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

In the Matter of	**)**	
	)	
Annual Assessment of the Status of	**)**	**MB Docket No. 06-189**
Competition in the Market for the	**)**	
Delivery of Video Programming	**)**	

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

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November 29, 2006

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NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION INITIAL COMMENTS

The National Telecommunications Cooperative Association (NTCA) hereby submits these comments in response to the Federal Communications Commission's (Commission's or FCC's) Notice of Inquiry (NOI) in the above referenced matter.[1] In its NOI, the Commission solicits data and information on the status of competition in the market for the delivery of video programming. In these Comments, NTCA provides information about and insight into the challenges of small companies providing video services in rural America.

I. INTRODUCTION AND SUMMARY

NTCA is an industry association representing rural communications providers. Established in 1954 by eight rural telephone cooperatives, today NTCA represents more than 570 rural communications providers of which many provide wireless, Internet, video and long distance service to their communities. Specifically, more than 75 percent of NTCA's members are multi-channel video programming distributors (MVPDs).[2]

Most NTCA members who provide video service to their communities do so according to traditional coaxial cable, fiber cable, or Direct Broadcast Satellite (DBS). However, more and

[1] In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, MB Docket No. 06-189 (released Oct. 20, 2006).

[2] Currently, 263 NTCA members provide cable television service (CATV), 103 provide Direct Broadcast Satellite, 39 NTCA members offer Video DSL and 35 provide Internet Protocol Television (IPTV) service.

more of NTCA's members are utilizing the so-called Telco-TV model, providing video service via alternative broadband infrastructures and technologies, such as Digital Subscriber Line (DSL) over copper facilities. In August 2006 NTCA surveyed its members in preparation for a broadband/Internet availability survey report.[3] One hundred and twenty NTCA members responded to the survey and provided information (21% of NTCA's total membership). Fifty-nine percent of survey respondents offer video service to their customers. Ninety-four percent of those offer video under a cable franchise while 1% offers video as an Open Video System (OVS) pursuant to Part 76, Subpart S of Communications Act, Fifty-eight percent of those respondents offering video offer cable TV, 26% IPTV and 14 % direct broadcast satellite (DBS). Of those respondents not currently offering video, 23% (9% of all respondents) plan to do so by year-end 2006, and 38% (16% of all respondents) plan to do so by year-end 2008.

NTCA member companies serve the most rural segments of this country, where the cost and difficulty of providing service is the greatest. In many areas, NTCA member companies are the only providers of video service to these customers. NTCA members and other small video programming providers are adapting to the changing environment in the video marketplace by providing new ways to transmit video programming services to the consumer. Small video providers, however, face many obstacles when trying to obtain video programming from content providers and attempting to enter new markets. Unreasonable commercial broadcast television rates, unfair prohibition and restrictions on rural video providers sharing a headend, exclusive dealing/programming arrangements, abuse of market power through non-disclosure agreements, tying practices, predatory pricing, and prohibitions on Internet protocol (IP) and analog transport

[3] *NTCA 2006 Broadband/Internet Availability Survey Report*, August 2006, p. 12. Available online at www.ntca.org/content_documents/2006%20NTCA%20Broadband%20Survey%20Report.pdf.

are some of the barriers faced by small video providers. These and other barriers described below limit the full utilization of small carriers' broadband facilities.

Section 706 permits the Commission to consider appropriate regulatory methods to remove barriers to investing in advanced telecommunications capabilities. Removal of these barriers will further the goals of Section 706 and enhance competition in the video marketplace. The Commission should recognize obstacles and adopt remedies where possible that will allow small video providers to gain access to video programming at reasonable rates. The Commission should also recommend in its report to Congress that Congress closely examine current laws, eliminate loopholes, and adopt legislation that will prevent further anti-competitive behavior, unreasonable pricing, and abuse of market power in the video services marketplace.

II. THE FCC RULES CONCERNING COMMERCIAL BROADCAST STATIONS NEGITIVELY IMPACT RURAL VIDEO COMPETITION AND SIGNIFICANTLY INCREASE END-USER RATES.

The NOI seeks comment on competition issues specific to video distribution in rural and smaller markets.[4] The Commission also seeks information on how does competition differ between rural and smaller markets and larger, urban areas.[5] The Commission further seeks information detailing the differences in cost of programming and the terms of carriage programming between larger systems and those in smaller rural areas.[6] To address all of these areas the Commission should first look closely at its rules how over-the-air commercial television broadcast stations (Broadcasters) are using these rules to negatively impact rural video competition and significantly increase rural consumer rates for video services.

The American Cable Association (ACA) estimates that absent relief, consumers served by rural cable television (CATV) and Internet protocol television (IPTV) providers will face

[4] NOI, ¶ 21.
[5] *Id.*
[6] NOI, ¶ 22.

more than $860 million in rate increases.[7] This will happen because over-the-air Broadcasters are demanding that small rural video providers pay substantially higher programming fees to carry broadcast channels to rural video provider subscribers. Unless relief is granted, the Broadcasters will get their rate increase because the current law requires rural video providers, in most cases, to carry broadcast channels as part of their basic cable service. Rural video providers currently serve approximately 7.7 million or 7% of all U.S. television households. Without a change in the law, this unjust rate increase will significantly harm the affordability of video services to rural consumers.

Today, there are six broadcast television networks in the United States: ABC, NBC, CBS, Fox, the CW (formerly UPN WB), and *i* Independent Television (formerly Pax). The six broadcast networks currently provide over-the-air commercial television broadcast signals to designated market areas (DMAs) throughout the United States. The term "DMA" specifies a geographic area established by Nielsen Media Research for the purpose of rating the viewership of broadcast television stations. DMAs represent the geographic areas covered by groups of competing commercial television broadcast stations. Section 76.56(b) of the FCC's rules, however, require CATV and IPTV providers located in a DMA to carry the local commercial broadcast television stations located in that DMA.

Currently, there are approximately 110 million television households in the United States. DMA boundaries therefore are of considerable financial importance to commercial broadcast stations because they determine the number of viewers each station can claim, and, thus, the dollar amount the station can charge per unit of advertising time. In the past, broadcast television stations relied solely on advertising revenues to run their businesses and earn a

[7] *In the Matter of the Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103, Retransmission and Consent, Non-Duplication, and Syndicated Exclusivity,* RM-11203, Report No. 2696, Public Notice (rel. March 17, 2005).

reasonable return on their investment. Rural and non-rural video providers carried broadcast stations for free to help expand the viewership within a DMA, and, hence, increase the adverting revenues to Broadcasters. Today, in addition to their enormous profits from advertising revenues, Broadcasters seek additional revenues by charging small and medium rural video providers rates as high as $1.00 per subscriber per month to carry a broadcast station in-DMA signal/channel.

Under today's rules, a rural video provider cannot take a lower programming rate from an alternative broadcast station in a neighboring DMA. Because rural video providers cannot shop in neighboring DMAs for lower rates, rural providers are at the mercy of all Broadcasters operating in their DMA. Moreover, given that rural video provider markets are so sparsely populated, refusal to carry a Broadcaster's station would not negatively impact the Broadcaster's Nielson rating/advertising revenues, and thus, rural video providers have no leverage in negotiations with Broadcasters. Rural video providers, therefore, will be required to pay a Broadcaster's unreasonable in-DMA programming rate or rural consumers will not receive their local broadcast channel programming. Either way rural consumers will be harmed.

NTCA, therefore, urges that Commission to rule on the *ACA Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103, Retransmission and Consent, Non-Duplication, and Syndicated Exclusivity*, RM-11203, and adopt the following NTCA proposed amendments to the FCC's rules so that the 7.7 million households served by rural video providers may consider and receive lower programming rates from alternative broadcast stations in neighboring DMAs.

Rural Commercial Broadcast Video Programming Reform:

New Section 47 CFR §76.64 (n):
(n) Where a commercial broadcast station seeks consideration for retransmission consent from a small CATV or IPTV provider beyond carriage and channel placement, neither such commercial broadcast station nor any other party shall take any action which has the purpose or effect of hindering or preventing the small CATV or IPTV provider from retransmitting the signal of any other local or non-local commercial broadcast station. Any CATV or IPTV provider with 400,000 subscribers or less meets the definition of a "small cable company" as defined by the Communications Act of 1934, as amended. A party shall be deemed to be preventing or hindering a small CATV or IPTV provider where such local commercial broadcast station or any other party does the following:

(1) Asserts network non-duplication or syndicated exclusivity under Sections 76.92 and 76.101 of this Part with respect to such small cable company.

(2) Influences or controls by contract or otherwise a commercial broadcast station's decision or ability to grant retransmission or influences or controls by contract or otherwise the terms and conditions of such station's retransmission consent for retransmission of its signal by a small CATV or IPTV company.

Addition of text to the following sections.

47 CFR § 76.93. Parties entitled to network non-duplication protection. Subject to 47 CFR §76.64(n), television broadcast station licensees shall be entitled to exercise non-duplication rights pursuant to 47 CFR §76.92 in accordance with the contractual provisions of the network-affiliate agreement that are consistent with the Federal Communications Commission's rules.

47 CFR §76.103(a). Parties entitled to syndicated exclusivity. Television broadcast station licensees shall be entitled to exercise exclusivity rights pursuant to §76.101 in accordance with the contractual provisions of their syndicated program license agreements that are consistent with the Federal Communications Commission's rules, and with §76.109 and subject to §§76.64(n), (o), and (p) in particular.[8]

Additional Remedies – Pool Bargaining and Arbitration:

New Section 47 CFR §76.64 (o):
(o) IN GENERAL.— In addition to New Section 47 CFR §76.64 (n)**,** any small CATV or IPTV provider that meets the Commission's definition of a small cable company may combine with any other small CATV or IPTV provider meeting such definition and appoint a bargaining agent(s) to bargain collectively on their behalf in negotiating carriage with a local or non-local commercial broadcast station(s) in any designated market area (DMA) throughout the United States. Any CATV or IPTV provider with 400,000 subscribers or less meets the definition of a

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[8] The proposed language in New Section 47 CFR §76.64 (n) was originally authored by the American Cable Association (ACA) and can be found in the ACA Petition for Rulemaking to Amend 47 CFR §§ 76.64, 76.93 and 76.103, filed with the Federal Communications Commission on March 2, 2005.

"small cable company" as defined by the Communications Act of 1934, as amended. The designated bargaining entity shall have the option of exercising the same rights and responsibilities in the procedures set forth by the Federal Communications Commission in Part IV of Appendix F in *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, For Authority to Transfer Control, Memorandum Opinion and Order*, 19 FCC Rcd 473 (2004). Any small CATV or IPTV provider may also negotiate directly with any local or non-local commercial broadcast station(s) in any DMA throughout the United States. If any small CATV or IPTV provider decides to negotiate on its own behalf in carriage negotiations with a local or non-local commercial broadcast station(s) in any DMA throughout the United States, the small CATV or IPTV provider shall have the option of exercising the same rights and responsibilities in the procedures set forth by the Federal Communications Commission in Part IV of Appendix F in *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, For Authority to Transfer Control, Memorandum Opinion and Order*, 19 FCC Rcd 473 (2004). Small cable companies may enter into agreements with in-DMA and out-of-DMA commercial broadcast stations simultaneously and broadcast in-DMA and out-of-DMA commercial broadcast station programming simultaneously to their consumers.

New Section 47 CFR §76.64 (p):
(p) IN GENERAL.— In addition to New Sections 47 CFR §76.64 (n) and (o), contracts or other influences between commercial broadcast stations and their network/parent company, affiliated company, or non-affiliated company, entity or person shall not prohibit any commercial broadcast station from negotiating and entering into agreements to provide in-DMA or out-of-DMA commercial broadcast programming to small CATV, IPTV providers, or their bargaining agent(s). No commercial broadcast station can refuse to negotiate with a small cable company.

Commercial broadcasters are specifically targeting small and medium size video providers for significant rate increases. For example, the Sinclair Broadcast Group, owner of KDSM Channel 17, in Des Moines, has recently decided to pull its stations, including KDSM, off the Mediacom cable systems on December 1, 2006, unless Mediacom pays them millions of dollars. Over the past six months, Mediacom has made several offers to Sinclair, all consistent with Mediacom's arrangements with the other stations in Des Moines. Sinclair, however, has rejected all offers and continues to demand exorbitant compensation, penalizing consumers who will ultimately bear the cost of Sinclair's unreasonable behavior. Since 2001, Mediacom has provided the Des Moines, Iowa area video service and has improved the picture clarity and expanded the audience reach of their weak UHF signal as a result of the significant investments they have made in their fiber-optic broadband network throughout Des Moines, Fort Dodge, Ames, and surrounding rural areas. In return, Sinclair has used its market power as one of the largest broadcasters in the nation to force Mediacom and its customers to accept its over-priced demands.[9] This Commission should not allow this to happen.

NTCA's proposed rules would permit rural video providers to consider and receive lower programming rates from alternative broadcast stations in neighboring DMAs. This would enable the establishment of fair market rates for rural broadcast programming, and would further reduce rural video provider costs, lower retail video prices, and provide broadcast television services to all consumers receiving service from rural video service providers. This would also ensure rural consumers receive access to comparable video services at rates comparable to consumers living in areas served by non-rural cable providers.

Because the proposed exception is limited to rural video providers, it would **not** affect 93% of the television households in the United States served by large, non-rural CATV and IPTV providers. Large video providers possess adequate leverage and market power which enables them to negotiate reasonable broadcast rates and reduce the economic burden on non-rural consumers. Conversely, rural video providers lack leverage and market power due to their sparsely populated service territories and require regulatory and/or legislative reform to ensure reasonable broadcaster programming rates. Ensuring reasonable broadcaster programming rates in rural video provider service areas would allow rural consumers to receive access to comparable video services at rates comparable to consumers living in areas served by non-rural cable providers. To accomplish this goal, the Commission should expeditiously rule on the ACA petition and revise its current retransmission and consent rules by adopting NTCA's proposed amendments listed above.

[9] See, http://www.befairsinclair.com/kdsm/index.html.

III. SOME VIDEO CONTENT PROVIDERS HAVE IMPOSED UNFAIR RESTRICTIONS ON RURAL VIDEO PROVIDERS THAT SHARE A HEAD-END.

Today, many small rural video providers would not be able to offer video services if they could not jointly purchase/lease a shared head-end with other small video providers. Some small video providers serve less than 300 residents within their service areas. If many small rural video providers were required to invest approximately $1 to $3 million in a head-end, manage and maintain the network, and absorb the programming costs, they could never expect to recover their investment nor provide affordable/competitive video services throughout their service areas. These same small video companies, however, have created an opportunity to provide video services by pooling their resources and jointly purchasing a head-end or leasing a head-end from another head-end owner. Sharing a head-end with several small companies substantially reduces initial investment and provides small video providers the opportunity to provide consumers with an affordable video service offering. Without the shared head-end option, many rural consumers would not have video service or would be limited to direct broadcast satellite service (DBS) without any other competitive offering.

Some video content providers are now taking issue with small providers sharing head-ends. Some content providers assert they are concerned with the ability of third parties (i.e., the controlling head-end entity) to manage administrative procedures for control of their content. Shared head-end video providers are concerned that when their current licensing agreements expire that they may be denied access to video programming from some content providers. Shared head-end providers are currently in negotiations with many content providers to resolve these issues so that consumers will receive uninterrupted video programming after their current licensing agreements expire. The Commission and Congress, however, should be aware of the shared head-end issue. If this issue is not resolved through negotiations prior to the expiration of many licensing agreements, many rural consumers may not have future access to existing video programming in their communities.

IV. SMALL MVPDS SERVING RURAL AMERICA FACE DIFFICULTIES GAINING ACCESS TO AFFORDABLE PROGRAMMING

The Commission seeks updated information on rural CATV and IPTV video programming costs.[10] The Commission also asks a variety of questions about how video programming distributors package and market their programming to retail video service providers in small and rural markets as compared to larger, urban markets.[11] NTCA's members have much to say on this issue. The most commonly cited difficulties faced by carriers providing video in rural areas are the practices and charges of program distributors. In order to provide a video service, carriers must rely on program distributors for content. However, there is an unequal bargaining relationship which leads to some distributors charging outrageous prices and demanding unreasonable contractual terms.

A. Small Providers Lack Leverage in Their Negotiations with Video Content Providers

Access to video content at a reasonable price is essential for small providers of video service. NTCA's members who provide video service stated most often that about 50% of their operating expenses go to acquiring programming and that percentage is likely to increase. Contracts for programming typically contain automatic escalation clauses – forcing prices up by a certain percentage yearly. Small video service providers lack the leverage necessary to negotiate a better rate from the video programmers, forcing consumers in rural America to pay a premium for video service.

[10] NOI, ¶ 22.
[11] *Id.*

According to the National Cable Television Association (NCTA), more than 112 million homes in the U.S. are passed by a local cable system.[12] The vast majority of these are passed by large multiple system operators (MSOs). However, many residents living and working in rural America receive their video service from small, rural providers.

Small video providers serving rural America lack the leverage of larger MSOs in dealing with content providers, to the detriment of rural consumers. In general, the larger the number of subscribers, the greater the degree of negotiating power and the better the eventual deal. Providers of programming content make much of their money by selling advertising, and can charge higher rates if they deliver more potential viewers. It is in the program providers' best interests, then, to take whatever steps are necessary to insure that their programming is carried by the larger MSOs. Content providers simply cannot afford to have the large MSOs not carry their content. The large MSOs use this fact to their own advantage. Consequently, they demand—and receive—more beneficial terms from the content providers than they otherwise might.

Smaller carriers, on the other hand, lack the leverage afforded by a large customer base, but their subscribers expect access to the same programming. Content providers are aware of this, and are thus able to take a relatively inflexible position in their negotiations with small carriers. Small carriers are not in a position to walk away from the negotiating table, and even if they did, the content providers' bottom line would be largely unaffected. Ultimately, this lack of leverage and negotiating power may lead to higher programming rates for the consumers served by smaller rural carriers.

Virtually all of the contracts negotiated between content providers and large MSOs include non-disclosure agreements. By restricting the flow of information, the content providers

[12] NCTA website, http://www.ncta.com/ContentView.aspx?contentId=54, accessed November 29, 2006.

make it virtually impossible to establish any semblance of "market rates." Consequently, smaller carriers must enter into their negotiations at a significant disadvantage, as they possess far less information than the party with whom they are negotiating.[13]

B. Large Programming Distributors Demand Expensive and Unreasonable Contractual Terms

Without disclosing any specific contractual terms, NTCA member video providers complained of a wide range of practices that drive up the price of video programming.

Tying arrangements—whereby a network requires a carrier to take as many as 12 additional networks in order to have access to a flagship network—are rampant. The end result is that the small CATV and IPTV providers must pay a higher price in order to ensure access to the desired flagship network. This problem is much more dramatic for a small carrier with limited capital resources than for a large MSO that can afford to pay for the extra networks.

In addition to forcing the rural MVPDs to provide programming their subscribers do not want or need, the program distributor may require that a large percentage of the subscribers receive the programming in order for it to be made available. Or, if the distributor makes the programming available no matter the number of subscribers, the price for programming increases if a certain percentage of households do not receive the programming. For example, a contract may provide that the price per subscriber for Sports Channel Y is $x if 85% of households receive the channel, but is (much higher rate) $z if less than that. In effect, the distributor of program Sports Channel Y ensures that the programming is carried on the lowest tiered offering of the rural video provider to reach all subscribers. In addition, contractual terms often dictate the channel on which the programming is to be provided.

[13] This imbalance – dubbed by economists as "asymmetric information" – is a significant impediment to the establishment of an efficient marketplace.

These contractual terms are especially troubling in rural areas. In some rural communities there is no over-the-air reception of broadcast channels. Some rural consumers have no choice but to subscribe to a pay service to receive local television news, sports and entertainment. The price of service increases as more and more channels become part of the lowest priced, basic tier of video service. Some rural MVPDs complain that they have no option other than to provide all channels to all subscribers to meet the contractual penetration rates. There is no low-priced basic tier of service. Further, smaller carriers typically lack channel capacity, and these arrangements often compel smaller carriers to reposition (or even drop) channels in order to accommodate the additional networks forced on them by the flagship network. This repositioning and dropping of networks in a carrier's channel line-up combined with the expensive lowest tier offering causes consumer confusion and dissatisfaction and puts smaller carriers at a significant competitive disadvantage.

C. Small Carrier Access to Reasonable Program Rates According to Reasonable Terms is Essential to Ensure Rural Customers' Access to the Same Programming as Urban Customers

It is important that carriers in rural areas are able to obtain programming content at reasonable rates in order to be able to provide the same service to rural customers as is available in urban markets or in those served by large MSOs. Unless these rural carriers are able to gain access to the programming content that their customers deserve at reasonable rates, their customers will receive higher cost service than their urban counterparts. There is no justifiable reason that certain customers should be penalized for no other reason than that their service provider has fewer customers than a large MSO. Allowing small carriers equal access to programming choices at equivalent prices would go a long way toward insuring equivalent video services in urban and rural America, and between small and large providers.

V. VIDEO CONTENT PROVIDERS ARE SLOW TO EMBRACE NEW TECHNOLOGIES AND UNFAIRLY DISCRIMINATE AGAINST NEW ENTRANTS TO THE VIDEO MARKETPLACE

New entrants into the video marketplace face especially difficult challenges as they seek to compete. They are often entering into a market with new technology seeking to compete with an established provider. Experience has demonstrated that video content providers are slow to embrace new technologies to deliver video to the end user.

A. Some Video Content Providers Unfairly Discriminate Against Carriers That Use IP-Transport

New small Telco-TV/IP-TV providers are facing discriminatory practices concerning their ability to get into the video services marketplace and gain access to video content because some content providers prohibit their video content from being distributed via DSL or the Internet. They claim that this IP-transport prohibition is required to prevent the piracy of their video content on the Internet. This concern, however, is easily addressed through today's encoding and encryption capabilities that enable IP-transport to be more secure than traditional cable transport. NTCA is concerned that some content providers/MVDPs/MSOs are using the false piracy excuse to actively discriminate against new Telco-TV/IP-TV entrants that are attempting to offer competitive video services in service territories currently served by existing MVDPs and MSOs. Such discriminatory practices should not be condoned by the Commission or Congress.

B. Small Carriers Using Analog Transport Face Difficulties Obtaining Programming

Though they are not using a "new" technology, traditional small analog CATV providers are also facing discriminatory practices concerning their future ability to offer video services using traditional analog cable networks. Some content providers are insisting that small analog cable TV providers upgrade their systems to a digital format for the transport of their video content. As described above, many small rural video providers do not have the economies of scale and scope to incur the cost of upgrading their analog networks to digital networks. For example, one NTCA member company provides video services using analog CATV to a community of 50 subscribers. If this company were to upgrade to a digital network today, it would be required to incur an expenditure of $180,000 - $250,000. This would result in such a substantial increase in rates to consumers that it would effectively put the small company out of the video business and leave the residents of the community with only one other option for video services – DBS. Such discriminatory practices should not be allowed.

VI. LARGE, INCUMBENT CABLE OPERATORS OFTEN ENGAGE IN QUESTIONABLE PRACTICES IN AN EFFORT TO DRIVE OUT COMPETITION

Large incumbent cable operators have every incentive and the opportunity to engage in practices that make it difficult, and often impossible, for new entrants to compete for subscribers. Small carriers are faced with predatory pricing behavior and large carriers abusing their power making it difficult for small carriers to obtain programming.

A. New MVPDs Seeking to Serve an Area Served by an Established Large Cable Operator may Face Predatory Pricing Practices

The most onerous, and often times insurmountable, challenge for new entrants seeking to deliver video service is competing with the predatory pricing practices of large, incumbent cable operators. NTCA members who are using new technology to compete with large cable operators tell of troubling circumstances. More than one member explains that when they enter a market, the cable operator will drop its price for service way below cost in the areas where it faces competition – thus making it impossible for the new entrant to gain a foothold. The incumbent cable operator is able to afford this practice because it will increase the price for service in areas where there are no competitors. One NTCA member told of a cable operator who faced competition offering the deal of a lifetime to any subscriber who had switched to the competitor - a check for $300 and a contract offering the same service as was received from the competitor for a mere $5.00 a month for a number of years.

In the long run**,** consumers do not benefit from win-back schemes of this kind. The cable operator is using profits from non-competitive markets to subsidize below-cost prices. The incumbent does not offer these prices to everyone, but only to subscribers who have already gone to a competitor or are in the process of doing so. The below-cost prices are made available or extended in an attempt to drive the competitor out of the market. In the end, there is no effective competition.[14]

The Cable Television Consumer Protection and Competition Act of 1992 included a uniform rate requirement to prevent cable operators from having different rate structures in different parts of one cable franchise and to prevent cable operators from dropping the rates in one portion of a franchise area to under cut a competitor temporarily.[15]

In the Telecommunications Act of 1996, however, Congress amended the uniform rate requirement to add an "effective competition" exception.[16] An incumbent cable operator need

[14] Congress was made aware of this and other anticompetitive practices of the MSOs in 2004. *See,* Testimony of the National Association of Telecommunications Officer and Advisors, United States Senate Committee on the Judiciary, *Cable Competition – Increasing Price: Increasing Value?* (Feb. 11, 2004). In addition to anticompetitive pricing behavior, the Association discussed problematic behavior of MSOs including: 1) Refusing to deal with suppliers and contractors that provide services to competitors; 2) Hiring away key employees of competitors; 3) Using litigation to prevent or delay competition; 4) Refusing to carry advertising of overbuilders; 5) Interfering with local franchise processes; 5) Flooding local media with misinformation about public communications initiatives; and 6) Lobbying for anticompetitive state laws.
[15] 47 U.S.C. Sec. 521(d). Normally, such practices would also violate the Sherman Act and/or Section 5 of the Federal Trade Commission Act. *See,* 15 U.S.C. Sec. 2 and 15 U.S.C. Sec. 45(a)(2).
[16] 47 U.S.C. Sec.543(d)

not comply with the uniform rate requirement if it is subject to "effective competition." It is thus allowed to charge different prices to different segments of subscribers. The effective competition exception has been interpreted in a way that permits incumbent cable operators to engage in unfair practices. Local exchange carriers entering a video market may be the triggering event for the "effective competition" exception. [17] The FCC has found that "effective competition" can be found to exist as long as the LEC is planning to provide cable TV service in an area overlapping the incumbent's territory. [18] Under the FCC's interpretation of the LEC test, "effective competition" can be found even where the competitor has a minimal number of subscribers and where the vast majority of customers in a given area have no competitive alternative at all. Effective video competition will not be realized until this legal loophole is closed, preventing large, incumbent cable providers from engaging in practices intended to drive all competition from the market.

B. Incumbent Cable Operators May Abuse Their Market Power to Minimize the Programming Available to New Entrants

Some incumbent cable operators are using their market power to make it difficult for competitors to obtain programming. The incumbents know that without access to certain programming, competitors cannot make their service attractive to subscribers. Certain large cable incumbents are known to have entered into exclusive programming arrangements. Contracts are written in such a way as to bar new entrants access to local or regional sports or news programming. Local subscribers expect the programming and are unlikely to switch to a new provider who is unable to provide it.

[17] 47 C.F.R. Sec.76.905(b)(4).
[18] *See*, Commission Implements Cable Reform Rule Modifications: Provides Information of Cable Rate Regulation, CS Docket No. 96-85 (March 29, 1999). "Potential as well as actual LEC service can be considered [to determine whether a cable operator is subject to effective competition]"

Further, the association currently primarily responsible for negotiating programming for smaller video providers makes it difficult for new Telco-TV/IP-TV entrants to take advantage of the master affiliation agreements with programming distributors it negotiates on behalf of its members. In order to join, the company must be "engaged in the business of providing television reception or service to the public, *primarily by means of a cable television* system." The fee to join is reportedly $25,000 more for video providers without "significant cable experience" than for incumbent cable operators, no matter the technology actually employed for delivering the programming. It appears to be another blatant example of incumbent cable operators protecting their businesses by driving up the cost of operation for new video competitors.

VII. CONCLUSION

The Commission should expeditiously rule on the ACA petition and revise its current retransmission and consent rules by adopting NTCA's proposed amendments. Unreasonable commercial broadcast rates, exclusive dealing arrangements, abuse of market power through non-disclosure agreements, tying practices, predatory pricing, shared head-end reservations, and prohibitions on Internet protocol (IP) and analog transport are some of barriers faced by small video providers. Removal of these barriers will further the goals of Section 706 and enhance competition in the video marketplace. The Commission should recognize these obstacles and adopt remedies where possible that will allow small video providers to gain access to video programming at reasonable rates. The Commission should also recommend in its report to Congress that Congress eliminate loopholes in the laws that allow for unreasonable pricing, anti-competitive behavior, and abuse of market power in the video services marketplace.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing **Initial Comments of the National Telecommunications Cooperative Association** in MB Docket No. 06-189, FCC 06-154 was served on this 29th day of November 2006 by electronic mail to the following persons:

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