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

In the Matter of	)	
	)	
Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace	)))	GN Docket. No. 20-60

COMMENTS

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April 27, 2020

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COMMENTS

I. INTRODUCTION AND SUMMARY

ACA Connects hereby submits comments in response to the Public Notice issued by the Federal Communications Commission ("Commission") Office of Economics and Analytics ("OEA") in the above-captioned proceeding.[1] The Public Notice seeks comment on competitive issues and trends in communications markets to inform the Commission's development of the 2020 Communications Marketplace Report, which will be the second of these biennial reports.[2]

In recent years, the Commission has prioritized adopting policies that stimulate deployment and drive competition in the fixed broadband marketplace, and its efforts

[1] *See Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace*, Public Notice, GN Docket No. 20-61, DA 20-199 (rel. Feb. 27, 2020) ("Public Notice").

[2] *See* 47 U.S.C. § 163 (directing the Commission to prepare a Communications Marketplace Report in "the last quarter of every even-numbered year" and delineating the contents of the report); *see also Communications Marketplace Report* et al., Report, GN Docket No. 18-231 et al., FCC 18-181 (2018) ("2018 Report").

are bearing fruit. ACA Connects' members and others continue to invest heavily in expanding and upgrading their broadband networks in response to the competitive dynamics they face. No doubt the fixed broadband marketplace is substantially competitive and is expected to become even more so in the years ahead. We urge the Commission to reach this conclusion in its forthcoming report.

The video marketplace, by contrast, remains broken. As ACA Connects has documented in the past, broadcasters have continued to consolidate, further increasing their significant leverage over cable operators and the harm they can inflict on consumers. As a result, consumers must suffer through more retransmission consent related blackouts, and they must pay even greater amounts to access local broadcast programming, which is often tied to carriage of other unwanted programming. Furthermore, prices for carriage of other video programming have continued to rise above the rate of inflation.

These harms afflict small and rural cable operators and their customers even worse than their larger counterparts. Indeed, some smaller operators have begun to exit the video business altogether. We were pleased to see the Commission present data in the 2018 Report on the particular harms that smaller, typically rural cable operators face in the video marketplace, though these data—compelling as they are—in fact *understate* the extent of the problem significantly. We thus urge the Commission to provide a fuller account of the harms faced by smaller cable operators in the 2020 report and address other matters, as explained below.

II. THE FIXED BROADBAND MARKETPLACE IS SUBSTANTIALLY COMPETITIVE, AND COMMISSION POLICY CONTINUES TO PLAY AN IMPORTANT ROLE IN SUSTAINING AND STRENGTHENING THIS COMPETITION

The Public Notice seeks comment on the state of competition in the fixed broadband marketplace. The data that the Commission presented in the 2018 Report revealed that this marketplace is substantially competitive, with a majority of Americans having more than one choice of provider for fixed service of at least 100 Mbps/10 Mbps as of 2017, and a large share enjoying multiple options at even higher speeds.[3]

The 700-plus small and medium-sized broadband providers that ACA Connects represents are helping drive this competition by investing in their networks and rolling out innovative services.[4] It is a necessity for these operators. The markets in which ACA Connects members provide broadband Internet access service are marked by pervasive and growing competition. Those members that operate in urban markets are typically "overbuilders," and as such they face direct competition from a major incumbent cable operator and incumbent telephone company, both of whom typically offer high-speed broadband (e.g., DOCSIS, FTTH) in these markets. ACA Connects members operating in more rural areas typically face an incumbent cable or telephone

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[3] *See* 2018 Report, ¶ 186, Fig. D-1; *see also Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2020 Broadband Deployment Report, GN Docket No. 19-285, FCC 20-50 at ¶ 41 (2020) ("Between 2017 and 2018, the deployment of 100/10 Mbps increased from 88.6% to 90.5% of the population, and the deployment of 250/25 Mbps dramatically increased from 58.3% to 85.6% of the population.").

[4] In doing so, they face challenges their larger competitors do not. To begin with, these smaller providers operate with less scale and scope, generally serving one or a few small, and less dense, local markets. Furthermore, they have relatively few subscribers, many of whom have less spending power. As a result, these operators cannot economically justify having personnel to handle a single task, and so they outsource various tasks that larger providers may handle in-house.

provider,[5] and often they also compete with fixed wireless providers, satellite providers, and increasingly, electric cooperatives.[6] In the years ahead, ACA Connects members expect to face competition from technologically novel sources, including 5G wireless deployments and low-earth orbit ("LEO") satellite constellations.[7] To respond to these competitive dynamics, ACA Connects members have ramped up their investments, reduced prices, and enhanced their customer service. In the past decade alone, they have invested billions to upgrade their networks to DOCSIS 3.0/3.1 and all-fiber technologies, and they continue to invest about $1 billion annually. Their prices for high-speed broadband have declined by at least 50% on a per Mbps basis in the past few years,[8] and they regularly win awards for providing good customer service.[9]

Americans are reaping the benefits of ACA Connects members' and other fixed broadband providers' competitive investments, especially now as they contend with the unprecedented COVID-19 pandemic. The crisis has driven online a vast range of

[5] ACA Connects members include both traditional cable operators and rural telephone companies. A member that belongs to one category is likely to face competition from another company that belongs to the other.

[6] Even in more rural markets that ACA Connects members serve, where the deployment of a high-performance broadband network by a second fixed provider may be economically infeasible, there are strong pressures on ACA Connects members to deliver high speeds and to keep their prices comparable to those offered in more populous areas. *See* Comments of American Cable Association, GN Docket No. 18-231 at 4 (filed Aug. 17, 2018) ("ACA Connects 2018 Fixed Competition Comments")

[7] *See, e.g.*, Moffett Nathanson Research, "Broadband Q4 2019: A Deep Dive Into Alternative Fixed Wireless Broadband Architectures at 1 (Mar. 2, 2020) (observing that "the most important threat" to cable operators' broadband growth "comes from fixed wireless broadband" using millimeter wave technology, and that "LEO constellations, like SpaceX's Starlink and Amazon's Project Kuiper" are "also worth watching").

[8] See, e.g., Comments of Fiber Broadband Association, WC Docket No. 17-108 at 10-13 (filed July 17, 2017).

[9] *See, e.g.*, Ben Gottesman, PC Mag, "Readers' Choice Awards 2019: Internet Service Providers (ISPs) (May 28, 2019)," https://www.pcmag.com/news/readers-choice-awards-2019-internet-service-providers-isps (bestowing on ACA Connects member Grande Communications the top ranking among ISPs for "overall satisfaction").

human activity that would normally be conducted in person, including office work, school, doctor visits, and more. These changes have brought with them dramatic increases in Internet traffic as well as shifting usage patterns.[10] Broadband providers have been able to accommodate these extraordinary increases in demand because of the investments they have made in their networks over time to keep up with their competitors in meeting customers' growing broadband appetites.[11] With the proliferation of 4K and other high-definition video offerings, online gaming, home automation, and other bandwidth-intensive applications, these trends show no sign of stopping.[12]

This substantial and growing competition in the broadband marketplace has been aided by policymaking at the Federal level. As ACA Connects noted in 2018, the Commission's efforts in recent years to remove regulatory barriers to broadband deployment have given ACA Connects members confidence to invest more robustly in upgrading their networks and edging out into new territory, including into areas where they will be competing head-to-head with one or more large incumbent providers.[13]

The Commission has advanced this pro-competitive agenda further in the two years since, including by its adoption of an Order that prohibits State and local

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[10] *See, e.g.,* FCC Commissioner Brendan Carr, "U.S. Internet and Telecom Networks Showing Strength With COVID-19," Medium (Mar. 27, 2020), https://medium.com/beat-the-virus/americas-broadband-networks-showing-strength-with-covid-19-f2a403c9700f (last visited Apr. 27, 2020).

[11] *See id*. ("The strong performance we've seen in the U.S. is no accident. Over the past few years, we have created a regulatory environment that enabled Internet providers to invest heavily in their networks — outpacing investments in other countries — and to build new Internet infrastructure at a record-breaking pace.").

[12] We also suspect that COVID-19 will leave behind permanent changes in consumer behavior that increase broadband demand—and competitive investment—even further.

[13] ACA Connects 2018 Fixed Competition Comments at 5.

authorities from imposing excessive regulations and fees through the franchising process that put cable operators at a competitive disadvantage among broadband providers.[14] The Commission has also taken substantial steps to promote the introduction of 5G wireless and low-earth orbit satellite services that are expected to compete head-to-head with fixed broadband,[15] which will drive ACA Connects members and other fixed providers to further improve their own network capabilities and service offerings.

We encourage the Commission to take additional steps in the coming two years to promote competitive entry and expansion in the fixed broadband marketplace, including by further streamlining attachments to investor-owned utilities' poles.[16] In addition, as ACA Connects has explained, the Commission's continual removal of

[14] *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*, Third Report and Order, MB Docket No. 05-311, FCC 19-80 (2018).

[15] *See, e.g.*, *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Report and Order and Order of Proposed Modification, GN Docket No. 18-122, FCC 20-22 at ¶ 4 (2020) ("Today, we expand on these efforts to close the digital divide and promote U.S. leadership in the next generation of wireless services, including 5G wireless and other advanced spectrum-based services, by reforming the use of the 3.7-4.2 GHz band, also known as the C-Band."); *Space Exploration Holdings, LLC et al*., Memorandum Opinion, Order and Authorization, IBFS File No. SAT-LOA-20170301-00027 et al., FCC 18-161 (2018) ("Grant of this application will enable SpaceX to provide both diverse geographic coverage and the capacity to support a wide range of broadband and communications services for residential, commercial, institutional, governmental and professional users in the United States and globally.").

[16] *See* Comments of ACA Connects on CTIA Petition for Declaratory Ruling, WC Docket No. 17-84 (filed Oct. 29, 2019) (supporting the Commission's adoption of a declaratory ruling to clarify further the pole attachment rights of telecommunications and cable providers seeking to deploy broadband); Letter From Brian Hurley, ACA Connects, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 et al. (filed Apr. 9, 2020) (urging the Commission to adopt an "attach-and-notify" policy for customer drop pole attachments). We also encourage the Commission to monitor implementation of the pole attachment reforms adopted in 2018 and other recent infrastructure rulings, and to intervene if and when necessary to address any problems.

outdated regulatory obligations, and its forbearance from imposing new ones, can free up capital for new broadband network upgrades and expansions into new markets.[17]

While the Commission can further stimulate competition in the fixed broadband marketplace through policymaking that unleashes private investment, we recognize that such measures alone are insufficient to deliver the benefits of broadband to all. There are hard-to-reach areas that are cost-prohibitive to serve, not to mention consumers who *are served* with reasonably priced broadband service, but have declined to purchase it due to financial constraints, lack of familiarity with broadband technology, or for other reasons. In such circumstances, local, State and Federal governments have a critical role to play in meeting connectivity needs. ACA Connects supports well-designed government programs, which work in tandem with, and do not undercut, private sector efforts. Government programs should support what is working in the market and intervene only where necessary to meet the remaining issues that the marketplace cannot solve on its own.

III. COMPETITIVE DYSFUNCTION IS RIFE IN THE VIDEO MARKETPLACE, AND SMALL AND RURAL CABLE OPERATORS FARE THE WORST

In recent years, the economics of multichannel video service have become increasingly challenging. Programming fees, charged on a per-subscriber basis by cable networks and broadcast TV stations, have generally risen much more rapidly than prices for multichannel video. Moreover, demands on MVPDs to carry unwanted

[17] *See* ACA Connects 2018 Fixed Competition Comments at 9-15. As ACA Connects explained, high and rising costs for video programming have substantial spillover effects on its members' ability to compete in the fixed broadband marketplace. *See id*. at 12-14.

programming continues, and multichannel video revenues continue to lag.[18] As ACA Connects has noted previously, these dynamics are particularly harmful for smaller cable video operators, which tend to pay much higher rates for video programming than larger ones.[19]

The situation is especially dire in the retransmission consent marketplace. In the two years since the issuance of the 2018 Report, retransmission fees have continued to rise and channel blackouts have continued to increase. A major factor driving these trends has been broadcast industry consolidation. Large station groups have grown larger nationally,[20] and have evaded the Commission's media ownership rules to amass duopolies, triopolies and even quadropolies of "Big Four" networks in some markets. They use this leverage to extract outrageous, ever-increasing fees from MVPDs in exchange for "must-have" broadcast programming. In the past year, a few MVPDs have found this situation so untenable they have exited the video business entirely.

The 2018 Report went some way toward documenting the competitive dysfunction that exists in the video marketplace, including the particular harms it creates

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[18] According to analysis by SNL Kagan, U.S. multichannel video per subscriber programming costs grew at an annual rate of 9.4% between 2010 and 2015 while multichannel video average revenue per subscriber only grew at an annual growth rate of 4.1% during the same period. *See* Robin Flynn, SNL Kagan, "The Larger Picture of Multichannel Video Revenues, Costs," April 28, 2014.

[19] *See* ACA Connects 2018 Fixed Competition Comments at 13, n.37.

[20] *See, e.g.*, *Applications of Tribune Media Company (Transferor) and Nexstar Media Group, Inc. (Transferee) et al.*, Memorandum Opinion and Order, MB Docket No. 19-30 et al., FCC 19-89 (2019) (Nexstar-Tribune); *Consent to Transfer Control of Certain License Subsidiaries of NBI Holdings, LLC to Terrier Media Buyer, Inc et al*., Memorandum Opinion and Order, MB Docket No. 19-98 et al., DA 19-1206 (MB 2019) (Terrier-Northwest-Cox); *Applications for Consent to Transfer Control of Certain License Subsidiaries of Raycom Media, Inc. to Gray Television, Inc et al.*, Memorandum Opinion and Order, MB Docket No. 18-230 et al., DA 18-1286 (MB 2018) (Gray-Raycom).

for small and rural cable operators. We encourage the Commission to build on that analysis in the 2020 report, as explained below.

A. Rural TV Discrimination

Small, typically rural MVPDs are suffering the problems of the broken retransmission consent marketplace even worse than larger operators. Congress recognized these concerns when it enacted the Television Viewer Protection Act of 2019, which extends "good faith" protections to small MVPD "buying groups" in their retransmission consent negotiations with large station groups.[21] The bill's sponsor explained that there has been "major consolidation occurring among broadcasters."[22] Ever larger groups of broadcast stations bring a major market-power advantage to retransmission negotiations with small MVPDs, "who don't have the scale" to negotiate reasonable rates against large adversaries.[23] Confronted with a large station group on the other side of the negotiating table, small MVPDs "have no leverage," and "no bargaining power," and face "take it or leave it" offers. The result of increased leverage on the part of large station groups has been escalating retransmission fees for small MVPDs and their customers, and a growing disparity in the fees paid by smaller MVPDs versus large MVPDs that are better-positioned to negotiate against large station groups.

We applaud the Commission for documenting this disparity to some extent in the 2018 Report with its presentation of data on retransmission consent fees paid by cable

[21] *See* Television Viewer Protection Act of 2019, Pub. L. 116-94, 133 Stat. 2534, 3198 (2019) (amendments to be codified at 47 U.S.C. § 325).

[22] *STELAR Review: Protecting Consumers in an Evolving Media Marketplace: Hearing Before the Subcomm. on Commc'ns and Tech. of the H. Comm. on Energy and Commerce,* 116th Cong. 4 (2019) (Statement of Rep. Doyle).

[23] *See id.* at 29 (Testimony of Mr. Thune) (large broadcast groups have "market power")

systems broken down by the size of the cable system. According to these data, small cable systems (defined to be those with less than 10,000 subscribers) pay on average $93.37 per subscriber per year in retransmission payments, while large cable systems (defined to be those with more than 75,000 subscribers) pay on average $70.88 per subscriber per year in retransmission consent payments.[24] Thus, according to these data, small cable systems pay on average 32% more for retransmission consent than the already high rates paid by large cable systems. This amounts to rural TV discrimination: the customers of small, rural cable operators pay far more for television programming than residents of more populous areas, for no defensible reason.

In fact, the figures reported in 2018 *understate* the extent of this discriminatory treatment. In the data that the FCC examined, the average number of retransmission consent stations carried by large cable systems is significantly greater than the average number of retransmission consent stations carried by small cable systems—11.99 stations for large cable systems vs. 7.56 stations for small cable systems.[25] In other words, smaller cable operators pay 32% more than larger cable operators for retransmission consent even though they are paying for 3.5 fewer stations on average. To fully account for the penalty faced by smaller and more rural cable operators in negotiating retransmission consent deals, the Commission would need to control for this disparity in channels carried. Because increasing the number of retransmission consent

[24] *See* 2018 Report at Appx. B-1, Table 12.

[25] ACA Connects believes that within any local region that most cable systems (regardless of their size) generally carry the same retransmission consent stations and that this difference is largely caused by the fact that smaller cable systems are on average located in less dense more rural markets than larger cable systems where there are fewer stations that charge retransmission consent fees.

stations that are available and carried tends to increase total retransmission consent payments, the correct measure of the penalty is almost certainly larger than 32%.[26]

The Commission could have calculated the precise size of the penalty by performing a regression analysis that controls for the number of retransmission consent stations carried. We encourage the Commission to perform such an analysis and to document the results in its 2020 report, using the most recent data available.[27] The completion of this analysis will enable the Commission to better determine the magnitude of the discrimination that small and rural cable operators face in their negotiations with broadcast station groups, and will also serve the interests of Congress, which has demonstrated its concern about this matter by enacting buying group protections for small MVPDs as part of the TVPA.

B. Vertical Integration of Programmers and Large MVPDs

In the 2018 Report, the Commission observed that "MVPDs that are vertically integrated with broadcast and cable networks may enjoy cost advantages."[28] As ACA Connects explained at the time, this observation is true, but only part of the story. Such vertically integrated entities also have the incentive and ability to raise prices in order to harm their MVPD rivals, including ACA Connects members. This is not a mere "cost

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[26] For example, suppose that each of the extra stations that larger cable systems carry charge retransmission consent fees of $.10 per subscriber per month. This would mean that the total average annual payment of large cable systems excluding payments for these four stations would be $66.68 (i.e., 3.5 stations x $1.20, subtracted from $70.88). The average retransmission consent payment of $93.37 for small systems is 40% higher than this figure.

[27] *See* 2018 Report at Appx. B-1, at 3 n.6 (describing the Commission's statutory obligation to publish data on retransmission consent fees as part of the biennial Communications Marketplace Report); *see also Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 et al.*, Order, MM Docket No. 92-266, DA 20-322 (MB 2020) (initiating the Commission's 2020 cable price survey).

[28] *See* 2018 Report, ¶ 132.

advantage." It is the very anticompetitive activity that the program access rules were promulgated to help remedy, and which ACA Connects has recommended that the Commission consider strengthening and augmenting. The AT&T/Time Warner merger is a case in point: in upholding the merger, Judge Richard J. Leon took into account AT&T's unilateral commitment to follow a binding arbitration requirement to settle program access disputes.[29] The decision thus leaves intact the proposition that an effective binding arbitration requirement is necessary to control the additional market power created when a large video distributor attempts to acquire significant programming assets.[30] We urge the Commission to acknowledge this point in the 2020 report.[31]

[29] *See U.S. v. AT&T*, 310 F.Supp. 3d 161, 217-218 (D.D.C. 2018) (citing the presence of voluntary arbitration commitments similar to those imposed in the Comcast-NBCU merger as part of the court's basis for rejecting the Government's argument that the merger would be likely to substantially lessen competition by increasing Turner's (i.e., Time Warner's) bargaining leverage in negotiations with rival MVPDs).

[30] Matthew Polka, President and CEO of ACA Connects, "AT&T/Time Warner Will Face Binding Arbitration Threat, But Not Comcast/NBCU," Morning Consult (July 9, 2018), https://morningconsult.com/opinions/att-time-warner-will-face-binding-arbitration-threat-not-comcast-nbcu/

[31] In its prior *ex parte* filing, ACA Connects suggested the following addition to the 2018 Report: "Such 'vertically integrated' entities may also have the incentive and ability to raise costs to, and otherwise disadvantage, their MVPD rivals. Some of those rivals, especially small cable system operators, argue that existing rules are insufficient to remedy such behavior." *See* Letter From Brian Hurley, ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-231 et al. at 3 (filed Dec. 4, 2018).

IV. CONCLUSION

ACA Connects appreciates the opportunity to participate in this proceeding, and it encourages the Commission to take its comments into consideration.

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