

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

In the Matter of)
)
The Regional Sports Network Marketplace) MB Docket No. 11-128
)

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

I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO),¹ the National Telecommunications Cooperative Association (NTCA),² the Independent Telephone and Telecommunications Alliance (ITTA),³ the Western Telecommunications Alliance (WTA),⁴ and the Rural Independent Competitive Alliance (RICA)⁵ (collectively, the Associations) hereby submit these reply comments in the above-

¹ 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 more than 3 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37).

² 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.

³ 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.

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.

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.

captioned proceeding.⁶ Video is an important component of the service suite provided by rural local exchange carriers (RLECs) in the small markets they serve, particularly as such services help promote broadband adoption.

The Public Notice seeks comment on issues concerning access to and carriage of regional sports networks (RSNs).⁷ It also notes that as part of a previous Order, the Commission has committed to issue a report (RSN Report) that will examine these issues on an industry-wide basis, and that the Commission may subsequently determine that further action is warranted.⁸ The Associations urge the Commission to acknowledge in its RSN Report that small and mid-sized multichannel video programming distributors (MVPDs) continue to encounter significant barriers to obtaining access to must-have RSN programming, and that these barriers impede the ability of these MVPDs to compete in or even enter the video marketplace, which, in turn, impedes broadband adoption and investment. Therefore, the RSN Report should outline the subsequent steps the Commission will take to lower these barriers.

II. THE RSN REPORT SHOULD OUTLINE HOW THE COMMISSION WILL LOWER BARRIERS ENCOUNTERED BY SMALL AND MID-SIZED MVPDS SEEKING ACCESS TO RSN CONTENT

The RSN Report should outline the subsequent steps the Commission intends to take to streamline the program access complaint process, reform its video access rules, address the vertical pricing problem, and other appropriate measures that will make it more feasible for small and mid-sized MVPDs to acquire RSN content under reasonable terms and conditions. In so

⁶ *Media Bureau Seeks Comment on The Regional Sports Network Marketplace*, Public Notice, MB Docket No. 11-128, DA 11-1238 (rel. Jul. 26, 2011) (Public Notice).

⁷ *Id.*, p. 4.

⁸ *Id.*, p. 2, citing *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8277, ¶165 (2006) (Adelphia Order).

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doing, the Commission will promote competitive entry in the video market. It will also encourage broadband adoption and investment.

The record in this proceeding demonstrates that RSN programming is non-replicable “must-have” content, and that MVPDs of all sizes face serious challenges in gaining access to it from vertically integrated programmers.⁹ This, in turn, leads to significant competitive and consumer harms.¹⁰ While the Public Notice references nominal reforms and alterations that have been made to complaint procedures,¹¹ these have done little to alleviate the problems encountered even by large MVPDs that have the substantial resources necessary to seek relief. Specifically, both AT&T and Verizon note that complaint proceedings initiated by them have been pending for two years, without resolution.¹² While the Commission is to be applauded for subsequently issuing two Orders that accurately found in favor of the complainants,¹³ the prolonged delay demonstrates that the new procedures are time-consuming and expensive. Small and mid-sized MVPDs lack the resources to engage in this sort of protracted proceeding. The complaint process is not a realistic avenue for relief for any except the largest providers.

⁹ *See*, American Cable Association (ACA), p. 2; AT&T, pp. 1-3; DIRECTV, pp. 2-7; DISH Network, pp. 2-4; Verizon, pp. 3-12.

¹⁰ *Id.* In addition, rural MVPDs should have the ability to craft programming tiers, including sports-oriented tiers, that reflect market demand. Currently, rural MVPDs are often forced to place certain channels, including RSN channels, into specific programming tiers as a condition of purchase of “must have” content (or having access to this content at a certain rate). The result is that rural MVPDs must include more channels than many consumers want in their basic tiers, but neither the MVPD nor the consumer can avoid the higher costs these requirements incur. *See* Associations’ comments, MB 10-71 (fil. May 27, 2011), pp. 22-23; *see also* OPASTCO, NTCA, RICA, and WTA *ex parte* letter, MB 07-198 (fil. Aug. 15, 2008).

¹¹ Public Notice, p. 3.

¹² AT&T, pp. 5-6; Verizon p. 2; *see also* ACA, pp. 11-12.

¹³ *Verizon Telephone Companies and Verizon Services Corp., Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, File No. CSR-8185-P, Order, DA 11-1594 (rel. Sept. 22, 2011); *AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, File No. CSR-8196-P, Order, DA 11-1595 (rel. Sept. 22, 2011).

ACA observes that the use of supra-competitive pricing by vertically integrated RSN programmers is especially harmful to smaller MVPDs, and that this problem is not addressed by current program access rules.¹⁴ Furthermore, ACA highlights that the current rules suffer from three major shortcomings:

- The “quantity discount” loophole, which allows a programmer to charge higher rates to MVPDs with fewer customers, eliminates any protection from unreasonable rates, terms and conditions for smaller MVPDs.¹⁵
- The program access rules do not prevent a vertically integrated programmer from raising rival MVPDs’ rates by simply charging itself very high fees for the same programming.¹⁶
- The program access complaint process offers no practical remedy for aggrieved MVPDs because access is not assured while disputes are pending.¹⁷

ACA correctly asserts that the RSN Report “will not be complete unless it focuses on the problem of the pricing levels vertically integrated RSNs charge rival MVPDs,”¹⁸ and that “it is incumbent on the Commission to carefully evaluate and consider industry-wide solutions to the vertical pricing problem in its report on the RSN Marketplace.”¹⁹

Without nondiscriminatory access to “must-have” content under reasonable terms and conditions, including RSN content, rural MVPDs face an inherent competitive disadvantage. In addition, some rural carriers are deterred from entering the video market altogether. Most rural carriers wish to provide video services and to offer “triple play” voice, video and broadband bundles to their customers. However, lack of access to programming under reasonable terms and

¹⁴ ACA, pp. 4-5.

¹⁵ *Id.*, pp. 7-10.

¹⁶ *Id.*, pp. 10-11.

¹⁷ *Id.*, pp. 11-12.

¹⁸ *Id.*, p. 2.

¹⁹ *Id.*, p. 4.

conditions, including vital RSN content, impedes or prevents RLEC-affiliated MVPDs from fulfilling consumer demand for this bundle.

As the Associations have demonstrated previously,²⁰ one of the most effective methods available to the Commission to encourage the adoption of advanced services and investment in broadband networks is to improve broadband providers' access to video content. The Commission has previously established that there is an intrinsic link between a provider's ability to offer video service and to deploy broadband.²¹ This conclusion has been confirmed by state regulators,²² and is further reinforced by the experience of rural carriers that are able to bundle video with broadband services.²³ Therefore, the Commission's RSN Report should recognize that lack of nondiscriminatory access to RSN programming under reasonable terms and conditions not only impedes competition in the video market, it also serves as a barrier to broadband adoption and investment.

III. CONCLUSION

The Commission's RSN Report should reflect that RSN programming is "must-have" content that small and mid-sized MVPDs require access to on a nondiscriminatory basis in order to provide viable services to consumers. The Report should also acknowledge that the current dispute resolution process is inadequate even for large, well-financed MVPDs, and is therefore

²⁰ Associations' comments, MB Docket No. 07-269 (fil. June 8, 2011), pp. 1-9; *see also* OPASTCO, NTCA, WTA comments, GN Docket No. 11-121 (fil. Sept. 6, 2011), pp. 8-10.

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) (MDU Order).

²² *See, 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>.

²³ In a 2009 study, the National Exchange Carrier Association (NECA) found that members of its Traffic Sensitive Pool offering broadband using Digital Subscriber Line (DSL) technology along with a video component had DSL adoption rates nearly 24 percent higher than those companies offering DSL without access to subscription video services. *See*, NECA comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (fil. Dec. 7, 2009).

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virtually unusable for small and mid-sized providers. Supra-competitive pricing is a particularly serious problem encountered by small and mid-sized MVPDs, and has a serious impact on their ability to offer both video and broadband services. The RSN Report should outline the next steps the Commission will take to alleviate these shortcomings.

Respectfully submitted,

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