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June 8, 2011

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ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 07-269

Dear Ms. Dortch:

Enclosed please find Comments In Response to Further Notice of Inquiry of Hiawatha Broadband Corporation, Inc., National Rural Telecommunications Cooperative, Rural Broadband Alliance and Rural Independent Competitive Alliance in the above-docketed proceeding.

Please direct any questions regarding this matter to the undersigned.

Respectfully,

Mark C. Ellison

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

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

COMMENTS IN RESPONSE TO
FURTHER NOTICE OF INQUIRY

OF

HIAWATHA BROADBAND CORPORATION, INC.
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE
RURAL BROADBAND ALLIANCE
RURAL INDEPENDENT COMPETITIVE ALLIANCE

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COMMENTS IN RESPONSE TO FURTHER NOTICE OF INQUIRY

I. INTRODUCTION

These Comments are submitted on behalf of the National Rural Telecommunications Cooperative ("NRTC"), Hiawatha Broadband Communications, Inc., ("HBC"), the Rural Broadband Alliance ("RBA"), and the Rural Independent Competitive Alliance ("RICA") (the "Commenters" or "Telcos"). Information regarding the Commenters is contained in Attachment A hereto.

The Commenters are, or represent, telephone companies either as local exchange carriers ("LECs") or as competitive local exchange carriers ("CLECs engaged in the distribution of video programming over cable, DSL technology, and/or fiber to the home to consumers in rural America. They are multichannel video programmer distributors ("MVPDs")[1] that are, in many cases, competitive to legacy cable systems in their markets. They are "telco video" distributors, providing competitive video service, principally in smaller markets and in rural America in similar manner to what AT&T's U-verse is doing in non-rural markets. In some cases, the

[1] As defined by 47 C.F.R. § 76.1000(e).

Commenters have built or acquired traditional coaxial cable systems which they are operating in their markets. The Commenters are also engaged in the provision of broadband services and have made significant strides in delivering broadband to consumers through DSL, fiber, wireless, and satellite.

The Commenters seek to provide the small and rural communities they serve competitive video options, with quality and choice the same as enjoyed by Americans in larger markets, but their efforts have been thwarted by obstructive and discriminatory conduct from many major programmers. Now, in the era of IPTV and online video distribution, the challenges imposed by such programmers' have peaked.

At the outset, it must be noted that the terms of the Commenters' agreements with programmers have confidentiality clauses that impede the Commenters' ability to provide the Commission with complete details of the discriminatory terms they face. To the best degree possible, in the face of such restrictions, these Comments will present the facts to the Commission.

II. SUMMARY

In recent years, many independent and rural telephone companies have entered the video distribution business in order to serve as their market's cable MVPD or to compete with incumbent cable operators in their markets, and to give themselves the ability to offer the "triple play" of voice, data and video services. Many of these telco MVPDs have entered the video market as recently as the mid-2000's. In addition to the challenge of often being the third market entrant – after cable and satellite – these operators have faced significant challenges with respect to programming rights.

First, there is a significant hurdle in securing programming distribution rights. In many cases, the rural telco operators are quite small, serving communities with a few hundred or a few thousand homes. It has therefore been a difficult task gaining the attention of large programmers to secure the myriad distribution rights agreements needed to operate. The process of rights-acquisition is a long and expensive undertaking that impedes the entry of new competitors in the MVPD market.

Once the onerous task of obtaining programming is overcome, the challenge is trying to operate under all-to-often egregious terms imposed by the larger programmers. Those hurdles include:

- Tying of unwanted channels as a condition of licensing "must-have" channels;
- Forced placement of channels on the most highly penetrated tier of service offered;
- Forced carriage of high-definition and 3-D channels;
- Tying of online video as a condition of licensing cable video channels; and
- Discriminatory pricing for cable and broadcast channels.

III. TYING OF CABLE VIDEO CHANNELS

A. Tying Carriage of "Must-Haves" to "Don't Wants"

Perhaps the greatest challenges telco MVPDs face are the obligations imposed by many multichannel programmers compelling the carriage of far more programming channels than either the telco or customers desire. With few exceptions, in order to gain carriage rights to the most popular channels (the so-called "must-have" channels, without which an MVPD cannot compete), large programmers offering multiple channels require that the telco distributors contract for carriage of <u>all</u> of the programmers' channels.

This buy-one, buy-all practice has even included demands that telcos reserve channel capacity for and commit to carriage of channels that are not launched and still on the drawing board.

In order to gain carriage rights for the must-have channels, the telcos must either agree to carriage of unwanted channels or pay exorbitant pricing penalties for the must-have channels. Instead of being able to contract for one or two of a programmer's most popular channels, the telco MVPDs end up being obligated to carry anywhere from 5 to more than a dozen channels… and compelled to carry them on the most highly penetrated tier of service, as discussed below. (See also Attachment B hereto for carriage comparisons.)

Based on the experience of the Commenters and as informed by the advertised packages of the incumbent cable systems with which many of telcos compete, those competitive cable systems do *not* typically face the same carriage requirements as the telcos.

Forced tying of content is a concern the Commission considered to be real and well-founded in the News Corp. transaction. There, the Commission concluded:

> [W]e agree with Commenters who contend that the transaction can enhance News Corp.'s incentive and ability to persuade competitors to carry its affiliated programming. Specifically, as we held above, the transaction may enhance News Corp.'s incentive and ability to extract higher compensation from competing MVPDs in exchange for carriage of its most popular programming—[Regional Sports Network (RSN)] and broadcast programming. Such compensation may include monetary compensation, but also carriage of News Corp. affiliated networks. To obtain RSN or broadcast programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay excessive rates for News Corp. programming. Absent these demands and higher costs, the MVPD might have elected to carry an independent rival network that would have expanded the sources of programming available to its subscribers.[2]

[2] General Motors Corp. and Hughes Electronics Corp and The News Corp., Memorandum Opinion and Order, 19 FCC Rcd 473, 484 ¶ 16 (2004) (internal citations omitted) (hereinafter, "News Corp.") ¶ 271. "[V]ertical transactions also have the potential for anticompetitive effects. In particular, a vertically integrated firm that competes both in an upstream input market and a downstream output market, such as post-transaction News Corp., may have the incentive and ability to: (1) discriminate against particular rivals in either the upstream or downstream markets (e.g., by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets."

The concerns expressed by the Commission in News Corp. are well-founded and borne out by market experience. When forced tying or tiering is practiced, the public interest is at risk. If the licensee refuses tying or tiering mandates, it and its customers lose access to content. On the other hand, if the MVPD submits to the bundling/tiering requirements, higher rates are incurred which must be passed to the subscribers – even for programming subscribers may never want.

The Commission has long recognized the adverse impacts felt by consumers when programmers tie undesired programming with "must-have" content, especially when they receive service from a small MVPD. The Commission has correctly noted:

> When programming is available for purchase only through programmer controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. We note that the competitive harm and adverse impact on consumers would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster or is affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a nonaffiliated independent network. Moreover, we note that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.[3]

Despite the Commission's well-founded concerns, nothing has been done to curtail this practice and it has grown as more and more channels are added to programmer offerings and tied

[3] See, 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, 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, 17862-17863, ¶120 (2007).

on a take-one, take-all licensing basis. This practice actually finds its origins with retransmission consent when programmers that were also broadcast affiliates required the addition of channels in lieu of retransmission fees. The potential for this problem to become more acute has increased with the Commission's approval of the Comcast – NBC Universal merger[4] where the merged entity now controls or has ownership interest in some fifty-four channels, raising the likelihood of even more forced tying as contracts are renewed.

Telco video distributors, many of which are relatively new to the market, have been particularly harmed by tying practices of the programmers. NRTC acts as a programming aggregator for small rural telcos. As it entered the aggregation business in 2005 to serve rural telco MVPDs, it soon discovered that it could not acquire rights to offer the same carriage terms that competitive incumbent cable operators could offer. NRTC is nearly always compelled by the multichannel programmers to carry all channels offered by the programmers and to carry them on the most widely distributed tier of service. The result is that the packages NRTC members have to offer contain far more channels and cannot be competitively priced against the incumbent cable operator, particularly in rural markets where household incomes are lower than the national average.

In comments filed in this proceeding in 2009, the National Telecommunications Cooperative Association ("NTCA") noted:

> 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 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

[4] See: In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56.

desirable programming changes little from year to year, but the channel lineup is growing ever larger and ever more expensive, due to the tying practices of program providers.[5]

An online article by the American Cable Association (ACA) clearly articulated the tying problem for smaller MVPDs:

> Therefore, by "wholesale bundling" additional channels to a desired channel, the programmer can pressure cable operators to carry and pay for numerous unwanted channels. *When statistics show that in order for cable operators to secure the rights to carry the most popular channels, programmers demand that at least 60 other channels are also carried, you can begin to understand why the most widely subscribed to programming packages are both bloated with channels and costly - charges that are ultimately passed on to customers in the form of higher cable bills.*
>
> While some programmers may "technically" provide cable operators with the option to purchase the desired channel on a standalone basis, or not tied to other programming distribution requirements, the per subscriber fee to offer a channel on a standalone basis is so exorbitantly high as compared to accepting a bundled package that the cable operator has no choice but to offer the bundle - or not to offer the channel at all. These standalone offers also include requirements that the channel be included in basic packages which means all subscribers would have to receive and pay for the channel, regardless of interest.
>
> Customers served by independent operators - who lack the negotiating power to command more attractive deals - face reduced choice and disproportionately higher cable costs, as the cable operators have no choice but to pass on the cost for carrying bundled channel packages in order to continue offering high demand programming. In fact, the FCC estimates that programmers could be overcharging consumers more than $100 million per year.[6]

It is the contention of the Commenters that the Commission's estimate of $100 million in programming overcharges is very low. Actually, if there are 60 unwanted channels being forced into the distribution chain, and one assumes a price of just $0.05 per channel, per month, per household, at 100 million cable households, the overcharge would be $300 million *per month.*

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[5] National Telecommunications Cooperative Association Initial Comments, pp. 4-5, , MB Docket No. 07-269, FCC 07-207, filed May 19, 2009.

[6] See: http://www.americancable.org/issues/page/Wholesale_Unbundling (Emphasis added.)

B. Forcing Carriage of HD and 3D Channels

The forced carriage issue has now bled into the carriage of high-definition ("HD") television. In addition to programmer requirements that a telco MVPD carry all of the programmers' channels on expanded basic, a newly emerging and disconcerting practice is the imposition of mandatory carriage of HD and even three-dimensional (3D) channels along with programmer-imposed restrictions on the ability of the telco to charge the consumer for access to such channels. In some instances HD channel carriage is now mandated along with standard definition ("SD") carriage. Aggravating such demands is the fact that pricing caps are imposed on HD services and related equipment, and time schedules are levied requiring HD carriage within specific timeframes. Although operation of 3D channels are not yet widespread, there is great concern among telco MVPDs that carriage of 3D will be the next mandate imposed as a condition of licensing SD content.

Rural telco MVPDs utilizing DSL systems are operationally impaired by such requirements. Although there may be sufficient bandwidth to carry one or two HD signals to any given customer premises at any given time, the telco must get *all* mandated HD signals out from the telco central office to remote digital subscriber line access multiplexers ("DSLAMs") so the channels are readily available to consumers. As the Commission is well aware, there are throughput limits on DSL systems and as more HDTV carriage is mandated, the telco's and the consumer's capacity can be severely strained, affecting speed and capacity of the system. If 3D channel carriage mandates are imposed, the systems may be taxed beyond current capacity. While telcos wish to be able to provide consumers with the services they want, the delivery and HD and 3D must occur on the basis of consumer demand and telco capacity, not as the result of programmers' tying such content to SD channels and forcing delivery prematurely or on terms that do not permit the telco to recover its costs.

IV. FORCED CHANNEL PLACEMENT

A. Mandating Carriage on Expanded Basic Raises Prices and Impedes Competition

Associated with channel tying demands are specific mandates from the programmers requiring carriage on a designated level of service, usually the most widely distributed level of service above the basic service level (typically called "expanded basic") or the imposition of penetration requirements and/or financial penalties that have the effect of mandating carriage on expanded basic carriage.

Forced placement of less popular or unwanted channels on expanded basic has multiple negative effects. Telco MVPDs face higher wholesale costs for the programming packages they offer as compared to incumbent cable systems. The costs of programming and inability to offer competitive packages in the market have restrained the expansion of telco video in rural markets. NTCA recently reported on the barrier to entry to the video business for telcos: "The main barrier facing those survey respondents providing or wishing to provide video service is access to reasonably-priced programming, as cited by 96% of survey respondents.[7]

Telco video operators are weighed down trying to sell higher cost programming packages (relative to incumbent cable operators) in small towns and rural markets where incomes are typically below those in urban and suburban markets. The penetration requirements even limit the ability of small MVPDs to promote the "Lifeline" (or the lowest basic) service package. Programmers effectively dictate what types of services may be carried on the Lifeline level, with specific contract provisions often expressly prohibiting the carriage of any of the most popular cable services. Programmer-imposed channel penetration requirements are commonly as high as

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[7] NTCA 2010 Broadband/Internet Availability Survey Report, January 20, 2011, p. 12. http://www.ntca.org/index.php?option=com_content&view=article&id=3757&Itemid=519

90% of the total subscriber base. That means that a telco video system in a rural market is forced to restrain the purchase of Lifeline level of service in the market. If more than 10% of the subscriber base were to select Lifeline service, the MVPD is suddenly in violation of contract covenants as the penetration level of expanded basic would fall below the 90% level. Thus, even in the most economically challenged regions, the offering of a low-cost Lifeline level of service is constrained by programmer dictates. Such practices of the multichannel programmers thwart the Congressionally-mandated policy goal of increased consumer choice in the video market and raise an additional barrier to broadband deployment and adoption.

Due to programmer tying requirements, the NRTC-formulated expanded basic package must, at a minimum, contain over 70 channels. NRTC's members then must typically sell that package at a retail price averaging $50 to $60 per month per subscriber. In contrast, an incumbent rural cable system not similarly burdened with tying and tiering mandates is typically able to carry only about 50 channels in its expanded basic line-up at a retail rate of about $35 per month per subscriber.[8] A retail pricing differential of $15 -- nearly 50% -- in the rural markets served by NRTC members is material and impedes the ability of rural telcos to compete as MVPDs. NRTC's experience is exemplary of the carriage difficulties faced by rural telcos.

The charts set forth at Attachment B hereto provide a comparison of the expanded basic line-up that NRTC telco member companies must offer versus the expanded basic line-up of incumbent cable and DBS operators based on publicly advertised channel line-ups.

Ironically, as NRTC has challenged programmers to explain why NRTC members are required to carry more channels than competing cable or DBS MVPDs, many programmers have sought to justify difference asserting that the cable and DBS providers have more subscribers

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[8] See In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56, Comments in Oppostion of the Fair Access to Content & Telecommunications Coalition, filed June 21, 2010.

than NRTC and are therefore given greater package flexibility. In effect, they are saying, "They are bigger than you and we're going to impose burdens on you to ensure they will always be bigger than you."

B. Forced Carriage on Expanded Basic Impedes Carriage of Independent Channels

Another aspect of the forced carriage / forced tiering problem is that it actually prevents competitive MVPDs from carrying alternative, independent programming on their expanded basic line-ups. Again referring to the experience of NRTC, it was NRTC members' desire to include rural-oriented channels such as RFD-TV and Blue Highways TV to their expanded basic channels, but because of the existing price disparity caused by forced tying of major programmers, the rural-oriented channels were either not carried or offered only as options on higher tiers.

V. FORCED CARRIAGE OF ONLINE CONTENT

A. A New Wrinkle: Tying Online Video to Cable Rights

In addition to tying of unwanted channels and forced carriage on expanded basic, another carriage requirement that telco video distributors are facing is that of being compelled to distribute – for a fee – the <u>online content</u> offered by a programmer as a condition to carriage of the programmer's cable content. One major programmer has tied – either expressly or by the imposition of rate penalties – the distribution of several online channels as a condition of licensing its traditional cable channels. Specifically, the telco video operators are required to deliver and pay a fee for every broadband home the operator serves, not just video customers.

The result of such practices is to significantly increase costs at the outset for telco video operators, making them less competitive vis-à-vis the incumbent cable operator. Ultimately, the practice will also drive up the cost of broadband access, impeding further broadband adoption.

As the foremost providers of broadband service in rural America, small telcos are keenly aware of the importance of being able to access online content by its customers. Online viewing of video content is today a small segment of video viewing, but it is growing at a rapid pace. The number of people watching video on the Internet increased by 14.8 percent in the year from the third quarter of 2008 to the third quarter of 2009,[9] and that trend is likely to increase with each passing month. The ability of consumers to access video content online increases the value of their broadband subscriptions and thus the incentive to deploy more broadband. However, while preventing or restricting access to online content is one concern, "forced carriage" of online content, or "broadband tying" is equally as great a concern and potentially more damaging.

The foremost practitioner of tied online carriage appears to be the ESPN service "ESPN3" (formerly called ESPN360.com). The American Cable Association described this practice:

> ESPN forces many broadband providers who are also cable operators to pay a per subscriber fee for their entire subscriber base to receive the ESPN360 service, regardless of customer interest in the service. Moreover, ESPN360 is a service that is only available to customers of broadband providers that pay the access fee. Therefore, a customer who is interested in the ESPN360 content, but whose broadband provider opts not to pay the fee, cannot subscribe to the content directly from ESPN. Such a business model increases broadband prices for some, and decreases consumer choice for others.[10]

As ACA notes, making forced tying of online content even more egregious is the fact that telcos affected by this practice are required to pay the per-broadband subscriber fee even if the customer is not a cable video customer. This represents an attempt to impose the cable pricing

[9] "The Proposed Comcast-NBC Universal Combination: How it Might Affect the Video Market", Charles B. Goldfarb, Congressional Research Service, February 2, 2010.

[10] ACA Comments, GN Docket No. 09-51 (filed on June 8, 2009), p. 5.

model upon the Internet, where consumers are forced to bear the costs of programming they may not want. Thus, even before it begins serving those homes with video service, the telco faces an immediate significant cost that impedes its ability to deliver affordable video and broadband services and diminishes its ability to compete.

Furthermore, not only is this burden being forced upon rural telcos, they are, according to press reports, being required to pay significantly higher rates for the ESPN3 online content than the price charged to incumbent cable providers that have agreed to carry the service.[11]

Online content producers have every right to charge consumers directly for access to their content. However, the coercing of MVPDs and broadband providers to pay per-subscriber fees for all of their broadband customers, whether the subscriber desires it or not, as a condition on access to the programmer's traditional cable channels raises costs and deters further broadband deployment and adoption.

VI. PRICING DISPARITY

At the heart of all these practices is the pricing disparity faced by small MVPDs. That disparity exists not only because of the tying practices described above (which not as widely imposed on larger cable systems), but also because of rate cards that offer large providers far greater cost savings than are merited by any reasonable economic analysis.

But there is not even a forum to conduct a debate about the fairness and reasonableness of such rate disparities. The Commissions program access rules[12] are applicable only to a small percentage of cable video distributors as few of them are vertically integrated with cable

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[11] See: "More Carriage Disputes: Time Warner vs. Disney, AT&T vs. Hallmark – Online Video Dispute New to Fight", at http://stopthecap.com/2010/08/31/more-carriage-disputes-time-warner-vs-disney-att-vs-hallmark-online-video-dispute-new-to-fight/

[12] 47 C.F.R. §76.1000, et seq.

operators today. Additionally, many of the financial benefits enjoyed by the largest cable operators are derived from deal elements that are not reflected in the standardized rate cards.

VII. RETRANSMISSION CONSENT - MUST CARRY

As the Commission is well aware, the existing framework for negotiations between MVPDs and broadcasters has become increasingly tenuous and adversarial in recent years. The system has moved from one where more often than not carriage of a local broadcast station by the local cable operator was on the basis of "must-carry" in which no fees changed hands, to one in which MVPDs are required to pay retransmission consent fees that are escalating at a dizzying rate. Making matters worse, as noted below, small telco MVPDs are paying twice the rate of cable MVPDs for the same content. Even including large companies like Verizon and AT&T that enjoy economies of scale, telco MPVDs pay more than twice what cable MVPDs pay on a per-subscriber basis ($1.21 compared to $0.56) for broadcast retransmission consent rights.[13]

This sea-change from free to fee has had a particularly detrimental impact on small cable and telco video operators, which lack the subscriber base to negotiate favorable terms in a manner that is negotiated by large cable systems or DBS operator.

The American Cable Association (ACA) has filed comments with the FCC documenting that price discrimination by broadcasters against small cable operators continues unabated, based on market analyses performed by Dr. William Rogerson, Professor of Economics at Northwestern University and former FCC Chief Economist from 1998-99.[14]

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[13] *See* American Cable Association comments, MB Docket No. 10-71 (filed on May 18, 2010), p. 6.

[14] In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71, Comments of American Cable Association, May 18, 2010. See, "ACA Calls On The FCC To Halt Broadcaster Price Discrimination", American Cable Association, at http://www.americancable.org/node/2087.

According to ACA, Dr. Rogerson's data determined that small cable operators – which often includes MVPDs operated by small rural telcos – pay at least double for retransmission consent per-subscriber as larger MVPDs, and that the difference in the prices paid has no basis in the broadcasters' costs.

For small, independent MVPDs such as rural telcos it is often a challenge just to get the attention of the broadcasters in order to negotiate carriage rights. A "most favored nation" provision would rectify the inequities faced by small MVPDs in the negotiating process by allowing them to request the same prices and conditions from any of the other existing retransmission consent agreements that a broadcast station has entered into with other MVPDs. This would reduce a barrier to video competition that is imposed by discriminatory pricing. Enabling small MVPDs to compete more vigorously in the video marketplace would provide more choice to consumers, as well as enhance small MVPDs' ability and incentive to expand their offerings of video and broadband services.

VIII. SPECIFIC FCC QUESTIONS ADDRESSED

A. Specific Actions the Commission Could Take to Facilitate MVPD Entry And Rivalry Among MVPDs And Thereby to Increase Consumer Choice In The Delivery of Video Programming.

1. Impose rules prohibiting tying and forced channel placement.

It is clear from the record that the Commission is aware of and concerned about the tying of less desirable programming channels with must-have networks. The articulation of such concerns is noted above. In 2008, in MB Docket 07-198, the Commission circulated a proposed rule that would have prohibited such tying arrangement, but such rule was never acted on by the Commission. With the proliferation of channels, the concentration of ownership in those channels by a few "mega-programmers", and with the explosion of online video (now being tied to traditional cable-type distribution), it is imperative that the Commission take steps to prohibit tying practices. If the Commission does not or cannot address the problem, small MVPDs may be compelled to turn to other federal agencies and/or the courts for help. In the absence of relief, the problem will continue to grow and competition will be diminished.

2. Reexamine and revise the program access rules.

It has been 19 years since passage of the Cable Television Consumer Protection and Competition Act of 1992 and 18 years since the Program Access Rules were promulgated pursuant to that Act. In that period of time very few cases involving program access and/or price discrimination have been fully prosecuted and resolved by the Commission. The Commenters submit that this is not reflective of the market working well. Rather it reflects the shortcomings of the Rules.

For most small MVPDs, particularly small telcos, the operating margins on video are *de minimus*, if not negative. Small MVPDs cannot afford to engage in protracted litigation at the Commission over video matters facing large corporate programmers with billions of dollars in revenue and armies of lawyers ready to battle any challenges to their practices. The Access Rules provide no easy path to relief and no clear timeframe in which it can be obtained.

Furthermore, as noted above, a number of the cable programmers that engage in tying requirements are not vertically integrated with cable operators and are not, therefore, subject to the Access Rules; they are immune from Commission scrutiny under those rules.

The Commenters recommend that the Commission undertake a rulemaking proceeding to specifically address tying practices with the goal being a rule that restricts or prohibits such practices applicable to all programmers, regardless of cable system ownership. Specifically, Commenters would urge the Commission to undertake the assessment of tying practices as it proposed in MB Docket No. 07-198.

Absent Commission action in this regard and absent action and relief under applicable federal antitrust law, the competition-killing practice of tying undesired programming and online video to must-have programming will continue and likely grow.

B. Non-Regulatory Conditions Affecting MVPD Entry And Rivalry.

1. Do supply-side economies of scale, where large MVPDs can spread fixed costs over more subscribers or negotiate lower prices for video content, affect competitive entry?

The economies of scale enjoyed by large MVPDs unquestionably impact competitive entry. As noted above, nearly all rate cards offered by major programmers have very significant volume discounts that make it extremely difficult for new market entrants to compete. When those discounts are combined with the fact that the large MVPD likely does not have the same carriage or channel placement obligations as small MVPD, the barrier to competition is nearly insurmountable. Small MVPDs can gain market share against large incumbent cable systems only by virtue of the small operators' quality of service and local presence.

2. Do these conditions also include expected retaliation, where potential MVPD entrants believe incumbents will lower prices to any household considering switching to the new MVPD entrant?

Telco MVPDs have certainly experienced competitive price reductions by incumbent cable operators when telcos launch video services. Telcos, because of the higher rates they typically pay for programming, the tying of additional channels, and the forced placement of channels on expanded basic -- burdens not endured by many of the incumbent operators -- find it extremely difficult to match any price reductions by the incumbent operator.

3. Does bundling MVPD services with broadband, and bundling channels into tiers rather than selling channels à la carte, affect entry and rivalry?

Typically, both the incumbent and the small competitive MVPD will bundle services, such as voice, data and video. That is actually the only way the competitive entrant can survive and compete. Obviously, the ability of the larger MVPDs to unbundle channels and create smaller, less expensive expanded basic tiers (while placing other channels on optional higher tiers) is an advantage the larger operator enjoys as opposed to the smaller competitor that may be forced to carry more affiliated channels on expanded basic.

C. We Seek Data, Information, And Comment on Trends Regarding the Tying Of Access To Some Online Programming To A Subscription To An MVPD.

The authentication or "TV Everywhere" model to which this question refers is problematical only if the option is not made available or is delayed by the programmer. There are currently situations where the involved programmer has granted authentication rights to its large MVPD affiliates, but has not yet granted such rights to smaller MVPDs.[15] If this situation persists it will pose a problem for smaller MVPDs. So long as licensing for TV Everywhere is licensed across the board and on non-discriminatory terms, it should not pose a competitive entry problem.

D. Differences In the Delivery of Video Programming Between Rural and Urban Areas And The Factors That Affect These Differences...

a. How does competition differ between rural and urban areas? What are the demographic, geographic, and economic factors that drive differences in competition between rural and urban markets?

There are substantial economic differences between rural and urban markets in terms of consumer household income and costs of operation that affect competition. Typically, rural households do not have the same level of income as households in urban areas, and when programmers force carriage of additional, unwanted channels for a price, and demand carriage on expanded basic, the package cost often rises above what the market can afford. In some areas, where the affordable level of service may be basic or lifeline, programmer-imposed

[15] This is an evolving situation affecting some of the Commenters. At this point, it is not certain whether details of the matter can be revealed to the Commission due to confidentiality requirements. Commenters may be able to address this situation in greater detail in reply comments.

penetration requirements impair the ability of small, rural MVPDs to broadly offer such level of service without the threat of disrupting its penetration obligations.

Additionally, because of smaller customer bases, rural MVPDs (not affiliated with a multiple system operator) cannot achieve subscriber volumes needed to achieve the discounts enjoyed by larger urban MVPDs.

The question here is not what services are available in urban versus rural markets, but rather the affordability of services offered and the ability to offer packages that meet the economic needs of a community. It is one thing to offer an expanded basic package of 120 channels for $70 a month in the Washington, D.C. metropolitan region where median household incomes, such as in Fairfax County, Falls Church, Montgomery County, and others are at or above the $100,000 annual level. Whereas many households in rural markets, such as Winona, MN, which is served by Hiawatha Broadband, with a median household income that is under $35,000, cannot typically afford such an expanded basic package. In such markets, the incumbent cable MVPDs may be able to offer a smaller, less costly expanded basic package, but newer market MVPDs, such as telcos, do not have the luxury of offering a smaller package and are forced to offer the "urban-type" package due to the demands of programmers.

Furthermore, because of the carriage and high penetration requirements imposed by programmers, the telco MVPD may be greatly limited in its ability to offer the Lifeline-type level of service and certainly cannot offer smaller services packages of basic cable programming. Such constraints are especially troublesome in rural markets where services are being offered to many homes with fixed incomes that simply cannot afford an expanded basic package with 100 or more channels.

IX. CONCLUSION

The tying, forced channel placement, and forced penetration requirements of programmers must be curtailed. The Commission has been aware of this problem for several years and no action has been taken. Programmers are using their "must-have" channels in a monopolistic manner, forcing the carriage of unwanted channels and shifting the entire risk of launching such channels to the MVPDs and, ultimately, the consumer. The costs to consumers of those forced-carriage channels are staggering – perhaps as high as $300 million a month.

The Commenters urge the Commission to act and act quickly to stem the ever-growing tide of tying practices.

Respectfully Submitted,

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Rural Broadband Alliance
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June 8, 2011

ATTACHMENT A

COMMENTERS

HIAWATHA BROADBAND COMMUNICATONS, INC. was created in 1997 as a successor to a not-for-profit education initiative called Luminet, Hiawatha Broadband Communications, Inc., provides cable modem and dial-up Internet connections, telephone, and cable television services to 12,000 customers in the greater Winona, Minnesota, area, St. Charles, Wabasha, Lewiston, Rollingstone, and Stockton, in Southeastern Minnesota. The Wabasha build, completed in the fall of 2005 was among Minnesota's first fiber-to-the-home projects. Lewiston, Rollingstone, and Stockton are also FTTH communities. HBC's mission as a locally owned company is to understand and respond to its community's needs in order to provide the highest quality access to information, education, and entertainment in a manner that will cause HBC to be the preferred provider. More than 40 percent of the stock in HBC is owned by Winona area educational institutions.

NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE is a non-profit corporation organized as a buying cooperative and made up of some 1500 rural telephone and electric cooperatives and companies. NRTC has delivered advanced telecommunications technology to its members since 1986 including C-band television, direct broadcast service television and, more recently, as an aggregator and sub-licensor of Internet protocol television (IPTV) distribution rights. NRTC is an Internet Service Provider for rural telcos and power companies.

THE RURAL INDEPENDENT COMPETITIVE ALLIANCE is a national association of nearly 80 competitive local exchange carriers (CLECs) that are affiliated with rural ILECs and provide facilities based service in rural areas.

THE RURAL BROADBAND ALLIANCE is a coalition of more than two hundred rural incumbent local exchange carriers formed to foster the deployment and adoption of broadband services for all of the nation's citizens including consumers and businesses residing in rural, insular and high cost-to-serve areas of the nation.

ATTACHMENT B

SAMPLE CHANNEL LINE UPS

Discovery Channels Carriage Analysis

	NRTC All Digital	NRTC Hybrid	Mediacom (Des Moines, IA)	Charter (Rainsville, AL)	DIRECTV	DISH
Animal Planet	Exp. Basic	Exp. Basic	Exp. Basic	Exp. Basic	Choice (Ex. Basic)	AT 200
Discovery	Exp. Basic	Exp. Basic	Exp. Basic	Exp. Basic	Choice	AT 120 (Exp. Basic)
TLC	Exp. Basic	Exp. Basic	Exp. Basic	Exp. Basic	Choice	AT 120
BBC America	Exp. Basic	Exp. Basic	Dig. Tier	Dig. Tier	Choice	AT 250
BBC World	Exp. Basic	Dig. Tier	Not Offered	Not Offered	Not Offered	Not Offered
Disc. Hlth & Fit	Exp. Basic	Exp. Basic	Dig. Tier	Dig. Tier	Choice Extra	Not Offered
Inv. Discovery	Exp. Basic	Dig. Tier	Dig. Tier	Dig. Tier	Choice	AT 200
Military Channel	Exp. Basic	Dig. Tier	Dig. Tier	Dig. Tier	Choice Extra	AT 200
OWN	Exp. Basic	Exp. Basic	Dig. Tier	Dig. Tier	Choice	AT 200
Planet Green	Exp. Basic	Dig. Tier	Dig. Tier	Dig. Tier	Choice Extra	AT 200
Science	Exp. Basic	Dig. Tier	Dig. Tier	Dig. Tier	Choice	AT 200
The Hub	Exp. Basic	Exp. Basic	Dig. Tier	Dig. Tier	Choice Extra	AT 200
HD Theater	HD Basic	HD Basic	HD Tier	Not Offered	Choice	AT 120

NBCU Carriage Analysis

	NRTC	Mediacom (Des Moines, IA)	Charter (Rainsville, AL)	DirecTV	DISH
Bravo	Exp. Basic	Exp. Basic	Exp. Basic	Choice	AT 200
Chiller	Exp. Basic	Digital Tier	Not Carried	Choice Extra	AT 250
CNBC	Exp. Basic	Exp. Basic	Exp. Basic	Choice	AT 120
CNBC World	Exp. Basic	Not Carried	Not Carried	Choice	AT 250
E! Entertainment	Exp. Basic	Exp. Basic	Exp. Basic	Choice	AT 120
G4	Exp. Basic	Digital Tier	Exp. Basic	Not Carried	AT 200
MSNBC	Exp. Basic	Exp. Basic	Not Carried	Choice	AT 200
Mun2	Hispanic Tier	Hispanic Tier	Not Carried	Hispanic Tier	AT 250
Oxygen	Exp. Basic	Not Carried	Exp. Basic	Choice Extra	AT 200
PBS Kids Sprout	Digital Tier	Not Carried	Not Carried	Choice Extra	Not Carried
Sleuth	Exp. Basic	Digital Tier	Not Carried	Choice Extra	AT 250
Style	Exp. Basic	Digital Tier	Digital Tier	Choice Extra	AT 250
SyFy	Exp. Basic	Exp. Basic	Exp. Basic	Choice	AT 120
Telemundo	Hisp. Tier or Retrans	Exp. Basic	Not Carried	Hispanic Tier	Hispanic Tier
The Golf Channel	Exp. Basic	Digital Tier	Exp. Basic	Choice Extra	AT 200
Universal HD	HD Exp. Basic or HD Tier	HD Tier	Not Carried	Not Carried	Not Carried
USA Network	Exp. Basic	Exp. Basic	Exp. Basic	Choice	AT 120
Versus	Exp. Basic	Exp. Basic	Not Carried	Choice Extra	AT 250