

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

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

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby comments on the Notice of Proposed Rulemaking² in the above captioned proceeding. While the Notice focuses on the behaviors of multichannel video programming distributors (MVPDs) that “may impede competition, diversity, and innovation in the video marketplace,”³ it also poses a series of questions that relate to broadcasters. NAB responds to the FCC’s limited inquiries on program bundling and the definition of “independent programmer.”

As NAB previously stated in comments on the earlier Notice of Inquiry, if the Commission determines to act in this proceeding, it should focus on consumers’ ability to access video programming, rather than on programmers’ negotiating proposals.⁴ Contrary to

¹ NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, MB Docket No. 16-41 (Sept. 29, 2016) (Notice).

³ *Id.* at ¶ 1.

⁴ Comments of the National Association of Broadcasters, MB Docket No. 16-41, at 2 (March 30, 2016) (NAB NOI Comments).

the pay TV industry's claims, programming bundles have pro-consumer benefits, including incentivizing greater consumer choice and diverse offerings – goals the Commission hopes to promote through this proceeding. Restricting the ability of programmers to negotiate for bundles will only enhance MVPDs' already considerable power in carriage negotiations with programmers, rather than benefit consumers.

The Notice also seeks comment on the appropriate definition of “independent programmer.” The Notice of Inquiry in this proceeding used the only appropriate definition available: a programmer “not vertically integrated with a MVPD.”⁵ Any other definition, including those proposed in this Notice,⁶ would be inconsistent with this proceeding's focus on the behavior of MVPDs and their treatment of programmers, particularly ones independent from them.

II. PROGRAM BUNDLING HAS MANY PRO-CONSUMER BENEFITS

As NAB previously explained,⁷ program bundling, despite some pay TV commenters' claims,⁸ is not contrary to the public interest. The bundling of programming, in fact, is common in competitive markets, is generally pro-competitive and has pro-consumer benefits.⁹ Notably, the benefits of bundling to consumers and programmers are not mutually

⁵ *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, MB Docket No. 16-41, at ¶ 1 n.4 (Feb. 18, 2016) (NOI)

⁶ See Notice at ¶ 16.

⁷ See NAB NOI Comments at 6-7.

⁸ See, e.g., Comments of Verizon, MB Docket No. 16-41 (March 30, 2016) (Verizon NOI Comments).

⁹ See, e.g., *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894-95 (9th Cir. 2008) (characterizing bundled discounts as “a fundamental option for both buyers and sellers”); Kevin W. Caves and Bruce M. Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, at ¶ 36 (Feb. 2016) (Economists Incorporated Report), attached to Letter from Rick Kaplan, General Counsel and Executive Vice President, National Association of Broadcasters, MB Docket No. 15-216 (Feb. 16, 2016); NAB NOI Comments at 6-7.

exclusive. Bundling helps broadcasters achieve economies of scale and cost savings and also promotes the amount, quality and diversity of programming available to consumers.¹⁰ Thus, bundling aligns with this proceeding's goal to "foster greater consumer choice and enhance diversity."¹¹

More specifically, bundling allows programmers to bargain for carriage of networks and channels that serve niche audiences, which, as MVPDs themselves admit,¹² are less attractive for stand-alone carriage. Bundling also allows programming providers to realize efficiencies, such as reducing transaction and contracting costs. These economic efficiencies are especially important because programmers "are obliged to recover large investments in 'first copy'" costs, which are typically both "fixed" and "sunk."¹³ Without the ability to bundle, programmers would face increased challenges in expanding their offerings for consumers, leading to higher costs and a reduction in high-quality and diverse content, including programming targeted to minority or niche audiences.¹⁴ Programmers' inability to negotiate for carriage of more specialized channels through bundling arrangements ultimately would result in the loss of some amount of diverse programming.¹⁵

¹⁰ See, e.g., Economists Incorporated Report at ¶¶ 45-47.

¹¹ Notice at ¶ 4 (quoting NOI at ¶ 2).

¹² See Petition of Mediacom Communications Corporation for Expedited Rulemaking, RM-11728, at 7-10 (July 21, 2014).

¹³ Economists Incorporated Report at ¶ 40.

¹⁴ For example, Univision has explained that negotiating for carriage of bundled channels allows it to deliver "Spanish-language programming responsive to the needs of the U.S. Hispanic community." In particular, "incentiviz[ing] carriage of new services by offering them as part of a discounted package is especially critical" for programmers seeking to bring "innovative content for diverse and often underserved populations" to market. Comments of Univision Communications Inc., MB Docket No. 15-216, at 10 (Dec. 1, 2015).

¹⁵ See, e.g., Opposition of the National Association of Broadcasters to Petition for Rulemaking, *Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728, at 6-18 (Sept. 29, 2014) (discussing these and related issues in more detail).

III. LIMITING THE RIGHT OF PROGRAMMERS TO NEGOTIATE FOR CARRIAGE OF BUNDLES WOULD PUT EVEN MORE POWER IN THE HANDS OF MVPDS – WITHOUT ANY INDICATION THAT ADDITIONAL PAY TV CONTROL WOULD BENEFIT CONSUMERS

The video content options available to consumers continue to expand at an incredible pace, and programmers face increasing competition in marketing their programming to distributors. Contrary to pay TV providers' protestations that programmers engage in anticompetitive bundling,¹⁶ programmers do not possess the monopoly, or near monopoly, power over the MVPDs purchasing their programming that would be required for any finding of anticompetitive conduct,¹⁷ and programmers' relative bargaining power in carriage negotiations continues to decline.¹⁸ As a 2016 study found, "[i]t is generally recognized that upstream content markets are increasingly fragmented across a large and rapidly growing space of viewing options," while downstream markets are "highly concentrated, with little scope for competitive entry."¹⁹ Or, put more bluntly:

Our view is that distribution at this point trumps content. Content is so fragmented. You can watch Netflix, you can watch Amazon, Hulu, but you need your broadband pipe and there are only a few suppliers of that.²⁰

Any restriction the Commission places on programmers to offer bundles would only enhance the marketplace position of pay TV providers. In a time of growing concern about the

¹⁶ See, e.g., Verizon NOI Comments at 3-4.

¹⁷ See, e.g., *Cascade Health Solutions*, 515 F.3d at 896-97.

¹⁸ See, e.g., Reply Comments of RFD-TV, MB Docket No. 16-41, at 14 (April 19, 2016) (dispelling the myth that a large MVPD can "plausibly maintain that it is squelching independent channels like RFD-TV because [programmers] have 'outsized negotiating power' over it." (quoting Verizon NOI Comments at 3); Economists Incorporated Report at ¶¶ 17-28.

¹⁹ Economists Incorporated Report at ¶¶ 18, 25.

²⁰ Shalini Ramachadran, *Big Media's Fortunes Wane as Cable Operators Prosper*, Wall Street Journal (Feb. 16, 2016) available at <http://www.wsj.com/articles/big-medias-fortunes-wane-as-cable-operators-prosper-1455655802>.

power possessed by a handful of MVPDs,²¹ and without any evidence that increasing that power by limiting the bargaining ability of programmers would “foster greater consumer choice and enhance diversity,”²² the Commission should reject the pay TV industry’s repetitive complaints about negotiating with programmers. As the head of the Antitrust Division of the U.S. Department of Justice observed, both established programming networks and newer over-the-top programming providers depend on MVPDs “to deliver their content” and to “enable them to sell ads or obtain subscribers,” and thus, MVPDs “are essential gatekeepers to what customers watch and how they watch it.”²³

A. Contrary to Some Pay TV Claims, MVPD Capacity Continues to Expand

Pay TV providers would have the Commission believe that program bundling is problematic in part because MVPDs have limited capacity and, therefore, cannot carry the program bundles offered by established programmers and the channels of new or less established programmers.²⁴ This claim is simply not true. As a 2013 study found, MVPD channel capacity doubles roughly every ten years, and

the vast majority of pay television services will encounter few technical obstacles to increasing their program-carrying capacity for the foreseeable future. Capacity constraints that may have hampered growth previously yield to evolved technologies and techniques in today’s digital multichannel world.²⁵

²¹ See, e.g., *AT&T-Time Warner deal sparks calls for scrutiny in Washington*, CNBC.com (Oct. 24, 2016) available at <http://www.cnbc.com/2016/10/24/att-time-warner-deal-sparks-calls-for-scrutiny-in-washington.html>.

²² NOI at ¶ 2.

²³ Assistant Attorney General William Baer, Keynote Address at the Future of Video Competition and Regulation Conference, Duke Law School (Oct. 9, 2015) available at <https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-keynote-address-future-video-competition>.

²⁴ See Comments of ITTA – the Voice of Mid-Size Communications Companies, MB Docket No. 16-41, at 5 (March 30, 2016).

²⁵ Steven J. Crowely, *Capacity Trends in Direct Broadcast Satellite and Cable Television Services* (Oct. 8, 2013) available at http://www.nab.org/documents/newsRoom/pdfs/100813_Capacity_Trends_in_DBS_and_Ca

Despite repeated calls by NAB to produce data, MVPDs have not backed up their capacity claims with empirical evidence. Even assuming *arguendo* that some smaller MVPDs have less capacity for carrying video programming, such constraints may stem from an unwillingness to invest in their pay TV businesses, rather than true capacity limits. As American Cable Association (ACA) president Matt Polka said last year: “Video is just not important. Broadband is.”²⁶ An unwillingness to invest is different than an inability – and an unwillingness to invest does not justify regulatory assistance from the Commission. Should the FCC consider alleged channel capacity constraints as a basis for any action, it must require detailed, empirical evidence from MVPDs, including the largest,²⁷ demonstrating their capacity constraints and how program bundling specifically deters their offering of other programming.²⁸

[ble_TVServices.pdf](#); see also *NAB Study Finds Pay-TV Carriage Capacity Not Constrained by Technological Barriers*, NAB (Jan. 14, 2014) available at <http://www.nab.org/documents/newsroom/pressRelease.asp?id=3283>.

²⁶ Kyle Daly, *ACA President: ‘Video is Just Not Important,’* SNL Kagan (Mar. 2, 2016). ACA Chairman Robert Gessner similarly observed that, for many cable operators, video is merely a “distraction.” *Id.* See also Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, National Association of Broadcasters, MB Docket No. 16-41 (Sept. 6, 2016) (refuting ACA claims about lack of channel capacity).

²⁷ For any programmer to survive, let alone thrive, it must obtain carriage on the largest MVPDs that reach the greatest number of subscribers. To convincingly argue that capacity constraints prevent the carriage of additional diverse or independent programmers, the MVPD industry must show that AT&T/DirecTV, Verizon and Time Warner Cable/Charter/Bright House lack relevant capacity, not that an MVPD serving under 1,000 subscribers in rural Montana has limited capacity.

²⁸ See Erratum, Reply Comments of Public Knowledge, MB Docket No. 16-41, at 8 (April 22, 2016) (“Not only do programmers need carriage by MVPDs to survive in the market place, they need to be carried by a majority of the large distributors. This results in the substantial disparity in bargaining power between independent programmers and MVPDs.”).

B. ACA Has Demonstrated the Threat to Diversity Posed by Anti-Bundling Proposals

Tellingly, ACA provided the clearest example in this proceeding of the risks to diversity posed by pay TV providers' attacks on program bundling. ACA submitted a list of questions it suggested the Commission should ask in this Notice, and included:

Should the Commission restrict bundling offers or demands directed only at certain parties, such as . . . [b]undling of a particular channel with respect to MVPDs without subscribers likely to express interest in that channel (such as forced bundling of a Spanish-language channel for cable systems with very few Spanish-speaking customers; or the forced bundling of an urban-interest channel for rural cable systems)[?].²⁹

Although framed as an attempt to ensure that viewers receive programming relevant to them, ACA's request directly parallels the "No urban/No Spanish" advertising dictates previously banned by the Commission.³⁰ Perhaps ACA could have been forgiven for this redlining plan if it had withdrawn the questions when confronted with their discriminatory nature. Yet despite the concerns raised by several public interest groups and NAB about the discriminatory impact of ACA's request,³¹ ACA decried such criticisms as cynical and continued to push their questions, including those facilitating redlining, in meetings with the

²⁹ Letter from Michael Nilsson, Harris, Wiltshire & Grannis LLP, Counsel for the American Cable Association, MB Docket No. 16-41, at 4 (Aug. 26, 2016) (Aug. 26 ACA Letter).

³⁰ See *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5941-42 ¶¶ 49-50 (2008) (requiring the inclusion of non-discrimination language in advertising contracts to prevent advertising firms from using "no urban/no Spanish" dictates against certain broadcast stations).

³¹ See Letter from Ebonie Riley, Washington, DC Bureau Chief, National Action Network, MB Docket No. 16-41 (Sept. 19, 2016); Letter from Asian Americans Advancing Justice – AAJC, Council on Native Hawaiian Advancement, National Asian Pacific American Women's Forum, National Queer Asian Pacific Islander Alliance, OCA – Asian Pacific American Advocates, MB Docket No. 16-41 (Sept. 20, 2016); see also Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, National Association of Broadcasters, MB Docket No. 16-41 (Sept. 7, 2016).

offices of all five FCC commissioners.³² ACA's attempt at redlining particular programming should be summarily rejected, and the Commission should examine all MVPD proposals to limit the ability of programmers to negotiate for carriage of programming bundles with the understanding that they run the risk of decreasing diversity.

IV. THE COMMISSION SHOULD ADOPT THE DEFINITION OF "INDEPENDENT PROGRAMMER" IT USED IN THE NOTICE OF INQUIRY

In its NOI, the Commission defined "independent programmers" as those "not vertically integrated with a MVPD."³³ Now, in the Notice, the Commission proposes to limit the definition of "independent programmer" to a subset of "video programming vendors,"³⁴ which it found in another context to exclude broadcast licensees.³⁵ The Commission also asks whether to narrow this definition on the basis of revenues and/or assets.³⁶ But because this proceeding is intended to encourage "independent" programming, the "video programming vendor" definition and the revenue/asset threshold are not directly relevant to this proceeding's goals, and they are not supported by the record. To adopt a definition on the basis of these standards would be arbitrary and capricious and inconsistent with the intent of

³² See, e.g., Letter from Michael Nilsson, Harris, Wiltshire & Grannis LLP, Counsel for the American Cable Association, MB Docket No. 16-41 (Sept. 2, 2016); Letter from Michael Nilsson, Harris, Wiltshire & Grannis LLP, Counsel for the American Cable Association, MB Docket No. 16-41 (Sept. 16, 2016) (ex parte disclosing a meeting with Mark Paul of Commissioner Rosenworcel's office, attaching Aug. 26 ACA Letter); Letter from Michael Nilsson, Harris, Wiltshire & Grannis LLP, Counsel for the American Cable Association, MB Docket No. 16-41 (Sept. 20, 2016) (ex parte disclosing meetings with Matthew Berry of Commissioner Pai's office, Gigi Sohn and Jessica Almond of Chairman Wheeler's office, David Grossman of Commissioner Clyburn's office and Robin Colwell of Commissioner O'Rielly's office, attaching Aug. 26 ACA Letter).

³³ NOI at ¶ 1, n.4.

³⁴ Notice at ¶ 16.

³⁵ See Notice at ¶ 16 n.70 (citing *Liberian Broadcasting, Inc. v. Comcast Corp.*, MB Docket No. 16-121, Memorandum Opinion and Order, 2016 WL 4494601, at * 1 ("finding, among other things, that a broadcast licensee is not a 'video programming vendor'").

³⁶ See Notice at ¶ 17.

this proceeding. “Independent” requires independence from something – and in this case, “independent” requires independence from MVPDs.

As the Commission stated in its NOI, this proceeding seeks to “eliminat[e] or reduc[e] any barriers faced by independent programmers in reaching viewers,”³⁷ and as discussed above, “distribution at this point trumps content.”³⁸ Like other programmers, broadcasters, even larger ones, live and die by distribution from increasingly consolidated MVPDs. Any programmer failing to obtain wide distribution of its programming “risks sacrificing both carriage fees and advertising revenue,” and “[g]iven the highly concentrated nature of the typical MVPD market . . . failure to secure carriage with even a single MVPD could mean the difference between profit and loss.”³⁹ The Department of Justice for these reasons has concluded that large MVPDs have “significant bargaining leverage in their negotiations with programmers.”⁴⁰ If the Commission determines that independent programmers are disadvantaged by the market power generally or any specific practices of MVPDs and adopts provisions to address those concerns, there is no basis to exclude broadcasters from such provisions. The Commission should define “independent programmer” as it did in the NOI: a programmer “not vertically integrated with a MVPD.”⁴¹

³⁷ NOI at ¶ 2.

³⁸ See *supra* at 4.

³⁹ Economists Incorporated Report at ¶ 24.

⁴⁰ U.S. Department of Justice, Competitive Impact Statement at 5, *U.S.A. v. Charter Communications, Inc., Time Warner Cable Inc., Advance/Newhouse Partnership, and Bright House Networks, LLC*, Civil Action No. 1:16-cv-00759 (RCL) (D.D.C. May 10, 2016) (also stating that large MVPDs have sufficient leverage over video programmers to obtain their agreement to contract terms that restrict programmers’ ability to provide their programming to and earn revenue from other video programming distributors). *Id.* at 12.

⁴¹ NOI at ¶ 1, n.4.

V. CONCLUSION

For the foregoing reasons, NAB urges the Commission to reject calls from the pay TV industry to limit the right of programmers to negotiate for carriage of programming bundles, and NAB further encourages the Commission to define “independent programmers” as just that: independent from MVPDs.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**
1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Rick Kaplan
Jerianne Timmerman
Emmy Parsons

January 26, 2017