

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Annual Assessment of the Status of) **MB Docket No. 16-247**
Competition in the Market for the)
Delivery of Video Programming)

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

**Genevieve Morelli
Michael J. Jacobs
ITTA
1101 Vermont Ave., NW
Suite 501
Washington, D.C. 20005**

September 21, 2016

Table of Contents

I.	INTRODUCTION AND SUMMARY	1
II.	SMALLER AND NEW ENTRANT MVPDS CONTINUE TO ENDURE CHALLENGES WITH OBTAINING ACCESS TO CONTENT ON REASONABLE TERMS AND CONDITIONS AS WELL AS OTHER BARRIERS TO ENTRY	3
A.	Smaller and New Entrant MVPDs Continue to Experience Dramatically Increasing Fees and Discriminatory Terms in Negotiating for Video Content	4
B.	Other Regulatory Challenges Present Barriers to Entry for Smaller and New Entrant MVPDs.....	8
C.	Market Conditions Continue to Hinder Competition by Smaller and New Entrant MVPDs	9
III.	CONCLUSION.....	11

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)	MB Docket No. 16-247
)	

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

ITTA – The Voice of Mid-Size Communications Companies (ITTA) hereby submits its comments in response to the Media Bureau’s Public Notice seeking data, information, and comment on the state of competition in the market for the delivery of video programming in 2015, for the Commission’s Eighteenth Report.¹

I. INTRODUCTION AND SUMMARY

ITTA’s members are mid-size, incumbent local exchange carriers that provide a variety of communications services to subscribers in predominantly rural areas in 45 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, fiber infrastructure, and hybrid fiber-coaxial cable.² Collectively, ITTA members currently pass in excess of 9.4 million homes with video service and serve over two million video subscribers in approximately 55 television markets across the United States. In the vast majority of these

¹*Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, DA 16-896 (MB Aug. 5, 2016) (*Public Notice*).

² One ITTA member also resells DBS service in a number of markets throughout its footprint. However, the data and information provided in these comments relate strictly to ITTA members’ telco-based video offerings.

markets, ITTA members are new entrant multichannel video programming distributors (MVPDs) that compete head-to-head against DBS providers, at least one (and in some cases, two or three) incumbent cable operators, and online video providers (OVPs), such as Netflix, Hulu, Amazon Video, Apple TV, and others.

ITTA members 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, such as non-English language tiers, and enhanced features such 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, and whole-home DVR service, 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. Though advances in technology have made it possible for telco-based MVPDs to respond

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 fiber, DSL, and cable modem subscriptions. According to one ITTA member, over 95 percent of its video subscribers also purchase high-speed Internet service.

to consumer demand for video services,⁴ continuing regulatory uncertainty, such as the Commission's lack of action in the retransmission consent good faith proceeding, combined with challenges associated with the local franchising process and entrenched barriers to marketplace entry, have placed smaller and new entrant MVPDs at a competitive disadvantage relative to their larger counterparts.

II. SMALLER AND NEW ENTRANT MVPDS CONTINUE TO ENDURE CHALLENGES WITH OBTAINING ACCESS TO CONTENT ON REASONABLE TERMS AND CONDITIONS AS WELL AS OTHER BARRIERS TO ENTRY

The *Public Notice* seeks data, information, and comment on how the Commission's franchising, program access, retransmission consent and other regulations affect competition in the market for the delivery of video programming.⁵ It also seeks comment on the impact of market conditions on MVPD competition, specifying such conditions to include access to capital, economies of scale, first-mover advantages, access to content, and the responses of competitors.⁶

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

⁴ For instance, IPTV and fiber technology paved the way for ITTA members to more aggressively expand into video distribution starting as early as 2001. Most ITTA members, however, began offering video services more recently than 2001 – one as recently as 2008.

⁵ See *Public Notice* at Sec. II.A.(i).

⁶ *Id.*

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 MVPD, ITTA members recognize that a video product is an integral component to being a viable competitor in today's communications marketplace.

A. Smaller and New Entrant MVPDs Continue to Experience Dramatically Increasing Fees and Discriminatory Terms in Negotiating for Video Content

Despite the increase in competition in the video distribution 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 77 percent annually during the past few years,⁷ whereas prices for non-broadcast programming typically have risen no more than 10 percent per year during the same timeframe.⁸

⁷ One member reports a 900 percent increase since 2008.

ITTA acknowledges that these Comments are replete with unattributed references to ITTA member experiences in the market. Were it not for the non-disclosure provisions that ITTA members are forced to accept in retransmission consent and other program access negotiations

(continued...)

Indeed, to ITTA members, the single most significant cost issue that they face in the delivery of their video programming is the helium-infused trajectory of retransmission consent fees. Simply stated, 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 have all of the bargaining leverage when dealing with small and new entrant MVPDs.

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. ITTA members have been forced by one broadcaster, for example, to agree to carry its new, unlaunched, non-broadcast programming (if and when it is ready to launch) in order to secure retransmission consent for its broadcast programming. An ITTA member reports that one broadcaster tied retransmission rights in two top-20 DMAs to carriage of its national sports network in all of the member's video markets. Further, it is commonplace for ITTA members to be forced by broadcast networks to engage in coordinated retransmission consent negotiations. Despite Commission action a couple of years ago to limit joint negotiations by two big-four network affiliates in the same market,⁹

(Continued from previous page) _____
and agreements, *see infra* pp.6, 9-10, that function tantamount to gag orders, ITTA members would be happy to attribute such references.

⁸ One member reports a 37 percent rate increase in sports-related content.

⁹ *See Amendment of the Commission's Rules Related to Retransmission Consent, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014).*

coordinated negotiations continue to be problematic with respect to big-four stations that negotiate carriage on behalf of CW and MyNetwork TV affiliates.

Compounding this litany of problems with the retransmission consent regime is the Commission's inaction in the rulemaking proceeding mandated by Congress to examine reforms to it. Not only is regulatory reform not on the horizon,¹⁰ but the existing retransmission consent complaint process is not a feasible avenue for relief for smaller and new entrant MVPDs. Besides being prohibitively costly and time consuming, the ability to pursue regulatory relief is hampered by mandatory non-disclosure provisions typically found in retransmission consent negotiations and agreements. These provisions prohibit MVPDs from revealing the contract rates, terms and conditions that are subject to dispute. This lack of transparency has become a valuable tool in the broadcasters' arsenal to silence smaller MVPDs through the threat of litigation.

The challenges associated with obtaining access to content on reasonable rates, terms and conditions are not limited to negotiations for broadcast programming. ITTA members experience the same problems with tying in their negotiations with large programmers for non-broadcast programming as they do with respect to broadcast programming.¹¹ Large and vertically-integrated programmers routinely tie access to must-have programming, including non-replicable sports programming, to their other less attractive programming. Moreover, in

¹⁰ See FCC Chairman Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC Blog (July 14, 2016, 10:37 AM), <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules> (announcing that Commission would not "at this time" adopt additional rules governing good faith negotiations for retransmission consent, and instead would rely on the complaint and enforcement processes to address allegations of bad faith in retransmission consent negotiations).

¹¹ One ITTA member company asserts that this occurs "100% of the time" in its negotiations for non-broadcast programming.

many cases those programmers attach penetration requirements to such programming, which forces small MVPDs to place the programmers' entire content bundle on the MVPD's basic tier, thereby causing capacity constraints and forcing subscribers to pay more to gain access to more desirable programming that has been relegated to specialty tiers.

Small and new entrant MVPDs also have endured other forms of tying. Some ITTA members have been subject to broadband tying by a certain sports network, whereby they are required to pay per-subscriber fees for their broadband customers, regardless of whether the customers subscribe to video service or access the sports network at all. Some ITTA members also have been forced prematurely into negotiations for must-have programming, such as the renewal of a regional sports network contract which was not yet due for renewal, at the same time as it was negotiating for renewal of affiliated must-have programming by the same content owner.

These marketplace distortions have real-world effects on the programming available to MVPD consumers. One ITTA member ceased offering video service in two markets last year primarily due to unsupportable programming fees. Sometimes, the fees being demanded are so exorbitant that even the largest MVPDs cannot reasonably carry the subject programming. In an example from this past Spring which received significant public attention, AT&T, DISH and Cox, in addition to ITTA member Frontier, were deterred from carrying the Los Angeles Dodgers' channel due to content cost considerations.¹²

¹² See Meg James, *Frontier, Time Warner Cable to Discuss Dodger Channel Distribution*, L.A. Times, May 3, 2016, <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-frontier-twc-dodger-channel-20160503-snap-story.html> (last visited Sept. 20, 2016) ("Only Time Warner Cable and Charter Communications distribute SportsNet LA. Other pay-TV providers, including AT&T (which owns DirecTV), Dish Network and Cox Communications, which serves Palos Verdes and Orange County, have refused to carry the channel, citing its high cost.").

B. Other Regulatory Challenges Present Barriers to Entry for Smaller and New Entrant MVPDs

As new entrants, some ITTA members have experienced barriers to entry through onerous local franchising requirements that add significantly to deployment costs. For instance, one ITTA member has been subject to local communities attempting to assess VoIP fees as part of video franchise negotiations. Another reports local franchise authorities (LFAs) extracting monetary grants or free high-speed Internet service from new entrant MVPDs. It further cites local ordinances that require the MVPD to pay all costs – including the LFA’s outside attorney and consultant fees – related to the franchise application and negotiation process, and notes that these negotiations at times have gone on much longer than expected, resulting in significant unexpected costs to acquire the franchise.

ITTA members also have encountered efforts by competitors to thwart competition via disingenuous intervention in the local franchise approval process. For instance, during the Commission’s consideration this past Spring of the acquisition by Charter of Time Warner Cable, Frontier detailed Charter’s aggressive tactics in seeking to delay Frontier’s entry into the Farmington, Minnesota market, where Charter asked the City of Farmington to reject Frontier’s local franchise application or impose unduly burdensome conditions, including unrealistic build-out obligations, and threatened Farmington with legal action if it approved Frontier’s franchise application.¹³ ITTA members also have fallen victim to legacy state cable franchising laws that

¹³ See Letter from Kathleen Q. Abernathy, Executive Vice President, External Affairs, Frontier Communications, to Chairman Tom Wheeler et al., Federal Communications Commission, MB Docket No. 15-149 (filed May 5, 2016).

require LFAs to impose excessive build-out obligations that the LFAs could not otherwise impose on their own due to Commission preemption of their doing so.¹⁴

Furthermore, ITTA members have encountered efforts by competitors to impede access to wiring in multiple dwelling unit (MDU) facilities that is required by law to ensure that consumers in apartment buildings and similar places can obtain video service from a competing provider. 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 franchising requirements, an entrenched provider's manipulation of franchising processes, or outright flouting of the Commission's requirements with respect to competitive access to MDUs.

C. Market Conditions Continue to Hinder Competition by Smaller and New Entrant MVPDs

In addition to challenges presented by the Commission's regulations, 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 or other favorable carriage terms and conditions.¹⁵ This competitive disparity is then compounded by the shrouding of these rates, terms and conditions in mystery through non-disclosure provisions, as discussed above. Some ITTA members also report being unable to obtain contract provisions that allow disclosure of rates, terms and conditions even to an independent auditor.

¹⁴ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007).

¹⁵ See, e.g., Joint Reply Comments of the Networks for Competition and Choice Coalition – INCOMPAS, ITTA, NTCA, and Public Knowledge -- and the Open Technology Institute at New America, MB Docket No. 15-216, at 24 (Jan. 14, 2016); ITTA Reply Comments, MB Docket No. 15-149, at 6-7 (Nov. 12, 2015) (both describing price discrimination between large MVPDs, who are able to secure volume discounts, and new entrants and smaller MVPDs).

Relatedly, due to their limited negotiating leverage which itself is attributable to their smaller scale, ITTA members are unable to secure Most Favored Nation (MFN) economic and non-economic provisions in contracts with broadcasters and/or other large programmers.¹⁶ Further, even in the highly unusual event they are successful in securing an MFN, non-disclosure provisions prevent ITTA member companies from verifying whether they really are receiving the most competitive rates, terms and conditions.

Smaller and new entrant MVPDs cannot afford the prolonged blackouts that larger providers can withstand. The threat of blackouts, however, is being wielded against smaller and new entrant MVPDs. Two ITTA member companies, for instance, report the same non-broadcast programmer having threatened, during contract renewal negotiations, to black out its channel immediately before commencement of a new season of a popular original program aired by that channel. Similarly, subscribers of several ITTA member companies have had access to non-broadcast programmers' online content blocked during negotiation impasses. Without access to must-have programming, subscribers will defect to the competition. Once a customer switches to another provider, it is difficult (if not impossible) to win back the customer. ITTA member companies, with their smaller customer bases, cannot absorb such subscriber defections and have no choice but to accede to increased content fees and unreasonable terms in order to remain in the market.

ITTA members are also hampered by having been forced to accept limitations on their subscribers' use of lawful devices and/or functionalities to access programming. For instance,

¹⁶ Some ITTA members have had some success in obtaining these provisions in contracts with smaller and independent programmers. However, the subject programming usually does not rise to the level of must-have programming, and such provisions tend to be limited to non-economic terms.

one ITTA member reports being subject to agreements limiting the types and number of “approved devices” for customers to use when accessing streaming content inside and outside the home. Moreover, some contracts limit or prohibit the use of DVR-type functionality, e.g., fast-forwarding through commercials on recorded content. Another member reports the inability to obtain for its subscribers *any* streaming rights outside the home, leading to a significant competitive disadvantage vis-à-vis OVPs and other providers. Yet another cites, in negotiations for streaming rights, restrictions on the use of wireless devices to access programming. It also depicts how if it pursues such rights as a contract amendment, it is pushed to renew its contracts and be subject earlier than otherwise to the higher content costs that inevitably come with renewal.

The end result of all of the aforementioned gambits is clear: market conditions continue to place tremendous barriers to the ability of smaller and new entrant MVPDs to compete. If the Commission truly wishes to promote pro-competitive policies in video markets – which also bestow collateral benefits in promoting other policy goals¹⁷ – it must adopt more comprehensive and effective pro-competition measures.

III. CONCLUSION

In sum, ITTA urges the Commission to acknowledge the challenges smaller and new entrant MVPDs continue to experience with obtaining access to content on reasonable rates, terms and conditions. Such challenges, as well as other barriers to entry, are due to Commission regulations, difficulties with local franchising processes, and marketplace conditions, and have placed smaller and new entrant MVPDs at a competitive disadvantage relative to their larger counterparts. It is not enough that the Commission merely recognize the competitive distortions

¹⁷ See *supra* n.3.

caused by regulatory and market conditions in reporting on the state of competition in the market for the delivery of video programming in 2015. Using this information, the Commission must move forward with long overdue reform of its video rules, in order to restore balance to negotiations for video content, address the rising costs of programming for MVPDs and their customers, minimize the harm and disruption 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.

Respectfully submitted,

By: /s/ Genevieve Morelli

Genevieve Morelli
Michael J. Jacobs
ITTA
1101 Vermont Ave., NW, Suite 501
Washington, D.C. 20005
(202) 898-1520
gmorelli@itta.us
mjacobs@itta.us

September 21, 2016