

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

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby responds to the *Notice of Inquiry*² in the above captioned proceeding. In this proceeding, the Commission seeks to better understand the dynamics of independent and diverse programming in the multichannel video programming marketplace and to assess how it can “foster greater consumer choice and enhance diversity” by “eliminating or reducing any barriers faced by independent programmers in reaching viewers.”³ Although most questions posed in the *Notice* apply to multichannel video programming distributors (MVPDs), NAB takes this opportunity to respond to inquiries potentially affecting broadcasters, particularly those regarding bundled programming and tier placement.

¹ The National Association of Broadcasters 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 Inquiry, MB Docket No. 16-41 (Feb. 18, 2016) (“*Notice*”).

³ *Id.* at ¶ 2.

The Commission should focus its attention in this proceeding on consumers' ability to access video programming, including programming from broadcasters, most of whom are "independent" as defined in the *Notice*.⁴ Today, video content options are expanding at a staggering pace, providing more varied and diverse programming choices for consumers. As a result of this vastly increased competition in the programming market, program providers lack market power over distributors, and they cannot extract anticompetitive or discriminatory contract provisions from MVPDs that would discourage the market entry of other programmers, including independent ones. Programmers cannot afford to make "take it or leave it" offers to large MVPDs that control almost the entire pay TV market without risking the loss of a critical mass of viewers and advertisers.

The *Notice* asks specifically whether two types of provisions common in program carriage arrangements – bundled programming and tier placement – disadvantage independent programmers.⁵ The short answer is they do not. The bundling of programming and tier placement provisions have many pro-consumer benefits, from achieving economies of scale and cost savings to enhancing programming diversity. Without the ability to negotiate for program bundles and tier placement, many content providers would face increased challenges in expanding their offerings for consumers, leading to a reduction in high-quality and diverse content including programming targeted to minority or niche audiences.

The Commission also seeks comment on MVPD capacity, asking whether "capacity constraints [are] as significant as they were years ago," and whether "capacity constraints

⁴ See *Notice* at ¶ 1 n.4 (defining "independent video programmer" or "independent programmer" as "one that is not vertically integrated with an MVPD.").

⁵ See *id.* at ¶¶ 15-20.

[will] be a less significant issue in the future.”⁶ A 2013 study commissioned in part by NAB confirms that MVPD channel capacity has expanded, and is continuing to expand, at an impressive rate, doubling roughly every ten years.⁷ These technological developments undermine arguments by MVPDs that channel capacity constraints restrict in any significant way their ability to offer more diverse and/or independent programming today, and any such constraints, to the extent they currently exist, will be reduced even further in the future. If the Commission ultimately determines to proceed to a notice of proposed rulemaking in this proceeding, it should refrain from seeking to limit the ability of program providers to negotiate for bundling and tier placement provisions with increasingly consolidated MVPDs. Such restrictions would only serve to disadvantage independent programmers, including broadcasters.

II. PROGRAMMERS DO NOT HAVE THE MARKET POWER TO FORCE MVPDS TO ACCEPT TERMS LIKE BUNDLING OR TIER PLACEMENT AGAINST THEIR WILL, AND REGULATING THESE TERMS WILL NOT ENHANCE THE DIVERSITY OF PROGRAMMING

MVPDs claim that some programmers “are able to force MVPDs to carry less desirable content through bundling arrangements . . . [which] limits programming choices and raises costs for consumers by forcing MVPDs to accept less desirable programming that may displace independent and diverse programming.”⁸ Programmers themselves appear split on such claims, with some arguing that bundling is “merely a pretext used by MVPDs in order to

⁶ *Id.* at ¶ 17.

⁷ See Steven J. Crowley, *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_Cable_TV_Services.pdf (Channel Capacity Study); see also *NAB Study Finds Pay-TV Carriage Capacity Not Constrained by Technological Barriers*, NAB (Jan. 14, 2014), <http://www.nab.org/documents/newsroom/pressRelease.asp?id=3283>.

⁸ *Notice* at ¶ 15.

justify continued denial of carriage for independent programming.”⁹ Some MVPDs also claim that certain programmers’ tier placement requests “compel MVPDs to place entire bundles in the most popular programming packages,”¹⁰ with the implication that this somehow restricts MVPDs’ ability to carry independent programmers.¹¹

As a threshold matter, for bundling to be considered anticompetitive, the programmer seller must be able to exercise market power, approaching monopoly power, over the MVPD buyer.¹² Similarly in the tier placement context, programmers must have significant market power over MVPDs before they can “compel” an MVPD to accept a tier placement proposal of “entire bundles.” Content owners simply do not have the requisite market power to impose anticompetitive bundling and tiering arrangements on MVPDs. On the contrary, “[i]t is generally recognized that upstream content markets are increasingly fragmented across a large and rapidly growing space of viewing options,”¹³ while downstream distribution markets are “highly concentrated, with little scope for competitive entry.”¹⁴

Indeed, today’s video programming marketplace is more competitive and diverse than ever before. Consumers enjoy unprecedented choice, and the number of scripted series and

⁹ *Id.*

¹⁰ *Id.* at ¶ 20.

¹¹ Notably, the *Notice* is silent as to whether any programmers have concerns about tier placement requests.

¹² See, e.g., *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 896-97 (9th Cir. 2008) (explaining that bundled discounts, offered by firms holding, or on the verge of gaining, monopoly power in the relevant market, can “harm competition”); See also, Kevin W. Caves and Bruce M. Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, at ¶ 38 (Feb. 2016), attached to Letter from Rick Kaplan, General Counsel and Executive Vice President, National Association of Broadcasters, MB Docket No. 15-216 (Feb. 16, 2016) (Economists Incorporated Report).

¹³ Economists Incorporated Report at ¶ 18.

¹⁴ *Id.* at p. 20, Heading B.

programming channels continue to expand.¹⁵ Content providers, including broadcasters, are under great and growing pressure to reach as many consumers as possible.¹⁶ As a result, programmers do not have market power over increasingly consolidated MVPD distributors.¹⁷

As Marci Ryvicker, an analyst at Wells Fargo, recently stated:

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.¹⁸

Rather than focusing on restricting programmers in the current environment, which will not enhance diversity, the Commission's emphasis should be on consumers and their ability to access the wide, and growing, variety of programming available in the marketplace via the distributor of their choice. Last fall, in fact, the head of the Antitrust Division of the U.S.

Department of Justice observed that both established programming networks and newer over-the-top programming providers such as Netflix depend on MVPDs "to deliver their content"

¹⁵ According to a study by FX Networks, in 2015 there were 409 scripted original series, up from 211 in 2009 and 181 in 2002, not counting news, sports, reality, movies, specials, daytime or children's programming. Lisa de Moraes, *FX Study: Record 409 Scripted Series on TV in 2015*, Deadline (Dec. 16, 2015), available at <http://deadline.com/2015/12/tv-study-record-number-scripted-series-fx-1201668200/> (FX Study); see also Tim Goodan, *TCA Journal No. 6: Welcome To the Platinum Age of Television – And Good Luck With That*, The Hollywood Reporter (Aug. 9, 2015) (finding that there are more than 1,700 total shows on television in primetime, from 8 to 11 p.m., not counting sports, news or late night shows), available at <http://www.hollywoodreporter.com/bastard-machine/golden-age-tv-best-tv-814146>).

¹⁶ As the FX Study also found, in 2002 more than 73 percent of original scripted series premiered on broadcast TV. By 2011, the number of original scripted series on basic and premium cable, as well as over-the-top providers like Netflix, passed the total number being produced by broadcast networks. In 2015, broadcast TV accounted for only 36 percent of original scripted series on TV.

¹⁷ See SNL Kagan, *Media Census Estimates, Q2 2015* (confirming that if the Charter/Time Warner Cable/BrightHouse merger is confirmed, the top ten MVPDs will control 94 percent of the nationwide MVPD market (measured in terms of subscribers)); see also Comments of the National Association of Broadcasters, MB Docket No. 15-158 (Aug. 21, 2015) and Reply Comments of the National Association of Broadcasters, MB Docket No. 15-158 (Sept. 21, 2015) (detailing the high and increasing levels of consolidation in the MVPD market).

¹⁸ Shalini Ramachadran, *Big Media's Fortunes Wane as Cable Operators Prosper*, Wall Street Journal (Feb. 16, 2016) available at www.wsj.com/articles/big-medias-fortunes-wane-as-cable-operators-prosper-1455655802.

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.”¹⁹

A. Bundling Is Common in Competitive Markets and Has Many Pro-Consumer Benefits

As numerous economists and courts have explained, bundling typically involves offering discounts conditioned on a buyer’s agreement to purchase two or more products from a seller. These arrangements are generally viewed as pro-competitive and pro-consumer, and are “pervasive” throughout the economy.²⁰ Economists also have stressed that allowing programming providers to realize efficiencies, such as reducing transaction and contracting costs through bundling, is especially important because programmers “are obliged to recover large investments in ‘first copy’” costs, which are typically both “fixed” and “sunk.”²¹

Bundling also has non-monetary consumer benefits, including increased quality and diversity of programming.²² Bundling incentivizes and facilitates the creation of new, diverse content. It allows content providers to bargain for carriage of networks that serve more niche audiences, which, as MVPDs themselves admit,²³ are less attractive to MVPDs for stand-alone carriage. Without the ability to negotiate for carriage of more specialized channels through bundling arrangements, there is no question that some amount of diverse programming will

¹⁹ 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>.

²⁰ *Cascade Health Solutions*, 515 F.3d at 894-95 (characterizing bundled discounts as “a fundamental option for both buyers and sellers”); *accord* Economists Incorporated Report at ¶ 36.

²¹ Economists Incorporated Report at ¶ 40.

²² See *id.* at ¶¶ 45-47.

²³ See Petition of Mediacom Communications Corporation for Expedited Rulemaking, RM-11728, at 7-10 (July 21, 2014).

be lost.²⁴ Between 2012 and 2014, for instance, programmers launched nearly 1,000 new multicast channels.²⁵ Commission adoption of a rule prohibiting or impeding program bundling would reduce the ability of programmers to successfully develop these and other new channels while simultaneously enhancing the power of MVPDs to discriminate against new programming options, including those that might compete against their own affiliated offerings.

B. Tier Placement Proposals Do Not Reduce Program Diversity and Have Pro-Consumer Benefits

Tier placement is also properly, and lawfully, a subject of arms-length negotiations between program providers and MVPDs.²⁶ Just as in the context of bundling, content providers lack the market power to force MVPDs to accept tier placement requests made during negotiations.

In any event, negotiating for tier placement is not about restricting access to diverse programming, but instead helps ensure that consumers receive a range of content relevant to them. Children’s programming, for instance, should not be in the same tier as adult entertainment programming. That type of “diversity” is not desirable. Program providers in other proceedings, moreover, have explained that negotiating for tier placement, as well as for program bundles, significantly enhances their ability to successfully launch new, innovative and/or diverse program channels.²⁷

²⁴ See 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) (NAB Opposition) (discussing these and related issues in more detail).

²⁵ *Id.* at 17.

²⁶ See, e.g., NAB Opposition at 2.

²⁷ See, e.g., Comments of Univision Communications Inc., MB Docket No. 15-216, at 13-14 (Dec. 1, 2015) (discussing how its ability to negotiate for tier placement is essential to “a viable distribution strategy” for its content and services responsive to the Hispanic community).

The Commission also has limited authority to regulate in the area of tier placement. As stated in Section 543 of the Communications Act of 1934, a cable operator must provide, at a minimum, on its basic tier:

(i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title; (ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers; (iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.²⁸

Finally, absent evidence from MVPDs that tier placement provisions actually restrict their ability to offer additional programming to consumers, the Commission has no rational basis to prevent program providers from negotiating for tier placement. If the Commission cannot establish an evidentiary link between tier placement and bundling provisions, and the inability of consumers to access independent or diverse programming, then any restrictions on such provisions would be arbitrary and capricious.²⁹

III. GIVEN THE RAPID PACE OF TECHNOLOGICAL ADVANCEMENTS, THE FCC SHOULD PUT TO REST CLAIMS OF MVPDS REGARDING CAPACITY PROBLEMS

At the heart of MVPD complaints about bundling and tier placement lies a central, unsupported claim related to channel capacity. MVPDs contend that their capacity is limited such that incumbent programmer demands shrink the capacity available to diverse and

²⁸ 47 U.S.C. § 543(b)(7)(A).

²⁹ Agency action must be “based on a consideration of the relevant factors,” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), and rest on reasoned decision-making in which “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). See also, e.g., *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763-64 (6th Cir. 1995) (finding FCC rules arbitrary where agency lacked “factual support for its conclusions”); *MCI Telecomm. Corp. v. FCC*, 842 F.2d 1296, 1305 (D.C. Cir. 1988) (finding FCC decision arbitrary and capricious where agency “lacked sufficient evidence on which to ground” its conclusions).

independent programmers. Technological advancements refute this claim. A 2013 study concluded that MVPD channel capacity doubles roughly every ten years,³⁰ and found that

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.³¹

Just as program offerings continue to expand, MVPDs' ability to offer consumers additional content offerings continues to grow.

Unsurprisingly, MVPDs do not back up their capacity claims with empirical evidence and cannot do so, given continuing advances in digital technology. Should the FCC consider alleged channel capacity constraints as a basis for any actions, it must require detailed, empirical evidence from MVPDs, including the largest,³² demonstrating their capacity constraints and how program bundling or tiering deters their offering of other programming.

IV. CONCLUSION

NAB understands the Commission's desire to encourage the development of diverse, independent content. Broadcasters take their commitment to public service seriously, and they continue to produce original content that serves their local communities. The Commission should not threaten the production of diverse local and national content by limiting the ability of broadcasters to negotiate with MVPDs for carriage of program bundles and tier placement.

³⁰ Channel Capacity Study at 2-3.

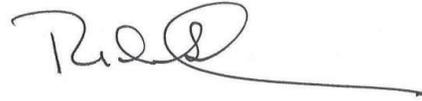
³¹ *Id.* at Executive Summary.

³² 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/DirectTV, Verizon and Time Warner Cable/Charter/Bright House lack relevant capacity, not that an MVPD serving under 1,000 subscribers in rural Wyoming has limited capacity.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right from the end of the signature.

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