

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

In the Matter of	)	
	)	
Implementation of the Cable Television	)	MB Docket No. 07-29
Consumer Protection and Competition Act of	)	
1992	)	
	)	
Development of Competition and Diversity in	)	
Video Programming Distribution: Section	)	
628(c)(5) of the Communications Act	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> hereby files its initial comments in response to the Federal Communications Commission’s (Commission’s or FCC’s) Notice of Proposed Rulemaking (NPRM) regarding the October 5, 2007, sunset provision for Section 628(c)(5) of the Communications Act of 1934. Section 628(c)(2)(D) prohibits exclusive contracts for satellite cable or broadcast programming between vertically integrated programming vendors and cable operators.<sup>2</sup> The Commission seeks comment on several issues relating to Section 628 and program access exclusivity.

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 575 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

<sup>2</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, MB Docket No. 07-79 (rel. Feb. 20, 2007 (NPRM)).

In evaluating the NPRM, the Commission should extend the exclusivity prohibition for at least five years beyond October 7, 2007. The Commission should also consider revising its program access complaint rules to allow binding arbitration as a means to resolve program access disputes. In addition, rural video providers need access to sports programming, so the Commission should revise its rules to prohibit exclusive sports programming by content providers. Furthermore, the Commission should protect rural retail video providers from content providers who unfairly discriminate against rural providers that share head-ends. Finally, the Commission should allow small video providers access to out-of-market designated market area (out-of-DMA) commercial broadcast programming.

## **I. Introduction**

Rural video providers currently serve approximately 7.7 million or 7% of all United States television households. More than 75% of NTCA's rural members are multi-channel video programming distributors (MVPDs), and NTCA video members provide video service using coaxial cable, fiber cable, Direct Broadcast Satellite (DBS), Open Video Systems (OVS), Digital Subscriber Line (DSL) over copper facilities and Telco-TV/Internet protocol television (IPTV). 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. As such, NTCA members and their customers have a vital interest in the outcome of the Commission's NPRM involving exclusive access to video programming.

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 exorbitant prices and demanding unreasonable contractual terms.

Access to video content at a reasonable price is essential for small providers of video service. In a recent NTCA member survey, NTCA members who provide video service stated most often that about 50% of their operating expenses go to acquiring programming and that this percentage is likely to increase.<sup>3</sup> 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. Allowing small carriers equal access to programming choices at equivalent prices would go a long way toward ensuring equivalent video services in urban and rural America, and between small and large providers.

## **II. The Commission Should Extend The Program Access Prohibition Sunset For Another Five Years.**

The Office of Advocacy for the Small Business Administration (SBA) stated that the initial flexibility analysis of the NPRM concluded that a sunset on the ban against exclusive contracts would negatively impact small businesses, which would include small rural carriers.<sup>4</sup> The SBA accurately characterized the relationship between small rural carriers and video content: “For small providers of video services, access to video programming is crucial to their ability to operate in today’s MVPD market.”<sup>5</sup> The exclusivity prohibition provided in Section

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<sup>3</sup> NTCA 2006 Broadband/Internet Availability Survey Report, August 2006, available at: [http://www.ntca.org/content\\_documents/2006%20NTCA%20Broadband%20Survey%20Report.pdf](http://www.ntca.org/content_documents/2006%20NTCA%20Broadband%20Survey%20Report.pdf).

<sup>4</sup> NPRM, ¶ 19, Appendix; Office of Advocacy for the Small Business Administration (SBA) Comment, p. 4.

<sup>5</sup> SBA Comment, p. 4.

628 remains a necessary protection for rural video providers and their customers, without which competition and diversity in the distribution of video programming would falter. Vertically integrated program suppliers still have the incentive and ability to favor their affiliated cable operators over rural MVPDs. Small rural video providers still do not have enough market power or large enough subscriber bases to negotiate effectively with large program suppliers.

Exclusive programming arrangements for national and regional programs must be prohibited. Some incumbent cable operators use their market power to make it difficult for competitors to obtain programming. The incumbent community access television (CATV) providers know that without access to certain programming, competitors cannot make their service attractive to subscribers. Certain content providers have entered into exclusive programming arrangements. Contracts are written in such a way as to effectively bar other retail video providers from access to sports or news programming. Local subscribers expect such programming and are unlikely to switch to a competing DBS, CATV or IP-TV provider that is unable to provide it. Thus the conditions that prevailed in 2002 to persuade the Commission to bar exclusivity remain today. The Commission, consequently, should extend the exclusivity bar for at least another five years.

### **III. Rural Video Providers Need Access To Sports Programming.**

Another question the Commission asked in its NPRM is whether MVPDs are having access problems to “marquee” or “must have” vertically integrated programming, such as sports programming.<sup>6</sup> The answer is “Yes,” and that answer is being given not only in the context of

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<sup>6</sup> NPRM, ¶¶ 8, 10.

this docket<sup>7</sup> but also during Senate hearings. Access to sports programming was discussed during a March 27, 2007 Senate Committee on Commerce, Science and Transportation hearing in the context of Direct TV's proposed exclusive broadcast agreement with Major League Baseball (MLB). Under the proposed exclusive agreement, the Direct TV satellite service would carry MLB's out-of-market games in its "Extra Innings" package from 2007 to 2013, which would effectively shut out cable competitors.<sup>8</sup> While it would allow, say, a Red Sox fan living in Washington to watch the Boston Red Sox team on a regular basis, DirecTV would be the only television outlet beginning in 2009 that would carry the MLB's new Baseball Channel.<sup>9</sup> This could force some consumers to either stop watching their team on television, change to DirecTV service, or purchase it separately using their Internet connection over the MLB website and watch the programming on their computer.<sup>10</sup>

These exclusive contracts do not foster competition and, consequently, lock out competitors (including rural video providers) and their customers. Exclusive contracts are written in such a way as to bar new entrants access to local or regional sports or news programming. Competitive choice for sports programming will enhance customer viewing value by pressuring incumbent providers to lower their prices and provide better services. Local subscribers expect the programming and are unlikely to switch to a new provider who is unable to provide it. The Commission should, therefore, continue to allow MVPDs access to sports programming by disallowing exclusive sports contracts.

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<sup>7</sup> See Carol Carlson Comment, pp. 1-2 (filed Mar. 20, 2007).

<sup>8</sup> "DirecTV Strikes Out With Senate Panel," Technology Daily, March 29, 2007.

<sup>9</sup> *Id.*

<sup>10</sup> As Ms. Carlson states, "It's outrageous that DirecTV, Cox, or any other company can use this to their advantage to force consumers to purchase their product." Carlson Comment, p. 2.

#### **IV. The Program Access Complaint Process Puts Small Carriers At A Disadvantage.**

The Commission seeks comment on its program access complaint process.<sup>11</sup> The rules and procedures to file a program access complaint, including the discovery process and lack of decision deadline, decidedly disadvantage a small carrier who is negotiating or litigating a program access complain against a larger opponent. Small video providers serving rural America lack the leverage of larger video providers in dealing with content providers, to the detriment of rural consumers. Binding arbitration, as suggested by the SBA,<sup>12</sup> may prove to be a viable and useful alternative to litigation, and the Commission should consider allowing parties to use binding arbitration as an alternative to the existing complaint process. Binding arbitration would provide a more level playing field for small rural carriers because small carriers would derive some bargaining power from the process. The Commission should revise the program access complaint process to allow binding arbitration as an alternative to the existing litigation procedures to permit small video providers adequate protections from large content providers.

#### **V. Restrictions on Shared Head-End Use are Unfair.**

The Commission also inquired into other video programming issues that may be relevant to new trends in the industry and to Section 628.<sup>13</sup> One such issue is unfair restrictions by some video content providers on rural video providers sharing a head-end to receive the content. 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

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<sup>11</sup> NPRM, ¶ 13.

<sup>12</sup> SBA Comment, p. 8.

<sup>13</sup> NPRM, ¶ 12.

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 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 content providers to resolve these issues so that consumers will receive uninterrupted video programming after their current licensing agreements expire. The Commission should be aware of the shared head-end issue. If this issue is not resolved through negotiations, many rural consumers may not have future access to existing video programming through the shared head-end platform.

## **VI. The Commission Should Permit Out-of-Market Sales.**

Another issue the Commission should consider in the context of this NPRM and Section 628 is the difficulty faced by rural households who cannot receive lower programming rates from alternative broadcast stations in neighboring designated marketing areas (DMAs). Under today's rules, rural video providers cannot take a lower programming rate from an alternative broadcast station in a neighboring DMA.<sup>14</sup> 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 has urged the Commission to allow out-of-market or out-of-DMA programming by ruling 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 adopting some NTCA proposed amendments to the FCC's rules. Those proposed rules are contained in NTCA's comments filed November 29, 2006 in the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189, which are incorporated by reference.<sup>15</sup>

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<sup>14</sup> 47 C.F.R. §§ 76.56, 76.64, 76.93, and 76.103.

<sup>15</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, NTCA Comments, pp. 4-8.

## **VII. Conclusion.**

For these reasons, the Commission should extend the exclusivity prohibition for at least five years beyond October 7, 2007. The Commission should consider revising its program access complaint rules to require binding arbitration as a means to resolve access disputes. Rural video providers need access to sports programming, so the Commission should revise its rules to prohibit exclusive sports program contracts by large content providers. Furthermore, the Commission should be aware that many rural video providers must share a head-end with other providers to receive content, and should protect rural video providers from large content providers who are unfairly discriminating against shared head-end use. Finally, the Commission should allow out-of-market (out-of-DMA) programming.

Respectfully submitted,

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April 2, 2007

**CERTIFICATE OF SERVICE**

I, Adrienne Rolls, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in MB Docket No. 07-29, FCC 07-7, was served on this 2nd day of April 2007 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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