Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting the Availability of Diverse and Independent Sources of Video Programming	)	MB Docket No. 16-41
	)	
	)	

COMMENTS OF ITTA –
THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

ITTA – the Voice of Mid-Size Communications Companies hereby respectfully submits its comments in response to the Commission's Notice of Inquiry ("*NOI*") on Promoting the Availability of Diverse and Independent Sources of Video Programming.[1]

INTRODUCTION AND SUMMARY

The Commission has issued the NOI "to begin a conversation on the state of independent and diverse programming, and to assess how the Commission or others could foster greater consumer choice and enhance diversity in the evolving video marketplace by eliminating or reducing barriers faced by independent programmers in reaching viewers."[2] ITTA has previously commented on issues pertinent to this "conversation" and thus has an interest in commenting on the *NOI*.

[1] 81 Fed. Reg. 10241 (Feb. 29, 2016) ("*NOI*").

[2] *NOI* at ¶ 2.

ITTA's members are mid-size, incumbent local exchange carriers that provide a variety of communications services, including video, voice, and high speed data, to subscribers in predominantly rural areas in 45 states. In the vast majority of these markets, ITTA members are new entrant MVPDs that compete head-to-head against two DBS providers, at least one (and in some cases multiple) incumbent cable operators, and online video providers such as Netflix, Hulu, Amazon Video, Apple TV, and others. Entering the market as the third, fourth, or fifth competitor is not easy, but ITTA members and other new entrant MVPDs have in recent years become a growing presence in the video distribution market. Offering a video product with the numerous and diverse video programming options that consumers desire is essential for ITTA members to compete in today's communications marketplace.

Practices that make it difficult for independent programmers to gain carriage are contrary not only to the interests of those programmers, but to the interests of ITTA's members and their customers as well. ITTA members carry significant amounts of independent and diverse programming, and would carry more but for the practices of large media entities that constrain their ability to do so. The practices identified in the *NOI* that are of particular concern are forced bundling and penetration or channel placement mandates. Forced bundling of unwanted channels by large media entities is directly responsible for displacing independent programming. Penetration mandates that require carriage of those channels on the most highly penetrated tiers likewise displaces independent programming on those tiers. The Commission clearly has authority to address such anticompetitive behavior under Sections 616, 628, and 706 of the Communications Act.[3] ITTA encourages the Commission to do so through consideration of an unbundling mandate or a mandatory a la carte option.

[3] 47 U.S.C. §§ 536, 548, 706.

DISCUSSION

I. The *NOI's* Definition of "Independent Programmers" is Unduly Broad

The *NOI* describes "independent video programmers" as programmers that are not vertically integrated with an MVPD.[4] That is an overly broad definition, under which large programmers that are vertically integrated with broadcast networks and/or movie studios, such as Disney or Viacom, are lumped together with truly diverse start-up programming networks that are essentially stand-alone operations.[5] As indicated in the discussion below, these large programmers have the same advantages and create the same roadblocks to consumer choice and programming diversity as MVPD-affiliated programmers and should not be considered "independent video programmers" for purposes of this proceeding.

II. Forced Program Bundling by Large Programmers Harms Independent Programmers and Programming Diversity

Notwithstanding the overly broad description of independent programmers, the *NOI* seeks comment on the bundling practices of "large media entities."[6] The *NOI* references concerns raised that have been raised numerous times by ITTA and others about the ability of such entities to leverage their marquee programming to force MVPDs to carry additional

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[4] *NOI* at note 4.

[5] The *NOI's* formulation of what constitutes an "independent" programmer for purposes of this proceeding is particularly odd given that Chairman Wheeler's accompanying statement quotes a GAO study that used a different and much narrower definition of independent programming – "programming not affiliated with broadcast networks or cable operators." *NOI,* Statement of Chairman Tom Wheeler.

[6] *NOI* at ¶ 15.

channels with little or no consumer demand.[7] This leaves MVPDs with fewer resources (both in terms of channel capacity and funds to pay programming carriage fees) for carriage of independent and diverse programming, and often results in MVPDs displacing independent and diverse programming with less desirable programming.

The adverse impact of bundling and possible actions that the Commission could take to address those concerns is at the heart of a petition for rulemaking that Mediacom filed in 2014. ITTA filed comments in support of that petition describing how its members and their customers experience the adverse impact of bundling firsthand.[8] ITTA hereby incorporates by reference and directs the Commission's attention to those comments.[9]

Briefly summarized, it is indeed the case that large media entities can and do leverage popular programming to force carriage of lower-rated programming, which pushes out independent programming. Most large media entities that offer video programming have one or more "must-have" channels that they offer to MVPDs, particularly smaller, new entrant MVPDs with no market power or leverage, in a take-it-or-leave it bundle with numerous less popular channels. Even if those must-have channels also are offered *a la carte*, it is at a price so high as

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[7] *Id*. *citing* Mediacom Communications Corporation, Petition for Expedited Rulemaking, RM-11728 (filed July 21, 2014) ("*Mediacom 2014 Rulemaking Petition*"). *See* Comments of ITTA, RM-11728 (Sep. 29, 2014) at 3.

[8] Comments of ITTA, RM-11728 (Sep. 29, 2014).

[9] The *NOI* acknowledges that some of the issues raised in this proceeding are similar to issues raised in the retransmission consent-related "Totality of the Circumstances" docket (MB Docket No. 15-216). *NOI* at note 8. As Chairman Wheeler has stated, bundling forces consumers "to buy channels they never watch." Comments regarding the forced bundling issue filed in the Totality of the Circumstances docket, as well as in the Commission's earlier retransmission consent reform proceeding (MB Docket No. 10-71), are relevant to the *NOI*'s investigation of bundling by non-broadcast programmers. *See* Comments of ITTA, MB Docket No. 15-216 (Dec. 1, 2015). *See also* Comments of American Television Alliance, MB Docket No. 15-216 (Dec. 1, 2015).

to be economically infeasible. Smaller and new entrant MVPDs are forced to purchase the bundled offering, which limits the channel capacity and resources they have available for the carriage of diverse, independent sources of video programming. Moreover, forced bundling impedes the ability of new entrant MVPDs to distinguish their services from incumbents by offering diverse, independently-produced content in lieu of programming foisted on them by the large media entities. This limits MVPDs' ability to compete in the challenging video distribution marketplace and, importantly, limits consumer choice in programming.

The burden that bundling puts on an MVPD's capacity often is direct – one commenter responding to Mediacom's 2014 Rulemaking Petition estimated that obtaining carriage rights for the 10 most widely distributed channels requires small MVPDs to contract for, pay for, and distribute 120-125 channels.[10] Forced carriage of bundled channels displaces other programming and limits the MVPD's options with respect to adding other services. An independent programmer commenting on Mediacom's 2014 Rulemaking Petition acknowledged "its discussions with mid-size, independent multichannel video programming distributors (MVPDs) are repeatedly halted due to bundling requirements that force the addition of the conglomerates' networks and use up system capacity that then becomes unavailable to independent programmers."[11] Moreover, like most MVPDs, ITTA's members offer a variety of services over their advanced broadband facilities. Capacity taken for unwanted video channels inevitably takes away from the capacity available for these other services – services that consumers increasingly demand and that can add to the diversity of content available to consumers.

[10] Comments of NTCA – The Rural Broadband Association, RM-11728 (Sept. 29, 2014) at 4.

[11] Comments of Rural Media Group, RM-11728 (Sept. 29, 2014) at 1.

ITTA does not contend that bundling is inherently contrary to the public interest. There can be times when a bundling option creates pro-consumer efficiencies. But generally speaking, "forced" bundling – a programmer's demand that an MVPD purchase and pay for content the MVPD would not otherwise want – unduly increases costs and restricts competition and consumer choice. The same is true for situations where the programmer ostensibly offers the MVPD programming on a standalone basis as an alternative to the bundle, but on terms such that the standalone offer does not represent an economically rational option.

ITTA urges the Commission to consider adoption of an unbundling mandate, which would require programmers to respond to an MVPD's demand for programming on a standalone basis by offering the MVPD (1) individual offers for any programming offered by the programmer at prices that represent a real economic alternative to a bundle; (2) a bundle containing the same video programming networks as contained in the expiring agreement between the MVPD and the programmer; or (3) any bundle of video programming networks or any individual network that the programmer has offered to sell to any other MVPD in the previous 24 months. These are reasonable proposals that are based on requirements the Commission found sensible enough to impose on Comcast/NBCU as a condition of approving its merger.[12]

Moreover, proceedings such as the Mediacom 2014 Petition for Rulemaking have elicited other vehicles for addressing the forced bundling practices of large media entities and ITTA commends those approaches to the Commission's attention. In particular, as ITTA has stated in the past, the public interest could be served by the creation of a mandatory a la carte option at

[12] *Applications of Comcast Corporation, General Electric Company and NBC Universal Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4358-63 (2011).

both the wholesale and retail level.[13] Under this approach, large media entities that are integrated with programmers would be required to offer MVPDs an economically viable option for purchasing programming on a standalone basis and MVPDs would be assured of the right to offer their customers the option of making standalone purchases of any service that the MVPD obtains on a standalone basis.

III. Penetration and Channel Placement Requirements Negatively Impact the Ability of MVPDs to Carry More Independent and Diverse Programming

The *NOI* asks about other practices that impact independent programmers, including minimum penetration requirements and channel placement mandates. In the experience of ITTA's members, the use of minimum penetration demands and channel placement requirements by large programmers consume capacity and limit the ability of distributors to fashion service offerings that best meet the needs and interests of their customers in diverse, independent content. When programming provided by large programmers must be carried on the most highly penetrated basic or expanded basic tiers, MVPDs have less capacity to carry diverse and independent programming on those tiers, and are unable to include large programmers' content in smaller and more tailored programming packages, which could highlight diverse programming.

The large media entities' programming demands come in a variety of forms. A programmer may condition carriage of its most popular programming on carriage of all or some subset of its programming on the most or second-most highly penetrated tiers. Or, for example, it may come in the manner of a "graduated license fee," in which the cost of a popular channel

[13] *See, e.g.*, Comments of ITTA, RM-11728 (Sep. 29, 2014) at 4; Comments of ITTA, OPASTCO, WTA, & RICA, MB Docket No. 07-198 (Jan. 4, 2008) at 11.

increases significantly if the programmer's weaker networks are not carried on the same tier as the more popular ones.

The a la carte and unbundling options described above could go a long way toward resolving these issues – the more flexibility that MVPDs have to arrange their program offerings, the more resources and capacity those MVPDs will have to carry and promote diverse and independent programming to the benefit of the public.

IV. The Commission has Ample Authority to Adopt Rules to Promote Diverse and Independent Programming

Section 628 of the Communications Act is designed to promote the public interest by increasing diversity in the video programming market – there is no reason this should not also apply to barriers independent programmers face in obtaining carriage. The Commission has previously found that it has authority to adopt rules to curb practices that deny consumers access to the programing of their choice.[14] The barriers put in place by large programmers that truly independent programmers face in obtaining carriage on MVPD systems operate effectively as limits on consumers' ability to obtain the programming they desire. The Commission's authority to adopt such rules under Section 628 is "broad and sweeping."[15] The D.C. Circuit found that this Section established a floor, rather than a ceiling, on the Commission's authority to adopt

[14] *E.g.*, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20244-46, ¶¶ 17-20 (Nov. 13, 2007).

[15] *Cablevision Systems Corp. v. FCC*, 649 F. 3d 695, 701 ("*Cablevision II*") *citing Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶¶ 40-41 (1993).

rules that proscribe anti-competitive conduct by programmers in their provision of programming.[16]

Section 616 provides a separate and similarly sweeping grant of authority for the Commission to adopt "regulations governing program carriage agreements and related practices between… multichannel video programming distributors and video programming vendors."[17] The same reasoning adopted by the D.C. Circuit to read Section 628 as including within its scope the practices of terrestrial programmers applies to the Commission's authority under Section 616. In both, while Congress may have been concerned with only one type of programmer (i.e., vertically integrated programmers) at the time of adoption, Congress understood that the competitive landscape may change, and so wrote these provisions using sufficiently expansive language to require the Commission to adopt rules based on a periodic evaluation of the current marketplace.[18] And the current marketplace is one where large programmers' use of forced bundling and tier placement mandates impede the ability of independent and diverse programmers to obtain MVPD carriage.

Finally, the Commission has previously cited Section 706 of the Telecommunications Act of 1996 as a source of Commission authority to adopt rules that remove barriers to investment in broadband deployment.[19] As indicated, bundling and tiering requirements can limit the resources

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[16] *Cablevision II,* 649 F. 3d at 705.

[17] 47 U.S.C. § 536(a).

[18] *Cablevision II*, 649 F.3d at 707. *See also Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage,* Memorandum Opinion and Order, 9 FCC Rcd 4415, ¶ 27 (1993).

[19] *See e.g.*, *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5721, ¶ 275 (2015).

that an MVPD has for investment in its broadband facilities as well as the capacity available for use in providing broadband service. Eliminating some of the costliest demands that large programmers make of MVPDs through bundling and tier mandates will reduce the rates that MVPDs and consumers pay for video programming, thereby allowing smaller, new entrant MVPDs such as ITTA's members to invest further in broadband deployment to the benefit of consumers.

CONCLUSION

ITTA urges the Commission to utilize the record compiled in response to the *NOI*, together with the records in related proceedings, to formulate and propose specific actions that proscribe the forced bundling and channel placement mandates that large media entities use to achieve preferred carriage and placement of their affiliated programming, thereby limiting the ability of MVPDs to carry more truly independent and diverse programming and compete more effectively.

Respectfully submitted,

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March 30, 2016