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

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 07-269
Competition in the Market for the	)	
Delivery of Video Programming	)	

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS

NTCA
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
The Voice of Rural Telecommunications
www.ntca.org

By: /s/ Daniel Mitchell
Daniel Mitchell
(703) 351-2016

By: /s/ Jill Canfield
Jill Canfield
(703) 351-2020

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

May 19, 2009

TABLE OF CONTENTS

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

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming Programming Tying Arrangements	)	MB Docket No. 07-269

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION INITIAL COMMENTS

The National Telecommunications Cooperative Association (NTCA) submits these comments in response to the above referenced *Notice of Inquiry* (NOI).[1] In its NOI the Federal Communications Commission (Commission) solicits data and information for the Commission's Report to Congress on the status of competition in the market for the delivery of video programming.[2]

I. INTRODUCTION AND SUMMARY

The provision of video service to subscribers is an increasingly vital component of the suite of services NTCA's members offer their rural customers. It is considered a "must have" service in the bundle of offerings a rural carrier provides its subscribers in an increasingly competitive marketplace.

All of NTCA's 581 members are full service rural incumbent local exchange carriers. The vast majority provide not only voice, but also video, wireless and broadband service to their rural communities. Specifically, 259 members offer video via coaxial cable (CATV) and 83 via

[1] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Notice of Inquiry*, MB Docket No. 07-269 (rel. January 16, 2009) (NOI).
[2] NTCA offers these comments in response to the January 2009 NOI and subsequent extensions. The Commission requests competitive information for years up to 2008 and separately requests comments for 2009, due in July. NTCA's comments necessarily combine survey results from 2008 and the first quarter of 2009 and information on trends that include the first quarter of 2009.

Direct Broadcast Satellite (DBS). At last count, another 106 NTCA members offered video via Internet Protocol Television (IPTV), a number that is growing rapidly as the percentage of members who offer broadband service approaches 100%. The ability to offer a quality video product to customers is viewed as a key driver of broadband deployment in rural areas and is essential to the long-term viability of rural telecommunications providers.

Successful video deployment requires access to technology and desirable content on reasonable terms and conditions. Rural carriers have been stymied in their efforts to obtain quality, affordable programming that their customers want and are willing to pay for. A variety of strategies employed by the programmers and broadcasters make it difficult for rural carriers to obtain content and offer it to subscribers at a reasonable price. Competition is being hampered because of bundling, tying, and forced tiering by program providers, and contract provisions restricting the use of shared head-ends. Program providers engage in unfair bargaining tactics, including employing non-disclosure provisions in contracts and using the threat of withholding "must have" content during the re-negotiation process.[3] Retransmission consent rules strongly favor the broadcasters to the detriment of consumers. The Commission will enhance competition by addressing the bargaining inequities threatening small video providers' viability.

II. VIDEO DEPLOYMENT IS INTRINSICALLY LINKED WITH BROADBAND

As video delivery moves to an IP format, video demand will spur broadband deployment and broadband availability will increase video demand. The two are intrinsically linked. The vast majority of rural telcos offer broadband service to at least some portion of their service territory and the number of telcos using that broadband connection to offer a bundle of service

[3] Content providers negotiating with existing MVPDs have been known to force agreement by threatening to withhold programming during negotiations. Both parties know that if highly desired content is dropped, even if temporarily, the MVPD will lose subscribers. These strong arm tactics that threaten the viability of small MVPDS should not be permitted.

including video is increasing rapidly. Rural telcos who participated in a NTCA 2008 broadband survey provided video deployment information.[4] A key finding of the survey was that video is a "'must have' offering for those wishing to succeed in the competitive marketplace."[5] Nearly two-thirds of respondents already offered video to their customers. That number was up from 63% in 2007 and 42% in 2005. Of those respondents that did not then offer video, 32% planned to do so by year end 2009. Nearly 80% of those with future video plans intended to offer IPTV service.[6]

Competition in broadband is becoming more prevalent and more varied: 93% of survey respondents indicated that they face competition from at least one other service provider for at least some of their customers. The typical respondent competes with two national ISPs, two satellite broadband providers, two wireless Internet service providers (WISPs) and one cable company. Other competitors mentioned include electric utilities, local ISPs and neighboring rural telcos. Fifty-five percent of those respondents facing competition indicated that their competitors were serving only the cities and towns in their service areas, while 45% said that competitors were serving customers throughout their service area.[7]

Members were specifically questioned about video competition in an informal NTCA poll.[8] Fifty-eight percent of poll participants indicated that they faced video competition from a cable provider, 92% from a satellite provider, and 6% from an IPTV provider. Not one participant who offered video indicated that there was no competition for video subscribers in their service territory.

---

[4] *See*, 2008 NTCA Broadband Survey Report, http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2008ntcabroadbandsurveyreport.pdf

[5] 2008 Broadband Survey, p. 14.

[6] *Id.*, pp. 12-13

[7] *Id.*, p. 10.

[8] This aggregate information is derived from seventy-six NTCA member companies that voluntarily answered specific questions in March 2009 about video deployment and competition in their service territories.

NTCA's members view broadband and the provision of video service as essential to their long term viability. Given the competitive environment, NTCA's members believe that they must offer and bundle the full range of services to attract and retain customers.

III. THE AVAILIBILITY OF PROGRAMMING AT REASONABLE RATES AND CONDITIONS WILL DETERMINE THE FUTURE SUCCESS OF RURAL VIDEO PROVIDERS

The Commission requests information on MVPD access to programming[9] and programming packaging.[10] Small video providers, like larger ones, must respond to consumer demand for certain popular programming to be able to sell their services and remain competitive. No NTCA members are affiliated with programming providers and thus must rely on vertically integrated or non-affiliated programmers for content. The availability of "must have" programming under reasonable terms and conditions is the difference between a viable system that supports broadband deployment and one that will fail.

A. Programming Vendors Force Small MVPDs to Offer and Pay for Undesired Programming to have Access to Desired Programming

NTCA has consistently argued against the common program distributor practice of tying undesired content with desired content. Tying of content is the most prevalent and pernicious problem faced by small MVPDs in the market today. It is true that rural telephone companies entering the video services business may gain access to virtually all available programming, but to do so, they must agree to take unwanted programming, driving up the price of the service they offer. In order to obtain carriage rights for the 10 most widely distributed basic programmers, small MVPDs must contract for, pay for and distribute 120 to 125 channels. The lineup of

---

[9] NOI, ¶ 19, 23.
[10] *Id*. ¶18.

desirable programming changes little year to year, but the channel lineup is growing ever larger and ever more expensive, due to the tying practices of program providers.

Contrary to the assertions of program providers, NTCA members indicate that the wholesale programming vendors are not permitting them to offer their programming on an "*a la carte*" basis and remove programming from their basic or expanded basic tier. Seventy eight percent of NTCA's poll participants indicated that not a single programming vendor would permit the unbundling and another 14% of participants said that less than 10% of their vendors would permit an *a la carte* offering. Only 2% of participants indicated that they were offered stand alone programming by half or more of the programming vendors. Tying of programming by programming vendors is a prevalent and destructive practice.

Content providers' assertions that they offer stand alone program are disingenuous. In truth, alternatives, if offered at all, are "false alternatives" with terms that are too onerous as to be realistic and genuine offers.

B. Increasingly, Video Content is being Tied to Web Content

A recent development in the struggle for access to untied and affordable content involves the tying of web content to video content.[11] Large wholesale content providers are attempting to require small CATV and IPTV providers to provide and pay for web content. In exchange for desired video programming, IPTV/CATV providers are being asked to not only carry several undesired video channels, but also to provide broadband content. Content providers are requesting that broadband content be made available to all of the IPTV provider's *broadband* customers, whether or not the customer subscribes to the IPTV service, whether or not the

[11] At least one popular programmer is now attempting to tie its broadband (Web-based) content to its video programming and seeking to require that small rural MVPDs promote those Websites on the MVPDs homepage and pay the programmer for every broadband customer served by the MVPD, irrespective of whether or not the customer is receiving the video content from the MVPD, nor ever utilizes the broadband content.

broadband customer is situated within the video service territory, and whether or not the customer utilizes the broadband content. The IPTV provider pays the content provider a set amount on a per *broadband* subscriber basis, a cost that is ultimately borne by all broadband subscribers. If every content provider jumps on the bandwagon and begins to charge the reported $.10 - $.25 per broadband subscriber for web content in order to have access to video content, subscribers will see their monthly bills increase substantially.

C. Program Vendors Require that Content be Placed on Certain Tiers of Service

The problem of tiering is closely related to tying and minimum penetration requirements. Not only are members required to take and pay for unwanted programming, but programming vendors require that programming be placed on a specific tier or require that a certain percentage of subscribers receive the service, forcing small video providers to provide the channel to the most widely subscribed tier or tiers of service. Ninety-four percent of NTCA's video poll participants reported that wholesale video programming providers have required them to place their programming in their most highly subscribed tier of video service.

The combination of bundling and forced tiering make it impossible for a small MVPD to offer a truly basic, stripped down package of affordable service. It also prevents small MVPDs from competitively distinguishing themselves. Programming vendors prevent MVPDs from responding to customer demands to offer packages specifically tailored to individual wants and needs or the demographics of the community. The small MVPD, and thus the consumer, has no alternative to a large, expensive package of channels with dozens of, if not a hundred or more channels that are unwanted and rarely viewed.

IV. THE RETRANSMISSION CONSENT RULES ARE HARMING COMPETITION

The Commission seeks comment on the impact of the regulatory environment and barriers to entry.[12] The Commission seeks "to understand what these barriers are and how they impede competition in the MVPD marketplace."[13] The Commission's must carry and retransmission consent rules permit broadcasters to leverage their bargaining power and drive up programming costs for rural MVPDs.

Today, the six commercial broadcast networks provide service according to Designated Market Areas (DMAs). Section 76.56(b) of the Commission's rules require that most CATV and IPTV providers may only carry the local commercial broadcast television stations located in their specified DMAs. MVPDs may not look to neighboring DMAs for network programming. Broadcasters' programming is carried by MVPDs according to retransmission consent agreements or must carry at the sole discretion of the broadcasters.

In the past, broadcast television stations relied solely on advertising revenues to earn a reasonable return on their investment and would require MVPDs to carry their in-DMA signals by invoking the "must carry" requirements. No payments between the MVPDs and broadcasters were exchanged.

Today, however, the vast majority broadcasters are gaining additional revenues by charging MVPDs for the privilege of carrying the in-DMA signal through retransmission consent agreements.[14] Rates for network programming may be as high as $1.00 per subscriber per month. Because MVPDs need network programming to offer a successful video service and because they may not look to neighboring markets for better deals, there is an unequal bargaining power.

---

[12] NOI, ¶ 9.
[13] *Id.*
[14] Seventy nine percent of NTCA's video poll participants indicated that in the latest round of negotiations, NBC elected retransmission consent, 78% said that ABC elected retransmission consent, and 75% reported retransmission consent for CBS and 72% for FOX.

MVPDs must pay the broadcasters whatever rate the broadcaster demands. Further compounding the unequal bargaining situation, the vast majority of retransmission agreements contain "non-disclosure" clauses.[15] Small MVPDs have no way of knowing if what they are charged is fair or comparable to what other MVPDs are paying.

Nearly half of NTCA's members who were polled reported that broadcasters failed to negotiate in good faith by issuing "take it or leave it" ultimatums. Faced with no alternative for "must have" programming, 60% of those given ultimatums ended up taking the offer as presented. Broadcasters are able to "flex their muscles" by withholding programming while negotiations are on-going, forcing small MVPDs to concede for fear of losing customers due to the lack of programming. Twenty-two percent of poll participants who declined the take it or leave it offer were ultimately prohibited from taking the broadcast signal.

NTCA urges the 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.[16] These mutually inclusive amendments will allow only small IPTV and CATV providers with 400,000 or fewer subscribers 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.

[15] Sixty percent of poll participants stated that all of their agreements contained non-disclosure clauses. More than 90% of participants reported that at least some of their agreements contained non-disclosure clauses.
[16] The Commission has authority 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 amend the current retransmission consent rules and DMA restrictions.

<u>Rural Commercial Broadcast Video Programming Reform:</u>

New Section 47 CFR §76.64 (n) Retransmission Consent Negotiations:
(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.

New Section 47 CFR §76.64 (o) Out-of DMA Negotiations and Pool Bargaining:
(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 "small cable company" as defined by the Communications Act of 1934, as amended. 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. 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) Network/Parent Company, Affiliated Company, or Non-Affiliated Company Influences:
(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.

New Section 47 CFR §76.64 (q) Most Favor Nation Status:
(q) IN GENERAL.— In addition to New Sections 47 CFR §76.64 (n), (o), and (p) when a commercial broadcast station seeks consideration for retransmission consent from a small CATV or IPTV provider, the CATV or IPTV provider may request the same price, terms and conditions from any of the existing retransmission consent agreements the commercial broadcast station has entered into and the terms and conditions of these retransmission agreements shall be made available to the CATV and IPTV provider, notwithstanding any non disclosure agreements.

New Section 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.

New Section 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), (p) and (q) in particular.[17]

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. Unlike small MVPDs, 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. 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.

[17] 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.

V. SOME SMALL MVPDS MUST SHARE HEADENDS TO BE COMPETITIVE

It is often prohibitively expensive for a small, rural telco to enter the video market. There are equipment, installation and human resource costs that run in the millions of dollars. Many carriers serving sparsely populated territories cannot "go it alone" and recover their costs from their subscribers. They would not be competitively priced. Therefore, rural carriers look for ways to keep their costs down. The headends that receive content can be shared between multiple providers, enabling them to pool their resources and split the $1 to $2 million purchase cost. The sharing of headends substantially reduces initial investment and provides small video providers the opportunity to provide consumers with an affordable video offering. The sharing of headends provides video competition for many rural consumers who previously could only receive content via satellite.

The shared headend business model is working for small carriers. Forty-four percent of NTCA's video poll participants indicated that they provide retail video service using a shared headend. But wholesale content providers often make it difficult and unnecessarily expensive for rural carriers to share headends.

A small number of wholesale video programming vendors have threatened to prohibit carriage of content unless each retail IPTV or CATV provider purchases its own stand-alone headend.[18] Seventy-eight percent of poll participants indicated that they have special language in their contracts concerning shared headends and more than one-third report that wholesale video programming providers have refused them programming because of the use of shared headend. The vast majority of wholesale video programming contracts also require that rural carriers sharing headends add encryption – an unnecessary and expensive endeavor.

[18] The number of vendors who have made threats is small, but the impact is large. If one "must have" wholesale programming vendor is permitted to discriminate against shared headend providers, the business model would fail for many rural MVPDs.

Content providers assert that they are concerned with the ability of third parties (*i.e.,* the entity controlling the headend) to manage administrative procedures for control and security of their content. However, legitimate concerns regarding security, billing and other management issues may be contractually addressed. Further, in an IPTV system, each consumer set top box is individually addressed with a unique IP address. Sets of IP addresses can be assigned to each distributor on a shared system so the programmer has the ability to track usage, payments, Video on Demand, etc. on not only a system-by-system basis, but also on a box-by-box basis.

Security issues are easily addressed when MVPDs share head ends. Wholesale programming providers should not be permitted to use "security issues" as an excuse to avoid providing small providers content.

VI. CONCLUSION

Video competition may be thriving, but small providers looking to enter or stay in the market struggle. The Commission should act to address some of the currently existing bargaining inequities and ensure the future availability of video service to rural consumers.

NTCA recommends the following:

- **Video Content Tying and Tiering Arrangements Should be Prohibited.** Many content providers require CATV and IPTV providers to take and pay for unwanted video programming in order to have access to desired programming. Content providers also require that content be placed on certain tiers of service. The practice results in consumers paying higher rates for unwanted video programming and the inability of MVPDs to specifically tailor bundles of programming to their demographics or individual subscribers' desires.

- **Video & Broadband Content Tying Arrangements Should be Prohibited.** In order to have access to programming large wholesale content providers are requiring small MVPDs to provide and pay for web content. Often, the web pages must be made available to all of the rural telco's *broadband* customers, regardless of whether the customer subscribes to video service, or whether the broadband customer is situated within the video service territory.

- **Commercial Television Broadcast Station Retransmission Consent Rules and DMA Restrictions Should be Amended.** Under today's rules, broadcasters have all of the power when negotiating carriage of their content with MVPDs. Rates for network content continue to rise and rural MVPDs are offered "take it or leave it" contracts.

- **Shared Headends Should be Permitted.** Wholesale video content providers have attempted to impose unfair and costly restrictions on small MVPD providers that share or seek to share a headend. The shared cost of shared headends is necessary for small companies to remain viable and offer a competitive video product. Without shared headends many rural consumers would have access to content only via satellite.

- **Non-Disclosure Agreements Should be Prohibited.** Virtually all contracts negotiated between content providers and MVPDs include non-disclosure clauses. These provisions restrict the flow of information, making it virtually impossible for anyone to guess at "market rates." Small MVPDs are at a significant disadvantage in negotiations.

- **Standstill Provisions Should be Enacted.** Content providers have the ability to use the threat of pulling content to force an agreement with rural video providers. The pulling of content can destroy a rural MVPD as customers will quickly switch service providers to see their favorite shows. That threat should be eliminated such that content cannot be withheld during the negotiation process.

Respectfully submitted

NTCA
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
The Voice of Rural Telecommunications
www.ntca.org

By: _/s/ Daniel Mitchell
Daniel Mitchell
(703) 351-2016

By: /s/ Jill Canfield
Jill Canfield
(703) 351-2020

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
703 351-2000

May 19, 2009

CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in MB Docket No. 07-269, FCC 07-207, was served on this 19th day of May 2009 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554
Michael.Copps@fcc.gov

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554
Jonathan.Adelstein@fcc.gov

Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554
Robert.McDowell@fcc.gov

Best Copy and Printing, Inc.
Federal Communications Commission
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

Marcia Glauberman
Federal Communications Commission
Media Bureau
445 12th Street, SW, Room 2-C264,
Marcia.Glauberman@fcc.gov

Dana Scherer
Federal Communications Commission
Media Bureau
445 12th Street, SW, Room 2-C222,
Dana.Scherer@fcc.gov

/s/ Adrienne L. Rolls
Adrienne L. Rolls