

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 07-269
Competition in the Market for the)	
Delivery of Video Programming)	
)	

COMMENTS OF

**THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
THE INDEPENDENT TELEPHONE AND
TELECOMMUNICATIONS ALLIANCE;
THE ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES;
THE RURAL INDEPENDENT COMPETITIVE ALLIANCE; and
THE WESTERN TELECOMMUNICATIONS ALLIANCE**

NTCA
4121 Wilson Boulevard
10th Floor
Arlington, VA 22203
703-351-2000

RICA
2154 Wisconsin Avenue, NW
Washington, DC 20007
202-333-5275

ITTA
1101 Vermont Avenue, NW
Suite 501
Washington, DC 20005
202-898-1519

WTA
317 Massachusetts Avenue, NE
Suite 300C
Washington, DC 20002
202-548-0202

OPASTCO
2020 K Street, NW
7th Floor
Washington, DC 20006
202-659-5990

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EXECUTIVE SUMMARY

For rural local exchange carriers (RLECs) competing in or attempting to enter the multichannel video programming distributor (MVPD) market, the difficulty of obtaining access to “must have” video content at reasonable rates, terms, and conditions is the single biggest obstacle they face to providing video, as well as to expanding their service offerings or expanding the availability of service to additional rural consumers. Access to the video content that consumers desire can not only improve competition in the video services market, it also results in additional consumers subscribing to broadband Internet access services, as the Commission itself has previously acknowledged. The Commission should use this proceeding to investigate the anticompetitive practices of video programmers and take steps to improve RLECs’ access to video content at affordable rates and under reasonable terms and conditions.

The Commission should prohibit programming vendors from requiring rural MVPDs to pay for programming that they and their consumers do not want in order to access programming that they desire. This practice unnecessarily increases rural MVPDs’ costs and prevents them from offering their subscribers affordable service packages. The Commission should also prohibit mandatory “broadband tying,” where rural MVPDs must pay per-subscriber fees for non-video broadband customers. Broadband tying forces rural MVPDs to either absorb these costs or raise end-user rates, neither of which benefits rural consumers. Programming vendors should also be prohibited from requiring rural MVPDs to place content in specific programming tiers, as

this prevents them from offering their subscribers a truly basic, stripped down service tier at an affordable rate. Additionally, the Commission should monitor the market for “over the top” web-based video services to ensure that exclusive arrangements between programmers and large broadband providers and/or MVPDs do not impede video competition or thwart broadband deployment in rural areas. Finally, the Commission should immediately reform its outdated retransmission consent process. Under the current rules, broadcasters are able to abuse their market power with “take it or leave it” ultimatums and the threat of withholding programming. These abuses are compounded by rural MVPDs’ inability to obtain alternative content from other markets. The Commission should therefore strengthen its “good faith” rules, and adopt other recommendations provided by the Associations in the retransmission consent proceeding.

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I. INTRODUCTION

The National Telecommunications Cooperative Association (NTCA),¹ the Independent Telephone and Telecommunications Alliance (ITTA),² the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO),³ and the Western Telecommunications Alliance (WTA),⁴ and the Rural

¹ NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities; each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended.

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 19.5 million customers in 44 states.

³ OPASTCO is a national trade association representing approximately 460 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve approximately 3 million customers.

⁴ WTA is a trade association that represents more than 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.

Independent Competitive Alliance (RICA)⁵(collectively, the Associations) hereby submit these comments in the above-captioned proceeding.⁶

The NOI solicits data and information for the Commission's Report to Congress on the status of competition in the market for the delivery of video programming,⁷ and particularly requests information on the provision of video services in rural areas.⁸ The Associations periodically conduct surveys of their membership regarding video services. The most recent survey was conducted by NTCA in 2010, and the results are reflected herein.⁹

In 2010, 252 NTCA members offered video via legacy coaxial cable (CATV). This number is down from 2007, when 276 provided service via a CATV system. Direct Broadcast Satellite (DBS) offerings have declined significantly. In 2007, 106 members provided video via DBS, but in 2010 that number has dropped to 66. Internet Protocol Television (IPTV) has shown a steady advance, growing from 61 rural providers in 2007 to 159 in 2010. The IPTV deployment number is likely to continue to grow, provided even-handed regulatory conditions exist, as the percentage of members who offer broadband service via fiber-to-the-home and fiber-to-the-curb technologies grow. For all Associations' members, the ability to offer a quality video service to customers is viewed

⁵ 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.

⁶ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Notice of Inquiry (rel. Apr. 21, 2011) (NOI).

⁷ *Id.*, ¶¶ 7-8.

⁸ *Id.*, ¶¶ 56-59.

⁹ The NOI requested competitive information for years up to 2010 and separately requests comments for 2010, due in June (NOI, ¶ 7). Figures provided by NTCA in these comments necessarily combine survey results from 2009 and 2010 and information on trends that include the first quarter of 2011. OPASTCO submitted the results of its previous video survey in response to the prior NOI in this proceeding; *see*, OPASTCO comments, MB Docket No. 07-269, pp. 3-5 (fil. Jul. 29, 2009). (OPASTCO comments).

as a key driver of broadband deployment in rural areas and is essential to the long-term viability of rural telecommunications providers.

Successful video deployment requires access to desirable content under reasonable terms and conditions. Rural carriers continue to face the monumental obstacle of obtaining the programming that their customers demand at affordable rates, and under reasonable terms and conditions. A variety of behaviors and strategies employed by the programmers and broadcasters make it difficult for rural carriers to offer content in competitive retail packages that reflect what their subscribers want and can afford. Competition is being hampered because of forced tying and tiering by program providers. Program providers engage in unfair bargaining tactics, including employing non-disclosure provisions in contracts and using the threat of withholding “must have” content during the re-negotiation process.¹⁰ Retransmission consent rules strongly favor the broadcasters to the detriment of consumers. The escalating costs associated with retransmission consent acts as an inhibitor to the provision of video service by rural providers and does nothing to enhance competition or broadband adoption in these areas. While the Commission is currently considering changes to the retransmission consent regime,¹¹ the Associations submit that the Commission should also investigate program providers’ use of bargaining inequities that threaten rural video providers’ viability.

¹⁰See, Associations comments, MB Docket No. 10-71, pp. 12-18, 24-25(fil. May 27, 2011) (Associations Retransmission Consent comments).

¹¹In the Matter of the Amendment of the Commission’s Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, MB Docket No. 10-71 (rel. May 27, 2011).

II. ACCESS TO VIDEO CONTENT AT AFFORDABLE RATES AND UNDER REASONABLE TERMS AND CONDITIONS CAN IMPROVE COMPETITION IN THE VIDEO SERVICES MARKET AND SPUR BROADBAND INVESTMENT IN RLEC SERVICE AREAS

A large majority of the Associations' RLEC members offer video services to at least some portion of their service territory. However, member surveys confirm that difficulty obtaining access to "must have" programming at affordable rates and under reasonable terms, and conditions is the single biggest obstacle that RLECs face to providing video, from expanding their service offerings, or expanding their service availability to additional rural consumers.¹² Forced "tying" and "tiering" arrangements, and the outdated and broken retransmission consent process, among other factors, prevent RLECs from offering the video content at affordable rates. This ultimately harms competition and reduces consumer choice in rural service areas.

Also, as the Associations have previously noted, access to video content at affordable rates and under reasonable terms and conditions spurs rural broadband investment.¹³ This is because when RLECs offer video and broadband Internet access services together, rural consumers' adoption of broadband increases significantly. When more consumers subscribe to an RLEC's broadband services, it provides the carrier with additional revenue and incentive to expand broadband availability and increase the data speeds available in their service area. This, in turn, drives even more consumers to adopt broadband and enables subscribers to use bandwidth-intensive applications and services

¹² See, NTCA 2010 Broadband/Internet Availability Survey, p. 12 (January 2011). (NTCA broadband survey). Available at: http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2010_NTCA_Broadband_Survey_Report.pdf OPASTCO's survey found similar results; See OPASTCO comments, p. 3.

¹³ Associations Retransmission Consent comments, p. 4.

that only robust broadband connections can accommodate, and that are available to urban consumers.

The Commission should use this proceeding to thoroughly investigate the anti-competitive practices of video programming vendors and take steps to improve RLECs' access to video content at affordable rates and under reasonable terms and conditions.

III. THE AVAILABILITY OF PROGRAMMING AT AFFORDABLE RATES AND UNDER REASONABLE TERMS AND CONDITIONS WILL DETERMINE THE FUTURE SUCCESS OF RURAL MVPDS

The Commission requests information on MVPD access to programming¹⁴ and programming packaging.¹⁵ Small rural video providers, like larger urban ones, must respond to consumer demand for certain popular programming to be able to sell their services and remain competitive. The Associations' members are not affiliated with content providers and therefore must rely on vertically integrated or non-affiliated programmers for "must have" content. The availability of "must have" programming at affordable rates and under reasonable terms and conditions marks the difference between a viable video service and one that will fail or be unable to launch.

A. The Commission Should Prohibit Programming Vendors From Requiring Rural MVPDs To Pay For Undesired Programming In Order To Gain Access To Desired Programming

The Associations have consistently opposed the commonly employed practice of tying undesired content with desired content.¹⁶ Content tying is the most prevalent and

¹⁴NOI, ¶ 19, 23.

¹⁵*Id.*, ¶18.

¹⁶See, e.g., Associations Retransmission Consent Comments, p. 16; OPASTCO, NTCA, RICA, and WTA, *ex parte* letter, MB Docket No. 07-198 (fil. Aug. 15, 2008).

pernicious problem faced by rural MVPDs in the market today. In practice, the only viable way that rural MVPDs may gain access to “must-have” programming is to agree to take unwanted programming, which drives up the purchase 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.¹⁷ 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 ever more expensive, due to the tying practices of network program providers and local broadcasters.

In addition, contrary to the assertions of programming providers, the Associations’ members indicate that wholesale content vendors do not permit them to offer their programming to end-user subscribers on an *a la carte* basis. For example, 78 percent of respondents to a NTCA video poll indicated that not a single programming vendor would permit the purchase of a channel on a stand-alone basis, and another 14 percent of participants said that less than 10 percent of their vendors would permit stand-alone access to an individual program network.

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

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

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

In order 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 “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 subscription video content. Broadband tying goes well beyond the realm of any reasonable condition for access to traditional subscription video content. 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 rural MVPDs have been required to promote programmers’ web sites. 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.

C. The Commission Should Prohibit Programming Vendors from Requiring Rural MVPDs to Place Content in Specific Service Tiers

The Associations' members also 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 widely penetrated tier(s) of service they offer. Ninety-four percent of NTCA's video poll participants reported that wholesale content providers have required them to place their programming in the most highly penetrated tier of video service.

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 a rural MVPD to offer 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. By prohibiting video programmers' use of forced tiering arrangements, the Commission can help to promote product differentiation among video service providers in rural areas and enable rural consumers to access the content that they desire at affordable rates.

D. 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 NOI also seeks comment about online video distribution.¹⁸ 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 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 broadband investment and adoption, will suffer in rural service areas. The Commission should therefore 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.

IV. THE COMMISSION SHOULD REFORM THE OUTDATED RETRANSMISSION CONSENT PROCESS

The Commission’s “must carry” and retransmission consent rules permit broadcasters to unfairly leverage their bargaining power and drive up programming costs for rural MVPDs. In the past, broadcast television stations relied solely on advertising revenues to earn a reasonable return on their investment and would require MVPDs to carry their signals from within their designated market area (DMA) by invoking the “must carry” requirements. No payments between the MVPDs and broadcasters were exchanged. Today, the vast majority of broadcasters are gaining additional revenues by

¹⁸NOI, ¶¶ 52-55.

charging MVPDs for the privilege of carrying the in-DMA signal through retransmission consent agreements. Rates for network programming may be higher than \$1.00 per subscriber per month. Since MVPDs need network programming to offer a successful video service, and because they may not look to neighboring markets for better deals,¹⁹ the Commission's rules confer unwarranted bargaining power to broadcasters. MVPDs must simply pay broadcasters whatever rate they demand. Further compounding this problem, the vast majority of retransmission consent agreements contain mandatory "non-disclosure" clauses. This means that rural MVPDs have no way of knowing if what they are being charged is comparable to market rates paid by larger MVPDs, or whether the rates they pay are discriminatory.

Nearly half of the respondents to NTCA's video poll reported that broadcasters failed to negotiate in good faith by issuing "take it or leave it" ultimatums. Faced with no alternative for "must have" programming, 60 percent of respondents presented with "take it or leave it" offers ended up taking the offer as presented. Another way broadcasters are able to "flex their muscles" is with the threat of withholding programming if the renewal is not completed prior to the previous term's expiration. This forces rural MVPDs to give in to the broadcaster's demand out of fear of losing customers due to the lack of programming. Twenty-two percent of poll participants who declined the "take it or leave it" offer were ultimately prohibited from gaining access to the broadcast signal.

¹⁹Today, the six commercial broadcast networks provide service according to DMAs. Section 76.56(b) of the Commission's rules requires that most MVPDs may only carry the local commercial broadcast television stations located in their specified DMAs. MVPDs may not look to neighboring DMAs for network programming.

The Associations recently filed comments in the Commission’s retransmission consent proceeding urging, among other things, a strengthening of the “good faith” requirements and a standstill provision which would help prevent broadcasters from abusing their market power to the detriment of rural consumers.²⁰ The Associations also urged the Commission to amend its rules so that households served by rural video providers may consider and receive lower programming rates from alternative broadcast stations in neighboring DMAs.²¹ As noted above, the availability of video content at affordable rates and under reasonable terms and conditions can increase competition in the video services market and spur broadband investment in RLEC service areas. The reforms proposed by the Associations should therefore be implemented without delay.

V. CONCLUSION

As demonstrated above, video programming vendors are able to use their market power to raise rural MVPDs’ costs and prevent them from offering their subscribers service packages that they actually want at affordable rates. Providing rural MVPDs with access to video content at affordable rates and under reasonable terms and conditions can improve competition in the video services market and spurt broadband investment in RLEC service areas. To do so, the Commission should:

- prohibit programming vendors from engaging in forced tying, i.e., requiring rural MVPDs to pay for undesired programming in order to gain access to desired programming;

²⁰ Associations Retransmission Consent comments, pp. 6–17.

²¹ The Commission has authority under Sections 151, 152(a), 153(5), 154(i), 303(r), 601(4), 601(6), 616(a), 628(a), 628(b), 628(c)(4) and 706 of the Communications Act of 1934, as amended, to amend the current retransmission consent rules and DMA restrictions.

- prohibit mandatory broadband tying, where rural MVPDs must pay per-subscriber fees for non-video broadband customers;
- prohibit programming vendors from requiring rural MVPDs to place content in specific service tiers;
- allow rural MVPDs to obtain content from outside of their DMA;
- closely 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; and
- reform the outdated retransmission consent process by strengthening the “good faith” rules, and adopt other recommendations provided by the Associations in MB Docket 10-71.

Respectfully submitted,

**THE NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION**

By: /s/ Michael Romano

Michael Romano
Senior Vice President, Policy

By: /s/ Jill Canfield

Jill Canfield
Director, Legal and Industry

4121 Wilson Boulevard
10th Floor
Arlington, VA 22203

703-351-2000

**THE INDEPENDENT TELEPHONE AND
TELECOMMUNICATIONS ALLIANCE**

By: /s/ Genevieve Morelli

Genevieve Morelli
President

1101 Vermont Avenue, NW
Suite 501
Washington, DC 20005

202-898-1519

**THE ORGANIZATION FOR THE PROMOTION
AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES**

By: /s/ Stuart Polikoff
Stuart Polikoff
Vice President – Regulatory Policy
and Business Development

By: /s/ Stephen Pastorkovich
Stephen Pastorkovich
Business Development Director/
Senior Policy Analyst

2020 K Street, NW
7th Floor
Washington, DC 20006

202-659-5990

**THE RURAL INDEPENDENT COMPETITIVE
ALLIANCE**

By: /s/ Stephen G. Kraskin
Stephen G. Kraskin
Its Attorney

2154 Wisconsin Ave., N.W.
Washington, DC 20007

202-333-1770

**THE WESTERN TELECOMMUNICATIONS
ALLIANCE**

By: /s/ Derrick B. Owens
Derrick B. Owens
Director of Government Affairs
Affairs

By: /s/ Eric Keber
Eric Keber
Associate Director of Government

317 Massachusetts Ave., NE300C
Washington, DC 20002

202-548-0202

June 8, 2011

CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Comments of **NTCA, ITTA, OPASTCO, RICA, and WTA** in MB Docket No.07-269, FCC 11-65 was served on this 8th day of June 2011 via electronic mail to the following persons:

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554
Julius.Genachowski@fcc.gov

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554
Michael.Copps@fcc.gov

Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554
Robert.McDowell@fcc.gov

Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554
Mignon.Clyburn@fcc.gov

Commissioner Meredith Attwell Baker
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554
Meredith.Baker@fcc.gov

Best Copy and Printing, Inc.
Federal Communications Commission
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

/s/ Adrienne L. Rolls
Adrienne L. Rolls