



The voice of mid-size communications companies

Introduction

ITTA, the voice of mid-size communications companies, is a Washington, DC-based industry association dedicated to representing mid-size, incumbent wireline carriers that provide a variety of communications services to consumers in predominantly rural areas across 45 states.

ITTA is pleased to respond to the Subcommittee on Communications and Technology's White Paper on Video Reform and welcomes the Subcommittee's interest in updating the outdated Communications Act.

ITTA's members provide a wide range of communications services. 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. 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 ("MVPDs") 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.

As the Subcommittee on Communications and Technology begins the important work of updating our outdated communications laws, ITTA urges the Subcommittee to look for areas of reform that enjoy bipartisan support in both the House of Representatives and the Senate. The need to update our video rules has brought together a diverse coalition of interested parties including public interest groups, video distributors, independent programmers and others. Similarly, video reform has brought Democrats and Republicans together and the passage of H.R. 5728, the STELA Reauthorization Act of 2014, represented an incremental, but positive, first step for Congress in passing bipartisan legislation that will directly benefit consumers. It is ITTA's hope that Congress will take advantage of the legislative record of bipartisan support on video reform and pass comprehensive video reform as part of the #CommActUpdate.

Thank you again for the opportunity to comment on this important subject.

Please feel free to contact Paul Raak, ITTA's Vice President of Legislative Affairs, by email at praak@itita.us or by phone at 202.898.1514 with any questions.

1) Broadcasters face a host of regulations based on their status as a “public trustee.”

a. Does the public trustee model still make sense in the current communications marketplace?

Yes. The government gives broadcasters exclusive rights to extremely valuable and limited public spectrum. In return, broadcasters have an ongoing obligation to serve the public interest. So long as broadcasters enjoy continued use of public spectrum they should be expected to not only fulfill all existing public service obligations, but also Congress and regulators should periodically revisit whether additional obligations are necessary or desirable to ensure taxpayers are receiving the full benefit of the broadcasters’ free use of the public airwaves.

b. Which specific obligations in law and regulation should be changed to address changes in the marketplace?

Today, many of the geographic areas within which ITTA members provide video service are outside the local broadcaster’s digital contour. Congress and the FCC should adopt rules to help ensure that broadcasters are delivering digital signals to all households inside their DMA. In instances where a broadcaster is unable, or unwilling, to deliver a digital signal to certain households within its DMA, it should have Must Carry status. This would avoid rewarding the broadcaster by permitting it to collect exorbitant retransmission fees for households that, absent an MVPD, would be unable to receive the broadcaster’s signal.

In addition, Congress should confirm the FCC’s authority to tie renewal of a broadcaster’s license to whether or not the broadcaster is negotiating in good faith with MVPDs with respect to carriage of the broadcaster’s signal.

c. How can the Communications Act foster broadcasting in the 21st century? What changes in law will promote a market in which broadcasting can compete with subscription video services?

In a competitive environment such as the video distribution market, Congress or regulators should not adopt additional rules that promote one segment of the industry over others. Congress should focus instead on whether there are any changes in law that would enhance current retail competition in the video market and promote reasonable access by all MVPDs to programming. There are several changes to the 1992 Cable Act identified by ITTA in this White Paper that it believes will help ensure equal and fair competition among video distributors.

d. Are the local market rules still necessary to protect localism? What other mechanisms could promote both localism and competition? Alternatively, what changes could be made to the current local market rules to improve consumer outcomes?

Prior to enactment of the 1992 Cable Act, broadcasters had the incentive to cover local news, weather, traffic and community activities because broadcast television and broadcast radio were virtually the only mediums available for Americans to receive local news in a time sensitive manner. Broadcasters' business models largely depended on revenue derived from local advertising. Today, Americans typically obtain local news and other local content from a wide range of sources and, consequently, broadcasters have significantly decreased their coverage of local happenings. Today, local broadcasters depend far less on local advertising for revenue and instead receive a significantly increasing amount of revenue from retransmission consent fees.

According to analysis by SNL Kagan, retransmission consent fee revenues grew by 45.8 percent in 2013 alone. At \$3.3 billion, such revenue now represents 18.5 percent of total broadcast television station industry revenue, double the figure from 2012. It is anticipated that retransmission consent revenue will continue to grow exponentially, escalating to \$7.6 billion in 2019.¹

Given the expected continued escalation in retransmission consent fees and the fact that local broadcasters are spending less time and fewer resources on local content, ITTA recommends that Congress repeal the network non-duplication and syndicated exclusivity rules and allow MVPDs to import broadcast programming from out-of-market stations.

By allowing MVPDs to import distant signals, Congress would afford consumers greater choice. Consumers, not broadcasters, would decide what signal is most valuable and relevant based on their individual needs and preferences. These rule changes would, in addition, lead to a more balanced retransmission consent fee negotiation process between broadcasters and MVPDs, provided there are measures in place to prevent broadcast networks and their affiliates from creating contractual restrictions or engaging in other practices that would circumvent such relief. Lastly, by repealing the exclusivity rules and allowing the importation of distant signals by MVPDs, broadcasters would face enhanced

¹ Mike Reynolds, "Station Retrans Fees to Reach \$7.6B in 2019: SNL Kagan," *Multichannel News*, Nov. 22, 2013, available at: <http://multichannel.com/news/content/station-retrans-fees-reach-76b-2019-snl-kagan/356879> (last visited: June 22, 2014).

regional competition that should encourage the development of compelling local program offerings and result in lower retransmission consent fees.

2) Cable services are governed largely by the 1992 Cable Act, a law passed when cable represented a near monopoly in subscription video.

a. How have market conditions changed the assumptions that form the foundation of the Cable Act? What changes to the Cable Act should be made in recognition of the market?

Today, competition in the retail video distribution market is well established, with ITTA member companies and other MVPDs offering video services in direct competition with traditional cable companies, satellite providers, and online video providers such as Netflix, Hulu, Amazon Video, Apple TV and others.

However, despite this increased competition in the retail video distribution market, ITTA members are saddled with a host of regulatory obligations that cable and satellite competitors do not have. This is a direct result of ITTA members' historical status as incumbent local exchange carriers (ILECs). This disparate regulatory treatment has unfortunately led to a dramatic disparity in operating costs between ILECs operating as MVPDs and their competitors.

Congress should reexamine all the outdated regulations that have resulted in an unequal playing field among providers of similar services. To allow one class of competitors to operate largely unfettered by regulatory requirements while another class of competitors are burdened with costly, outmoded, and unnecessary regulatory obligations will only chill investment and stifle further innovation.

b. Cable systems are required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and PEG channels. Are these provisions warranted in the era of the Internet?

Program access rules continue to be absolutely necessary given the consolidation that has occurred in the cable industry, with increasingly large cable companies becoming vertically integrated providers. Regional Sports Networks (RSNs) provide a stark illustration of why meaningful program access rules remain necessary.

RSNs represent some of the most popular programming in any given market and an MVPD's success depends largely on access to high-definition RSNs and other must-have programming. As the Commission previously recognized, "RSNs have no good substitutes, are important for competition, and are non-replicable."² As new entrants into the video distribution marketplace, ITTA members' access to RSNs is critical to compete.

Congress should ensure that reforms to the 1992 Cable Act permit smaller and new entrant video distributors to obtain access to vertically integrated programming, including RSNs, 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 because incumbent cable operators withhold access to valuable, must-have programming like local sports.

With respect to leased access and PEG channel requirements, the Internet has provided cities and local public interest groups a new and better platform to distribute their programming. Most ITTA members have found that in their local markets the local PEG channel is streaming its programming over the Internet, thereby diminishing the need for the MVPD to carry the programming.

ITTA members also have found that local franchising authorities may still require MVPDs to collect PEG fees from consumers on the municipality's behalf even when they do not provide the MVPD with PEG content. This practice effectively enacts a local tax by virtue of state and local franchise agreements with no consumer benefit. ITTA recommends that Congress revisit the relevancy of local franchising rules, pass measures to incentivize states that have not already moved to a statewide franchise regime to do so, and prohibit franchising authorities from implementing PEG fees without providing local programming.

3) Satellite television providers are currently regulated under law and regulation specific to their technology, despite the fact that they compete directly with cable. What

² *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, MB Docket Nos. 12-68, 07-18, 05-192, Notice of Proposed Rulemaking, FCC 12-30 (rel. Mar. 20, 2012).

changes can be made in the Communications Act (and other statutes) to reduce disparate treatment of competing technologies?

As mentioned in response to Question 2(b), Congress should revisit the issue of local franchising and examine whether such rules are needed in today's marketplace. Satellite television providers are not required to pay local franchising fees despite offering the same video service as ITTA members and cable companies. ITTA does not recommend that satellite TV providers be subjected to the same franchising requirements as non-satellite MVPDs, but rather that other MVPDs not be required to pay franchising fees in markets with sufficient satellite competition.

ITTA would like to highlight two other areas where Congress can enhance parity between satellite television providers and other MVPDs:

1) Harmonizing the out-of-market compulsory license fees.

Today, non-satellite MVPDs pay a much higher out-of-market compulsory license fee to import distant signals than satellite providers. As a result, it is often cost prohibitive for non-satellite MVPDs to bring in out-of-market station programming, even when it is relevant to and desired by consumers. This results in reduced consumer choice. ITTA recommends that Congress amend Section 119 of the Copyright Act to allow all MVPDs to import an out-of-market signal at the same rate paid by satellite TV providers.

2) Basic Tier Requirements.

One of the primary goals of any Communications Act reform efforts should be to create and enhance parity among competitors. The retail video distribution market is one of the more competitive marketplaces in the communications industry, yet satellite providers do not have to operate under the same regulations as cable and IPTV providers. One area in which Congress can create parity between satellite providers and other MVPDs is to repeal the basic tier mandate for non-satellite MVPDs.

4) The relationship between content and distributors consumes much of the debate on video services.

a. What changes to the existing rules that govern these relationships should be considered to reflect the modern market for content?

ITTA suggests two changes that will remove the MVPD from the middleman position, give consumers more opportunity to choose the programming that is most beneficial to them, and allow consumers more discretion regarding how much they pay for programming.

ITTA's first recommended change would be to adopt an approach similar to the Local CHOICE proposal that Senate Commerce Committee Thune and former Senate Commerce Committee Chairman Rockefeller circulated to industry in August of last year. One benefit of the Local CHOICE proposal is that it would give consumers the choice of whether or not to receive and pay for local broadcast stations. MVPDs would merely collect the fee that is established by the local broadcaster and pass it through to the consumer.

Another benefit of the Local CHOICE proposal is that it would enhance transparency. The consumer would know how much the broadcaster is charging for "free over-the-air" signals. Additionally, it would allow consumers to reduce their monthly cable bills by choosing not to take a broadcast signal.

ITTA would include in the Local CHOICE proposal a provision that MVPDs be allowed to give consumers the choice of bringing in an adjacent out-of-market station that may be more geographically relevant to them. In addition, ITTA would add language that prevents a broadcaster from charging consumers who live outside of the broadcaster's digital contour and would not receive the content but for the MVPD's distribution network.

The second change ITTA recommends would be the adoption of reforms that would provide relief from coercive and anticompetitive practices by video programmers, such as wholesale tying, forced tier placement, and discriminatory pricing, that lead to less marketplace competition and higher prices for consumers of video services.

As ITTA has noted before the Federal Communications Commission (FCC) on numerous occasions, programmers often use a variety of methods to force MVPDs and their video customers to purchase unwanted networks.³ Often, programmers' price bundles of programming and stand-alone channels in a manner that makes it uneconomic for an MVPD to purchase anything but the bundle. Many programmers also routinely dictate how MVPDs must package programming in their retail offerings to consumers by including in affiliation agreements provisions that effectively require MVPDs to bundle many, if not all, of the programmers' networks together on the basic or expanded basic tier. In addition, programmers typically offer larger MVPDs volume discounts that have no correlation to the actual cost of video programming, placing smaller MVPDs at a competitive disadvantage, and leading to higher prices and fewer choices for consumers. Programmers also have begun to force MVPDs to accede to their

³ See, e.g., Comments of ITTA, *In the Matter of Mediacom Communications Corporation Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014).

unreasonable demands by limiting consumers' access to programming on the Internet and interfering with consumers' ability to enhance their viewing experience through use of lawful devices and technologies that enable time-shifting and space-shifting of video programming services.

In order to remedy such behavior, Congress should confirm the FCC's authority to adopt rules addressing coercive tying and tier placement requirements and discriminatory pricing practices. Congress should also confirm the FCC's authority to prohibit programmers from blocking access to online content when an impasse in negotiations for carriage happens.

5) Over-the-top video services are not addressed in the current Communications Act. How should the Act treat these services? What are the consequences for competition and innovation if they are subjected to the legacy rules for MVPDs?

Any Communications Act reform should be technology neutral. As such, any legacy rules that are deemed unnecessary or inappropriate for new platforms such as over-the-top video services should be re-examined as to their validity for existing MVPDs in a competitive market. Additionally, Congress must continue to preserve policies that ensure MVPDs and their customers have access to programming at reasonable rates, terms and conditions regardless of the delivery platform.