

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Rulemaking to Amend the)	MB Docket No. 10-71
Commission’s Rules Governing)	
Retransmission Consent)	

COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project (“MAP”) respectfully submits these comments in response to the Media Bureau’s *Public Notice*¹ seeking comment on a Petition for Rulemaking² to amend the Commission’s rules governing retransmission consent negotiations. MAP agrees with the petitioners that reform of the retransmission consent regime is necessary, but urges the Commission to take a more holistic approach to reforming all rules governing programming negotiations between and among multichannel video programming distributors (“MVPDs”) and content providers. Thus, while MAP generally supports consideration and implementation of the remedies that the Petition for Rulemaking proposes for retransmission consent, MAP also submits that the Commission should adopt the same reforms for its program access and program carriage rules.

¹ “Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent,” MB Docket No. 10-71, *Public Notice*, DA 10-474 (rel. Mar. 19, 2010) (the “*Public Notice*”).

² Time Warner Cable *et al.*, Petition for Rulemaking, MB Docket No. 10-71 (filed Mar. 9, 2010) (“Petition for Rulemaking” or “Petition”). The fourteen parties that jointly filed the Petition for Rulemaking included twelve multichannel video programming distributors (“MVPDs”) or associations representing MVPDs (American Cable Association; Bright House Networks, LLC; Cablevision Systems Corp.; Charter Communications, Inc.; DIRECTV, Inc.; Dish Network LLC; Insight Communications Company, Inc.; Mediacom Communications Corp.; OPASTCO; Suddenlink Communications; Time Warner Cable; and Verizon) along with two public interest organizations (New America Foundation and Public Knowledge).

INTRODUCTION

Over the years, MAP and numerous other entities have sought reform of the Commission's retransmission consent and program access rules.³ In fact, the Commission already has issued a *Notice of Proposed Rulemaking* (the "2007 NPRM") seeking comment on whether reforms to these rules are necessary.⁴ In addition to disposing of other issues, the 2007 NPRM sought comment on: (1) the terrestrial loophole;⁵ (2) exclusive contracts for non-cable affiliated programming; (3) tying of desired programming with undesired programming, both by cable programmers and broadcasters;⁶ (4) conditions imposed by programmers for carriage; and (5) modification of the program access complaint procedures. The new Petition for Rulemaking raises several issues that are similar to those discussed in the 2007 NPRM, and on which the

³ See, e.g., *Ex Parte Notice* of Consumers Union, Free Press, Media Access Project, and Public Knowledge, MB Docket 07-198 (filed July 25, 2008) ("MAP *Ex Parte*"); *Ex Parte Notice* of OPASTCO, MB Docket No. 07-198 (filed Aug. 15, 2008) ("OPASTCO *Ex Parte*"); Comments of American Cable Association, MB Docket No. 07-198 (filed Jan. 3, 2008) ("ACA Comments").

⁴ See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, MB Docket Nos. 07-29 & 07-198, *Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, ¶¶ 115-137 (2007) ("2007 NPRM").

⁵ While the Commission has since resolved the terrestrial loophole issue, the other issues remain unresolved. See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-198, *First Report and Order*, 25 FCC Rcd 746 (2010).

⁶ MAP and others previously have argued that programmers, by tying popular programming with less popular programming, use this leverage to command a greater proportion of an MVPD's capacity and better channel positions. In this manner, programmers gain prime carriage slots for content that MVPDs do not want to carry, but that they must accept as a condition for carrying more popular programming. See, e.g., MAP *Ex Parte* at 1; OPASTCO *Ex Parte* at 2-3; ACA Comments at 12, 16-17 (stating that tying hinders the ability of MVPDs to purchase stand-alone programming under reasonable conditions, thereby preventing such MVPDs from being competitive and offering diverse programming). This practice of tying also hurts minority and independent programmers that vie for space on cable systems, as minority and independent programming most typically is not included in the programming giants' bundles. See MAP *Ex Parte* at 1.

Commission already has sought comment, with respect to programming negotiations governed by the Commission's program access rules and program access complaint procedures.

Although the Petition for Rulemaking seeks Commission reform solely of the retransmission consent rules, there is no reason to address only one of the "broken"⁷ regulatory regimes, nor to ignore the "mounting consumer harms"⁸ that result from ineffective rules and complaint procedures governing retransmission consent, program access, *and* program carriage negotiations. MAP urges the Commission to act on the Petition for Rulemaking but also to resolve this pending proceeding, and to adopt reforms akin to those urged in the Petition for Rulemaking not only for the Commission's retransmission consent rules but for its program access and program carriage regimes as well.

The Petition primarily suggests reform of the dispute resolution process that negotiating parties may utilize when retransmission consent negotiations break down. It seeks the creation of an interim carriage "standstill" provision to preserve the status quo during a dispute,⁹ and calls for binding arbitration or the creation of an expert tribunal to assess the reasonableness of rates demanded by parties to programming negotiations.¹⁰ The Petition also requests further scrutiny of the practice of tying or bundling programming channels together, effectively forcing distributors to agree to carriage of multiple channels in order to obtain any of the content providers' offerings.¹¹ MAP agrees with the Petition's contention that the Commission should examine and reform the current retransmission consent rules by adopting such dispute resolution procedures and analyzing the reasonableness of tying. However, the Commission should not

⁷ Petition for Rulemaking at 1.

⁸ *Id.* at 30.

⁹ *See id.* at 35-37.

¹⁰ *See id.* at 32-33.

¹¹ *See id.* at 34-35.

evaluate broadcast retransmission issues in a vacuum, and should adopt the Petition's proposed reforms for its retransmission consent, program access, and program carriage rules.

I. THE COMMISSION SHOULD ADOPT THE PROPOSED REFORMS FOR RESTRANMISSION CONSENT, BUT SIMULTANEOUSLY ADOPT THE SAME REMEDIES FOR PROGRAM ACCESS AND PROGRAM CARRIAGE RULES.

Recent events have demonstrated conclusively what several submissions¹² in the 2007 *NPRM* proceeding contended: the entire multichannel video programming market is in need of reform, not just the retransmission consent rules and the broadcast programming negotiations that they cover. Refusals to deal, brinksmanship consisting of threats to pull signals, and the resulting long-term denial of content or the actual short-term loss of programming for which MVPD subscribers have paid, do not just affect broadcast retransmissions. Time Warner Cable subscribers faced the potential loss of their Fox signals and desired sports programming around New Year's Day in 2010,¹³ but prior to the Commission's action in the terrestrial loophole order subscribers to competitive MVPDs routinely lost out on news and sports programming produced and controlled by incumbent cable operators.¹⁴ Cablevision subscribers missed several minutes of the Academy Awards broadcast in March because of a decision by the New York City ABC station,¹⁵ but this same cable operators' subscribers lost out on nearly *three weeks* of programming on the Food Network and HGTV channels when Cablevision – the MVPD, not the

¹² See, e.g., ACA Comments at 18-26; *Ex Parte Notice* of Consumers Union, MB Docket No. 07-198, at 1 (filed Aug. 12, 2008).

¹³ See Petition for Rulemaking at 25, 28-29.

¹⁴ See, e.g., John Eggerton, "AT&T Strikes Out On Program-Access Complaint Over Cox San Diego Service," *Multichannel News*, Mar. 9, 2009, available at http://www.multichannel.com/article/189686-AT_T_Strikes_Out_On_Program_Access_Complaint_Over_Cox_San_Diego_Service.php.

¹⁵ See Petition for Rulemaking at 23-24.

programming provider – decided to terminate carriage at the expiration of its previous contract with independent programmer Scripps Networks.¹⁶

Each of these situations results in the consumer confusion and consumer harm that the Petition describes. The Petition is replete with references to the special position occupied by broadcasters due to certain provisions in the Communications Act and the Copyright Act (along with Commission decisions implementing these statutes). Nevertheless, while broadcasters may in some respects occupy a unique position, broadcasters are not unique in their disproportionate bargaining power, control over “must-have” programming, and ability either to foreclose distribution or demand exorbitant compensation for carriage. Broadcaster advantages in this regard may indeed be augmented by certain statutory and regulatory protections, but the advantages are not solely a product of such laws and rules.¹⁷ Cable operators and other distributors likewise enjoy such advantages when they control the rights to regional sports and news programming essential to competitive MVPDs, or when they can dictate terms of both traditional linear carriage and online video distribution for independent programmers.

¹⁶ See Associated Press, “Cablevision, Scripps Deal: Food Network, HGTV Back To Cablevision Customers,” Jan. 21, 2010, *available at* http://www.huffingtonpost.com/2010/01/21/cablevision-scripps-deal-_n_432164.html.

¹⁷ The Petition intimates that a “free market” approach to broadcast negotiations might alleviate issues faced by MVPDs seeking retransmission rights for network programming. See Petition for Rulemaking at 6-7. However, the Petition does not suggest less regulation as a cure for supposed broadcaster malfeasance, and calls instead for greater Commission oversight of retransmission consent terms and conditions as well as increased intervention when negotiations break down. See *id.* at 30-40. Moreover, as petitioners are well aware, Commission regulations such as the network non-duplication and syndicated exclusivity rules protect broadcasters only to the extent that the network affiliation or syndication contracts grant such exclusive rights. See, e.g., 47 C.F.R. § 76.93 (“Television broadcast station licensees shall be entitled to exercise non-duplication rights...in accordance with the contractual provisions of the network-affiliate agreement.”). Likewise, while the must-carry option may provide a strong fallback option for guaranteed carriage in the long term, broadcasters must elect must-carry or retransmission consent at the outset of each bargaining cycle, and once the retransmission election is made they cannot resort to must-carry status for that cycle. See 47 C.F.R. § 76.64(f)-(g).

All of these various bottleneck controls, whether exercised by broadcasters or MVPDs, lead to higher costs for programming throughout the MVPD industry. Costs increase both for broadcast and non-broadcast programming alike whenever programmers (including broadcasters and cable programmers) can restrict access or MVPDs can restrict distribution outlets in an unreasonable and unlawful manner.¹⁸ MVPDs inevitably pass those higher costs along to the consumer in the form of higher prices.¹⁹ Structural impediments, unbalanced leverage, and market power in *each* of these various programming markets all limit the diversity of content available, and thus diminish consumer choice of programming and competitive MVPD offerings.

The Commission should refresh the record in the 2007 *NPRM* docket while considering the reforms advocated in the instant Petition. At the conclusion of that process, the Commission should adopt the reforms proposed in the Petition, but for all three program negotiation regulatory regimes: retransmission consent, program access, and program carriage. MAP agrees with the substance of the Petition for Rulemaking, if not its tone nor all of its conclusions

¹⁸ See 47 U.S.C. § 536(a)(3) (requiring the Commission to adopt rules “designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly”); *id.* § 548(b) (prohibiting cable operators and their programming affiliates from engaging in “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor” from competing in the delivery of programming). As the Petition for Rulemaking notes in several instances, Section 325(b)(3)(A) of the Communications Act explicitly directs the Commission to consider when establishing its retransmission consent rules “the impact that the grant of retransmission consent by television stations may have on the rates” for MVPD services. See, e.g., Petition for Rulemaking at 11 (citing 47 U.S.C. § 325(b)(3)(A)). Yet, Sections 616 and 628 of the Cable Act contain no less clear an indication of the Commission’s obligations to protect consumer by facilitating a level playing field and prohibiting unfair practices in the program access and program carriage contexts.

¹⁹ See, e.g., Petition for Rulemaking at 16, 22. The Petition confines its discussion to MVPDs practice of passing along retransmission consent costs to consumers in the form of higher multichannel video subscriber bills, but of course MVPDs also pass through to subscribers the cost increases they incur to obtain non-broadcast programming.

regarding the relative bargaining power and alleged “misconduct”²⁰ of MVPDs, broadcasters, and other programming providers. The Commission should adopt comprehensive and consistent reform of its various programming rules because the use of leverage and bargaining power in any of these contexts can result in the public interest harms that the Petition rightfully decries.

II. REFORM OF ALL THREE REGIMES IS NECESSARY TO PROMOTE PROGRAMMING DIVERSITY AND LIMIT RATE INCREASES.

As noted above, MAP previously has urged the Commission to take a closer look at program tying by both broadcasters and cable programmers.²¹ A number of entities have noted the harm that tying arrangements cause to their ability to compete and offer diverse programming.²² A March 2010 GAO report noted the same factors, describing “the business practice of bundling networks...which may occur during negotiations between broadcasters...and video providers for retransmission rights.... [and which] influences video providers’ carriage decisions and limits their ability to select independent programming.”²³ However, tying also occurs for non-broadcast programming, resulting in the same bad consequences for independent programmers and consumers. As the Commission observed in the 2007 *NPRM*, “the competitive harm and adverse impact on consumers” from tying “would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster or is affiliated with neither a cable operator nor a broadcaster.”²⁴ Tying not only harms consumers

²⁰ Petition for Rulemaking at 31.

²¹ See *supra* note 6.

²² See ACA Comments at 12-13; OPASTCO *Ex Parte* at 2-3; Comments of Dish Network, MB Docket No. 07-198, at 3-6 (filed Jan. 7, 2008).

²³ U.S. Government Accountability Office, “Media Programming: Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio,” GAO-10-369, at 22 (Mar. 17, 2010).

²⁴ 2007 *NPRM* ¶ 120.

by forcing them to pay for channels they do not want, but also by depriving them of choice, as such arrangements have had a “devastating impact” on independent, stand-alone networks.²⁵

Contrary to some parties’ claims,²⁶ tying and bundling do not necessarily benefit programming for niche audiences. As the American Cable Association has pointed out, it has “been shown that large [cable] programmers use their market power to coerce...providers into carrying their affiliated networks, but by and large, they do not do so to ensure carriage of their minority-focused channels.”²⁷ For example, ACA reported that Viacom “does not bundle any of its marquee networks for general audiences, such as Nickelodeon or MTV, with any of its minority-focused networks, including Black Entertainment Television...Networks and Logo, in the deals available to and accepted by the vast majority of independent operators.”²⁸

Unreasonable programming rates, terms, and conditions, including but not limited to tying, also affect the price that consumers pay to purchase video programming. The Commission’s 2009 report on cable industry prices indicated that cable customers’ bills continue to rise.²⁹ Despite claims of increased competition between MVPDs, cable subscribers saw in

²⁵ See Letter from Michael Schwimmer, Chief Executive Officer, Si TV, Inc., to Hon. Kevin J. Martin, Chairman, Federal Communications Commission, MB Docket No. 07-198 (Feb. 12, 2008); see also *id.* at 2 (“[U]nrestrained tying practices, when combined with the current state of consolidation among both cable operators and programmers alike, have left American viewers without...rich and diverse content from a broad array of providers.”).

²⁶ See, e.g., Viacom Inc. *Ex Parte* Presentation, MB Docket No. 07-198, at 9 (filed Aug. 21, 2008) (arguing that rules limiting practices such as tying and bundling will “hinder the development and dissemination of diverse programming networks,” including minority and niche programming).

²⁷ See Letter from Matthew M. Polka, President and CEO, American Cable Association, to Hon. Kevin J. Martin, Chairman, Federal Communications Commission, MB Docket No. 07-198, at 1 (filed Sept. 8, 2008).

²⁸ *Id.*

²⁹ 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*, 24 FCC Rcd 259, ¶ 2 (2009) (“*Cable Price Report*”).

2008 the largest yearly percentage increase in their bills in the previous three years.³⁰ The Commission's most recent cable price report confirmed that prices continue to rise, despite the existence of wireline and satellite MVPD competition.³¹ Satellite providers do not provide meaningful competition to control video programming prices, as the Commission has found that "[i]t does not appear...that DBS effectively constrains cable prices."³² Thus, while cable operators often argue that the price of cable service actually has not increased on a per-channel basis, real rates and total prices paid by consumers for cable service certainly have increased.³³ Furthermore, MVPD customers usually watch a fraction of the channels they have paid for as part of a bundle,³⁴ and they generally must purchase tiers rather than purchasing programming on the "per-channel" basis touted by cable operators.

III. THE COMMISSION SHOULD ADOPT THE INTERIM CARRIAGE AND DISPUTE RESOLUTION REMEDIES PROPOSED IN THE PETITION, ALONG WITH OTHER REMEDIES THAT WILL EMPOWER CONSUMERS.

For all of the reasons cited in the Petition for Rulemaking, a "standstill" interim carriage requirement during the pendency of negotiations would be an appropriate and necessary addition to the program access, program carriage, and retransmission consent rule alike. Consumers do

³⁰ *Id.*

³¹ *See id.* ¶ 3, Chart 1-a. This increase occurred despite AT&T's and Verizon's aggressive entry into the multichannel video programming distribution market, with telcos subsequently offering video service to more than a quarter of Comcast's footprint a year ago. *See* Comcast Corporation, Q2 Financial Call Transcript (Aug. 6, 2009) ("The [RBOCs] now have over built 28% of our footprint."), *available at* <http://seekingalpha.com/article/154406-comcast-corporation-q2-2009-earnings-call-transcript?page=-1>.

³² *Cable Price Report* ¶ 3.

³³ *See, e.g.,* Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269, at 17 (filed May 20, 2009). NCTA conceded in the same submission that "rate-card prices have risen on a total-cost basis." *Id.*

³⁴ U.S. Government Accountability Office, "Issues Related to Competition and Subscriber Rates in the Cable Television Industry," GAO-04-8, at 37 (Oct. 24, 2003) (reporting that "most people, on average, watch only about 17 networks").

not deserve to be held hostage and lose access to programming during such negotiations, no matter whether it is broadcast or non-broadcast programming at the heart of the dispute. Just as important – and just as appropriate in all three contexts – would be binding arbitration, expert tribunals, or similar dispute resolution procedures designed to prevent the imposition of exorbitant, unfair, and unlawful terms and conditions in programming agreements.

Beyond adopting these reforms proposed in the Petition but extending them to the program access and program carriage contexts, the Commission should consider establishing mechanisms that would allow MVPD subscribers to realize the benefits of the resulting improvements in fair bargaining between programmers and distributors. Such steps might include an ability for consumers to select channels affirmatively or to opt out of receiving certain bundled channel offerings, along with heightened public disclosure requirements for programming agreement rates, terms, and conditions.³⁵

CONCLUSION

For the foregoing reasons, MAP respectfully submits that the Commission should adopt the remedies proposed by the Petition for Rulemaking. Yet, the Commission should act simultaneously to reform not only its retransmission consent rules, but also its program access and program carriage regimes. The Commission should adopt standstill, interim carriage requirements in the retransmission consent, program access, and program carriage contexts; require binding arbitration or similar mechanisms to assess the reasonableness of carriage terms and conditions in all three settings; inquire into the propriety of tying arrangements in both the broadcast and non-broadcast context; and adopt such other reforms as would facilitate the pass through of such benefits to consumers.

³⁵ See Comments of Free Press, Parents Television Council, and Consumers Union, MB Docket No. 10-71, at 7-11 (filed May 18, 2010).

Respectfully submitted,

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