

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

<b>In the Matter of</b>	)	
	)	
<b>Implementation of the Cable Television Consumer Protection and Competition Act of 1992</b>	)	<b>MB Docket No. 07-29</b>
	)	
<b>Development of Competition and Diversity In Video Programming Distribution: Section 628(c)(5) of the Communications Act:</b>	)	
	)	
<b>Sunset of Exclusive Contract Prohibition</b>	)	
	)	
<b>Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements</b>	)	<b>MB Docket No. 07-198</b>

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
REPLY COMMENTS**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> hereby submits these reply comments in response to initial comments filed on January 4, 2008, regarding the Federal Communications Commission's (Commission's or FCC's) Public Notice in the above referenced proceeding (Notice).<sup>2</sup> Silence on any positions raised by parties in this proceeding connotes neither agreement nor disagreement with their positions or proposals. Unless

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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 more than 583 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. 276 NTCA members provide coaxial cable (CATV) service, 106 members provide direct broadcast satellite (DBS) service, 76 members provide Internet Protocol television (IPTV) service, and 61 provide video over digital subscriber line (DSL). NTCA's 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*, MB Docket No. 07-29, *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, MB Docket No. 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (rel. October 1, 2007) (Report and Order or NPRM).

specifically stated below, NTCA reasserts its positions described in its January 4, 2008 initial comments filed in this docket.

**I. THE FALSE ECONOMIC BASIS IN SUPPORT OF WHOLESALE VIDEO PROGRAMMING TYING ARRANGEMENTS IS RESTRICTING COMPETITION AND HARMING CONSUMERS.**

NTCA has retained Dale Lehman, Professor of Economics and Director of the MBA Program and Executive MBA in Information and Communication Technology Program at Alaska Pacific University to examine the economic assumptions and arguments use by the wholesale video programming industry to support the continued practice of wholesale video programming tying/bundling arrangements. Dr. Lehman's concludes in his paper entitled, *Programming Obstacles Facing Small Cable Companies*, that wholesale video programming tying arrangements without a cost based option to purchase unbundled wholesale video programming hinders competition in the wholesale and retail video programming markets and may harm consumers. Attachment A.

Dr. Lehman recommends that the Commission take specific actions to prevent creation of artificial economies of scale and/or artificial entry barriers. This means prohibiting exclusive contracts, ensuring access to unbundled cable-affiliated wholesale video programming, and limiting price discrimination by providing most favored nation access to programming contracts.

Bundling and tying of wholesale video programming content raises complex and important issues. Given that it would be better for the market to determine the fates of wholesale packaging, it is important that MVPDs have a realistic opportunity to design packages that match their subscribers' needs. The Commission is wisely relying on intermodal competition to discipline pricing in the video marketplace, and the best way to ensure that this competition will explore different programming packages is if the wholesale cost structure permits this option.

If the Commission were to require networks to be offered on an unbundled basis at the wholesale level, Dr. Lehman believes this requirement would only be meaningful if it were associated with regulation of the stand-alone prices for these networks. The Commission could, for example, require that all wholesale video programming that is included in any programming bundles be made available on a stand-alone basis, and that the sum of the stand-alone wholesale video programming prices not exceed the price of any wholesale bundle in which they are contained. This requirement should also be combined with a “most favored nation” requirement to limit price discrimination so that wholesale video programming providers cannot set different stand-alone prices for each retail CATV and IPTV provider, depending on which specific wholesale programming channels the retail provider chooses to purchase. This would still provide flexibility for how retail video programming providers choose to price their individual networks while constraining the potential deleterious effects of wholesale tying.

## **II. THE EXCLUSIVE CONTRACT PROHIBITION SHOULD REMAIN IN PLACE FOR ITS FULL FIVE YEAR TERM**

The Report and Order extended the prohibition on exclusive contracts for video content with vertically integrated cable programming by an additional five years.<sup>3</sup> The Notice of Proposed Rulemaking (NPRM) questions whether a procedure to shorten the extension to two years should be established if a vertically integrated cable operator can show that another multi-channel video programming distributor (MVPD) has achieved a certain penetration on a market-by-market basis.<sup>4</sup> Several commenters in this proceeding demonstrate that the adoption of rules that permit the early sunset of the prohibition would be contrary to the public interest, inuring

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<sup>3</sup> Report and Order, ¶¶ 79-81.

<sup>4</sup> NPRM, ¶ 114.

solely to benefit of major incumbent cable operators, and would frustrate video competition and the development of new programming.<sup>5</sup>

A market-by-market analysis of competition is not appropriate for determining whether competitive levels are sufficient to justify the shortening of the 5-year exclusive contract prohibition. As the Coalition for Competitive Access to Content points out, it is the markets that have, or are about to have, two cable competitors where vertically integrate cable operators have the greatest incentive to use their control over programming to inhibit competitive entry.<sup>6</sup> An early sunset of the exclusivity prohibition would have an adverse impact on nascent competition, virtually guaranteeing the continued video dominance of incumbent cable companies.

The vast majority of vertically integrated cable incumbents enjoy national market presence. The five largest cable operators control nearly all must-have programming. NTCA's members are small, wireline entrants typically competing in small designated market areas (DMAs). National vertically integrated cable incumbents have the ability to spread the costs of programming across their nationwide customer base. Under the proposed market-by-market analysis, if the prohibition is lifted in their rural territories, NTCA's members would be competing for content with nationwide players, despite vast differences in market share, subscribership and purchasing power. In such a scenario, NTCA's members stand little chance of securing "must have" programming. Ultimately, the national cable incumbents would remain the primary source of video programming.

An early sunset of the programming exclusivity ban would benefit only a handful of large incumbent cable providers, and harm non-vertically integrated cable television (CATV), Internet

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<sup>5</sup> See, Comments of the Broadband Service Providers Association, Comments of OPASTCO, ITTA, WTA, RICA, USTelecom, Comments of The Coalition for Competitive Access to Content, MB Docket No. 07-198 (filed January 4, 2008).

<sup>6</sup> Comments of The Coalition for Competitive Access to Content, MB Docket No. 07-198, p. 23 (filed January 4, 2008).

protocol televisions (IPTV) and direct broadcast satellite (DBS) providers and consumers. NTCA joins the Broadband Service Providers Association in urging the Commission to defer consideration of the concept for five years when the current exclusivity prohibition is once again reviewed for further extension.

### III. CONCLUSION

Based on the above stated reasons contained in NTCA's initial comments, reply comments, and Dr. Lehman's paper entitled *Programming Obstacles Facing Small Cable Companies* contained in Attachment A, NTCA recommends the Commission adopt the following proposed changes to its rules which will enhance competition, diversity and affordability in the retail video programming market.

- **Exclusive Programming Contracts Should Be Prohibited, Including Terrestrially Delivered and Non-Cable Affiliated Video Programming.** The current ban on exclusive contracts contained in Section 628(c)(2)(D) should be extended to non-cable affiliated programming, such as DirecTV and EchoStar, and terrestrially delivered programming. The FCC has ancillary jurisdiction under Sections 151, 152(a), 153(5), 154(i), 303(r), 601(4), 601(6), 616(a), 628(a), 628(b), 628(c)(4) and 706 of the Communications Act of 1934, as amended, to implement an exclusive contracts ban on non-cable affiliated programming and terrestrially delivered programming.
- **Mandatory Video Content Tying Arrangements By Wholesale Providers Should Be Prohibited.** Many over-the-air commercial broadcast networks and cable programming networks require CATV and IPTV providers to take unwanted video programming and put it in their basic or expanded basic tier in order to have access to the network's flagship programming. The end result is that consumers are paying higher cable rates for unwanted video programming in order to have access to wanted video programming. Mandatory tying arrangements have been increasing consumer cable rates for decades.
- **Video & Broadband Content Tying Arrangements Should Be Prohibited.** Large wholesale content providers are now attempting to require small MVPDs to provide and pay for web content. In exchange for "must have" video programming, the IPTV or CATV provider is required not only carry and pay for several undesired video channels, but also pay for several broadband web pages. The web pages must be made available to all of the CATV or IPTV provider's *broadband* customers, whether or not the customer subscribes to the CATV or IPTV service, or whether the broadband customer is situated within the video service territory. The CATV or IPTV provider pays the content provider a set amount on a per *broadband* subscriber basis, a cost that is ultimately borne by the broadband subscribers.

- **Commercial Television Broadcast Station Retransmission Consent Rules and DMA Restrictions Must Be Amended.** Today there are six over-the-air commercial broadcast television networks (Broadcasters) in the United States: ABC, NBC, CBS, Fox, the CW and ION Television. The six broadcast networks currently provide commercial television broadcast signals to DMAs throughout the United States. Section 76.56(b) of the FCC rules, however, require many CATV and IPTV providers located in a DMA to carry only the local commercial broadcast television stations located in that DMA. Under today’s rules, many rural video providers cannot take a lower programming rate from an alternative broadcast station in a neighboring DMA. Because many rural CATV and IPTV providers cannot shop in neighboring DMAs for lower rates, rural video providers are at the mercy of all Broadcasters operating in their DMA. The Commission should amend its retransmission consent rules to allow small IPTV and CATV providers with 400,000 subscribers or less to: (a) enter into agreements to provide out-of-DMA commercial broadcast channels, (b) pool bargain, and (c) exercise Most Favored Nation status through the use of other existing retransmission consent agreements.
- **Shared Head-Ends Must Be Allowed.** Some wholesale video content providers have attempted to impose unfair and costly restrictions on small retail CATV and IPTV providers that share or seek to share a head-end. Many small CATV and IPTV providers have created an opportunity to provide retail video services to their communities 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 allows small video providers the opportunity to give consumers an affordable video services offering. Without the shared head-end option, many rural consumers would not have terrestrial video service or would be limited to DBS service without any other competitive offering.
- **Encryption Should Not Be Mandatory For Traditional CATV Providers.** Some content providers are insisting that small radio frequency CATV providers upgrade their systems to support encryption. Many small rural video providers do not have the economies of scale and scope to incur the cost of providing encryption on their networks. Mandatory encryption would result in a substantial increase in rates to consumers or would put some small rural CATV providers out of business.
- **The Commission’s Rules Should Permit Voluntary Arbitration.** The Commission should modify its program access complaint rules through the implementation of an early “final offer” step in complaints that relate to the price of video programming. The “final offer” step would allow the FCC to adopt one of the parties’ final offers on price as interim compensation pending final resolution of the complaint or as the rate in the program access complaint final decision. The “final offer” step is consistent with the Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-584, and is within the Commission’s authority.
- **The Commission Should Use Standstill and Temporary Orders to Further the Goals of Diversity and Competition and Promote the Efficient Settlement of Cases.** Standstill and temporary orders maintain the status quo during a complaint proceeding and act as an

incentive to encourage settlement which, in turn, furthers the Commission's goals of speedy resolution of Section 628 complaints as required by Congress. The Commission should adopt some form of standstill or temporary relief to permit small MVPDs to buy programming pending resolution of a program access complaint. The Commission should specifically adopt a procedure similar to the "standstill" provision in Appendix B(2)(c) of *Adelphia Order*; this will benefit small providers that have little leverage in negotiating with large vertically integrated wholesale video programming vendors.

- **The Commission Should Use Interim Orders to Encourage Compliance with Section 628 and Provide Timely Relief to New Entrants and Small MVPDs Seeking Initial Programming Agreements with Programming Vendors.** The Commission should adopt some form of stay or temporary relief based on a presumption that first time buyers that are small MVPDs have a right to purchase "must-have" programming at the lowest available rate offered to competing or similarly situated MVPDs. Alternatively, the Commission should provide relief based on a simplified showing that harm will accrue to small MVPDs seeking to provide service for the first time unless providers are required to permit small MVPDs to buy programming pending resolution of the dispute.
- **Non-Disclosure Agreements Should Be Prohibited.** Virtually all of the contracts negotiated between content providers and large MSOs include non-disclosure agreements. By restricting the flow of information, the video content providers make it virtually impossible to establish any semblance of "market rates." Consequently, small retail CATV and IPTV providers are significantly disadvantaged in negotiations with video programming providers. The Commission may institute an inquiry pursuant to its authority under Section 403 of the Act for the purpose of gathering additional information to create a complete record on the issue. Section 1.1 of the FCC's rules provides that the Commission may hold a proceeding for the purpose of obtaining information necessary or helpful in the determination of its policies or amendment of its rules and regulations." Given the inability of MVPDs to volunteer all of the specific information necessary to establish a complete record in this proceeding, NTCA believes the Commission should institute a Section 403 Inquiry to review a representative sample of relevant agreements and/or prohibit the use of non-disclosure agreements in case-by-case program access disputes through the use of protective orders.
- **Most Favored Nation Status.** The FCC should require to make a wholesale programming channel that is included in any whole programming bundle be made available on a stand-alone basis, and the sum of the stand-alone wholesale channel not exceed the price of any wholesale video programming bundle/tying arrangement in which the stand-alone programming channel is contained. This requirement must be combined with a "most favored nation" requirement to limit price discrimination so that wholesale video programming providers cannot set different stand-alone prices for each retail CATV and IPTV provider, depending on which specific wholesale programming channel(s) the retail providers choose to purchase.

Programming access and retransmission consent rules may have a significant economic impact on a substantial number of small entities, such as small rural MVPDs. The Regulatory

Flexibility Act (5 U.S.C. §601) requires the FCC to consider alternative rules that will reduce the economic impact on small entities. NTCA's proposed amendments to the Commission's program access and retransmission consent rules would reduce the impact on small rural MVPDs. NTCA's proposals will also promote the public interest, convenience, and necessity by increasing competition and diversity in the multi-channel video programming market and spur development of new advanced communications technologies and broadband deployment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Reply Comments of the National Telecommunications Cooperative Association in MB Docket No. 07-29 & MB Docket No. 07-198, FCC 07-169, was served on this 12th day of February 2008 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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