

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

In The Matter Of)
)
Promoting Innovation and Competition in the) MB Docket No. 14-261
Provision of Multichannel Video Programming)
Distribution Services)
)

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)¹ is pleased to submit its comments in response to the Federal Communications Commission’s (Commission) above referenced Notice of Proposed Rulemaking (Notice).² The Commission seeks comment on whether it should revise its interpretation of the term “multichannel video programming distributor” (MVPD) by including within its scope services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming.

I. USTELECOM MEMBER COMPANIES ARE DEPLOYING MVPD SERVICES TO CONSUMERS

Much has changed in the MVPD marketplace in the years since the initial passage of the 1992 Cable Act that brought about the Commission’s program access rules, and the retransmission consent framework. In recent years, the MVPD marketplace has evolved,

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

² See Notice of Proposed Rulemaking, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, FCC 14-261, 80 Fed. Reg. 2078 (January 15, 2015) (*Notice*).

particularly as LECs of all sizes have entered the video market in areas throughout the country. The Commission's most recent video competition report from 2013, notes that local exchange carrier (LEC) MVPDs alone had 8.5 million video subscribers at the end of 2011, and by the end of 2012, AT&T's U-verse and Verizon's FiOS services combined had 8.6 million video subscribers.³ At the time of the Commission's report, CenturyLink had also just entered the MVPD market.⁴ The Commission also noted, however, that during the same timeframe, smaller LECs were also extending their reach into the MVPD, particularly with respect to the deployment of Internet Protocol Television (IPTV) technologies.⁵

This is far different from the MVPD marketplace described in the Commission's 1995 Video Competition Report, where less than 59.7 million consumers even subscribed to MVPD services (just over a 65% penetration rate); direct broadcast satellite (DBS) providers of MVPD services had just exceeded one-million customers; and LECs were only in the planning stages of deploying video offerings. The vast majority of the changes in the MVPD marketplace since the Commission's 1995 report have been overwhelmingly beneficial to consumers.

In all areas where LECs have deployed MVPD services, they compete with other video services offered by cable, satellite and other MVPD providers. Local telephone company competitive video entry has greatly benefitted consumers by providing them an alternative to the incumbent which, as the Commission has previously found, has also led to lower consumer prices than in areas without a wireline cable competitor. The Commission has also recognized

³ Fifteenth Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 28 FCC Rcd 10496, FCC 13-99, ¶ 3 (*Fifteenth Report*).

⁴ *Fifteenth Report*, ¶ 29.

⁵ *Id.*, ¶ 30.

that a successful video offering is directly related to an ILEC's ability to deploy robust broadband facilities.⁶

But as acknowledged in the Commission's Notice, the video marketplace continues to evolve and transform as various over the top (OTT) video services gain increased attention from consumers. While taking no formal position on the specific proposals contained in the Notice, USTelecom notes that in reviewing whether changes are necessary to the evolving MVPD marketplace, the Commission should consider necessary actions to address issues in the current MVPD marketplace.

II. THE COMMISSION SHOULD REMOVE REGULATORY PREFERENCES IN ORDER TO FOSTER A MARKET-BASED VIDEO FRAMEWORK.

In recent years, the Commission has undertaken separate proceedings to address competitive imbalances that continue to impact the current MVPD marketplace. Despite the significant changes in the MVPD marketplace, these Commission proceedings remain pending. Regardless of how – and at what pace – the MVPD marketplace evolves, these existing regulatory imbalances should be resolved in an expeditious manner by the Commission.

As the Commission is well aware, the fundamental issue impacting the ability of ILEC video service providers to compete effectively is access to essential programming that is often

⁶ See e.g., Report and Order and Further Notice of Proposed Rulemaking, *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*, 22 FCC Rcd. 5101, ¶51 (2006) (concluding that “broadband deployment and video entry are ‘inextricably linked’”) (*Franchise Reform Order*); *Franchise Reform Order*, ¶62 (stating that, “[t]he record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”); Report and Order, Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶20 (2007) (stating that “broadband deployment and entry into the MVPD business are ‘inextricably linked.’”); First Report and Order, *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, ¶36 (2010) (concluding that “a wireline firm’s decision to deploy broadband is linked to its ability to offer video.”).

owned by the very cable companies against which they are competing, and local broadcasters. In this context, our member companies have previously had well-publicized and protracted disputes with vertically integrated cable providers over access to programming under their control.

A. The Commission Should Resolve its Proceeding Regarding Reforms to the Retransmission Consent Framework

In 2011, the Commission initiated a proceeding to revise its rules relating to the retransmission consent framework (*Retransmission Notice*).⁷ That proceeding was in response to a Petition for Rulemaking filed by several MVPD stakeholders, including cable companies, direct broadcast satellite providers, new wireline entrants, small cable and wireline providers, and public interest groups.⁸ As noted in the original Petition, bargaining imbalances between broadcasters and MVPDs in the decades-old retransmission consent process created tangible consumer harms that have resulted in “widespread and increasingly urgent” calls to reform this “broken system.”⁹ A 2007 study from the Congressional Research Service (CRS Study) affirmed this view, by concluding that “[t]he negotiations between programmers and distributors,

⁷ See, Notice of Proposed Rulemaking, *Amendment of the Commission’s Rules Related to Retransmission Consent*, 26 FCC Rcd. 2718, FCC 11-31 (March 2011) (*Retransmission Notice*).

⁸ The signatories to the Petition include Public Knowledge, Time Warner Cable, Inc., DIRECTV, Inc., Verizon, DISH Network, LLC, Cablevision Systems Corp., Charter Communications, Inc., Mediacom Communications Corp., Charter Communications, Inc., American Cable Association, Bright House Networks, LLC, New America Foundation, Insight Communications Company, Inc., OPASTCO and Suddenlink Communications (*Petitioners*).

⁹ See, Petition for Rulemaking, *Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, March 9, 2010, p. 27 (*Petition*). See also, Public Notice, *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, DA 10-474, MB Docket No. 10-71 (released March 19, 2010); Order, *Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, DA 10-594 (released April 2, 2010) (extending Comment and Reply Comment dates to May 18, 2010 and June 3, 2010, respectively).

although private, are strongly affected by statutory and regulatory requirements and cannot be properly characterized as free-market.”¹⁰

In the Commission’s *Retransmission Notice* proceeding, USTelecom noted that the intrinsically linked public-policy goals of increased MVPD competition and greater broadband deployment are increasingly imperiled by the imbalance in the current retransmission consent process.¹¹ While the MVPD marketplace has changed dramatically over the last ten years, particularly with the increase in wireline video competitors to cable incumbents, the Commission’s retransmission consent rules have remain largely unchanged in the 18 years since they were adopted.¹²

Although incremental progress was made on the retransmission consent issue at the end of the 113th Congress with the passage of the Satellite Television Extension and Localism Act Reauthorization (STELAR),¹³ the Commission’s current regulatory framework still leaves broadcasters in a position to abuse their bargaining position with the constant threat of station blackouts, particularly at inopportune times for the viewing audience. USTelecom believes that the proposed reforms contained in the Commission’s *Retransmission Notice* are reasonable, necessary and pro-consumer, and action by the Commission to implement its proposals would establish a framework more reflective of a market-based environment.

¹⁰ Congressional Research Service, Report to Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, p. 20, July 9, 2007 (*CRS Study*).

¹¹ USTelecom Comments, MB Docket No. 10-71, pp. 5 – 9 (submitted May 27, 2011) (*USTelecom Retrans Comments*).

¹² *Petition*, p. 2.

¹³ STELA Reauthorization Act of 2014, Pub. L. No: 113-200.

For example, the Commission considered various proposals relating to the strengthening of its good faith rules. It proposed good faith measures that would prohibit networks from interfering in retransmission consent negotiations between an MVPD and the local broadcaster. The Commission's record in that proceeding contains substantial evidence regarding the negative impact such involvement has on retransmission consent negotiations.

The Commission also considered the question of whether it had sufficient statutory authority to order interim carriage during retransmission disputes. USTelecom and others argued that the Commission has the necessary statutory authority and that such a mechanism would achieve critical public policy goals.¹⁴ These include the elimination of brinksmanship as a negotiating tool, as well as ensuring fulfillment of the government's interest in localism by preventing the withholding of local broadcast signals from the viewing public. USTelecom noted that such an approach is consistent with Commission precedent and would result in substantial benefits to consumers.¹⁵

B. The Commission's Network Non-Duplication and Syndicated Exclusivity Rules Should be Eliminated

In a related proceeding, the Commission in 2014 initiated a rulemaking to examine a discrete area within the retransmission consent framework regarding its network non-duplication and syndicated exclusivity rules (Exclusivity Rules).¹⁶ USTelecom supports elimination of the network non-duplication and syndicated exclusivity rules, which are outdated regulations from a bygone era. Elimination of the Exclusivity Rules will foster more market-based negotiations for

¹⁴ *USTelecom Retrans Comments*, pp. 20 – 22.

¹⁵ *Id.*, pp. 21 – 22.

¹⁶ *See*, Report and Order and Further Notice of Proposed Rulemaking, *Amendment of the Commission's Rules Related to Retransmission Consent*, 79 Fed Reg. 19849 (April 10, 2014) (*Network Non-Duplication Notice*).

broadcast signal carriage, and would expand the ability of video providers to deliver must-have programming content that their subscribers desire.

USTelecom noted in its comments at the time that the Commission's outdated Exclusivity Rules have created a lopsided marketplace whereby broadcasters benefit from a competition-free environment. This regulatory wall prevents MVPDs from carrying another affiliate of the same network if retransmission consent negotiations fail. It also creates a monopoly marketplace that forestalls the benefits of true competition within any given MVPD market. As a result, MVPDs are often faced with broadcast stations adopting a 'take it or leave it' bargaining strategy.

USTelecom agrees with the Commission's assessment that these rules are an "unnecessary regulatory intrusion in the marketplace."¹⁷ The CRS Study supported a proposal to allow the importation of distant signals when a retransmission consent impasse develops.¹⁸ The study concluded that such an approach could strengthen the negotiating position of MVPDs by potentially allowing them to bargain among alternative providers of the same must-have network programming. By eliminating these outdated rules, the Commission will move the video marketplace towards true and free negotiations between broadcasters and MVPDs.

C. The Commission Should Complete Reforms to its Program Access Rules

The final area in which Commission action remains pending relates to its open rulemaking regarding its program access rules. That proceeding commenced in 2012,¹⁹ and resulted from the Commission's decision to decline to extend its exclusive contract prohibition

¹⁷ *Network Non-Duplication Notice*, ¶ 55.

¹⁸ *CRS Study*, p. 21.

¹⁹ *See*, Order and Further Notice of Proposed Rulemaking, *In the Matter of Revision of the Commission's Program Access Rules*, FCC 12-123, 77 Fed. Reg. 66052 (October 31, 2012) (*Program Access Notice*).

regarding vertically integrated cable programming. By lifting the exclusivity prohibition, the Commission's program access framework shifted to a complaint driven process. As a result of this shift, the Commission asked for comment on various proposals that were narrowly tailored to address specific harms that could arise under the new program access complaint framework. Despite the passage of time, and the continued evolution of the MVPD marketplace, the Commission has still not acted on its proposals.

The Commission's proposals relate to sports programming, particularly regional sports networks (RSNs). For example, given that cable-affiliated RSN programming is popular and non-replicable, and therefore uniquely important to competition in the video and broadband marketplace, it would be entirely reasonable for the Commission to establish a rebuttable presumption that withholding such programming by a cable-affiliated programmer constitutes an "unfair act."²⁰

The Commission should also adopt its proposed standstill agreement during the pendency of an RSN related program access complaint.²¹ Implementation of a standstill mechanism for RSN programming is particularly critical, due to the unique nature of the programming. Given the tremendous consumer interest in sports programming, and its time-sensitive nature, the loss of RSN networks has a significant impact on consumers and competitive MVPDs alike.

In addition, the Commission should establish its proposed rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network – regardless of whether it is terrestrially delivered or satellite-delivered – is anti-competitive, any other exclusive contract involving the same network will be afforded the

²⁰ *Program Access Notice*, ¶¶ 75 – 77.

²¹ *Program Access Notice*, ¶¶ 78 – 80.

same treatment.²² The Commission is permitted to exercise its predictive judgment in such instances, and such an approach would economize the Commission's limited resources, by foreclosing the need for Commission staff to undertake repetitive examinations of program access complaints. Such an approach would be particularly beneficial to smaller MVPDs and to the Commission's broadband policy goals.

Furthermore, the Commission should adopt procedures specific to new MVPD entrants seeking access to vertically integrated programming under a new contract. In instances where a new MVPD is unable to reach an agreement with a vertically integrated programmer for a certain network (or networks), the Commission should establish a shot clock for resolving any associated program access complaint. It should also establish a mechanism whereby a new MVPD may request interim carriage of the programming subject to retroactive application of established prices, terms and conditions during the pendency of any complaint.

Finally, the Commission should continue to consider reforms to its program access rules as issues arise for competitive MVPDs in negotiations for must-have cable operator-affiliated programming. For example, a program owner may only offer certain desired programming in a bundle with other less desired content, resulting in the purchase of programming that may not be a good fit for an MVPD's offerings and increased rates for distribution rights for the channels. The required purchase of such bundles can make it more difficult for competitive MVPDs to develop cost-effective channel lineups that compete for existing and/or new subscribers. The Commission should consider whether such actions by program owners significantly hinder access to programming, and, if so, what remedies may be available.

²² *Id.*, ¶ 81.

III. THE COMMISSION SHOULD CONSIDER MARKET ORIENTED REFORMS FOR TODAY'S VIDEO ENVIRONMENT

While USTelecom takes no formal position on the specific proposals contained in the Notice as to how to address OTT video services, the Commission should nevertheless consider whether yesterday's regulations should apply to tomorrow's video services. Legacy regulations should not discourage the deployment of emerging online video services, nor should they burden the provision of traditional video services in the highly competitive MVPD marketplace.

When considering whether developing video services such as OTT should be treated as MVPDs, the Commission should also consider whether cable operators and/or MVPDs should be treated in a less regulated manner. Given the extensive competition in today's MVPD marketplace, and the developing ecosystem of OTT business models,²³ consumers would be well served by Commission efforts to remove unnecessary regulations from MVPDs. As competition in the video marketplace flourishes precisely because of new video competitors, such as many of USTelecom's members, the Commission should follow the prime directive of the 1996 Telecommunications Act to "establish a pro-competitive, deregulatory national policy framework" rather than trying to simply regulate for the sake of regulation.

IV. CONCLUSION

Despite significant changes in the MVPD marketplace, several important proceedings relevant to video programming issues remain pending at the Commission. Regardless of the pace of change in the MVPD marketplace, the Commission should expeditiously resolve outstanding proceedings. The Commission should also consider market oriented reforms for

²³ In its Notice, the Commission notes that the current business models for OTT providers include, "but are not limited to," five types of Internet-based video service offerings: Subscription Linear, Subscription On-Demand, Transactional On-Demand, Ad-based Linear and On-Demand, and Transactional Linear. *Notice*, ¶ 13.

today's MVPD environment. In light of the extensive competition in today's MVPD marketplace, and the developing ecosystem of OTT business models, consumers would be well served by Commission efforts to remove unnecessary regulations for MVPDs.

Respectfully submitted,

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