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

In the Matter of	)	
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Amendment of the Commission's Rules Related To Retransmission Consent	)	MB Docket No. 10-71
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INITIAL COMMENTS OF THE INDIANA UTILITY REGULATORY INDIANA COMMISSION

Introduction

The Indiana Utility Regulatory Commission ("Indiana Commission") respectfully submits these initial comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking on Retransmission Consent ("NPRM"). The Indiana Commission commends the FCC on its decision to look into the issue of retransmission consent in the video market.

The Indiana Commission's concern in this matter is limited to issues arising in the NPRM at paragraph 29; specifically, the part of paragraph 29 where the FCC seeks comment on "whether small and new entrant multichannel video programming distributors (MVPDs) are typically forced to accept retransmission consent terms that are less favorable than larger or more established MVPDs, and if so whether this is fair." The Indiana Commission submits that discrimination in the pricing of content does occur and that it is detrimental not only to the small network providers (cable companies and local exchange companies) involved and to their customers, but also to competition in the video market and the build out of Broadband, particularly in rural, unserved and high cost areas.

Broadband Deployment Linked to Video Deployment

To be competitive in today's market, many local exchange companies ("LECs") have upgraded their networks to support data—and many of them view video as a way to maximize the revenues they can generate from their broadband networks. The ability to provision video with voice and broadband enables providers to make the business case to deploy needed infrastructure. In Indiana, passage of the Telecom and Video Reform Act (2006 Ind. PL 27, 2006 HEA 1279) that was signed into law by Gov. Mitch Daniels stimulated significant infrastructure investment by telecommunications and cable providers alike who saw and seized the opportunity to build out or expand their networks and thereby maximize revenues.

During the three years following passage of the Act, Indiana's reformed regulatory environment drove unprecedented investment across multiple communications sectors, particularly among large providers. AT&T's total capital investment in its Indiana wireless and wireline networks was more than $1.3 billion.[1] AT&T deployed its AT&T U-verse^{SM} services, including U-verse TV, U-verse High Speed Internet and U-verse Voice, across its ILEC territory. In addition, Comcast invested $549 million in its Indiana networks and Verizon deployed its FiOS network in and around Fort Wayne, Indiana which made video and high speed internet service available to customers.

[1] http://www.prnewswire.com/news-releases/att-investment-in-indiana-network-aimed-at-enhancing-mobile-broadband-service-across-the-state-89112457.html.

Rural local exchange carriers asserted in comments filed with the FCC in December 2009 that rural providers that offer broadband along with video have broadband adoption rates that are 24% higher than those offering broadband alone.[2]

Offering the "triple-play" gives providers greater opportunities to provide additional services and thereby obtain a greater "share of wallet." However, this competitive benefit is severely reduced if content providers are able to discriminate on pricing of content among providers based on the number of customers a provider serves, without regard to marginal or incremental cost of provisioning. It is within the Commission's authority to limit such discriminatory pricing. In fact, the FCC commented on this very topic in its 2007 Report and Order and Further NPRM.[3] That order stated,

> 62. Our authority to adopt rules implementing Section 621(a) (1) is further supported by Section 706 of the Telecommunications Act of 1996, which directs the Commission to encourage broadband deployment by utilizing "measures that promote competition... or other regulating methods that remove barriers to infrastructure investment." n237 The D.C. Circuit has found that the Commission has the authority to consider the goals of Section 706 when formulating regulations under the Act. n238 The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated. n239 Thus, if the franchising process were allowed to slow competition in the video service market, that would decrease broadband infrastructure investment, which would not only affect video but other broadband services as well. n240[4]

[2] National Exchange Carrier Association comments, GN Docket Nos. 09-47, 09-51, 09-137 (filed Dec. 7, 2009)

[3] In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Released March 5, 2007.

[4] Ibid, Para. 62.

Small and Mid-sized MVPDs Face Substantial Price Discrimination

The American Cable Association ("ACA") has provided data in a previous FCC docket showing that prices, terms, and conditions for access to broadcast programming have increased substantially; that small MVPDs face substantial discrimination in prices for access to broadcast programming unrelated to actual marginal cost; that increasing demands of content providers result in subscribers of small and medium-sized operators losing access to content; and that these rising costs of retransmission consent raise the costs of multi-channel video, harm competition, and hinder the deployment of advanced services.[5]

A 2007 report by the Congressional Research Service[6] contrasts the situation between small and medium-size cable companies versus the major direct broadcast satellite (DBS) providers as follows.

> "Small and mid-size cable companies often face direct competition from the two major satellite companies, DirecTV and DISH Network. These cable companies have fewer subscribers than the major satellite companies and thus when negotiating with programmers typically do not pose a serious risk to the programmers if there is an impasse and the programming is not carried; a programmer's foregone per subscriber fees from these cable companies and foregone advertising revenues would not be substantial. By contrast, a programmer's revenues could be significantly reduced if one of the satellite companies discontinued carriage, since each of the satellite carriers have more than 13 million subscribers."

The report also points out that large cable operators are in an even stronger negotiating position than the DBS providers. The Indiana Commission agrees that the same asymmetric relationship exists between content providers and LECs, making it significantly less likely that

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[5] *See*, ACA comments, MB Docket No. 07-269 (filed May 20, 2009), pp. 4-16 (ACA comments). Previously, the Commission has correctly recognized that there is an intrinsic link between a provider's ability to offer video service and to deploy broadband networks. *See*, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report

[6] Goldfarb, Charles B. *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, Congressional Research Services Report for Congress, July 9, 2007 ("*CRS Report*").

video can be provided profitably, thereby also impairing the ability of both types of network providers to establish a business case which results in build out in high cost, rural, and insular areas.

Frontier FiOS TV example

In recent years the transfer of networks from large to mid-sized carriers has been followed, by significant price increases, which have been attributed in whole or in part to automatic price increases sought by content providers from those small to mid-sized carriers. An example that has directly affected Indiana consumers is the recent transfer, from Verizon to Frontier Communications, of the Verizon FiOS TV video network. In January 2011, Frontier Communications announced rate hikes of as much as 46% for FiOS TV service in markets the company acquired from Verizon last year. In a letter sent by Frontier to Oregon cable regulators to advise them of the price increase in that state, Frontier pointed to rising programming costs as the reason for the price increase. And several news reports cite a statement from a Frontier spokeswoman who said the company's small "footprint" does not make it possible for the company to spread its costs over a broad customer base as some of its competitors are able to do.[7] "The move could be the latest example of a video content pricing structure that rewards the largest video providers and penalizes smaller video operators."[8]

[7] http://www.telecompetitor.com/frontier-says-content-costs-forced-it-to-raise-fios-video-prices, January 5, 2011.
[8] Ibid.

The FCC and State Commissions are Mandated to Act

The FCC has already addressed content issues by placing conditions on the Comcast NBCU Deal.[9] In that order, the FCC: 1) established an arbitration process for resolving disputes about pricing and terms and conditions involving programming; and 2) required Comcast/NBCU to provide to all MVPD, non-discriminatory pricing and terms for affiliated content they provide to their own subsidiaries and subscribers. No such requirements were imposed for pricing of TV content.

47 U.S.C. §706 states:,

> "The Commission and each State Commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." [emphasis added]

Hence, §706 requires states to act to use their regulatory authority, to expand broadband deployment. Therefore, in the event of failure to act timely by the FCC, states could, in a manner consistent with § 252(i), act to expand deployment and eliminate content costs as a "barrier to entry", by permitting video providers to adopt the terms and conditions negotiated with content providers by other providers in the state. Because "a provider's ability to offer video service and to deploy broadband networks are linked intrinsically,"[10] this solution to allow video providers to

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[9] In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for consent to assign licenses and transfer control of licensees, MB Docket No. 10-56, Released January 20, 2011, Para. 49.

[10] In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Released March 5, 2007, Para. 62.

adopt agreements reached by other providers will result in the concurrent expansion of the deployment of broadband.

Conclusion

It would be the preference of the Indiana Commission that content providers voluntarily adopt an industry code for the pricing of content, pricing content at the margin, so that the ability of rural providers to build out broadband in unserved areas is not undermined. Failing such industry response, the public interest requires the FCC and/or state commissions to act.

In summary, the Indiana Commission asks the FCC to recognize that small and new entrant MVPDs are often forced to accept terms and pricing significantly less favorable than those given to larger MVPDs and, in so recognizing, to act decisively to limit the ability of content providers to continue the practice of discrimination based on the size of the MVPD's service footprint, without regard to incremental costs, absent binding voluntary action by content providers. The Indiana Commission urges the FCC to allow smaller MVPDs to adopt terms and conditions negotiated by larger providers as a solution which will eliminate a barrier to video entry and thereby expand the deployment of broadband in areas served by small and mid-sized providers operating in high cost, rural, and insular areas.

Respectfully submitted this 27th day of May, 2011.

INDIANA UTILITY REGULATORY COMMISSION

James D. Atterholt

James D. Atterholt, Chairman

Kari A. E. Bennett, Commissioner

Larry S. Landis, Commissioner
State Chair, Federal-State Joint
Conference on Advanced Services

Carolene R. Mays, Commissioner

David E. Ziegner, Commissioner