

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

In the Matters of)	
)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)	MB Docket No. 17-214
)	
Promoting the Availability of Diverse and Independent Sources of Video Programming)	MB Docket No. 16-41
)	
Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard)	GN Docket No. 16-142
)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014)	MB Docket No. 15-216
)	
Totality of the Circumstances Test)	

**COMMENTS OF
ITTA – THE VOICE OF AMERICA’S BROADBAND PROVIDERS**

ITTA – The Voice of America’s Broadband Providers (ITTA) hereby submits its comments in response to the Media Bureau’s Public Notice seeking comment on the state of competition in the market for the delivery of video programming for the Commission’s Nineteenth Report.¹

I. SMALLER AND NEW ENTRANT MVPDS CONTINUE TO EXPERIENCE SOARING FEES AND DISCRIMINATORY TERMS IN NEGOTIATING FOR VIDEO CONTENT

The *Public Notice* seeks comment on the impact of programming prices and retransmission consent fees on multichannel video programming distributor (MVPD) business

¹*Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, DA 17-797 (MB Aug. 24, 2017) (*Public Notice*).

models and competitive strategies.² The impact remained profound in 2016. The Commission's lack of action in the retransmission consent good faith proceeding and to combat anticompetitive forced program tying, combined with challenges associated with entrenched barriers to marketplace entry, perpetuated the competitive disadvantage suffered by smaller and new entrant MVPDs relative to their larger counterparts.³

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 latter is particularly stark.⁴ Indeed, to ITTA members, the single most significant cost issue that they

² *See id.* at 5, Sec. II.A.1.

³ ITTA's members are incumbent local exchange carriers that provide a variety of communications services to subscribers in predominantly rural areas in 43 states. In addition to voice and high-speed data offerings, most ITTA members provide video service to subscribers utilizing a variety of distribution platforms. Collectively, ITTA MVPDs currently serve fewer than one million video subscribers across the United States. In the vast majority of these markets, ITTA members are new entrant 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 distributors (OVDs), such as Netflix, Hulu, Amazon Video, Apple TV, YouTubeTV, and others.

The *Public Notice* asks whether bundles of video, Internet, and voice services help attract and retain video subscribers. *See id.* at 5. 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.

⁴ The most recent official Commission statistics on soaring retransmission consent fees evinces a 63 percent increase from 2013 to 2014. *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 31 FCC Rcd 11498, 11512-13, para. 25 & Tbl. 10, *Retransmission Consent Compensation* (MB 2016). The pace has continued with 40 percent annual increases over the last three years, amounting to a 2,426 percent increase over the past decade. American Television Alliance (ATVA), *As Football Season Kicks Off, TV Blackout Season Kicks Into High Gear* (Sept. 7, 2017), *Broadcasters Jack Up Fees While Ratings Plummet* (July 19, 2017), <http://www.americantelevisionalliance.org/category/press-releases/>. In contrast, prices for non-broadcast programming, while also consistently increasing at an exorbitant rate, tend to do so at

(continued...)

face in the delivery of their video programming is the unbounded 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 skyrocketing retransmission consent fees, but also in other negotiating trends. As ITTA and others have indicated in the past, smaller and new entrant MVPDs are commonly forced to accept program tying, where retransmission of broadcast stations is conditioned upon carriage of less popular multicast channels or affiliated non-broadcast content.⁵ The problem is pernicious in rural areas, presenting the double-edged sword of artificially raising the price of video service offerings for rural consumers while providing them less of the programming they demand.⁶ This problem did not abate in 2016, and there has been no sign that

(Continued from previous page) _____

no more than 10 percent per year, and one ITTA member forecasts that to continue in this year's renewal cycle.

⁵ For example, one ITTA member reports that nearly all of its retransmission consent agreements require it to carry, at a minimum, one multicast channel, and most require it to carry all of the station's multicast channels. Another ITTA member reports that one broadcaster, during last year's retransmission consent negotiations, forced it 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.

⁶ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 582, para. 33 (MB 2017) (*18th Report*) (citing ITTA and NTCA comments in *18th Report* proceeding); see also *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) (describing the conundrum that forced tying presents, particularly for smaller MVPDs, forcing them either to forego marquee programming critical for subscriber attraction and retention, or to incur costs for and devote channel capacity to programming their subscribers do not demand, thereby harming subscribers); Comments of NTCA – The Rural Broadband Association, RM-

(continued...)

the regulatory intervention that is warranted is forthcoming. The 18th Report addressed the scourge of forced program tying in merely one paragraph, appearing to relegate more extensive treatment of the issue to the pending Independent Programming proceeding.⁷ There has been no indication, however, that action in that proceeding is a current Commission priority.

Furthermore, it is commonplace for ITTA members to be forced by broadcast networks to engage in coordinated retransmission consent negotiations, despite Commission action a few years ago to limit joint negotiations by two big-four network affiliates in the same market.⁸

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.⁹ 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

(Continued from previous page) _____

11728, at 4 (Sept. 29, 2014) (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).

⁷ See 18th Report, 32 FCC Rcd at 582, para. 33 (citing *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, 31 FCC Rcd 11352 (2016) (*Independent Programming NPRM*)).

⁸ 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).

⁹ *Public Notice* at 10, Sec. V (seeking comment on “the regulations that have the most significant potential for impact on competition in the market for the delivery of video programming”).

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). Unfortunately, ITTA is unaware of any public statements by Chairman Pai suggesting that a change in course is contemplated. If anything, the widely speculated upcoming relaxation of the Commission's local TV ownership rules would exacerbate the situation by conferring upon large station group owners the ability to acquire more “top-four” stations in local markets, and thereby enjoy even greater leverage in retransmission consent negotiations with smaller MVPDs.

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.

Moreover, the impending transition to the next generation ATSC 3.0 broadcast television standard is beginning to provide new ground for retransmission consent abuses. Broadcasters are seizing upon the retransmission consent process to compel MVPD carriage of ATSC 3.0 streams before MVPDs are prepared to undertake the costly equipment upgrades necessary to enable carriage of ATSC 3.0 signals. As ATVA has depicted:

[M]ultiple broadcasters have already demanded that multiple ATVA members carry ATSC 3.0 signals during recent retransmission consent negotiations. In doing so, broadcasters have explicitly sought to tie continued carriage of their ATSC 1.0 signals with carriage of the new ATSC 3.0 signals. In some cases, broadcasters have demanded that MVPDs carry the entire 6MHz of the allotted ATSC 3.0 spectrum—no matter what service the broadcaster chooses to deploy using that spectrum. These demands, by their terms, contemplate carriage of non-broadcast services.¹¹

Unless the Commission takes remedial action in its ATSC 3.0 proceeding,¹² the transition to ATSC 3.0 will continue to magnify the problems smaller and new entrant MVPDs endure as a result of the flawed retransmission consent regime.

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-

¹¹ Letter from Mike Chappell, Executive Director, ATVA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1 (filed Mar. 20, 2017).

¹² See *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Notice of Proposed Rulemaking, 32 FCC Rcd 1670 (2017); ITTA Comments, GN Docket No. 16-142, at 6-10 (May 9, 2017).

broadcast programming, such as “must-have” sports programming, as they do with respect to broadcast programming.¹³ Moreover, like other rural MVPDs,¹⁴ ITTA members suffer tier placement requirements, pursuant to which, for instance, small MVPDs are forced to place content bundles on their basic tier, thereby causing subscribers to pay more to gain access to more desirable programming that must be shifted to specialty tiers. Again, the *18th Report* deferred treatment of these issues to the likely moribund Independent Programming proceeding.¹⁵

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. Thus, the reality is that the dramatically increasing fees and discriminatory terms that smaller and new entrant MVPDs continue to experience in negotiating for video content are not the by-products of a competitive market naturally producing winners and losers; rather, they are hallmarks of market failure. Regulatory intervention is necessary to redress them if the Commission is serious about promoting competition and diversity in multichannel video markets, as it is statutorily required to do.¹⁶

¹³ In this regard, MVPDs, such as ITTA’s members, that are not vertically integrated in video offerings are at an immense competitive disadvantage relative to MVPDs that are vertically integrated with large programmers, whether broadcast or non-broadcast. *See Public Notice* at 5, Sec. II.A.1 (seeking comment on whether this is the case).

¹⁴ *See 18th Report*, 32 FCC Rcd at 582, para. 33.

¹⁵ *See id.*

¹⁶ *See Public Notice* at 1, Sec. I (citing 47 U.S.C. § 548); *see also id.* at 10, Sec. V (seeking comment on whether there are particular regulations that impact some types of distributors more than others).

II. MARKET CONDITIONS CONTINUE TO HINDER COMPETITION BY SMALLER AND NEW ENTRANT MVPDS

The *Public Notice* seeks comment on the impact of marketplace conditions on MVPD competition, innovation, and investment.¹⁷ As new entrants, some ITTA members have experienced barriers to entry through onerous local franchising requirements that add significantly to deployment costs. ITTA members also have fallen victim to legacy state cable franchising laws that require local franchise authorities (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.¹⁸

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.

The *Public Notice* also seeks comment on whether large MVPDs have a competitive advantage relative to smaller MVPDs.¹⁹ ITTA members are at a competitive disadvantage vis-à-vis larger competitors that can lower their content costs and mass advertising rates by availing

¹⁷ See *id.* at 5, Sec. II.A.1.

¹⁸ 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).

¹⁹ See *Public Notice* at 5, Sec. II.A.1.

themselves of volume discounts or other favorable carriage terms and conditions.²⁰ 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 have reported being unable to obtain contract provisions that allow disclosure of rates, terms and conditions even to an independent auditor.

Relatedly, due to the limited negotiating leverage 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.²¹ 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, has been wielded against smaller and new entrant MVPDs. Similarly, subscribers of several ITTA member companies have had access to non-broadcast programmers' online content blocked during negotiation impasses. As discussed above,²² without access to marquee programming, subscribers will defect to the competition, but ITTA member companies, with their smaller customer bases, cannot absorb

²⁰ *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).

²¹ 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.

²² *See supra* p.6.

such subscriber defections and have no choice but to accede to unreasonable programmer demands 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. Moreover, some contracts limit or prohibit the use of DVR-type functionality, e.g., fast-forwarding through commercials on recorded content.

The end result of all of the aforementioned gambits is clear: market conditions continue to place tremendous limitations on the ability of smaller and new entrant MVPDs to compete. If the Commission truly wishes to promote pro-competitive policies in video markets – which bestow collateral benefits in promoting other important policy goals²³ – 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. But it is not enough that the Commission merely recognize the competitive distortions caused by regulatory and market conditions in reporting on the state of competition in the market for the delivery of video programming in 2016. 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

²³ See *supra* n.3.

increased broadband investment and other advantages that stem from increased competition in the video marketplace.

Respectfully submitted,

By: /s/ Michael J. Jacobs

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

October 10, 2017