

**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)	
)	

REPLY COMMENTS OF COMPTEL

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September 21, 2015

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	WIRELINE BROADBAND COMPETITION IS INTERTWINED WITH THE ABILITY TO OFFER LINEAR VIDEO SERVICE, AND COMPETITORS FACE SIGNIFICANT BARRIERS TO OBTAINING VIDEO PROGRAMMING AT NONDISCRIMINATORY AND REASONABLE RATES WHICH IMPACTS THEIR ABILITY TO COMPETE ON LINEAR VIDEO OFFERINGS AND TO INVEST IN EXPANDING AND UPGRADING THEIR BROADBAND NETWORKS.	2
III.	THE AVAILABILITY OF VIDEO NAVIGATION DEVICES IS CRITICAL TO THE DELIVERY OF COMPETITIVE MVPD SERVICES BY NEW ENTRANTS.	7
IV.	THERE IS SIGNFICANT POTENTIAL FOR COMPETITION AND CONSUMER CHOICE IN THE AVAILABILITY OF ONLINE VIDEO, AND THE COMMISSION MUST REMAIN DILIGENT THAT ITS POLICIES PROMOTE THE DISTRIBUTION OF OVD SERVICES.	8
V.	CONCLUSION	10

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Delivery of Video Programming)
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REPLY COMMENTS OF COMPTTEL

COMPTTEL, by its undersigned counsel, hereby submits these Reply Comments in response to the Media Bureau’s Public Notice seeking comment on the status of competition in the market for the delivery of video programming.¹

I. INTRODUCTION

As the preeminent national industry association for competitive communications networks and service providers, COMPTTEL represents providers in the video marketplace—most of which are new entrants. Such providers include, for example, companies providing fiber-to-the-home as the third wireline provider in their communities in competition to the incumbent cable provider and the telephone company. COMPTTEL’s members offer broadband, linear MVPD, and voice services in urban, suburban and rural areas. COMPTTEL also represents online video distributors (OVDs) which offer video programming over broadband Internet access services to consumers. COMPTTEL will focus its Reply Comments on the impediments to MVPD competition, including access to programming, video

¹ *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 15-58, Public Notice, DA 15-784 (rel. July 2, 2015).

navigation devices, and for OVDs the importance of an Open Internet and reasonable interconnection practices to promote over-the-top video competition.

II. WIRELINE BROADBAND COMPETITION IS INTERTWINED WITH THE ABILITY TO OFFER LINEAR VIDEO SERVICE, AND COMPETITORS FACE SIGNIFICANT BARRIERS TO OBTAINING VIDEO PROGRAMMING AT NON-DISCRIMINATORY AND REASONABLE RATES WHICH IMPACTS THEIR ABILITY TO COMPETE ON LINEAR VIDEO OFFERINGS AND TO INVEST IN EXPANDING AND UPGRADING THEIR BROADBAND NETWORKS.

In order to be competitive in the residential broadband marketplace, competitive wireline providers must offer broadband and linear video services. The Commission has long recognized that residential consumers continue to prefer to purchase both broadband and linear video services together in a bundled product.² As such, competitive networks must provide competitive linear video services—not just broadband services, in order to compete head-to-head with other wireline providers in the residential marketplace—and to achieve higher broadband adoption rates by consumers.

As the Commission is well aware, obtaining the rights to provide video content is critical to offering linear video;³ however, content costs continue to rise significantly. In its comments in this proceeding, ACA submits a research paper entitled, “High and Increasing Video Programming Fees Threaten Broadband Deployment” (ACA Research Paper).⁴ The ACA Research Paper states that “[o]ver the last eight years, total programming fees for the US multichannel video industry have more than doubled.”⁵ Moreover, “[o]n an annual basis, per subscriber programming fees have increased an

² See, e.g., Federal Communications Commission, Connecting America: The National Broadband Plan 38 (2010), available at <http://transition.fcc.gov/national-broadband-plan/national-broadbandplan.pdf>.

³ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, FCC 15-41 at ¶ 39 (rel. April 2, 2015).

⁴ ACA Comments, MB Docket No. 15-58 (filed Aug. 21, 2015).

⁵ ACA Comments, High and Increasing Video Programming Fees Threaten Broadband Deployment Research Paper, at 5 (“ACA Research Paper”).

average of 9.4% a year between 2010 and 2015.” For smaller MVPDs, the paper notes that an increase in fees has been even greater—10.6%—even excluding regional sports networks and retransmission consent fees.⁶ Likewise, ATVA et al. recently noted that retransmission consent fees grew 8,600% between 2005 and 2012.⁷

The ACA Research Paper predicts that programming fees will continue to grow rapidly in the future,⁸ and it states that increasing pricing on subscribers is likely to be constrained due to direct competition and the availability of OVDs.⁹ The ACA Research Paper goes on to find that due to the increase in programming fees, the business case for new broadband deployment will be “less tenable” for rural expansion, new fiber deployments, and incumbent telco deployments in the near future. COMPTEL’s members already are experiencing this prediction. They are offering linear video service at a loss which necessarily impacts their ability to expand and upgrade their broadband networks. They are providing video simply to complete the bundle and support the provision of competitive broadband services.

COMPTEL’s members are not the only broadband providers that are facing this predicament. NTCA-The Rural Broadband Association states in its comments that “video services remain vital to the

⁶ *Id.*

⁷ ATVA et. al Ex Parte Notice, MB Docket No. 10-71 (filed July 17, 2015) (*citing* Broadcast Investor Deals & Finance: Retrans projections update: \$10.3B by 2021, SNL Kagan, June 30, 2015 (“SNL Kagan June 30, 2015”)).

⁸ ACA Research Paper at 5. Similarly, SNL Kagan estimates that TV broadcasters’ retransmission consent fees will reach \$10.3 billion by 2021 compared to the projected level of \$6.3 billion in 2015. SNL Kagan June 30, 2015.

⁹ *Id.* at 6.

deployment and adoption of broadband services.”¹⁰ Video programming prices and practices “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.”¹¹ Similarly, WTA-Advocates for Rural Broadband states in its comments that:

WTA members have been disappointed because their substantial broadband network upgrades and their capabilities to provide high-quality video signals have had virtually no positive effect on their efforts to compete profitably (or even at a break-even basis) in the video market. Rather, their broadband investment efforts have been virtually entirely counteracted and overridden by the fact that they have been unable to obtain the video programming desired by their rural customers at affordable prices and on reasonable terms.¹²

Indeed, even for the largest telephone companies, such as AT&T, the provision of video services is often a loss leader, and was a significant reason for AT&T’s acquisition of DirecTV.¹³ Similarly, CenturyLink asserts in this proceeding that Commission must reign in escalating retransmission consent fees in order to promote consumer choice in video delivery services.¹⁴

¹⁰ NTCA-The Rural Broadband Association Comments, MB Docket No. 15-58, at 1 (filed Aug. 21, 2015).

¹¹ *Id.* at 3.

¹² WTA-Advocates for Rural Broadband Comments, MB Docket No. 15-58, at 2 (filed Aug. 21, 2015).

¹³ See Statement of Randall Stephenson, Chairman, CEO, and President, AT&T, Inc., The AT&T/DIRECTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond: Examining the Comcast-Time Warner Cable Merger And The Impact On Consumers: Hearing Before the S. Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights, 113th Cong. at 3 (June 24, 2014), available at <http://www.judiciary.senate.gov/download/06-24-14-stephenson-testimony>; see also *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, MB Docket No. 14-90, FCC 15-94, at ¶ 3 (rel. July 28, 2015) (“With fewer than 6 million subscribers, AT&T’s video product is hampered by higher costs of procuring programming – limiting its ability to both offer lower consumer prices and expand its high-speed broadband footprint.”) (“AT&T/DTV Order”).

¹⁴ CenturyLink Comments, MB Docket No. 15-58, at 3 (filed Aug. 21, 2015).

In order to promote more competitive broadband choice, including the deployment of new networks, the Commission must promote video competition. The Commission’s own data concerning the availability of wireline broadband network options for residential broadband Internet access service suggests that only 12 percent of households have three or more choices; 27 percent of households have just two provider choices (typically the incumbent cable provider and incumbent telco); and 45 percent of households have only one single provider—in other words, no competitive choice.¹⁵ To effectively promote broadband competition, the Commission will need to address the availability of video programming so that broadband providers can compete head-to-head on linear video service in order to attract consumers to their broadband service. COMPTTEL is pleased that the Commission is reviewing some aspects of access to programming, including retransmission consent and good faith negotiations and is considering an Order to eliminate the Commission’s outdated program exclusivity rules.¹⁶

In retransmission consent negotiations, there are a number of practices that are anticompetitive and should be a *per se* violation of good faith negotiations, including for example, failure of broadcasters to deliver a renewal proposal within six months of contract expiration; using blackouts during marquee events/special programming and otherwise withholding programming to gain leverage in negotiations; forced tying/tiering of programming; and forcing MVPDs to comply with FCC policies

¹⁵ *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*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, GN Docket No. 14-126, FCC 15-10, at ¶ 83 (rel. Feb. 4, 2015).

¹⁶ See Tom Wheeler, “Upgrading Media Rules to Better Serve Consumers in Today’s Video Marketplace,” FCC Blog, available at: <https://www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace> (Aug. 12, 2015); see also *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216, FCC 15-109 (rel. Sept. 2, 2015).

that have been eliminated (such as the programming exclusivity rules once the Commission's pending Order is adopted). There is wide support for these findings in the Commission's proceedings.¹⁷

Moreover, the Commission should promote transparency of rates so that new entrants/competitors are not disadvantaged in the marketplace—this is especially so for retransmission consent fees—where we believe it is often the case the new entrants are paying more for programming than large incumbent cable operators. As such, COMPTTEL supports NTCA's proposal:

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 accessible manner, the lowest fee they will charge, prior to any volume discount.¹⁸

Moreover, non-discriminatory pricing of video programming is critical to promoting competition among MVPDs. The transparency of rates charged by programmers to MVPDs would go a long way toward ensuring that programmers are offering such rates to MVPD competitors on a non-discriminatory basis.

Chairman Wheeler has made competition the central theme of this Commission:

So let's be clear. We're not going to let up on protecting and promoting broadband competition.

As I have made plain on innumerable occasions, competition is paramount. It is the best assurance of industry dynamism, that opportunities for improvements in quality and reductions in cost will be pursued assiduously, and that the benefits will be shared with consumers.

¹⁷ See, e.g., NTCA's Comments at 11-14; WTA's Comments at 7-9 (discussing the harmful effects of program tying and tiering requirements); Letter from Micah M. Caldwell, ITTA, MB Docket No. 10-71 (Aug. 7, 2015); Letter from Mike Chappell, American Television Alliance, MB Docket No. 10-71 (July 22, 2015); Letter from Ross J. Lieberman, American Cable Association, MB Docket No. 10-71 (July 24, 2015); and Letter from Sam Feder, Jenner & Block on behalf of Cablevision, MB Docket No. 10-71 (July 31, 2015).

¹⁸ NTCA Comments at 10.

Suffice it to say, continuing to protect and encourage a competitive marketplace is the foundational requirement of the modern FCC.¹⁹

COMPTTEL could not agree more that protecting and promoting broadband competition is absolutely necessary to ensure investment, innovation, and consumer benefits. Wireline broadband competition is intertwined with the availability of video programming, and the Commission must address the long-standing issues with the availability of video programming at reasonable and non-discriminatory rates, terms, and conditions in order to promote broadband competition.

III. THE AVAILABILITY OF VIDEO NAVIGATION DEVICES IS CRITICAL TO THE DELIVERY OF COMPETITIVE MVPD SERVICES BY NEW ENTRANTS.

The lack of access at competitive prices to advanced, innovative video navigation devices also remains an impediment to new entrants in the video programming marketplace. The Commission must foster a competitive marketplace for video navigation devices. COMPTTEL is a member of the Consumer Video Choice Coalition which submitted comments in this proceeding which COMPTTEL fully supports. In particular, those comments discussed how broadband competitors offering MVPD services (which as noted above is required to compete in the marketplace) would benefit from greater competition for video navigation devices:

Today, large MVPDs benefit from economies of scale. Set-top box manufacturers are incentivized to focus on orders from these larger MVPDs, while small MVPDs are left with high costs if they want to offer devices different from those of the major operators due to their smaller subscriber bases over which to spread costs. Robust retail competition would allow manufacturers to take advantages of economies of scale over a larger base of retail navigation device users—ultimately lowering costs of new entrants and other small network operators to acquire innovative navigation devices.²⁰

¹⁹ Prepared Remarks of FCC Chairman Tom Wheeler, The Brookings Institution, at 4 (June 26, 2015).

²⁰ Consumer Video Choice Coalition Comments, MB Docket No. 15-158, at 7 (filed Aug. 31, 2015).

In addition, the promotion of competition and availability of video navigation devices potentially lowers consumers' costs when switching service providers and would further encourage video and broadband competition in the marketplace. Accordingly, COMPTTEL agrees with the Coalition that the Commission should act expeditiously and adopt the appropriate policies and rules that would unleash competition in the retail video navigation device market.

IV. THERE IS SIGNIFICANT POTENTIAL FOR COMPETITION AND CONSUMER CHOICE IN THE AVAILABILITY OF ONLINE VIDEO, AND THE COMMISSION MUST REMAIN DILIGENT THAT ITS POLICIES PROMOTE THE DISTRIBUTION OF OVD SERVICES.

The way Americans access video services continues to evolve. While many Americans continue to rely upon traditional broadcast television, cable, and satellite services, the growth of on demand, streaming and other OVD services, such as Hulu, Netflix, and Amazon Prime continues to grow. Moreover, some providers, such as Dish, have begun to offer a competitive linear service over the Internet. As Netflix discusses in this proceeding, however, most consumers that use OVDs currently do so in conjunction with their MVPD service and/or over-the-air broadcast television.²¹

COMPTTEL believes that the development of OVD options is good for consumers and for video competition.²² However, as COMPTTEL and others discussed in the Commission's Open Internet proceeding and in the Commission's review of the Comcast/TWC merger and AT&T/DirecTV

²¹ Netflix Comments, MB Docket No. 15-58, at 2 (citing SNL Kagan which predicts that only 7.6 million of the 118.9 million television households in the U.S. rely exclusively on online video).

²² Indeed, such developments potentially could decrease the need for BIAS providers to also offer a separate MVPD service to attract broadband subscribers. However, at this time approximately only 6% of U.S. TV households rely exclusively on over-the-top video. *Id.* at n.4 (citing SNL Kagan Survey).

merger,²³ some broadband Internet access service providers have used their gatekeeper positions to allow their interconnection ports to congest, demanding tolls for such Internet traffic to be delivered to their consumers—even when resulting in their consumers not receiving the Internet speeds for which they paid. If broadband Internet access service (BIAS) continue to block or degrade traffic to demand tolls, the development of video competition will be harmed. As Netflix states:

Such access fees can have an adverse effect on OVD competition. Whether applied to a proprietary or public CDN service, access fees raise the costs for online video services. These costs are passed through to the consumer as a price increase and/or a decrease in an OVD's content investment. BIAS providers with affiliated video services may be particularly motivated to raise the costs of competitive OVDs, as this makes the affiliated service more attractive.²⁴

COMPTEL commends the Commission for the steps it has taken so far to ensure that unreasonable Internet interconnection practices do not impede consumers' access to an Open Internet.²⁵ COMPTEL agrees with Netflix that settlement free interconnection practices are essential to realize the efficiencies of CDNs and transit providers that deliver traffic to BIAS providers' networks. Over-the-top video competition will have the opportunity to flourish where BIAS providers offer settlement free interconnection with CDNs and transit providers. The Commission should continue to encourage such arrangements in order to promote over-the-top video competition and consumer choice.

²³ See, e.g., COMPTEL Ex Parte Letters, MB Docket No. 14-90 (filed June 25, 2015 & June 2, 2015); COMPTEL Ex Parte, Docket No. 14-28 (filed Feb. 19, 2015); and COMPTEL's Petition to Deny, MB Docket No. 14-57, at 15-22 (filed Aug. 25, 2014).

²⁴ Netflix Comments at 8.

²⁵ *Protecting and Promoting the Open Internet*, Report and Order and Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24 at ¶¶ 203-206 (rel. March 12, 2015) (establishing a case-by-case review for Internet interconnection and traffic exchange practices); AT&T/DTV Order at ¶ 219 (requiring AT&T to submit its Internet interconnection agreements and to disclose related performance metrics).

V. CONCLUSION

COMPTEL urges the Commission to address the high barriers to video and broadband competition by ensuring access to video programming at reasonable and non-discriminatory rates, terms, and conditions; promoting retail competition in the video navigation devices marketplace; and fostering over-the-top video competition.

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