

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

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

**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 Commission’s Notice of Proposed Rulemaking on promoting the availability of diverse and independent sources of video programming.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

ITTA’s members provide a variety of communications services, including video, voice, and high speed data, to subscribers in predominantly rural areas in 43 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 markets 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.

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<sup>1</sup> See *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, 31 FCC Rcd 11352 (2016) (*NPRM*).

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 *NPRM* that are of particular concern are unconditional most-favored nation (MFN) provisions and forced bundling. Unconditional MFN provisions in carriage agreements between large MVPDs and independent video programming vendors ultimately inhibit carriage deals between such vendors and smaller MVPDs. Forced bundling of unwanted channels, especially by large programmers, is directly responsible for displacing independent programming.<sup>2</sup> ITTA encourages the Commission to adopt its proposed ban on unconditional MFN provisions, and to address the anticompetitiveness of forced bundling through adoption of an unbundling mandate or a mandatory a la carte option.

## **II. DISCUSSION**

### **A. The Commission Should Adopt a Narrower Definition of “Independent Video Programming Vendors”**

In the *NPRM*, the Commission recounts widespread concern among commenters on the *NOI* that the *NOI*’s proposed definition of “independent programmer,” merely as a programmer that is not vertically integrated with an MVPD, is unduly broad and would include established programmers that control a significant share of the video programming marketplace and have bargaining leverage in carriage negotiations. In light of such concerns, the Commission seeks

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<sup>2</sup> In its comments on the Notice of Inquiry that initiated this proceeding, ITTA also expressed concerns regarding penetration and channel placement mandates, which require carriage of channels on the most highly penetrated tiers and likewise displace independent programming on those tiers. *See* ITTA NOI Comments at 7-8; *see also Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd 1610 (2016) (*NOI*). Though ITTA remains concerned with these practices and encourages the Commission to address them through rulemaking action, ITTA does not address these practices here insofar as the *NPRM* does not seek comment on them.

comment on whether the term “independent video programming vendor” should be defined more narrowly for purposes of this proceeding to reflect that certain large programmers that are not vertically integrated with an MVPD nevertheless do not confront the same barriers in securing carriage for their content as smaller programmers.<sup>3</sup> ITTA responds with a resounding yes. More specifically, ITTA continues to believe that the Commission should define an independent video programming vendor as a video programming vendor that is not affiliated with a broadcast network, movie studio, or MVPD.<sup>4</sup>

### **B. Forced Channel Bundling by Large Programmers Harms Independent Programmers and Programming Diversity**

In the *NPRM*, the Commission seeks further comment on bundling practices by video programming vendors.<sup>5</sup> Among other specific questions, the Commission asks how bundling practices affect MVPDs’ ability to carry independent programmers, whether programmers insist on bundling even with respect to capacity-constrained MVPDs, what the impact of bundling is on small MVPDs relative to large ones, and how bundling affects consumer costs, choice, and access to diverse programming.<sup>6</sup>

As has been shown numerous times by ITTA and others, large programmers leverage their marquee programming to force MVPDs to carry additional channels with little or no consumer demand.<sup>7</sup> 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

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<sup>3</sup> *NPRM*, 31 FCC Rcd at 11360-61, para. 16.

<sup>4</sup> *See id.* at 11361, para. 17 (citing ITTA NOI Comments at 3).

<sup>5</sup> *NPRM*, 31 FCC Rcd at 11370, para. 33. The Commission sought comment in the *NOI* on the impact of program bundling practices on carriage by MVPDs of independent programming. *See NOI*, 31 FCC Rcd at 1616-18, paras. 15-18.

<sup>6</sup> *NPRM*, 31 FCC Rcd at 11370, para. 33.

<sup>7</sup> *See, e.g.*, Comments of ITTA, RM-11728, at 3 (Sept. 29, 2014) (ITTA 2014 Rulemaking Petition Comments).

programming, and often results in MVPDs displacing independent and diverse programming with less desirable programming.

The Commission has long recognized the conundrum that forced bundling (tying) presents particularly for smaller MVPDs. For instance, in an NPRM over nine years ago in dockets established to promote development of competition and diversity in video programming distribution, and to examine programming tying arrangements, the Commission explained:

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 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 . . . 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.<sup>8</sup>

The adverse impact of bundling and possible actions that the Commission could take to address those concerns also 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.<sup>9</sup>

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

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<sup>8</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket Nos. 07-29 and 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17862, para. 120 (2007).

<sup>9</sup> See generally ITTA 2014 Rulemaking Petition Comments.

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 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 petition for rulemaking 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.<sup>10</sup> 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 petition for rulemaking acknowledged “its discussions with mid-size, independent [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.”<sup>11</sup> 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

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<sup>10</sup> See Comments of NTCA – The Rural Broadband Association, RM-11728, at 4 (Sept. 29, 2014).

<sup>11</sup> Comments of Rural Media Group, RM-11728, at 1 (Sept. 29, 2014).

other services – services that consumers increasingly demand and that can add to the diversity of content available to consumers.

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 that are passed on to consumers, 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 individual offers for any programming offered by the programmer at prices that represent a real economic alternative to a bundle, or 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.<sup>12</sup>

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

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<sup>12</sup> See *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, 4358-61, 4364, Appx. A at Secs. III-IV.B, VII.A (2011).

both the wholesale and retail level.<sup>13</sup> 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.

**C. The Commission Should Prohibit Unconditional MFN Provisions in Program Carriage Agreements Between MVPDs and Independent Video Programming Vendors**

In the *NPRM*, the Commission proposes to define an unconditional MFN provision as “a provision that entitles an MVPD to contractual rights or benefits that an independent video programming vendor has offered or granted to another video programming distributor, without obligating the MVPD to accept any terms and conditions that are integrally related, logically linked, or directly tied to the grant of such rights or benefits in the other video programming distributor’s agreement, and with which the MVPD can reasonably comply technologically and legally.”<sup>14</sup> The Commission tentatively concludes that the potential harms to competition, diversity and innovation resulting from unconditional MFN provisions outweigh any potential public interest benefits, and proposes to adopt a rule prohibiting the inclusion of unconditional MFN provisions in carriage agreements between MVPDs and independent video programming vendors.<sup>15</sup> ITTA supports these conclusions and proposals.

The record accurately reflects that MFN provisions that are unconditional can and do lead to numerous public interest harms. For example, they narrow the distribution of independent

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<sup>13</sup> See, e.g., ITTA 2014 Rulemaking Petition Comments at 4; Comments of ITTA, OPASTCO, WTA, & RICA, MB Docket No. 07-198, at 11 (Jan. 4, 2008).

<sup>14</sup> *NPRM*, 31 FCC Rcd at 11362, para. 18. “Video programming distributor,” as used under this definition, includes both traditional MVPDs and alternative video programming distributors such as online video distributors (OVDs). *Id.* at 11362, para. 18 n.80.

<sup>15</sup> See *id.* at 11362, 11364, paras. 18, 20.

programming by reducing a programmer's economic incentive to grant certain rights to smaller MVPDs or OVDs, because doing so would obligate it to offer such rights to an MVPD with MFN status for no incremental consideration.<sup>16</sup> As a consequence, independent programmers forfeit revenue growth and lose the ability to launch new or innovative program offerings, leading to the demise or weakening of independent networks, and ultimately resulting in less diversity in sources and programming available to consumers.<sup>17</sup> Independent video programming vendors, properly defined,<sup>18</sup> are particularly in need of protection from unconditional MFN provisions because of their lack of bargaining leverage especially as compared to large MVPDs. In this regard, unconditional MFN provisions effectively forced upon truly independent programmers are precisely the type of scheme that Congress sought to inhibit in adopting Section 616 of the Communications Act of 1934, as amended (Act),<sup>19</sup> which was driven by Congress' concern "that MVPDs may be able 'to extract concessions from programmers' which 'could discourage entry of new programming services, restrict competition, impact adversely on diversity, and have other undesirable effects on program quality and viewer satisfaction.'"<sup>20</sup> In contrast, no public interest benefits are derived from making MFN provisions unconditional.<sup>21</sup>

The public interest dictates that the Commission prohibit unconditional MFN provisions that apply to a full range of video programming distributors, not merely those that apply to terms

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<sup>16</sup> See *id.* at 11357, 11363, paras. 10 & n.36, 19 n.84.

<sup>17</sup> See *id.* at 11357, para. 10 & n.38.

<sup>18</sup> See *supra* Sec. II.A.

<sup>19</sup> 47 U.S.C. § 536.

<sup>20</sup> *NPRM*, 31 FCC Rcd at 11371, para. 35 (quoting H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 42-43 (1992)).

<sup>21</sup> See *id.* at 11364, para. 20.



negotiated with OVDs.<sup>22</sup> The Commission’s proposed definition of an unconditional MFN provision takes this into account in its further definition of “video programming distributor.”<sup>23</sup> While ITTA supports the Commission’s proposed definition of an unconditional MFN provision, ITTA also encourages the Commission to adopt rules that address MFN provisions that are partially unconditional or effectively discourage wider distribution of content. Such provisions likewise run counter to the purposes of Section 616 of the Act, as discussed above.

### **III. CONCLUSION**

As a threshold matter, the Commission should adopt a narrower definition of “independent video programming vendors” than it effectively proposed in the *NOI* in this proceeding. This definition should be used in any relief the Commission confers upon truly independent video programming vendors in this proceeding, including the prohibiting of inclusion of unconditional MFN provisions in program carriage agreements between MVPDs and independent video programming vendors. The Commission also should ban forced channel bundling and require video programming vendors of all sizes to offer programming on a standalone basis. These actions collectively will serve to curb the abuses wrought especially by large MVPDs on the one hand and large video programming vendors on the other – abuses catching smaller and new entrant MVPDs, as well as truly independent video programming

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<sup>22</sup> *See id.* at para. 21.

<sup>23</sup> *See supra* note 14.

vendors, in the crosshairs, undermining availability of diverse and innovative video programming, ultimately to the detriment of consumers who seek it.

Respectfully submitted,

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