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

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 14-16
Competition in the Market for the Delivery of	)	
Video Programming	)	

COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION

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SUMMARY

The provision of video services is key to rural LECs' ability to deliver robust broadband services to consumers in high-cost areas. Therefore, most NTCA members also provide video. The Commission has long recognized the linkage between video and broadband services. Access to video content at affordable rates and under reasonable terms and conditions is needed not only to generate greater video competition, but also to spur broadband investment in rural service areas. However, over 98 percent of respondents to a recent NTCA survey of members indicate that access to reasonably-priced programming is a significant barrier to the provision of video services. This, in turn, also impedes further broadband deployment.

Consequently, the Commission should take a number of steps outlined below to facilitate the availability of programming at affordable rates and under reasonable terms and conditions to rural multichannel video programming distributors (MVPDs). This is not only within the Commission's authority granted by the Cable Act, but it is also part of the Commission's responsibility to encourage further deployment of broadband.

The Commission should strengthen its "good faith" negotiating standards and clarify what constitutes a *per se* violation of these rules. The Commission should also amend its rules so that households served by rural MVPDs may consider and receive lower programming rates from alternative broadcast stations in neighboring areas. Rules should facilitate the ability of rural MVPDs to gauge market rates for programming, rather than be forced to accept mandatory non-disclosure provisions that obscure the market value of content.

Programmers should not be permitted to require rural MVPDs and their customers to pay for undesired programming in order to gain access to desired programming. These requirements prevent rural MVPDs from crafting service tiers, especially lower-cost tiers, which match the needs of local consumers. The Commission should also prohibit mandatory broadband tying, where rural MVPDs are required to pay per-subscriber fees for non-video broadband customers. Additionally, the Commission should prohibit programming vendors from requiring rural MVPDs to place content in specific service tiers.

"Most favored nation" pricing, which would mitigate discriminatory pricing and encourage market entry, should be available to small MVPDs. An interim carriage or "standstill" provision should be also be available in order to protect consumers from the impacts of program access disputes. In order to be viable, small MVPDs must also have non-discriminatory access to non-replicable regional sports network content.

The Commission should monitor the market for "over the top" web-based video services to ensure that exclusive arrangements do not prevent rural MVPDs and broadband providers from gaining access to certain web-based video content, especially vertically integrated content. Finally, the requirement to separate security and navigation functions in set-top boxes should be eliminated, as it has been transcended by the marketplace and technology.

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I. INTRODUCTION

NTCA–The Rural Broadband Association (NTCA)[1] hereby submits these comments in the above-captioned proceeding.[2] The NOI 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,[3] and requests information on the provision of video services in rural areas.[4] The provision of video services remains vital to the deployment and adoption of broadband services. Accordingly, NTCA periodically canvasses its members regarding video and broadband services, most recently in 2013.[5]

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[1] NTCA represents nearly 900 rural rate-of-return regulated local exchange carriers (RLECs). All of NTCA's members are full service local exchange carriers and broadband providers, and many provide wireless, video, satellite, and/or long distance services as well.
[2] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, Notice of Inquiry (rel. Jan. 31, 2014) (NOI).
[3] *Id.*, ¶ 1.
[4] *Id.*, ¶¶ 59-61.
[5] Figures are derived from a survey NTCA sent to its membership in the autumn of 2013. The survey received 171 responses, a rate of approximately 28 percent. The number of carriers offering services when broken down by technology platform may exceed the overall total due to some members' use of more than one platform.

A strong majority of respondents to NTCA's most recent survey, 76.9 percent, indicated that they currently offer video services to customers. Significantly, 98.6 percent of respondents – whether they currently provide video or not – stated that access to reasonably-priced programming is a significant barrier to the provision of video services. It is therefore unsurprising that 48.6 percent also named the challenges associated with making a business case for offering video services as a main impediment to the provision of these services. Furthermore, 71.6 percent identified the difficulty of competing with other video providers as a major impediment. This reflects the inherent disadvantages RLECs encounter serving high-cost, sparsely populated areas, in addition to their lack of scale and scope as compared to larger MVPDs.

The NOI also seeks data, such as the number of homes passed, the number of subscribers, and the number of channels offered by various MVPDs.[6] The mean number of homes passed by respondents to NTCA's survey is 5,359, with a median of 2,000 (from a low of 100 to a high of 64,500). The mean number of subscribers is 2,648, with a median of 789 (from a low of 3 to a high of 60,000).

Internet protocol television (IPTV) is the most common delivery technology used by respondents, at 80.3 percent. Legacy coaxial cable is used by 55.1 percent of respondents, while only 7.4 percent report offering video via direct broadcast satellite. These figures total more than 100 percent as many respondents use more than one technology depending on the needs of their service areas.

Respondents indicate both a median and mean of three tiers of channel offerings (from a low of 0 to a high of 15). The mean number of linear channels offered is 175,

[6] NOI, ¶ 15.

with a median of 190 (from 0 to 350). Most respondents, at 77.3 percent, do not offer video on demand (VOD) service. Among the 22.7 percent that do, the mean number of VOD options at any given time is 1,298, and a median of 350 (from a low of 1 to a high of 8,800). The ability to watch programming on multiple devices, inside or outside of the home, is provided by 41.1 percent of respondents.

For all of NTCA's members, the ability to offer quality video services is viewed as a key driver of broadband deployment and adoption in rural areas and is an important component to promoting the long-term viability of most rural telecommunications providers. As noted above, IPTV is the most commonly deployed video delivery platform among NTCA members, and it is dependent upon the same network infrastructure as broadband Internet access services. Furthermore, customers are often incented to obtain both video and broadband services when they are offered in a bundle of services at a discount. Consequently, factors that impede the provision of video services in RLEC service areas adversely affect broadband deployment and adoption as well.

An RLEC's ability to successfully deploy video services requires access to desirable content under reasonable terms and conditions. A variety of behaviors and strategies employed by programmers and broadcasters make it difficult for rural carriers to offer content in competitive retail packages that reflect what their subscribers want and can afford. The Commission can help enhance consumer choice, and encourage

additional broadband adoption and deployment, by reforming retransmission consent rules[7] and taking other actions to ensure access to content as outlined below.

For example, Commission action is also needed to correct various anticompetitive behaviors by content providers, such as forced tying and tiering. Programmers also engage in unfair bargaining tactics, such as the inclusion of non-disclosure provisions in contracts and threatening that "must have" content will be withheld during the re-negotiation process. Furthermore, retransmission consent rules strongly favor broadcasters to the detriment of consumers. The escalating costs associated with retransmission consent inhibit the provision of video service by RLECs and do nothing to enhance competition or broadband adoption in rural areas. Therefore, while the Commission is considering changes to the retransmission consent regime in MB Docket No. 10-71, the Commission should concurrently investigate content providers' use of unfair bargaining practices that threaten the viability of rural video providers. Commission attention to this matter is also particularly timely as the prospect of cable giants Comcast and Time Warner Cable joining forces will only exacerbate the protracted fight being waged by small video distributors to secure programming under reasonable and affordable terms.

[7] *See* comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), NTCA, the Independent Telephone and Telecommunications Alliance, the Western Telecommunications Alliance, and the Rural Independent Competitive Alliance, MB Docket No. 10-71 (fil. May 27, 2011), pp. 12-18, 24-25 (Joint Retransmission Consent comments).

II. RLECS' ABILITY TO ACCESS VIDEO CONTENT AT AFFORDABLE RATES AND UNDER REASONABLE TERMS AND CONDITIONS WILL LEAD TO GREATER VIDEO COMPETITION AND SPUR BROADBAND INVESTMENT IN RURAL SERVICE AREAS

As noted above, NTCA's members overwhelmingly convey that difficulty obtaining access to "must have" programming at affordable rates and under reasonable terms and conditions is the most significant obstacle that RLECs face when attempting to provide or expand video services. Forced "tying" and "tiering" arrangements, and the outdated and broken retransmission consent process, among other factors, impede RLECs' ability to offer the video content that consumers desire at affordable rates. This ultimately harms competition and reduces consumer choice in rural service areas.

Also, as NTCA and others have previously noted,[8] access to video content at affordable rates and under reasonable terms and conditions spurs rural broadband investment. This is because when RLECs offer video and broadband Internet access services together, rural consumers' adoption of broadband increases. The Commission has long recognized the intrinsic link between a provider's ability to offer video service and to deploy broadband networks.[9] This assessment has been reinforced by state regulators.[10] Furthermore, an industry survey found that rural carriers offering broadband along with a video component had broadband adoption rates nearly 24 percent

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[8] *See, e.g.*, Joint Retransmission Consent comments, pp. 4-5.
[9] MB Docket No. 05-311, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2007).
[10] *Resolution on Fair and Non-Discriminatory Access to Content*, National Association of Regulatory Utility Commissioners (adopted Feb. 16, 2011), available at http://www.naruc.org/Resolutions/Resolution%20on%20Fair%20and%20Non%20Discriminatory%20Access%20to%20Content.pdf .

higher than those companies offering broadband without access to subscription-based video services.[11]

Unfortunately, the barriers encountered by RLECs that attempt to serve as MVPDs result in limits to consumer choice and higher prices, which dissuade customers from subscribing to rural carriers' video services.[12] This, in turn, impedes broadband investment and adoption, as well as video competition. Therefore, the Commission can and should use this proceeding to thoroughly investigate anti-competitive practices of video programming vendors and take certain steps to improve RLECs' access to video content at affordable rates and under reasonable terms and conditions.

III. THE COMMISSION SHOULD REFORM PROGRAM ACCESS RULES IN ORDER TO FACILITATE THE AVAILABILITY OF PROGRAMMING AT AFFORDABLE RATES AND UNDER REASONABLE TERMS AND CONDITIONS TO RURAL MVPDS

The NOI requests comment on the impact of the Communications Act and Commission rules on MVPD entry and competition, and how the Commission might facilitate improvements.[13] Small rural MVPDs, like larger urban ones, must respond to consumer demand for certain popular programming to be able to sell their services and remain viable. NTCA's members are not affiliated with content providers and therefore must rely on vertically integrated or non-affiliated programmers for "must have" content. The availability of "must have" programming at affordable rates and under reasonable

[11] National Exchange Carrier Association comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (filed Dec. 7, 2009).
[12] RLECs operating as MVPDs routinely do so at or near break-even levels, if that. In these instances, video services are provided in order to meet community needs and consumer demands, in addition to countering competition from other service providers, despite the lack of a compelling business case.
[13] NOI, ¶¶ 19-20.

terms and conditions marks the difference between a viable video service and one that will fail or be unable to launch. Therefore, in order to facilitate the availability of content, the Commission should take a number of steps as outlined below.

A. The Commission Has The Authority And Responsibility To Initiate Reform of Retransmission Consent Rules Without Delay

In the plain text of section 325(b)(3)(A) of the Cable Act of 1992 (Cable Act), Congress instructed the Commission "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[14] This language imparts direct authority to the Commission to set, and, if necessary, revise, ground rules for a retransmission consent regime that will enable broadcasters and programmers to receive fair payment for their material, in a manner consistent with other legislative goals, including increased consumer access to video programming. The authority to "govern" is of little meaning if such actions are not within the Commission's authority.

Congress did not stop there. The same section further instructed the Commission to account for "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier…" while ensuring that the retransmission consent regime does not conflict with the need "to ensure that the rates for the basic service tier are reasonable."[15] In short, the text of section 325 "expressly gives the Commission broad authority to adopt rules that protect the public interest as it relates to broadcasters' grant of retransmission consent rights to MVPDs."[16]

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[14] 47 U.S.C. § 325(b)(3)(A).
[15] *Id*.
[16] American Cable Association (ACA) comments, MB Docket No 10-71, p. 18 (fil. May 18, 2010) (ACA comments).

The Commission's ability to address retransmission consent is further buttressed by ancillary authority conveyed through section 706 of the Telecommunications Act of 1996 (1996 Act). This section mandates that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" using a variety of means, including the utilization of "methods that remove barriers to infrastructure investment."[17] Perceiving the linkage between video and broadband services, the Commission has used its ancillary authority under section 706 to modify rules related to video services, specifically in the 2007 *Local Franchising Order*,[18] and later the same year in the *Multiple Dwelling Unit Order*.[19]

Notably, these precedents were set when the Commission had determined under Section 706 that broadband deployment was being deployed to all Americans in a reasonable and timely fashion. Subsequently, the Commission reversed that finding and concluded that deployment is not occurring in a reasonable and timely fashion, mostly in rural communities located throughout the country.[20] In this case, section 706 directs the Commission to "take *immediate action* to accelerate deployment"[21] of advanced services by removing barriers to infrastructure investment. Given the proven link between access to video content and broadband deployment, the antiquated retransmission consent regime is clearly a barrier that section 706 requires the Commission to remove without

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[17] 47 U.S.C. § 1302(a).
[18] MB Docket No. 05-311, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2007); *see also* ¶¶ 4, 13, 18, 41, 51-52, 64.
[19] MB Docket No. 07-51, 22 FCC Rcd 20235, 20257-20258, ¶ 47 (2007); *see also* ¶¶ 46, 52, 78.
[20] GN Docket Nos. 09-137, 09-51, 25 FCC Rcd 9556, 9574, ¶ 28 (2010). *See also*, GN Docket No. 10-159, 26 FCC Rcd 8008, 8035, ¶ 52 (2011).
[21] 47 U.S.C. § 1302(b) (2010) (emphasis added).

delay. By following the recommendations provided below, the Commission will spur competition in the video market, as required by the Cable Act of 1992, and will remove barriers to broadband investment and deployment as directed by section 706 of the 1996 Act.

NTCA, along with others, filed comments in the Commission's 2011 retransmission consent proceeding urging, among other things, a strengthening of the "good faith" requirements and a standstill provision which would help prevent broadcasters from abusing their market power to the detriment of rural consumers.[22] Specifically, the Commission was urged to strengthen the good faith negotiating standards and clarify what constitutes a *per se* violation. It should be clear that the good faith rule has been violated when any of the following occurs: 1) a broadcaster grants agreement approval rights to an affiliated network; 2) stations that are not commonly owned negotiate or approve agreements on behalf of other stations, as might be reflected in local marketing agreements ("LMAs"), Joint Sales Agreements ("JSAs"), or shared services agreements;[23] 3) either party to a retransmission negotiation refuses to offer bona fide proposals on important issues; 4) either party to a retransmission negotiation refuses to agree to nonbinding mediation in the event of an impasse; 5) either party engages in behaviors designed to manipulate the expiration of retransmission consent agreements to coincide with "must have" broadcasts; 6) parties attempt to deny customers access to significantly viewed out-of-market signals; and/or 7) practices that unfairly advantage the

[22] Joint Retransmission Consent comments, pp. 6–17.
[23] *See also* OPASTCO reply comments, MB Docket Nos. 09-182, 07-249 (fil. Apr. 3, 2012); OPASTCO-NTCA *ex parte*, MB Docket Nos. 09-182, 10-71, GN Docket No. 12-228 (fil. Dec. 7, 2012).

broadcaster to the detriment of the end-user, such as forced tying, multicast tying, broadband tying and the inclusion of mandatory nondisclosure provisions (discussed more fully below). In addition, the "totality of circumstances" standard should be expanded to include price discrimination that is not based on objective competitive marketplace conditions.

The Commission was also urged to amend its rules so that households served by rural video providers may consider and receive lower programming rates from alternative broadcast stations in neighboring designated market areas (DMAs).[24] This is especially important for consumers who live in DMAs that are centered in neighboring states, as it impairs their ability to receive in-state news content that may be more relevant to them. The non-duplication and syndicated exclusivity rules should be eliminated, as they insulate broadcasters from market forces and lead to higher consumer rates, less competition and diminished broadband investment. There is ample evidence before the Commission showing that these rules provide broadcasters with a "one-sided level of protection" and artificially-inflated bargaining leverage in retransmission consent negotiations, and are thus no longer justified. The rules essentially require a small MVPD to pay whatever retransmission rates are demanded by the broadcast station within a given DMA. The MVPD is not permitted to purchase programming from an alternative broadcast station in a neighboring DMA even if offered at a lower rate. This prohibition against "shopping" for content in nearby DMAs prevents competition for

[24] 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.

broadcast programming. Similarly, broadcast networks should be prevented from penalizing local affiliates that may be amenable to arrangements where MVPDs obtain content from other markets. As mentioned earlier and discussed more fully below, the inability of small MVPDs to obtain certain content from alternative sources can also compound the problem of forced tying.

B. Commission Rules Should Facilitate The Ability Of Rural MVPDs To Gauge Market Rates For Programming

The NOI specifically asks if MVPDs serving rural areas are charged similar rates for content as MVPDs in urban areas.[25] As NTCA and others have previously noted,[26] mandatory non-disclosure agreements demanded by content providers in contracts for programming prohibit rural MVPDs from disclosing the rates they pay, even to policymakers who may request this information. Similarly, these agreements prevent rural MVPDs from learning the true market value of video content.[27] As rural MVPDs cannot confirm that the price at which programming is being offered to them is even roughly comparable to what other MVPDs in the marketplace are paying for the same content, their ability to negotiate fair and reasonable rates is compromised from the outset. In short, the NOI asks a question for which only the content holders have the answer – and those content holders take affirmative, deliberate steps to ensure that neither the market nor the regulator can obtain reasonable access to that information. Therefore, the Commission should encourage equitable market-based negotiations by prohibiting the

[25] NOI, ¶¶ 59-61; *see also* ¶¶ 21, 24.
[26] *See, e.g.*, Joint Retransmission Consent comments, p. 16.
[27] Research has been conducted indicating that small MVDPs endure price discrimination; *see, e.g.*, ACA comments, MB Docket No. 07-269 (fil. May 20, 2009), pp. 4-16. However, aggregate data is of limited use for small MVPDs seeking access to content under the current rules.

use of mandatory non-disclosure provisions, and it should find a means to demand from content holders the information needed for the Commission to make informed decisions about the state of these markets.

C. The Commission Should Prohibit Programming Vendors From Requiring Rural MVPDs To Pay For Undesired Programming In Order To Gain Access To Desired Programming

NTCA has consistently opposed the commonly employed practice of forced tying in which programmers require MVPDs to purchase undesired content in order to obtain the content they actually want.[28] Forced tying is one of the most prevalent and pernicious problems faced by rural MVPDs. In practice, the only viable way that rural MVPDs may gain access to "must-have" programming is to agree to purchase unwanted programming, which drives up the retail price of their service offerings. Rural MVPDs have found that in order to provide customers with access to the 10 most requested channels, it is necessary to pay for and distribute as many as 120 to 125 additional programming channels.[29] While the lineup of video programming that consumers demand changes little from year to year, the channel lineups in rural MVPDs' service tiers are growing ever larger and more expensive, due to the forced tying practices of network program providers and local broadcasters. The FCC itself aptly recognized this problem years ago, and noted how it affected small MPVDs in particular:

> "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

[28] Joint Retransmission Consent comments, p. 16.*; see also* OPASTCO, NTCA, RICA, and WTA *ex parte* letter, MB Docket No. 07-198 (fil. Aug. 15, 2008).
[29] NTCA comments, MB Docket No. 07-26 (fil. May 19, 2009), pp. 4-5; NTCA comments, MB Docket Nos. 07-29, 07-198 (fil. Jan 4, 2008), pp. 16-17.

> 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 noncable 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**."[30]

In short, forced tying unnecessarily increases rural MVPDs' costs and prevents them from offering affordable service packages. This limits rural MVPDs' ability to effectively compete in the video services market and diminishes consumer choice. The Commission should therefore ban forced tying immediately.

D. The Commission Should Prohibit Mandatory Broadband Tying, Where Rural MVPDs Must Pay Per-Subscriber Fees For Non-Video Broadband Customers

To obtain "must-have" video content, some programmers require rural MVPDs to pay an additional fee based on the number of broadband subscribers they serve, regardless of whether or not those customers subscribe to video services. This practice, commonly known as "broadband tying," amounts to a forced payment on a per-customer basis for access to online content (regardless of whether or not the customer views it), in addition to purchasing subscription video programming. Broadband tying goes well

[30] MB Docket Nos. 07-29, 07-198, 22 FCC Rcd 17791, 17862-17863, ¶ 120 (2007) (emphasis added).

beyond the realm of any reasonable condition for access to traditional subscription video content. More recently, programmers have cut off access to their online content for customers of MVPDs with whom the programmer is engaged in a retransmission consent dispute, ensuring that customers are "caught in the middle" and further illustrating the need to reform the imbalance in the current rules.

While parties may wish to negotiate packages that incorporate the optional tying of broadband content with subscription video programming, programmers that have engaged in broadband tying have typically done so in a "take-it-or-leave-it" manner that violates the Commission's "good faith" requirements. If an alternative is eventually offered by a programmer, the rates involved are so prohibitive as to effectively force the rural MVPD to accept the broadband tying or forgo the "must have" content.

Additionally, some programmers have required rural MVPDs to promote their web sites. Also, some require MVPDs to submit payments for, and promote web sites to, broadband customers that not only do not subscribe to a carrier's video service, but are also located outside of the MVPD's video service territory.

Each of the practices described above is an unfair practice that forces rural broadband providers to either absorb the additional costs or raise their end-user rates for broadband, neither of which benefits rural consumers. Moreover, higher rates for broadband discourage broadband adoption, contrary to Commission goals. The Commission should therefore prohibit the use of mandatory broadband tying provisions in contracts for video content.

E. The Commission Should Prohibit Programming Vendors From Requiring Rural MVPDs To Place Content In Specific Service Tiers

The NOI asserts that MVPDs decide the specific programming carried on each tier that is offered to consumers.[31] However, this is essentially inaccurate in practice. Rather, it is the programmers that, by and large, dictate the makeup of programming tiers. NTCA's members report that programming vendors require that certain channels be placed in specific service tiers or that a certain percentage of subscribers receive the channels, forcing rural MVPDs to include these channels in the most popular tier(s) of service they offer. Rural MVPDs should be free to create and market video programming tiers as they see fit in order to meet the demands of their subscribers. However, the practice of "forced tiering" makes it impossible for rural MVPDs to craft truly basic, stripped down service tiers that can be offered at very affordable rates and that their subscribers actually desire. It also prevents rural MVPDs from offering service packages that help to distinguish themselves from their competitors. By prohibiting video programmers' use of forced tiering arrangements, the Commission can encourage product differentiation and competition among video service providers in rural areas, while enabling consumers to access the content they desire at affordable rates.

F. "Most Favored Nation" Pricing Should Be Available to Small MVPDs

The NOI inquires about the impacts of size and economies of scale in the video market.[32] The Commission has previously acknowledged ample evidence showing the prices that small and mid-size MVPDs pay for broadcast programming per subscriber are much higher than that paid by large MVPDs. Large MVPDs are able to negotiate a

[31] NOI, ¶ 22.
[32] NOI, ¶ 21, ¶ 24.

favorable rate because they provide broadcasters with a larger number of potential viewers that generate additional advertising revenue. In contrast, a broadcaster can extract higher per-subscriber rates from small and mid-size MVPDs because it loses little by denying them access to programming. However, as noted above, small and mid-size MVPDs are prevented from determining the true market value of the programming they attempt to acquire due to mandatory nondisclosure provisions required by broadcasters as a condition of access.

Though small and mid-size MVPDs often provide service to rural areas not served by large MVPDs, they often compete for subscribers in the lower-cost towns and suburban markets that dot the much broader rural landscape. A small or mid-size MVPD cannot effectively compete for customers with a large MVPD in these relatively more attractive markets if the large company is receiving lower rates for programming. This situation can be exacerbated by broadcasters that demand "most favored nation" clauses entitling broadcaster "A" to the same rate as broadcaster "B" if broadcaster "B" obtains a higher rate. In some cases, these combined factors have led small MVPDs to exit the video marketplace, diminishing rural consumers' choice of video service providers.

These harms and disparities could be partially rectified by a "most favored nation" rule that would allow small and mid-size MVPDs 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 help to level the playing field among negotiating parties and reduce a barrier to video competition that is imposed by discriminatory pricing. Enabling small and mid-size MVPDs to compete

more vigorously in the video marketplace would provide consumers with more choices and would enhance small and mid-size MVPDs' ability and incentive to expand their offerings of video and broadband services.

G. An Interim Carriage or "Standstill" Provision Should Be Available In Order To Protect Consumers From The Impacts Of Program Access Disputes

Broadcasters are currently able to pull signals from the customers of an MVPD as soon as a retransmission consent agreement expires. This imbalance leaves MVPDs with only two options: 1) incur higher costs by acceding to the broadcaster's demands or 2) forgo access to programming that consumers demand and expect. Both options harm consumers. A "standstill" rule should be enacted that would preserve consumers' access to a broadcast signal while negotiations and/or dispute resolution proceedings are underway. In addition to the immediate impact the loss of a signal has on consumers, the Commission should also consider that an MVPD's resulting loss of revenue will harm its ability to make further investments in video and broadband infrastructure. When customers cannot view programming due to a contract dispute between a video provider and a broadcaster, that provider will likely lose customers, impeding its ability to improve and expand access to video and broadband services.

A standstill provision would help level the playing field and inject market forces into the negotiation process. Once an agreement expires, the current rules permit broadcasters to withhold, with impunity, signals that are available over the public airwaves. MVPDs have no practical recourse to this stranglehold. Even if an MVPD considered filing a complaint in response to a rule violation, the Commission has

observed that "the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations and may discourage parties from filing legitimate complaints."[33] A standstill provision would help to promote an environment in which good faith negotiations between parties could occur.

H. Small MVPDs Must Have Non-Discriminatory Access To Regional Sports Network Content

The NOI requests comment regarding the provision of sports content, especially as it relates to small MVPDs.[34] Regional sports network (RSN) programming has long been recognized as nonreplicable "must-have" content. Based on established precedent, the Commission has accurately stated: "[W]en programming is non-replicable and valuable to consumers, such as regional sports programming, no amount of investment can duplicate the unique attributes of such programming, and denial of access to such programming can significantly hinder an MVPD from competing in the marketplace."[35]

MVPDs of all sizes face serious challenges in gaining access to RSN content from vertically integrated programmers. This, in turn, leads to significant competitive and consumer harms, as the Commission has observed. While nominal reforms and alterations have been made to complaint procedures, these have done little to alleviate delays and expenses associated with the complaint process. Small and mid-sized MVPDs lack the resources to engage in this sort of protracted proceeding. The complaint process is not a realistic avenue for relief for any except the largest providers. Yet, the use of supra-competitive pricing by vertically integrated RSN programmers is especially

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[33] MB Docket Nos. 07-29, 07-198, 22 FCC Rcd 17791, 17869, ¶ 138 (2007).
[34] NOI, ¶ 23. *See also* ¶¶ 18, 62.
[35] MB Docket No. 07-198, 25 FCC Rcd 746, 750, ¶ 9 (2010).

harmful to smaller MVPDs, and this problem is not addressed by current program access rules. Lack of access to programming under reasonable terms and conditions, including vital RSN content, impedes or prevents smaller MVPDs from fulfilling consumer demand.

As demonstrated in a previous proceeding, three main shortcomings regarding sports programming should be addressed:

- The "quantity discount" loophole, which allows a programmer to charge higher rates to MVPDs with fewer customers, eliminates any protection from unreasonable rates, terms and conditions for smaller MVPDs;
- The program access rules do not prevent a vertically integrated programmer from raising rival MVPDs' rates by simply charging itself very high fees for the same programming;
- The program access complaint process offers no practical remedy for aggrieved MVPDs because access is not assured while disputes are pending.[36]

The Commission should address these deficiencies without delay.

I. The Commission Should Monitor The Market For "Over The Top" Web-Based Video Services To Ensure That Exclusive Arrangements Do Not Prevent Rural MVPDs And Broadband Providers From Gaining Access To Certain Web-Based Video Content

The NOI also seeks comment about vertical integration and the provision of online content.[37] The market for web-based video continues to grow, providing consumers with additional choices for video entertainment and additional incentives to adopt broadband. As this market grows, it is imperative that the Commission is cognizant of any exclusive arrangements between content producers and large MVPDs

[36] ACA comments, MB Docket No. 11-128 (fil. Sept. 9, 2011), pp. 4-12.
[37] NOI, ¶ 50.

that could prevent rural MVPDs and broadband providers from gaining access to certain web-based video services. Rural MVPDs and broadband providers must have access to all of the same content – including web-based content – as their non-rural counterparts. Without it, video competition, along with broadband investment and adoption, will suffer in rural service areas. The Commission should therefore carefully monitor the evolution of the market for web-based video content and ensure that consumers in RLEC service areas continue to have access to all of the video content that the Internet has to offer.

IV. THE REQUIREMENT TO SEPARATE SECURITY AND NAVIGATION FUNCTIONS IN SET-TOP BOXES SHOULD BE ELIMINATED

The NOI inquires about the market for retail set-top boxes and the requirement that security and navigation functions be separated.[38] As amply demonstrated in MB Docket 10-91 (Video Device Competition) *et. al.*, the use of a set-top box, or its functional equivalent, is just one option for consumers as technology and the marketplace continue to evolve at a rapid pace. Vigorous competition in the customer equipment market has come to fruition thanks to innovation and technological advancements, not regulation. In light of these fast-changing developments, it is apparent that that standards bodies and the marketplace are better suited than regulations to determine the functionality and specifications that should be included in set-top boxes. The separate security requirement is an anachronism that should be rescinded.

V. CONCLUSION

The provision of video services is key to rural LECs' ability to deliver robust broadband services to consumers in high-cost areas. Therefore, access to video content at

[38] NOI, ¶ 66.

affordable rates and under reasonable terms and conditions is needed not only to generate greater video competition, but also to spur broadband investment in rural service areas. Yet in practice, access to reasonably-priced programming is a significant barrier to the provision of video services, which in turn impedes further broadband deployment.

Consequently, the Commission should take the steps outlined above to facilitate the availability of programming at affordable rates and under reasonable terms and conditions to rural MVPDs. Retransmission consent reform, including clarification of the "good faith" negotiating standard and repeal of non-duplication and syndicated exclusivity rules, are imperative. The Commission should also amend its rules so that households served by rural MVPDs may consider and receive lower programming rates from alternative broadcast stations in neighboring areas. Mandatory non-disclosure provisions should no longer be permitted to obscure the market value of content, and programmers should not be permitted to require rural MVPDs to pay for undesired programming, or dictate the tiers in which programming is placed.

"Most favored nation" pricing should be available to small MVPDs, and an interim carriage or "standstill" provision would protect consumers from the impacts of program access disputes. In order to be viable, small MVPDs must also have non-discriminatory access to non-replicable regional sports network content.

The Commission should monitor the market for "over the top" web-based video services to ensure that exclusive arrangements do not prevent rural MVPDs and broadband providers from gaining access to certain web-based video content, especially vertically integrated content. Finally, the requirement to separate security and navigation

functions in set-top boxes should be eliminated, as it has been transcended by the marketplace and technology.

Respectfully submitted,

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