

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

In the Matter of	)	
	)	
Status of Competition in the Market for the	)	MB Docket No. 15-158
Delivery of Video Programming	)	
	)	

**COMMENTS  
OF  
NTCA–THE RURAL BROADBAND ASSOCIATION**

August 21, 2015

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## EXECUTIVE SUMMARY

The provision of video services is key to rural LECs' ability to deliver robust broadband services to consumers in high-cost areas. Indeed, the Commission has long recognized the linkage between video and broadband services. Access to video content at affordable rates and under reasonable terms and conditions is needed not only to generate greater video competition, but also to spur broadband investment in rural service areas. Even as an overwhelming majority of small rural carriers therefore offer video services to consumers, over 98 percent of respondents to a recent NTCA survey of members indicate that access to reasonably-priced programming is a significant barrier to the provision of such services. This, in turn, also impedes further broadband deployment.

Consequently, the Commission should take a number of steps outlined below to facilitate the availability of programming at affordable rates and under reasonable terms and conditions to rural multichannel video programming distributors (MVPDs). This is not only within the Commission's authority granted by the Cable Act, but it is also part of the Commission's responsibility to encourage further deployment of broadband.

Reforms undertaken by the Commission should include measures to facilitate rural MVPDs' ability to gauge market rates for programming, and prohibit programmers from forcing small MVPDs and consumers to purchase unwanted programming in order to access desired content. Similarly, the Commission should prohibit mandatory broadband tying, where rural MVPDs are forced to pay per-subscriber fees for non-video broadband customers.

Programmers should not be permitted to require rural MVPDs to place content in specific service tiers, nor should they withhold favorable pricing from small MVPDs that are presently reserved for large ones. Finally, the Commission should monitor the market for “over the top” video services to ensure that exclusive arrangements do not prevent rural MPVDs and broadband providers from gaining access to web-based video content.

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**COMMENTS  
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**I. INTRODUCTION**

NTCA–The Rural Broadband Association (NTCA)<sup>1</sup> hereby submits these comments in the above-captioned proceeding.<sup>2</sup> The PN solicits data and information to update the information and metrics provided in the Sixteenth Report on Video Competition to Congress<sup>3</sup> and report on the state of competition in the video marketplace in 2014.<sup>4</sup> The provision of video services remains vital to the deployment and adoption of broadband services. Accordingly, NTCA periodically canvasses its members regarding video and broadband services. NTCA’s 2014 report was released in June 2015.<sup>5</sup>

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<sup>1</sup> NTCA represents nearly 900 rural rate-of-return regulated local exchange carriers (RLECs). All of NTCA’s members are full service local exchange carriers and broadband providers, and many also provide wireless, video, satellite, and/or long distance services.

<sup>2</sup> *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 15-158, Public Notice (rel. July 2, 2015) (PN).

<sup>3</sup> *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, Sixteenth Report, 30 FCC Rcd 3253 (2015 (“16<sup>th</sup> Report”))

<sup>4</sup> *Id.*, ¶ 1.

<sup>5</sup> Figures are derived from a survey NTCA sent to its membership in the winter of 2014 and released June 2015. The survey received 128 responses, a rate of approximately 20 percent. <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2013ntcabroadbandsurveyreport.pdf>

Seventy-three percent of survey respondents indicated that they currently offer video services to customers. While that number is down slightly from 2013 (when it was 76.9%), it still represents a significant majority. Significantly, 98 percent of respondents – whether they currently provide video or not – stated that access to reasonably-priced programming is a *significant* barrier to the deployment of video services. It is therefore unsurprising that 63 percent also named the challenges associated with making a business case for offering video services as a main impediment to the provision of these services, up significantly from 49 percent a year ago. Furthermore, 67 percent identified the difficulty of competing with other video providers as a major impediment. This reflects the inherent disadvantages RLECs encounter serving high-cost, sparsely populated areas, in addition to their lack of scale and scope as compared to larger MVPDs.

The PN also seeks data, such as the number of homes passed, the number of subscribers, and the number of channels offered by various MVPDs.<sup>6</sup> Although NTCA does not have more recent numbers, according to a 2013 membership survey of video services, the mean number of homes passed by respondents was 5,359, with a median of 2,000 (from a low of 100 to a high of 64,500). The mean number of subscribers was 2,648, with a median of 789 (from a low of 3 to a high of 60,000).

Internet protocol television (IPTV) was listed as the most common delivery technology used by respondents, at 80.3 percent. Legacy coaxial cable was used by 55.1 percent of respondents, while only 7.4 percent reported offering video via direct

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<sup>6</sup> PN, pp 4-5.

broadcast satellite. These figures total more than 100 percent as many respondents use more than one technology depending on the needs of their service areas.

Respondents indicated both a median and mean of three tiers of channel offerings (from a low of 0 to a high of 15). The mean number of linear channels offered was 175, with a median of 190 (from 0 to 350). The ability to watch programming on multiple devices, inside or outside of the home, is provided by 41.1 percent of respondents.

For all of NTCA's members, the ability to offer quality video services is viewed as an essential component of the business case for broadband deployment (including upgrading of existing broadband plant) and a key driver of broadband adoption in rural areas. A video strategy is therefore an important component to promoting the long-term viability of most rural telecommunications providers. As noted above, IPTV is the most commonly deployed video delivery platform among NTCA members, and it is dependent upon the same network infrastructure as broadband Internet access services.

Furthermore, customers are often incented to obtain both video and broadband services when they are offered in a bundle of services at a discount. Consequently, factors that impede the provision of video services in RLEC service areas adversely affect broadband deployment and adoption as well.

Any MVPD's ability to successfully deploy video services requires access to desirable content under reasonable terms and conditions. A variety of behaviors and strategies employed by programmers and broadcasters make it particularly difficult, however, for small rural carriers to offer content in competitive retail packages that reflect what their subscribers want and can afford. The Commission can help enhance consumer choice, and encourage additional broadband adoption and deployment, by

reforming retransmission consent rules<sup>7</sup> and taking other actions to ensure access to content as outlined below.

For example, Commission action is also needed to correct various anticompetitive behaviors by content providers, such as forced tying and tiering. Programmers also engage in unfair bargaining tactics, such as the inclusion of mandatory non-disclosure provisions in contracts and threatening that “must have” content will be withheld during the re-negotiation process. The Commission should address inequities in the retransmission consent regime and issue a Notice of Inquiry to investigate content providers’ use of unfair bargaining practices that threaten the viability of rural video providers.

**II. RLECS’ ABILITY TO ACCESS VIDEO CONTENT AT AFFORDABLE RATES AND UNDER REASONABLE TERMS AND CONDITIONS WILL LEAD TO GREATER VIDEO COMPETITION AND SPUR BROADBAND INVESTMENT IN RURAL SERVICE AREAS**

As noted above, NTCA’s members overwhelmingly convey that difficulty obtaining access to “must have” programming at affordable rates and under reasonable terms and conditions is the most significant obstacle that RLECs face when attempting to provide or expand video services. Forced “tying” and “tiering” arrangements, and the outdated and broken retransmission consent process, among other factors, impede RLECs’ ability to offer the video content that consumers desire at affordable rates. This ultimately harms competition and reduces consumer choice in rural service areas.

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<sup>7</sup> See comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), NTCA, the Independent Telephone and Telecommunications Alliance, the Western Telecommunications Alliance, and the Rural Independent Competitive Alliance, MB Docket No. 10-71 (fil. May 27, 2011), pp. 12-18, 24-25 (Joint Retransmission Consent comments).

Also, as NTCA and others have previously noted,<sup>8</sup> access to video content at affordable rates and under reasonable terms and conditions spurs rural broadband investment. This is because when RLECs offer video and broadband Internet access services together, rural consumers' adoption of broadband increases. The Commission has long recognized the intrinsic link between a provider's ability to offer video service and to deploy broadband networks.<sup>9</sup> This assessment has been reinforced by state regulators.<sup>10</sup> Furthermore, an industry survey found that rural carriers offering broadband along with a video component had broadband adoption rates nearly 24 percent higher than those companies offering broadband without access to subscription-based video services.<sup>11</sup>

Unfortunately, the barriers encountered by RLECs that attempt to serve as MVPDs result in limits to consumer choice and higher prices, which dissuade customers from subscribing to rural carriers' video services.<sup>12</sup> This, in turn, impedes broadband investment and adoption, as well as video competition. Therefore, the Commission can and should use this proceeding to thoroughly investigate anti-competitive practices of

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<sup>8</sup> See, e.g., Joint Retransmission Consent comments, pp. 4-5.

<sup>9</sup> MB Docket No. 05-311, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2007).

<sup>10</sup> *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>.

<sup>11</sup> National Exchange Carrier Association comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (filed Dec. 7, 2009).

<sup>12</sup> RLECs operating as MVPDs routinely do so at or near break-even levels, if that. In these instances, video services are provided in order to meet community needs and consumer demands, in addition to countering competition from other service providers, despite the lack of a compelling business case.

video programming vendors and take certain steps to improve MVPDs' access to video content at affordable rates and under reasonable terms and conditions.

**III. THE COMMISSION SHOULD REFORM PROGRAM ACCESS RULES IN ORDER TO FACILITATE THE AVAILABILITY OF PROGRAMMING AT AFFORDABLE RATES AND UNDER REASONABLE TERMS AND CONDITIONS TO RURAL MVPDS**

Small rural MVPDs, like larger urban ones, must respond to consumer demand for certain popular programming to be able to sell their services and remain viable. NTCA's 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. Therefore, in order to facilitate the availability of content, the Commission should take a number of steps as outlined below.

**A. The Commission Has the Authority And Responsibility To Initiate Reform Without Delay**

In the plain text of section 325(b)(3)(A) of the Cable Act of 1992 (Cable Act), Congress instructed the Commission "to govern the exercise by television broadcast stations of the right to grant retransmission consent."<sup>13</sup> This language imparts direct authority to the Commission to set, and, if necessary, revise, ground rules for a retransmission consent regime that will enable broadcasters and programmers to receive fair payment for their material, in a manner consistent with other legislative goals,

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<sup>13</sup> 47 U.S.C. § 325(b)(3)(A).

including increased consumer access to video programming. The authority to “govern” is of little meaning if such actions are not within the Commission’s authority.<sup>14</sup>

Congress did not stop there. The same section further instructed the Commission to account for “the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier...” while ensuring that the retransmission consent regime does not conflict with the need “to ensure that the rates for the basic service tier are reasonable.”<sup>15</sup> In short, the text of section 325 “expressly gives the Commission broad authority to adopt rules that protect the public interest as it relates to broadcasters’ grant of retransmission consent rights to MVPDs.”<sup>16</sup>

The Commission has additional authority as part of its obligation to ensure that broadcast licensees act in furtherance of “the public interest, convenience, and necessity.”<sup>17</sup> Behaviors that prevent MVPDs from providing consumers with signals that are broadcast over the public airwaves under reasonable terms and conditions, and that lead to blackouts, are clearly contrary to the public interest. This is especially the case, as explained more fully below, when such behaviors also impede the deployment of broadband infrastructure.

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<sup>14</sup> NTCA notes that the Chairman is circulating a Notice of Proposed Rulemaking to address the “good faith” negotiating standard as is required by the s the Satellite Television Extension and Localism Act Reauthorization (STELAR) Act of 2014, but NTCA suggests that the Commission has the authority to address Most Favored National clauses in contracts, forced bundling, and non-disclosure agreements.

<sup>15</sup> *Id.*

<sup>16</sup> American Cable Association (ACA) comments, MB Docket No 10-71, p. 18 (fil. May 18, 2010) (ACA comments).

<sup>17</sup> 47 U.S.C. § 309(a).

The Commission holds further ancillary authority under sections 303(r) and 4(i) of the Act. Section 303(r) instructs the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions” of Title III of the Act.<sup>18</sup> The Commission’s authority is also elucidated in section 4(i), calling upon it to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”<sup>19</sup> Furthermore, the Commission has previously asserted its ancillary authority to enhance consumers’ access to programming.<sup>20</sup>

The Commission’s ability to address content provider practices that hinder broadband deployment is further buttressed by ancillary authority conveyed through section 706 of the Telecommunications Act of 1996 (1996 Act).<sup>21</sup> This section mandates that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” using a variety of means, including the utilization of “methods that remove barriers to infrastructure investment.”<sup>22</sup> Perceiving the linkage between video and broadband services, the Commission has used its ancillary authority under section 706 to modify rules related to video services,

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<sup>18</sup> 47 U.S.C. § 303(r). *See also*, *Cellco P’ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

<sup>19</sup> 47 U.S.C. § 154(i).

<sup>20</sup> *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶¶ 71-72 (2010) (“*2010 Program Access Order*”) (relying on the Commission’s ancillary authority to establish standstill rules for program access disputes).

<sup>21</sup> Section 706 provides the Commission ample authority to address issues regarding contractual inequalities between content providers and MVPDs that are delaying or hampering the deployment of broadband.

<sup>22</sup> 47 U.S.C. § 1302(a).

specifically in the 2007 *Local Franchising Order*,<sup>23</sup> and later the same year in the *Multiple Dwelling Unit Order*.<sup>24</sup>

Notably, these precedents were set when the Commission had determined under section 706 that broadband was actually being deployed to all Americans in a reasonable and timely fashion. Subsequently, the Commission reversed that finding and has concluded in recent years that deployment is not occurring in a reasonable and timely fashion, mostly in rural communities located throughout the country.<sup>25</sup> In this case, section 706 directs the Commission to “take *immediate action* to accelerate deployment”<sup>26</sup> of advanced services by removing barriers to infrastructure investment. Given the proven link between access to video content and broadband deployment, the antiquated retransmission consent regime is clearly a barrier that section 706 requires the Commission to remove without delay. By following the recommendations provided below, the Commission will spur competition in the video market, as required by the Cable Act of 1992, and will remove barriers to broadband investment and deployment as directed by section 706 of the 1996 Act.

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<sup>23</sup> MB Docket No. 05-311, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2007); *see also* ¶¶ 4, 13, 18, 41, 51-52, 64.

<sup>24</sup> MB Docket No. 07-51, 22 FCC Rcd 20235, 20257-20258, ¶ 47 (2007); *see also* ¶¶ 46, 52, 78.

<sup>25</sup> GN Docket Nos. 09-137, 09-51, 25 FCC Rcd 9556, 9574, ¶ 28 (2010). *See also, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd 1375, 1378, ¶¶ 5-6 (2015 *Broadband Progress Report*).

<sup>26</sup> 47 U.S.C. § 1302(b) (2010) (emphasis added).

**B. Commission Rules Should Facilitate the Ability Of Rural MVPDs To Gauge Market Rates For Programming**

Another barrier to the provision of video and broadband services by small MVPDs is the pervasive use by programmers of mandatory non-disclosure agreements. “The market” – if one exists at all – cannot function in the absence of competition and transparency between buyers and sellers. The PN therefore rightly asks if some MVPDs, such as those of a certain size, have a competitive advantage in the marketplace for the delivery of video program and whether some pay lower prices for video programming.<sup>27</sup> But as NTCA and others have previously noted,<sup>28</sup> mandatory non-disclosure agreements demanded by content providers in contracts for programming prohibit rural MVPDs from disclosing the rates they pay, even to policymakers who may request this information. Similarly, these agreements prevent rural MVPDs from learning the true market value of video content.<sup>29</sup> As rural MVPDs cannot confirm that the price at which programming is being offered to them is even roughly comparable to what other MVPDs in the marketplace are paying for the same content, their ability to negotiate fair and reasonable rates is compromised from the outset.

To facilitate transparency and enable competitive forces to police behavior in the marketplace, broadcasters utilizing public airwaves should, as a condition of their license, be required to publically disclose, in an easily accessible manner, the lowest fee they will charge, prior to any volume discount. Ownership information should also be publically

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<sup>28</sup> See, e.g., Joint Retransmission Consent comments, p. 16.

<sup>29</sup> Research has been conducted indicating that small MVPDs endure price discrimination; see, e.g., ACA comments, MB Docket No. 07-269 (fil. May 20, 2009), pp. 4-16. However, aggregate data is of limited use for small MVPDs seeking access to content under the current rules.

disclosed, in a clear manner that does not obfuscate controlling or substantial ownership interests.

NTCA has anecdotal evidence that larger MVPDs have access to content at a significant cost savings, creating an unfair competitive advantage for those companies that often compete for NTCA's members in the towns and suburbs, leaving the most rural consumers to pay the highest rates for video services. If the Commission and Department of Justice approve a Charter/Time Warner combination, there will be three major purchasers of video content who will likely receive volume price discounts, all but compelling content providers to seek higher fees from everyone else to make up the resulting revenue shortfalls. Therefore, the Commission should encourage equitable market-based negotiations by prohibiting the use of mandatory non-disclosure provisions, and it should find a means to demand from content holders the information needed for the Commission to make informed decisions about the state of these markets.

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

NTCA has consistently opposed the commonly employed practice of forced tying in which programmers require MVPDs to purchase undesired content in order to obtain the content they actually want.<sup>30</sup> Forced tying is one of the most prevalent and pernicious problems faced by rural MVPDs. In practice, the only viable way that rural MVPDs may gain access to “must-have” programming is to agree to purchase unwanted programming, which drives up the retail price of their service offerings. Rural MVPDs have found that

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<sup>30</sup> Joint Retransmission Consent comments, p. 16.; *see also* OPASTCO, NTCA, RICA, and WTA *ex parte* letter, MB Docket No. 07-198 (fil. Aug. 15, 2008).

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.<sup>31</sup> 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 more expensive, due to the forced tying practices of network program providers and local broadcasters. The FCC itself aptly recognized this problem years ago, and noted how it affected small MPVDs in particular:

“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 noncable MVPD or a nonaffiliated 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.**”<sup>32</sup>

In short, forced tying unnecessarily increases rural MVPDs' costs and prevents them from offering affordable service packages. This limits rural MVPDs' ability to

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<sup>31</sup> NTCA comments, MB Docket No. 07-269 (fil. May 19, 2009), pp. 4-5; NTCA comments, MB Docket Nos. 07-29, 07-198 (fil. Jan 4, 2008), pp. 16-17.

<sup>32</sup> MB Docket Nos. 07-29, 07-198, 22 FCC Rcd 17791, 17862-17863, ¶ 120 (2007) (emphasis added).

effectively compete in the video services market and diminishes consumer choice. The Commission should therefore ban forced tying immediately.

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

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 purchasing subscription video programming. Broadband tying goes well beyond the realm of any reasonable condition for access to traditional subscription video content. More recently, programmers have cut off access to their online content for customers of MVPDs with whom the programmer is engaged in a retransmission consent dispute, ensuring that customers are “caught in the middle” and further illustrating the need to reform the imbalance in the current rules.

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 programmers have required rural MVPDs to promote their web sites. Also, 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 in contracts for video content.

**E. The Commission Should Prohibit Programming Vendors From Requiring Rural MVPDs To Place Content In Specific Service Tiers**

The PN inquires about offering consumers small, less expensive programming packages, sometimes known as “skinny bundles”.<sup>33</sup> In most cases, however, content providers dictate the makeup of programming tiers and thereby prevent small MVPDs from offering consumers this kind of often-requested option. NTCA's members 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 popular tier(s) of service they offer. 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, as alluded to by the PN. However, the practice of “forced tiering” makes it impossible for rural MVPDs to craft 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

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<sup>33</sup> PN, p. 7.

distinguish themselves from their competitors. By prohibiting video programmers' use of forced tiering arrangements, the Commission can encourage product differentiation and competition among video service providers in rural areas, while enabling consumers to access the content they desire at affordable rates.

**F. Favorable Pricing Should Be Available to Small MVPDs**

The Commission has previously acknowledged ample evidence showing the prices that small and mid-size MVPDs pay for broadcast programming per subscriber are much higher than that paid by large MVPDs. Large MVPDs are able to negotiate a favorable rate because they provide broadcasters with a larger number of potential viewers that generate additional advertising revenue. In contrast, a broadcaster can extract higher per-subscriber rates from small and mid-size MVPDs because it loses little by denying them access to programming. However, as noted above, small and mid-size MVPDs are prevented from determining the true market value of the programming they attempt to acquire due to mandatory nondisclosure provisions required by broadcasters as a condition of access.

Though small and mid-size MVPDs often provide service to rural areas not served by large MVPDs, they often compete for subscribers in the lower-cost towns and suburban markets that dot the much broader rural landscape. A small or mid-size MVPD cannot effectively compete for customers with a large MVPD in these relatively more attractive markets if the large company is receiving lower rates for programming.

These harms and disparities could be partially rectified by a rule that would allow small and mid-size MVPDs to request the same prices and conditions from any of the other existing retransmission consent agreements that a broadcast station has entered into

with other MVPDs.<sup>34</sup> This would help to level the playing field among negotiating parties and reduce a barrier to video competition that is imposed by discriminatory pricing.

Enabling small and mid-size MVPDs to compete more vigorously in the video marketplace would provide consumers with more choices and would enhance small and mid-size MVPDs' ability and incentive to expand their offerings of video and broadband services.

**G. 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 PN also seeks comment about online video distributors.<sup>35</sup> 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 or most favored nation clauses in their contracts that could prevent rural MVPDs and broadband providers from gaining access to certain web-based video services.<sup>36</sup> 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 carefully monitor the evolution

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<sup>34</sup> Broadcasters cite “Most Favored Nation” provisions in their contracts with large MVPDs as the reason they cannot offer lower prices to small providers.

<sup>35</sup> PN, p. 2.

<sup>36</sup> Large providers use most favored national clauses to restrict competition by artificially inflating prices below which a content provider may not negotiate with another MVPD and by restricting content providers' ability to enter into agreements with providers using different delivery platforms.

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. CONCLUSION**

The provision of video services is key to rural LECs' ability to deliver robust broadband services to consumers in high-cost areas. Therefore, access to video content at affordable rates and under reasonable terms and conditions is needed not only to generate greater video competition, but also to spur broadband investment in rural service areas. Yet in practice, access to reasonably-priced programming is a significant barrier to the provision of video services, which in turn impedes further broadband deployment.

Consequently, the Commission should take the steps outlined above to facilitate the availability of programming at affordable rates and under reasonable terms and conditions to rural MVPDs.

Respectfully submitted,



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