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

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	
	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198

COMMENTS of
THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES;
THE INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE;
THE WESTERN TELECOMMUNICATIONS ALLIANCE;
and the
RURAL INDEPENDENT COMPETITIVE ALLIANCE

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TABLE OF CONTENTS

SUMMARY

Video services are an increasingly important part of rural and mid-size LECs' service offerings. Rural and mid-size LECs are often entering the MVPD market using DSL and fiber-to-the-home technologies which are also used to provide high-speed data services. Thus, video services offered by rural and mid-size LECs play an important role in spurring additional broadband investment in rural areas, in addition to bringing greater choice to video consumers.

The Commission should retain the ban on exclusive contracts for content for its full five year term. The Report and Order correctly concluded that the rapidly evolving nature of the video market makes it difficult, if not impossible, to determine what events might demonstrate competition in the MVPD market without a thorough review.

Given the intrinsic link between the availability of video services and broadband deployment, the Commission's program access rules should be extended to all terrestrially delivered programming, regardless of whether or not it is affiliated with cable. Lack of access to programming of any kind impedes competition in the video market while deterring investment in broadband infrastructure.

Forced tying arrangements, where MVPDs are forced to carry certain programming in exchange for access to must-have programming, are rampant in the industry and impede both consumers' choice in tiers of programming, as well as broadband deployment. Small MVPDs are often presented with "take it or leave it" offers or their equivalents from programmers on a regular basis. Most recently, demands for payments based on unrelated broadband subscribership levels, and requirements to promote a programmer's web page content, represent a disturbing new trend that the

Commission should forcefully prohibit. The Commission should exercise its authority to level the playing field for rural MVPDs seeking to acquire content in order to preserve customer choice and encourage broadband investment.

Small, rural MVPDs are particularly impacted by restrictions on the use of shared head-ends, mandatory non-disclosure provisions, demands for high numbers of advertising slots, and bias against IPTV systems that extends to the denial of programming. The Commission should clarify that the use of shared head-ends is not sufficient grounds to deny access to content. Further, the Commission should not allow non-disclosure provisions to interfere with market forces, and should clarify that demands for advertising slots, and restrictions on, or denial of, content for IP based architectures, all constitute impermissible denial of access to content.

Finally, in the event of a dispute, the Commission should protect consumers by instituting a "standstill" provision that would ensure that customers experience no loss of signal while differences are resolved. Commission-sanctioned arbitration procedures have the potential to greatly enhance consumer choice in video services and encourage further broadband investment and subscriptions.

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I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO),[1] the Independent Telephone and Telecommunications Alliance (ITTA),[2] the Western Telecommunications Alliance

[1] OPASTCO is a national trade association representing over 520 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3.5 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37).

[2] ITTA represents mid-size LECs that provide a broad range of high quality wireline and wireless voice, data, Internet, and video telecommunications services to more than 25 million customers in 45 states.

(WTA),[3] and the Rural Independent Competitive Alliance (RICA)[4] (collectively, the Associations) hereby submit these comments in response to the Notice of Proposed Rulemaking in the above-captioned proceedings.[5] OPASTCO and ITTA are also participating in this proceeding as part of the Coalition for Competitive Access to Content (CA2C), and submit this filing to supplement and expand upon comments made by that group.

The Associations' members find that broadband penetration increases when a carrier is able to combine that service with a video offering. This benefits consumers by expanding the communications service offerings available to them, and makes it more economically feasible for carriers to upgrade broadband-capable infrastructure in high-cost rural areas. Therefore, meaningful access to video content is imperative to achieve the Commission's goals of more video choices for consumers and increased broadband investment and penetration.

[3] WTA is a trade association that represents approximately 250 rural telephone companies operating west of the Mississippi River. Most members serve fewer than 3,000 access lines overall, and fewer than 500 access lines per exchange.

[4] RICA is a national association of nearly 80 competitive local exchange carriers (CLECs) that are affiliated with rural ILECs and provide facilities based service in rural areas.

[5] *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 (2007) (Report and Order or NPRM).

II. THE EXCLUSIVE CONTRACT PROHIBITION SHOULD REMAIN IN PLACE FOR ITS FULL FIVE YEAR TERM

The Report and Order extended the prohibition on exclusive contracts for video content by an additional five years.[6] The NPRM asks if a procedure to shorten the extension to two years can be established in the event that a cable operator can show that another multichannel video programming distributor (MVPD) has achieved a certain penetration level.[7] This question was answered squarely by the Report and Order's finding that "... the evolving nature of the video distribution and programming markets makes it difficult if not impossible to determine in this proceeding what specific marketplace events would demonstrate that competition in the MVPD market is sufficient such that the exclusive contract prohibition can sunset."[8] Without a clear understanding of what would constitute sustainable and sufficient competition, it is premature to contemplate shortening the prohibition on exclusivity.

The NPRM further asks if a market-by-market analysis approach is appropriate.[9] It is not. From a practical standpoint, this approach would be administratively difficult. Furthermore, technological and marketplace developments may render market borders less relevant as consumers demand more control over how, when and where to view their content choices, breaking down the distinctions that currently exist between various markets.[10] Therefore, the exclusive contract prohibition should remain in place for its full five years across all markets. The Commission should maintain its plan to conduct

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[6] Report and Order, ¶¶79-81.
[7] NPRM, ¶114.
[8] Report and Order, ¶80.
[9] NPRM, ¶114.
[10] Video content is increasingly obtainable online, and devices such as video iPods and Slingboxes provide consumers with greater control over their viewing habits.

another assessment of the state of competition as the prohibition's expiration approaches.[11]

III. THE EXTENSION OF PROGRAM ACCESS RULES TO TERRESTRIALLY DELIVERED CABLE-AFFILIATED PROGRAMMING IS NECESSARY TO ENSURE THE PROVISION OF VIDEO SERVICES AND INCREASE BROADBAND INVESTMENT IN AREAS SERVED BY RURAL LECS

The NPRM reports that the withholding of programming, including terrestrially delivered cable-affiliated programming, has had a material adverse impact on competition.[12] However, the NPRM also notes that terrestrially-delivered programming has generally been treated as "outside of the direct coverage" of the exclusive contract prohibition found in Section 628(c)(2)(D) of the 1992 Cable Act.[13] Unfortunately, this "terrestrial loophole" has enabled certain programmers to withhold programming or otherwise discriminate against other video providers. Therefore, the loophole should be closed because it thwarts competition in the video market while also hindering broadband investment.

The Report and Order correctly found that vertically integrated cable programmers retain the incentive to withhold programming from their competitors.[14] Furthermore, the Report and Order provides concrete examples illustrating that programmers deny access to programming when permitted to do so.[15] Programmers retain the incentive to restrict or deny access to content regardless of whether the delivery system is satellite or terrestrially based. Rural MVPDs experience these restrictions on a

[11] Report and Order, ¶79.
[12] NPRM, ¶115.
[13] *Ibid.*
[14] Report and Order, ¶50.
[15] *Id.*, ¶49.

routine basis. In a recent survey of rural MVPDs conducted by OPASTCO and Viodi LLC,[16] 43 percent of respondents indicated that they could not obtain video content that is critical to their service offering.[17] Therefore, extension of the program access rules to terrestrially delivered cable-affiliated programming is clearly necessary not only to facilitate video competition, but also to reduce barriers to investment in advanced services infrastructure.

The NPRM inquires about the Commission's authority to extend the program access rules in order to close the terrestrial loophole.[18] In its recent decision regarding the provision of MVPD services within multiple dwelling units, the Commission recognized that implementing its duty to "promote the development of new technologies that will provide facilities-based competition to existing cable operators" also serves the purpose set forth in Section 706 of the 1996 Telecommunications Act.[19] The Commission then noted that removing barriers to the MVPD market furthers a variety of statutory purposes:

> ...[T]he 1992 Cable Act sought to promote competition and consumer choice in cable communications. In addition, the purpose of the Communications Act of 1934, as amended, is "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." Moreover, Section 706 of the Telecommunications Act of 1996 directs the Commission to "encourage

[16] Surveys were sent to 325 carriers on October 31, 2007. Of these, approximately 225 (roughly 70 percent) provide video. Responses were provided by 52 carriers, representing a response rate of about 23 percent.

[17] The most common example of this kind of "must have" programming is regional sports networks, which often deliver signals to providers terrestrially.

[18] NPRM, ¶¶115-116.

[19] *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, ¶46 (rel. Nov. 13, 2007).

> the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . ."[20]

The Commission has definitively established the existence of an intrinsic link between the availability of video and the deployment of broadband services.[21] This linkage underscores the multiple sources of authority found in the 1934 Communications Act, as amended by the 1992 Cable Act and the 1996 Telecommunications Act, that empowers the Commission to close the terrestrial loophole.[22]

In addition, the Commission is granted further authority to close the terrestrial loophole under Section 201(b) of the Communications Act, which authorizes it to "prescribe such rules and regulations as may be necessary" to implement the Act.[23] Section 601 of the Act notes that the purpose of Title VI is to "promote competition" in the video marketplace.[24] Furthermore, Section 303(r) permits the Commission to make such rules and regulations that "may be necessary to carry out the provisions" of the law.[25]

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[20] *Id.*, ¶47 (citations omitted).

[21] *See, 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, 22 FCC Rcd 5101, 5132-33, ¶62 (2007).

[22] OPASTCO and ITTA are also filing in this docket with the Coalition for Competitive Access to Content (CA2C), whose comments provide a detailed examination of the Commission's authority under §628. The Associations concur with CA2C's assertions on this matter.

[23] 47 U.S.C. §201(b).

[24] 47 U.S.C. §601(6). Furthermore, §612(g) provides additional Commission authority, in the event that the Commission finds that cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available.

[25] 47 U.S.C. §303(r).

The Commission has also established precedent for closing the terrestrial loophole to ensure access to certain content.[26] Although this was done in the context of a merger proceeding, the Commission has clearly recognized the consumer benefits of closing the terrestrial loophole, and has exercised its authority to do so.

In short, the Commission should use its authority to close the terrestrial loophole without delay. Doing so will help the Commission achieve the twin goals of promoting competition in the video market and encouraging further investment and penetration in broadband services, especially in the rural areas served by the Associations' members.

IV. THE COMMISSION SHOULD EXPAND THE EXCLUSIVE CONTRACT PROHIBITION TO NON-CABLE AFFILIATED PROGRAMMING

The NPRM also seeks comment on whether to expand the exclusive contract prohibition to non-cable affiliated programming that is instead affiliated with a different MVPD, such as a direct broadcast satellite (DBS) provider.[27] The reasons for doing so are the same as stated above in the case of cable-affiliated programming. Vertically integrated programmers of all types have little incentive to supply content to rural MVPDs serving small markets that programmers view as insufficiently lucrative. Discriminatory and exclusionary conduct on the part of programmers has the same impact on consumers – restricted choice and less access to broadband – regardless of whether the programming in question comes from a cable-affiliated source or not. The net effect is still to "hinder significantly or to prevent any MVPD"[28] from providing

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[26] *See, Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al*., MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006).

[27] NPRM, ¶118.

[28] 47 U.S.C. §628(b).

content to consumers. As noted in Section III, the Commission has the statutory authority and responsibility to ensure that consumers have access to the content of their choice from additional MVPDs, which will also serve to remove barriers to investment in broadband infrastructure.

V. THE COMMISSION SHOULD PRECLUDE THE MANDATORY TYING OF PROGRAMMING

The NPRM notes that programmers often tie undesired programming with "must-have" content, and asks whether the Commission should preclude this practice.[29] The NPRM's accurate description of the adverse impacts of mandatory tying effectively illustrates why mandatory tying should be precluded, especially in the case of small and rural MVPDs:

> 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 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 non-cable MVPD or a non-affiliated 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.**[30]

[29] NPRM, ¶¶119-120.

[30] *Id.*, ¶120 (emphasis added).

The NPRM then correctly assesses the cumulative adverse impacts of forced tying as they relate to the retransmission consent regime and the Commission's "good faith" negotiating requirement.[31] Specifically, the NPRM explains that programmers are required to negotiate in "good faith," emphasizing that "take it or leave it" negotiating tactics fail to comply with the Commission's rules.[32] Accordingly, the NPRM seeks comment on the status of carriage negotiation in today's marketplace, and inquires if broadcast networks and station groups engage in retransmission consent tying arrangements that result in harm to small MVPDs and their customers.[33]

As the NPRM acknowledges, small MVPDs are particularly vulnerable to tying arrangements because their small subscriber bases are unable to provide them with negotiating leverage.[34] As a result, "carriage negotiation" in today's marketplace for small MVPDs is largely a misnomer. Oftentimes there are no negotiations to speak of for these providers.

Must-carry, retransmission, and non-duplication rules limit small MVPDs' ability to serve customers, while effectively allowing programmers to set prices with few, if any, restraints. Small MVPDs are routinely left with the choice of paying what the programmers dictate and accepting forced carriage of channels in specified tiers, or lose customers due to lack of must-have content.

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[31] *Id.*, ¶¶122-125.
[32] *Id.*, ¶¶122-123.
[33] *Id.*, ¶125.
[34] For an illustrative example of how programmers' restrictions impede customer choice and additional broadband investment, s*ee, e*x *parte notice*, letter from John Kuykendall, JSI Inc. on behalf of Ringgold Telephone Company, to Secretary Dortch, MB Docket Nos. 07-29; 07-198 (fil. Oct. 5, 2007).

While many rural carriers are seeking to enter the MVPD market despite these obstacles, it is increasingly common for entry into the market to be significantly delayed, or put off indefinitely, due in large part to unbridled programming price increases and burdensome conditions on program carriage. There are even some rural carriers that had previously entered the video market but have since left because of these impediments.

In practice, programmers are effectively flouting the requirement that negotiations occur in "good faith," under which the Commission has determined that "take it or leave it" offers constitute a "*per se* violation" of this regulation.[35] In fact, 81 percent of respondents to the OPASTCO/Viodi survey reported being presented with "take it or leave it" offers that may technically permit them to obtain programming, but not under reasonable prices, terms or conditions.[36] Although in some cases alternatives are allegedly offered, the prices or conditions are so onerous as to leave rural MVPDs no realistic choice but to accept the programmers' pricing and tiering requirements.

Rural MVPDs further report that forced tying as a condition of retransmission arrangements are pervasive and growing. Increasingly, more programmers are requiring that more channels be placed into basic tiers, and programmers are demanding ever-higher payments in return for carriage. This increases rates for consumers. If fewer consumers are willing to purchase high-priced basic cable tiers, this saps the ability of MVPDs to enhance their investment in broadband-capable infrastructure.

[35] NPRM, ¶¶122-123.

[36] For example, marquee programming might technically be "offered" with reduced ties to unwanted programming, but at such a high price as to render that "choice" impossible to accept.

Rapid Commission action to restore balance to the marketplace is urgently needed. The current rules also allow broadcasters to insist on payments for retransmission consent that can quickly become debilitating to many smaller MVPDs. At the same time, current rules further allow broadcasters to block access to potentially lower cost substitute sources of programming from nearby markets, permitting no content alternatives for many smaller video providers. Absent changes to the current regime, marketplace forces will have no bearing on prices demanded by broadcasters for retransmission consent. Broadcasters presently have insufficient incentive to provide retransmission consent to smaller video providers at reasonable rates.[37]

The practice of forced tying, regardless of whether or not the programmer is cable-affiliated, raises prices and constrains consumer choice, especially when programmers dictate which tiers channels must be placed in. While mandatory *a la carte* would be technically and financially unachievable for many small MVPDs, more flexibility is clearly called for. Consumers should be permitted to purchase tiers that tie programming together, but they should be granted as much freedom as possible to choose the content and price points that they feel are most appropriate.

[37] The NPRM notes that the American Cable Association (ACA) filed a Petition in 2005 to resolve this situation through a modest alteration of the rules that would apply only in circumstances where smaller video providers and their customers face the most harm. Specifically, ACA's Petition seeks to permit smaller video providers to acquire content from alternative sources, but only when broadcasters choose to require additional cash payments or other consideration in exchange for retransmission consent. *See*, NPRM, fn. 539. The ACA Petition does not seek to ban cash payment or other consideration in exchange for retransmission consent. Rather, if broadcasters exercise their right to be compensated for retransmission consent, then smaller MVPDs should have a corresponding right to seek content from alternative sources under more reasonable terms. The proposed solution would allow the marketplace, rather than any one entity, to determine what price small video providers should pay for content if their original supplier chooses to require additional payment for retransmission consent. *See*, OPASTCO comments, *ACA Petition for Rulemaking to Amend 47 C.F.R. §§76.64, 76.93, and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, RM No. 11203 (fil. Apr. 18, 2005).

The adverse impacts felt by small MVPDs and their customers resulting from mandatory tying requirements are not limited to higher costs and fewer choices among programming packages. Because this practice impairs the ability of customers to receive video that is bundled with affordable broadband services, mandatory tying acts as another barrier to broadband investment and penetration, especially in high-cost rural areas served by small MVPDs. Therefore, it is imperative for the Commission to preclude mandatory tying.[38]

A. The Commission should also preclude broadband tying, where MVPDs must pay per-subscriber rates based on non-video broadband customers

A disturbing new practice has emerged that further threatens the Commission's twin goals of greater consumer choice in the video market and more broadband investment. Some MVPDs that rely on Internet protocol television (IPTV) technology are now being required to provide programmers with broadband subscription data. In order to obtain "must-have" content, the MVPD is required to pay an additional fee based on its number of broadband subscribers, regardless of whether or not these customers subscribe to video services. MVPDs are also required to promote programmers' web sites.[39] Making the practice even more egregious is the requirement to submit payments for, and promote web sites to, broadband customers that not only do not subscribe to a carrier's MVPD service, but are also located outside of the carrier's MVPD service territory. Essentially, this amounts to forced payment for broadband content, in addition to video content. Broadband tying goes well beyond the realm of any reasonable

[38] The Commission has the authority to do so, as illustrated in Section III.

[39] Carriers are required to promote web sites through efforts such as prominent links, bill stuffers, advertising slots, etc. The web sites in question may be "walled gardens" containing exclusive content,

condition for access to video content. As this practice is clearly abusive and anti-competitive, it should be curtailed.

While parties may wish to negotiate packages that incorporate the optional tying of broadband content with video programming, programmers that have engaged in broadband tying have done so in a "take-it-or-leave-it" manner that violates the Commission's "good faith" requirements, discussed in Section V above. If an alternative was eventually offered by a programmer, the rates involved were so prohibitive as to effectively force the MVPD to accept broadband tying or forgo the marquee content. Therefore, the Commission should preclude mandatory tying of programming, as well as mandatory tying of broadband content with programming.

VI. THE COMMISSION SHOULD ADDRESS CONCERNS RAISED BY RURAL MVPDS REGARDING SHARED HEADENDS, MANDATORY NON-DISCLOSURE PROVISIONS, DEMANDS FOR ADVERTISING SLOTS, AND DENIAL OF CONTENT TO IPTV PROVIDERS

The NPRM requests comment on several issues of particular importance to rural MVPDs. Specifically, these issues include: concerns about the ability to gain access to content when shared headends are used; the use of restrictive mandatory non-disclosure provisions; demands for excessive advertising slots as a condition for access to content; and unwarranted biases against IPTV systems.[40] All of these issues, to one degree or another, impede the ability of rural MVPDs to viably provide customers with video services. In turn, the ability of rural MVPDs to increase broadband investment is similarly impaired.

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presumably accessible to those online visitors whose IP addresses indicate that they are subscribers of a particular broadband provider.

[40] NPRM, ¶133.

SHARED HEADENDS: According to the OPASTCO/Viodi survey, 28 percent of respondents reported facing the prospect of being cut off from programming due to a potentially irresolvable dispute stemming from a programmer's objection to the use of economical shared headends. In addition to this percentage being significant in itself, the MVPDs that use or will potentially use shared headends tend to be the smallest providers serving the least populated, highest cost areas. Therefore, unwarranted restrictions on shared headend use disproportionately affect carriers catering to those customers that are already the most challenging to serve. In a number of cases where rural MVPDs use shared headends, programmers' legitimate concerns regarding security, billing and other management issues have been contractually addressed to all parties' mutual satisfaction. IPTV systems make such accommodations even easier because the addressable nature of the technology provides greater control over the destination of content, both at the system and end-user levels. Despite technological advancements and a demonstrated track record that alleviate programmers' legitimate concerns, some programmers retain a bias against shared headends and inflexibly obstruct this economical solution. The Commission should clarify that the use of shared headends, by itself, is not a valid reason to restrict or deny rural MVPDs' access to content.[41]

MANDATORY NON-DISCLOSURE PROVISIONS: As discussed earlier, the NPRM accurately illustrates that small MVPDs are particularly vulnerable to programmers' demands because they lack negotiating leverage due to their small

[41] Despite the contention of some parties that the Commission lacks the jurisdiction to address this issue (NPRM, fn. 552), this problem impacts both video competition and broadband deployment. Therefore, the Commission is empowered by the Communications Act to take action, as illustrated in Section III above.

subscriber bases.[42] Exacerbating this problem is the fact that contracts negotiated between content providers and MVPDs typically include mandatory non-disclosure provisions. Small MVPDs are typically required to accept these terms or forgo access to necessary content. Consequently, this makes it difficult for small MVPDs to learn the market value of the programming they seek. In addition, small MVPDs are prevented from sharing with regulators the details of the challenges they face, unless they undertake the costly and onerous formal complaint process.

Fifty-three percent of respondents to the OPASTCO/Viodi survey indicated that mandatory non-disclosure provisions impair their ability to gauge the market value of programming, as well as their ability to bring potential program access problems to the attention of regulators. It is likely that these provisions lead rural MVPDs, who already face higher per-customer costs, to pay more for programming than their larger counterparts. This increases the difficulty of the already daunting task of crafting a viable business model for providing video services. The Report and Order outlines new complaint procedures that could potentially address some of these concerns as they relate to the enforcement of rule violations.[43] However, the prevalent use of mandatory non-disclosure provisions skews the market against smaller MVPDs and thwarts competition. Therefore, the Commission should preclude the use of mandatory non-disclosure provisions in programming contracts.

ADVERTISING SLOTS: Several rural MVPDs have reported that vertically integrated programmers have demanded disproportionately high numbers of advertising

[42] NPRM, ¶120.

[43] Report and Order, ¶¶83-109.

slots in exchange for access to must-have programming. While this practice may not be prevalent, this kind of effort to blatantly impede competition should be curbed. Not only does it harm the consumers of MVPDs that are targeted, it chills further entry by other carriers that are considering becoming MVPDs.

DENIAL OF CONTENT TO IPTV PROVIDERS: Many programmers retain unwarranted fears about IP technology. Apparently, many mistakenly believe that the use of IP technology in IPTV applications will result in their content traveling over the public Internet. While efforts to educate some programmers on this matter have proven successful, this is not always the case. These programmers restrict or outright deny access to content for IPTV providers. Forty-two percent of respondents to the OPASTCO/Viodi survey reported experiencing this problem. This figure is remarkably high, given the fact that the use of IPTV technology remains a relatively recent development.

However, IPTV systems are no less secure than traditional coaxial cable systems which do not face claims of purported security issues as a basis for the denial of access to content. In fact, IPTV systems may arguably have greater security because they incorporate security capability and encrypt video signals from the headend to the consumer set-top box. Accordingly, rural MVPDs utilizing advanced IPTV technology have been astonished by the decisions of many programmers to deny access to content based upon their claims of security concerns. Even when content can be obtained by rural MVPDs using IPTV, the security requirements, restrictions and attendant costs are frequently out of proportion to both the security risks and the requirements and conditions imposed by the programmers on competing systems using older technologies.

As with shared headends, numerous rural MVPDs have found that programmers' legitimate security concerns can be addressed by finding mutually agreeable solutions through the contract negotiation process. The Commission should make clear that denial of access to content, or the imposition of restrictions so onerous as to essentially deny access to content, is not permissible simply due to the use of IP technology.

All Americans, even those in high-cost, sparsely populated areas, should have access to viable video services that can offer the content they seek. Moreover, the ability of rural MVPDs to extend and improve broadband services in these areas will be impaired if access to content continues to be hindered as illustrated above.

VII. THE COMMISSION SHOULD ENSURE THAT CONSUMERS RETAIN ACCESS TO VIDEO PROGRAMMING IN THE EVENT OF A DISPUTE

The NPRM examines the concept of a "standstill" requirement, which would preserve consumers' access to programming they already receive during adjudication of program access disputes.[44] The Associations support the establishment of a standstill requirement. As the NPRM observes, parties have established that vertically integrated programmers have incentives to use temporary foreclosure strategies during negotiations for programming.[45] The Associations agree that "...the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations and may discourage parties from filing legitimate complaints."[46]

When customers cannot view the content of their choice from an MVPD due to a contract dispute, that provider will likely lose customers. In addition to the immediate impact on consumers and providers, the Commission should also consider that the

[44] NPRM, ¶135.
[45] *Id.*

MVPD's resulting loss of revenue will harm its ability to make further investments in broadband infrastructure. Thus, the Commission should implement a "standstill" requirement in order to protect consumers and MVPDs from the anticompetitive actions of programmers.

The NPRM also contemplates establishing an "arbitration-type" step when determining a remedy for a program access violation. The Commission reasonably feels that the commercial arbitration process impels parties to resolve differences through settlement. Therefore, the NPRM seeks comment on a modified version of this process, where parties each submit to the Commission their best "final offer" proposal for an appropriate remedy and whether the Commission should have the discretion to adopt one of the proposed remedies.[47] An arbitration-type step for use in the remedy process as described by the NPRM has the potential to help expedite the resolution of program access violations, and should therefore be available to the Commission.

VIII. CONCLUSION

The experiences of rural and mid-size LECs confirm that there is an intrinsic link between the provision of video services and broadband penetration and investment. Providing consumers with additional choices in the video market is beneficial not only for its own sake. It also leads to increased availability of more robust and more affordable broadband offerings, even in high-cost rural areas.

Therefore, the Commission should exercise its authority to ensure that rural and mid-size LECs have nondiscriminatory access to programming. The five-year extension of the exclusive contract prohibition should remain in effect for its full term. Program

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[46] *Id.*, ¶137.

access rules should be extended to terrestrially delivered cable-affiliated programming in order to ensure that rural and mid-size LECs serving as MVPDs will have viable service offerings. Similarly, the Commission should expand the exclusive contract prohibition to non-cable affiliated programming.

Furthermore, the Commission should preclude the mandatory tying of programming, which restricts consumer choice and impedes entry into the MVPD market. This, in turn, impedes additional broadband investment, making Commission action imperative. The Commission should also preclude broadband tying, where programmers force MVPDs to pay per-subscriber rates based on non-video broadband customers.

The Commission should also address other concerns raised by rural MVPDs. Specifically, the Commission should take action to clarify that the use of shared head-ends cannot be used as a justification to deny or impair access to content; mandatory non-disclosure provisions should also be precluded, as should demands for disproportionate amounts of advertising slots; and programmers should not be permitted to deny or place unreasonable restrictions on access to content based upon the use of IP technology by MVPDs. Finally, the Commission should ensure that consumers continue to have access to programming in the event of a dispute.

In the final analysis, the Commission should exercise its authority to ensure that consumers have not only more choices among video providers, but also among the packages of programming that are available to them. By taking the steps outlined above,

[47] *Id.*, ¶134.

the Commission will provide consumers with greater choice, while lowering barriers to broadband investment.

Respectfully submitted,

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January 4, 2008

CERTIFICATE OF SERVICE

I, Stephen Pastorkovich, hereby certify that a copy of the comments by the Organization for the Promotion and Advancement of Small Telecommunications Companies, the Independent Telephone and Telecommunications Alliance, the Western Telecommunications Alliance, and the Rural Independent Competitive Alliance was sent via electronic mail, on this, the 4th day of January, 2008, to those listed on the attached sheet.

By: /s/ Stephen Pastorkovich
Stephen Pastorkovich

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