

**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)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ submits these brief reply comments in the above captioned proceeding primarily to respond to those commenters intent on rehashing their erroneous retransmission consent-related claims that certain programmers engage in “forced bundling” or “forced tying.” NAB also refutes the argument that broadcasters should be excluded from the definition of “independent programmer.” The Commission should reject these arguments and avoid wading into free market negotiations in ways that would favor certain competitors over others. This is particularly so given that there is no evidence such intervention would result in more diverse or otherwise improved programming options for consumers.

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.

II. ARGUMENTS ABOUT “FORCED BUNDLING” AND “TYING” DO NOT ACCURATELY REFLECT MARKETPLACE DYNAMICS AND ARE SIMPLY AN ATTEMPT TO RESCUSITATE THE RETRANSMISSION CONSENT PROCEEDING

Several commenters accuse broadcasters and other large programmers of engaging in “forced bundling”² or “forced tying,”³ yet no commenter provides empirical evidence of, or even factual assertions about, the (alleged) market power of these programmers as compared to the market power of multichannel video programming distributors (MVPDs). Merely reciting the numbers of networks owned by some programmers provides no actual evidence showing that programmers possess coercive market power to sustain a claim of anticompetitive bundling or tying.⁴ Instead, as NAB previously explained, MVPDs are increasingly consolidated, control the few available distribution pipes and continue to be

² See e.g., Comments of ITTA – The Voice of Mid-Size Communications Companies, MB Docket No. 16-41, at 2 (Jan. 26, 2017); Joint Comments of The American Cable Association, MAVTV Motorsports Network, One America News Network and AWE, and Ride TV, MB Docket No. 16-41, at 4 (Jan. 26, 2017) (ACA et al. Comments).

³ See Comments of NTCA—The Rural Broadband Association, MB Docket No. 16-41, at 3 (Jan. 26, 2017).

⁴ 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, NAB, MB Docket No. 15-216 (Feb. 16, 2016).

essential gatekeepers” to consumers.⁵ In today’s increasingly fragmented programming marketplace, broadcasters do not have the market power to coerce MVPDs.⁶

As NAB and other commenters have demonstrated at length, bundling is presumptively pro-consumer and provides clear benefits.⁷ In the context of content production, bundling provides efficiencies that allow programmers to provide additional diverse content to consumers, and it allows programmers to negotiate for the carriage of niche channels that might otherwise be rejected by MVPDs on a standalone basis.⁸ No commenter decrying bundling refutes the existence of these benefits. Instead, the commenters use increasingly inflammatory rhetoric to make bald accusations about bundling and tying.⁹

⁵ Comments of NAB, MB Docket No. 16-41, at 5 (Jan. 26, 2017) (quoting 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>; see also *id.* at 4 (citing 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>).

⁶ As of 2016, there were 455 scripted original series, an 8 percent increase over 2015, and up 71 percent since 2011. See Michael Malone, *Scripted Originals Hit 455 in 2016, Says FX Networks*, (Dec. 21, 2016) *available at* <http://www.broadcastingcable.com/news/programming/scripted-originals-hit-455-2016-says-fx-networks/161994>. As Comcast/NBCU demonstrated, even established programmers do not have the requisite market power to “force” MVPDs to carry bundles of channels. “NBCUniversal networks are not carried by every MVPD, nor are all of them carried on the most widely penetrated tier,” and subscriber numbers for NBCUniversal networks range from 23.8 million to 93.1 million. Comments of Comcast Corp. and NBCUniversal Media, LLC, MB Docket No. 16-41, 41, n.126 (Jan. 26, 2017) (Comcast/NBCU Comments).

⁷ See, e.g., Comments of CBS Corp., The Walt Disney Company, Time Warner Inc., 21st Century Fox, Inc., and Viacom Inc., MB Docket No. 16-41, at 2 n.12 (Jan. 26, 2017); Comments of NAB, MB Docket No. 16-41, at 2-3 (Jan. 26, 2017).

⁸ See, e.g., Comments of NAB, MB Docket No. 16-41, at 6-7 (March 30, 2016).

⁹ Perhaps the real concern of these commenters is best encapsulated by INSP’s statement that programmers are nervous about MVPDs offering so-called skinny bundles. As INSP stated, “[w]hile experimentation in the marketplace is occurring, with MVPDs testing consumer reaction to OTT, ‘skinny bundles’ and other new offerings, skinny bundles are of no

These commenters' efforts, moreover, are no more than a not so thinly veiled¹⁰ attempt to relitigate arguments the Commission previously rejected in the good faith retransmission consent docket¹¹ –arguments the FCC explicitly stated it would not address in this proceeding.¹² The Commission should disregard these arguments.

III. DEFINING “INDEPENDENT PROGRAMMER” TO EXCLUDE NON-VERTICALLY-INTEGRATED BROADCASTERS IS UNJUSTIFIABLE

The stance taken by some commenters that large programmers, and all broadcasters, should be excluded from the definition of “independent programmer” starts and ends at a very basic argument: they do not need the help.¹³ Yet no commenter actually explains why, in a proceeding about enhancing the independence and diversity of content available to consumers through MVPDs, broadcasters that are not owned by an MVPD should be considered as anything other than independent from those MVPDs. Instead, they make general assertions about the size of broadcasters. Should the Commission adopt this position and exclude broadcasters from the protections it proposes in this proceeding, it would be arbitrarily favoring some competitors over others without any basis to conclude that such a decision would enhance the diversity, independence or quality of content.

benefit to independent programmers if their networks are not included. . . .” Comments of INSP, LLC, MB Docket No. 16-41, at 29 (Jan. 26, 2017) (INSP Comments).

¹⁰ See Comments of Public Knowledge, MB Docket No. 16-41, at 8-9 (Jan. 27, 2017) (Public Knowledge Comments).

¹¹ See Blog of Chairman Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules* (July 14, 2016) available at <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules>.

¹² See *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, MB Docket No. 16-41, at ¶ 4 n.6 (Sept. 29, 2016) (Notice) (“As we noted in the NOI, we do not address in this proceeding issues relating to retransmission consent negotiations between MVPDs and broadcast stations.”).

¹³ See, e.g., Comments of RFD-TV, MB Docket No. 16-41, at 8 (Jan. 26, 2017).

NAB also notes that arguments by some smaller MVPDs favoring exclusion of broadcasters from the definition of “independent” miss the potential benefit to smaller MVPDs by affording broadcasters the proposed protections. As Senator Claire McCaskill wrote in a letter to the Commission,

By requiring sellers to give the MFN-protected buyer the lowest price it offers to any buyer, an MFN discourages the seller from offering a discounted price to any other buyers. This can effectively set a floor price for the product.¹⁴

If the Commission decides to act on most favored nation (MFN) or alternative distribution method (ADM) provisions, but to exclude broadcasters from any protections it adopts, that will reduce the ability of broadcasters to negotiate discounts with smaller MVPDs for fear that they will then be required to offer the same discounts to the largest MVPDs¹⁵ – the top three of which control 83 percent of basic cable subscribers¹⁶ and have market capitalizations dozens, or even hundreds, of times larger than some of the largest broadcast TV station group

¹⁴ Letter of Claire McCaskill, Ranking Member, Committee on Homeland Security and Governmental Affairs, to Chairman Ajit Pai, MB Docket No. 16-41, at 9 (Feb. 6, 2017).

¹⁵ ACA et al. argues the Commission should ban unconditional MFNS between MVPDs and all “video programming vendors,” thus still excluding broadcasters, yet their comments actually highlight the risk of excluding broadcasters from the definition on independent: “[U]nconditional MFN provisions involving large programmers also hinder the distribution of independent programmers. They compound the problems of bundling and penetration requirements, effectively compelling programmers to apply those provisions across the board. Even when an MFN provision binds a large programmer, that provision still has the effect of ‘discourag[ing] or foreclose[ing] the wider distribution of video content’ from independent programmers.” ACA et al. Comments at 12-13 (citing *Notice* ¶ 19); see also Public Knowledge Comments, MB Docket No. 16-41, at 2 (Jan. 27, 2017) (“Because of [MFNs and ADMs], a programmer might not be able to give a special break to a new entrant in order to promote competition, or to grant an online provider on-demand access to programs, without also granting those rights to an incumbent cable company.”).

¹⁶ See Comments of The Writers Guild of America, West, Inc., MB Docket No. 16-41, at 4 (Jan. 26, 2017).

owners.¹⁷ The only appropriate decision is to define “independent programmers” as the Commission originally did in the *Notice of Inquiry* in this proceeding.¹⁸

IV. CONCLUSION

For the foregoing reasons, NAB urges the Commission to dismiss arguments 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,

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¹⁷ See Letter of Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB, MB Docket Nos. 14-50, 09-182, at 2-3 (June 6, 2016) (comparing the market capitalization rates of AT&T/DirecTV (\$201 billion), Verizon (\$182 billion) and Charter/TWC/Bright House (\$72 billion) with TV station group owners such as Media General, Scripps and Nexstar (\$1 billion each).

¹⁸ *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) (defining “independent video programmer” or “independent programmer” as “one that is not vertically integrated with an MVPD.”).