



June 9, 2014

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

Re: *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 14-16: Ex Parte Communication*

Dear Ms. Dortch:

ITTA submits this filing in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Inquiry seeking information and comment on the status of competition in the market for the delivery of video programming.¹

ITTA's members are mid-size, incumbent local exchange carriers that provide a variety of communications services to subscribers in predominantly rural areas in 44 states. In addition to voice and high-speed data offerings, all ITTA members provide video service to subscribers utilizing a variety of distribution platforms, including IPTV networks, coaxial cable systems, and fiber infrastructure.² Collectively, ITTA members currently pass in excess of 3.9 million homes with video service and serve well over half a million video subscribers in approximately 50 television markets across the United States. In nearly all of these markets, ITTA members are new entrant video programming distributors ("VPDs") that compete head-to-head against both DBS providers, at least one (and in some cases two or three) incumbent cable operators, and online video providers, such as Netflix, Hulu, Amazon Video, Apple TV, and others.

ITTA members and other telco-based video providers have in recent years become a growing presence in the video distribution market because consumers have increasingly come to value the ability to subscribe to a suite of services that includes video programming bundled with data, voice, and other services. Offering a video product with numerous and diverse broadcast and non-broadcast programming options that consumers desire, including enhanced features such

¹ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 14-16, Notice of Inquiry, FCC 14-8 (rel. Jan. 31, 2014).*

² At least two ITTA members also resell DBS service in a number of markets throughout their footprints. However, the data and information provided in this filing relates strictly to ITTA members' telco-based video offerings.

as video-on-demand and the ability to stream video to multiple devices within and outside the home, allows ITTA members to compete more effectively in the communications marketplace.³ ITTA members have invested hundreds of millions of dollars to upgrade their networks to give subscribers access to a competitive video product that includes hundreds of standard and high definition linear programming networks, popular premium channels, thousands of options for VOD programming that customers may view at the time of their choosing, as well as the capability to stream programming to other devices on-the-go with TV Everywhere and similar applications.

Entering the video market as the third, fourth, or fifth competitor has not been an easy task, but advances in technology have made it possible for telco-based VPDs to respond to consumer demand for video services. Specifically, IPTV and fiber technology paved the way for ITTA members to more aggressively expand into video distribution starting as early as 2001.⁴

Several factors impact ITTA members' entry into new video markets, including capital requirements, economies of scale, and access to content at reasonable rates. For most members, the decision to offer video in a particular market is influenced by the size and speed of existing broadband infrastructure, which dictates the capital costs of performing the necessary upgrades to obtain facilities capable of delivering video services. Obviously, the number of potential customers weighs in the decision, so new entrants must consider the presence of other competitors and the technology they use, as well as population density. Traditional operating parameters dictate higher deployment costs in rural settings, so ITTA members must perform a business case to determine if launching a video service will be successful in rural markets with fewer potential subscribers. Fortunately, it is becoming easier to do so as emergent over-the-top capabilities and options, such as advanced video compression technologies, become increasingly available.

Other factors that impact video entry include franchise obligations, build out requirements, and as discussed in more detail below, the ability to acquire programming at a reasonable cost. Although it can take 18-36 months to see any return on investment as a new entrant VPD, ITTA members recognize that a video product is an integral component to being a viable competitor in today's communications marketplace.

³ ITTA members' provision of video service also drives broadband adoption when it is offered as part of a bundle with other communications services. In markets where ITTA members offer video as part of a bundle with broadband services, most have experienced steady and continued growth of both DSL and cable modem subscriptions. According to one ITTA member, 90% of its video subscribers also purchase high-speed Internet service.

⁴ Most ITTA members began offering video services more recently than 2001 (one as recently as 2008).

Despite the increase in retail competition in the video marketplace, ITTA members and their customers continue to experience dramatically increasing fees for video content. While this significant upward trend in the cost of video programming applies to both cable network programming and broadcast stations carried pursuant to retransmission consent, the difference in cost increases between the two types of programming is staggering. Several ITTA members report retransmission consent fee increases of up to 200% annually during the past few years, whereas prices for non-broadcast programming typically have risen no more than 10% per year during the same timeframe.

CenturyLink speaks for all ITTA members when it states that “[t]he single most significant issue from a cost standpoint that [it] faces in the delivery of its video programming is the escalating cost of retransmission consent fees.”⁵ Numerous commenters in this proceeding agree that the outdated retransmission consent regime has failed to keep pace with developments in the video distribution marketplace and has created an unlevel playing field in which broadcasters and other content providers have all the bargaining leverage.⁶

The marketplace distortions caused by the outdated retransmission consent regime are reflected not only in soaring retransmission consent fees, but also in other negotiating trends. ITTA members commonly encounter and are forced to accept program tying, where retransmission of broadcast stations is conditioned upon carriage of less popular multicast channels or affiliated non-broadcast content.⁷ ITTA members also experience broadband tying, where broadcasters require VPDs to pay per-subscriber fees for broadband customers, regardless of whether the customers subscribe to video service or access the video programming at issue online. Further, it is commonplace for ITTA members to be forced by broadcast networks to engage in coordinated retransmission consent negotiations. Despite recent Commission action to limit joint negotiations by two big-four network affiliates in the same market,⁸ coordinated negotiations will continue to be problematic with respect to big-four stations that negotiate carriage on behalf of CW and MyNetwork TV affiliates. Additional evidence that the retransmission consent process is in dire need of reform is the alarming new tactic by

⁵ Comments of CenturyLink, MB Docket No. 14-16 (filed Mar. 21, 2014), at 4.

⁶ *See id.* *See also* Comments of Verizon, MB Docket No. 14-16 (filed Mar. 21, 2014); Comments of NTCA – The Rural Broadband Association, MB Docket No. 14-16 (filed Mar. 21, 2014); Comments of AT&T, MB Docket No. 14-16 (filed Mar. 21, 2014); and Comments of WTA – Advocates for Rural Broadband, MB Docket No. 14-16 (filed Mar. 21, 2014).

⁷ In addition, these extensive carriage obligations typically do not include carve outs for low-capacity systems.

⁸ *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-29 (rel. Mar. 31, 2014).

programmers of blocking online access to content for VPDs' broadband subscribers, including non-video subscribers, during retransmission consent disputes.⁹

Moreover, the challenges associated with obtaining access to content on reasonable terms and conditions are not limited to negotiations for broadcast programming. ITTA members routinely experience difficulties gaining access to highly valued content, such as regional sports network ("RSN") programming, from vertically integrated content providers. RSN programming is non-replicable, must-have programming for consumers, giving vertically integrated content providers the incentive and ability to withhold such programming from their competitors. The inability to obtain RSN programming is especially problematic for smaller and new entrant VPDs. For them, the costly and time consuming program access complaint process is not a viable option, especially since it does not ensure access to the desired programming while a dispute is pending.¹⁰

As new entrants, some ITTA members have experienced barriers to entry through onerous local franchising build out requirements that add significantly to deployment costs. For new entrants starting out with no customer base, particularly where they are competing against an incumbent cable provider with a monopoly on subscribers for facilities-based video service, deployment should be driven by success in the market rather than arbitrary build out requirements. ITTA members also have encountered efforts by competitors to intervene in the local franchise approval process and to impede access to wiring in multiple dwelling unit facilities that is required by law to ensure that consumers in apartment buildings and similar places can obtain video service from a competing provider.

It also is evident that ITTA members are at a competitive disadvantage vis-à-vis larger competitors that can lower their content costs and mass advertising rates by availing themselves of volume discounts. Their size also enables larger competitors to negotiate for more diverse packages of programming – e.g., so-called "skinny packages," which are a draw for consumers

⁹ See, e.g., Jeff Baumgartner, "CBS Blocks TWC Broadband Subs from Accessing Full Episodes Online," *Multichannel News* (Aug. 4, 2013), available at: <http://www.multichannel.com/distribution/cbs-blocks-twc-broadband-subs-accessing-full-episodes-online/144786>.

¹⁰ For the same reasons, the retransmission consent complaint process is not a feasible avenue for relief for smaller and new entrant VPDs. The ability to pursue regulatory relief is further hampered by mandatory non-disclosure provisions typically found in retransmission consent agreements. These provisions prohibit VPDs from revealing the contract rates, terms and conditions that are subject to dispute. This lack of transparency has become a valuable tool in the broadcaster's arsenal to silence smaller VPDs through the threat of litigation.

because they are typically smaller programming tiers of attractive programming at an attractive price.

Smaller and new entrant VPDs also cannot afford the prolonged blackouts that larger providers increasingly experience. Without access to broadcast network and other must-have programming, subscribers will defect to the competition. Once a customer switches to another provider, it is difficult (if not impossible) to get them back. ITTA member companies, with their smaller customer bases, cannot absorb these subscriber defections and have no choice but to accede to increased content fees in order to remain viable competitors. In addition, telco-based VPDs like ITTA members face a huge cost disadvantage vis-à-vis their non-telco video competitors because as common carriers they are subject to higher taxes and fees on the regulated services they offer.

The record in this proceeding makes clear that the video distribution marketplace has undergone sweeping change since Congress enacted the 1992 Cable Act, changes that have produced an environment in which smaller and new entrant VPDs have little to no bargaining power for required inputs despite increased retail competition. The Commission must recognize and make appropriate modifications to its rules to account for this drastically altered competitive landscape.

First, the Commission must address the broken retransmission consent regime. Strengthening the good faith negotiation standard by prohibiting joint negotiations among separately-owned, big-4 broadcast stations within a market was an important first step to help level the playing field between broadcasters and VPDs. However, the Commission must do more, such as move forward to eliminate the syndicated exclusivity and network non-duplication rules. These rules are no longer necessary in today's marketplace, and suspending them would give VPDs the flexibility to offer alternative broadcast programming desired by consumers. Under the Commission's existing rules, a broadcaster can prevent a VPD from carrying the duplicative programming of another station in the same local market or from importing duplicative programming of another station outside of the local market, which gives broadcasters a huge unfounded advantage over VPDs, particularly when retransmission consent discussions stall. To facilitate fair and balanced negotiations, the Commission should permit all VPDs to enter into arrangements for carriage of duplicative programming of another station to ensure consumers have access to desirable and relevant programming. The Commission also should prohibit broadcast licensees, singularly or in concert, from creating restrictions on such private arrangements.

ITTA also encourages the Commission to adopt a standstill provision to prevent signal loss for consumers during retransmission consent negotiation impasses. Doing so would ensure that a stall in negotiations does not disrupt viewers' access to desired programming. ITTA also urges the Commission to increase the effectiveness of its good faith negotiation standard by

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clarifying that certain behavior, including the negotiating tactics described above, constitutes a *per se* violation of the statutory duty to negotiate in good faith. Such conduct would include attempts by parties to deny customers access to significantly viewed out-of-market signals, and practices such as forced tying, multicast tying, broadband tying, blocking of online content, mandatory non-disclosure provisions, and payments rooted in network reverse compensation formulas.

Second, the Commission should ensure that its program access rules provide adequate opportunity for VPDs, particularly smaller and new entrant VPDs, to gain access to vertically integrated programming on reasonable terms and conditions. Without reasonable access to such programming, competitive providers cannot offer a meaningful alternative for consumers. Consumers should not be denied the benefits of increased retail competition in the video marketplace because incumbent cable operators withhold access to valuable, must-have programming.

Third, in light of increased competition from online and over-the-top video programming sources, the Commission should refrain from applying legacy regulations to such services and level the playing field by relaxing or removing unnecessary regulatory requirements applicable to VPDs to allow them to operate more nimbly in this new competitive landscape.

In sum, ITTA urges the Commission to acknowledge the vast changes that have occurred in the video distribution marketplace and move forward with long overdue reform of its video rules. Implementing the changes outlined above would help restore balance to negotiations for video content, address the rising costs of programming for VPDs and their customers, minimize the disruption and harm that occurs when consumers lose access to desired programming, and ensure that consumers benefit from increased broadband investment and other advantages that stem from increased competition in the video marketplace.

Sincerely,



Micah M. Caldwell

Vice President, Regulatory Affairs