketplace, broadcasters utilizing public airwaves should, as a condition of their license, be required to publically 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. Ownership information should also be publically disclosed, in a clear manner that does not obfuscate controlling or substantial ownership interests.

B. 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” 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. Forced tying is one of the most prevalent and pernicious problems faced by rural MVPDs and only serves to drive 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. 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 several years ago, yet it remains a common practice that harms rural consumers.²¹

In short, forced tying unnecessarily increases rural MVPDs’ costs and prevents them from offering affordable and diverse 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.

C. The Commission Should Prohibit Mandatory Broadband Tying, Where Rural MVPDs Must Pay Per-Subscriber Fees For Non-Video Broadband Customers

To obtain “must-have” video content, some programmers require rural 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

²¹ 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.”).

“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 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 rural MVPDs to promote their websites. Also, some 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 rural broadband providers to either absorb the additional costs or raise their end-user rates for broadband, neither of which benefits rural consumers. 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.

D. The Commission Should Prohibit Programming Vendors From Requiring Rural MVPDs To Place Content In Specific Service Tiers

The Public Notice seeks comment on offering consumers small, less expensive programming packages, commonly known in industry parlance as “skinny bundles.”²² In most cases, however, content providers dictate the makeup of programming tiers and thereby prevent small MVPDs from offering consumers this kind of frequently-requested option. NTCA’s members report that programming vendors require that certain channels be placed in specific service tiers or that a certain percentage of subscribers receive the channels, forcing rural MVPDs to include these channels in the most popular tier(s) of service they offer. Rural MVPDs should be free to create and market video programming tiers as they see fit in order to meet the demands of their subscribers. However, the practice of “forced tiering” makes it impossible for rural MVPDs to craft truly basic, stripped down service tiers that can be offered at very affordable rates and that their subscribers actually desire. It also prevents rural MVPDs from offering service packages that help to distinguish themselves from their competitors or are tailored to their customers’ interests. By prohibiting video programmers’ use of forced tiering arrangements, the Commission could encourage product differentiation and competition among video service providers in rural areas, while enabling consumers to access the diverse content they desire at affordable rates.

²² Public Notice, p. 7.

V. THE COMMISSION SHOULD MONITOR THE MARKET FOR “OVER THE TOP” WEB-BASED VIDEO SERVICES TO ENSURE THAT EXCLUSIVE ARRANGEMENTS DO NOT PREVENT RURAL MVPDS AND BROADBAND PROVIDERS FROM GAINING ACCESS TO CERTAIN WEB-BASED VIDEO CONTENT

The Public Notice also seeks comment about online video distributors (“OVDs”). The market for web-based video continues to grow, providing consumers with additional choices for video entertainment and additional incentives to adopt broadband. As this market grows, it is imperative that the Commission is cognizant of any exclusive arrangements between content producers and large MVPDs or most favored nation clauses in their contracts that could prevent rural MVPDs and broadband providers from gaining access to certain web-based video services. Rural MVPDs and broadband providers must have access to all of the same content – including web-based content – as their non-rural counterparts. Without it, video competition, along with diversity of programming and broadband investment and adoption, will suffer in rural service areas. The Commission should therefore carefully monitor the evolution of the market for web-based video content and ensure that consumers in RLEC service areas continue to have access to all of the video content that the Internet has to offer.

VI. CONCLUSION

For all of the reasons discussed above, the Commission should reform its program access and retransmission consent rules as proposed herein.

Respectfully submitted,



By: /s/ Michael R. Romano

Michael R. Romano

Senior Vice President –

Industry Affairs & Business Development

mromano@ntca.org

By: /s/ Brian J. Ford

Brian J. Ford

Senior Regulatory Counsel

bford@ntca.org

4121 Wilson Boulevard, Suite 1000

Arlington, VA 22203

703-351-2000 (Tel)



Appendix A: NTCA 2015 Retransmission Consent Survey

In January 2015, NTCA–The Rural Broadband Association distributed to its members a survey asking about their experiences in negotiating for access to video content. A total of 143 member companies participated in the survey.¹

Ninety-nine percent of survey respondents provide broadband service, 98% voice service, 95% video service, and 37% wireless service. Fourteen percent compete in the video arena with Mediacom, 13% with Charter, 11% with Comcast, 9% with Time Warner, 8% with Midcontinent, 5% with Suddenlink, and 4% with Cox. Just over half compete with some other provider.² The typical respondent provides 8 broadcaster signals, of which six are retransmission consent and 2 are must carry.

Content costs are substantial for survey respondents: nearly two-thirds (64%) reported that expenditures for content make up 60% or more of their total video expenditures. Nearly one-fifth (19%) said that content represents 80% or more of total video expenditures.

Yet the cost is not the only challenge survey respondents face: 94% of respondents categorized the process of negotiating agreements for access to video content as relatively to extremely hard. When asked what factor made the process difficult, 90% responded “content provider’s lack of willingness to negotiate (i.e., ‘take it or leave it’)”, 84% “difficulty obtaining access to reasonably priced content, and 28% “difficulty obtaining the specific content I want.” Twelve percent cited some other factor, such as short negotiating time frames, inexperience in negotiating, and confusing language in agreements.³ Just over 80% of respondents indicated that they have at one time been presented a “take it or leave it” offer for access to video content.

As a direct consequence of these challenges, 99% of survey respondents indicated that their retransmission consent fee expenditures on video content have increased over the past five years. In response, 94% have had to increase their customers’ bills, with the overall increase attributable to increased expenditures for retransmission consent averaging \$5.78 per month.

¹ Based on the sample size, results of this survey can be assumed to be accurate to within $\pm 7\%$ at the 95% confidence level.

² Totals sum to greater than 100% as respondents may compete with more than one other provider.

³ Totals sum to greater than 100% as respondents may have cited more than one challenge.