

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

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

**JOINT COMMENTS OF
THE AMERICAN CABLE ASSOCIATION,
MAVTV MOTORSPORTS NETWORK,
ONE AMERICA NEWS NETWORK AND AWE, AND
RIDE TV**

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road
Seven Parkway Center, Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Michael D. Nilsson
William B. Sullivan
Harris, Wiltshire & Grannis LLP
1919 M Street NW, Eighth Floor
Washington, DC 20036
(202) 730-1300

Attorneys for the American Cable
Association

Ross J. Lieberman
Senior Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

Robert E. Patison
President
MAVTV Motorsports Network
302 N. Sheridan St.
Corona, CA 92880
(951) 817-6664

Charles P. Herring
President
Herring Networks, Inc.
One America News Network and AWE
4757 Morena Blvd
San Diego, CA 92117
(858) 270-6900

Michael Fletcher
Chief Executive Officer
Ride Television Network, Inc.
1025 S. Jennings Avenue
Fort Worth, Texas 76104
(817) 984-3500

January 26, 2017

SUMMARY

The American Cable Association and independent programmers MAVTV Motorsports Networks, One America News Network and AWE, and RIDE TV generally support the Commission's proposed restrictions on "unconditional" most-favored national clauses and "unreasonable" alternative distribution method provisions. From our perspective, however, the *Notice's* focus on MFNs and ADMs is like the Fire Department attempting to douse a four-alarm fire using Solo cups of water.

Independent programmers—including the signatories to these Joint Comments—often find unconditional MFNs and unreasonable ADMs imposed upon them by large MVPDs. Far more often, however, they never even get to that point. There is simply no deal to be struck (under any terms) with small cable operators who, due to bundling, lack the money and capacity to carry them. The largest programmers universally bundle their most desirable channels with programming that is little watched and overpriced, requiring MVPDs to take all the channels or get none of them. To obtain must-have programming, MVPDs must set aside huge amounts of their limited bandwidth and programming budgets to carry dozens of bundled channels in which they (and their subscribers) have no interest. As both ACA and the independent programmers attest, it is bundling that represents by far the greatest threat to the viability of independent programming, and therefore it is bundling that must be the focus of the Commission's efforts.

This is not to say that MFNs and ADMs are not worth addressing. They are, just as you can fight fires better with small amounts of water than with no water at all.

Unconditional MFN provisions can prevent independent programmers from reaching the creative deals they need to gain carriage. Likewise, unreasonable ADM provisions can—depending on how they are written—hinder independent programmers from accessing the viewers online who are vital to their future. The Commission is right to seek to address these harms.

In doing so, however, the Commission should ensure that its rules address the full scope of harm such clauses cause independent programming. Likewise, it should ensure that its rules do not inadvertently address conduct that does *not* harm independent programming. We thus respectfully suggest the following modifications to the Commission’s proposed rules.

Unconditional MFNs. The proposed rules would prohibit *all* MVPDs from entering into unconditional MFNs with *independent* programmers. This, however, is both under- and over-inclusive.

- The Commission should restrict *large* MVPDs from entering into unconditional MFNs with *all* “video programming vendors.” Unconditional MFNs between large MVPDs and large programmers preclude carriage of independent programmers every bit as much as those forced upon independent programmers themselves.
- The Commission has no basis, however, to restrict small MVPDs. No record evidence exists that small MVPDs seek unconditional MFNs—let alone that they can insist on them or that they have any effect on independent programmer carriage.

- The Commission should also examine unconditional MFNs demanded by broadcasters. These too can operate to preclude carriage of independent programmers.

Unreasonable ADMs. If the Commission is going to restrict “unreasonable” ADMs, it should also specify certain practices as presumptively *reasonable*. For example, the Commission should identify as presumptively reasonable short-term restrictions on distributing programming for free online and conditional “MFN-like” rate protections for MVPDs against rates charged for online distribution.

TABLE OF CONTENTS

I.	ADDRESSING BUNDLING IS THE MOST IMPORTANT THING THE COMMISSION CAN DO IN THIS PROCEEDING.	2
A.	The Record Demonstrates Bundling’s Pernicious Effects.....	2
B.	Addressing Bundling Remains ACA and Independent Programmers’ Highest Priority.	7
II.	THE COMMISSION SHOULD MODIFY ITS PROPOSED MFN RULE.	10
A.	Unconditional MFNs Imposed by Large MVPDs Can Hinder Viewer Access to Independent Programming.	11
B.	The Commission Should Restrict Unconditional MFNs Involving All Video Programming Vendors.....	12
C.	The Commission Should Not Restrict Small MVPDs.	14
D.	The Commission Should Also Examine MFNs Sought by Broadcasters.....	16
III.	THE COMMISSION SHOULD ACHIEVE A BETTER BALANCE IN ITS PROHIBITION ON UNREASONABLE ADMS.	17
IV.	THE COMMISSION SHOULD ADOPT A SLIGHTLY MODIFIED VERSION OF ITTA’S DEFINITION OF “INDEPENDENT PROGRAMMER.” ...	20

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

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

**JOINT COMMENTS OF
THE AMERICAN CABLE ASSOCIATION,
MAVTV MOTORSPORTS NETWORK,
ONE AMERICA NEWS NETWORK AND AWE, AND
RIDE TV**

The American Cable Association (“ACA”)¹ and independent programmers
MAVTV Motorsports Network,² One America News Network and AWE,³ and RIDE TV⁴

¹ ACA represents nearly 750 small and medium-sized cable operators, incumbent telephone companies, and municipal utilities. ACA members offer broadband Internet access, video, and voice services. These providers offer service to homes and businesses in smaller communities and rural areas, as well as provide competition to incumbent providers in urban and suburban areas. These providers pass nearly 19 million homes in all 50 states and many U.S. territories, and serve about 7 million of them. More than half of ACA’s members serve fewer than 1,000 subscribers each.

² MAVTV Motorsports Network is an independent, high-definition cable channel owned by Forrest Lucas. MAVTV provides 24-hour motorsports programming, including exclusive coverage of events like The AMA Pro Motocross series and the Lucas Oil Challenge Cup. It produces and televises many grassroots race events that do not receive television coverage elsewhere, and currently reaches 27 million homes.

³ One America News Network provides 24-hour coverage of national and international news, including political talk shows and extensive live coverage of political events. AWE provides 24-hour lifestyle and entertainment programming ranging from travel shows to live world championship boxing. Both networks are owned and operated by Herring Networks, Inc., a family-owned independent media company.

⁴ RIDE TV is a 24-hour, independent network showcasing the horse culture and lifestyle. Launched in 2014, the network creates 90 percent of its content, which includes documentaries, children’s programming, and coverage of equestrian sports.

submit these comments in response to the Notice of Proposed Rulemaking issued by the Commission in the above-captioned proceeding.⁵ While we believe that the Commission’s proposed rules restricting “unconditional” most-favored nation clauses (“MFNs”) and “unreasonable” alternative distribution method (“ADM”) clauses would benefit from certain clarifications and refinements, the regulations generally represent worthwhile steps to addressing anti-competitive barriers faced by independent programmers. Yet the proposed regulations cannot meaningfully improve the outlook for programming diversity unless they come coupled with restrictions on the bundling practices of large programmers. Bundling represents by far the greatest barrier to independent programming reaching viewers. Without action to address bundling, small cable operators will continue to lack the capacity to offer independent programming carriage under any terms—at which point, unconditional MFNs and unreasonable ADMs are irrelevant. A proceeding that aims to enhance the availability of diverse and independent programming but fails to regulate bundling would be an opportunity missed.

I. ADDRESSING BUNDLING IS THE MOST IMPORTANT THING THE COMMISSION CAN DO IN THIS PROCEEDING.

A. The Record Demonstrates Bundling’s Pernicious Effects.

In the initial phase of this proceeding, ACA demonstrated that the bundling engaged in by large programmers prevents small cable operators from carrying diverse

⁵ *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, 31 FCC Rcd. 11352 (2016) (“Notice”).

and independent programming.⁶ As ACA explained, large-programmer bundling forces small cable operators to carry numerous channels they would not carry otherwise.⁷ For example, a small cable operator who wants to get the must-have programming from nine of the largest media groups—Disney/ESPN, Fox, Comcast/NBCU, Turner, Viacom, AETN, AMC, Discovery, and Scripps—through the National Cable Television Cooperative buying group (“NCTC”) must carry 65 channels at a minimum.⁸ As a result, ACA members regularly have to drop independent programmers or deny them carriage for lack of room, without regard to the merits of their content.⁹ (The fact that bundled

⁶ Comments of the American Cable Association, MB Docket No. 16-41 at 13-26 (filed Mar. 30, 2016) (“ACA NOI Comments”); Reply Comments of the American Cable Association, MB Docket No. 16-41 at 6-14 (filed Apr. 19, 2016) (“ACA NOI Reply”).

⁷ Throughout these comments, we refer to facts as reported by ACA members or independent programmers. The programming agreements entered into between ACA members and large programmers—and between independent programmers and large MVPDs—invariably contain stringent confidentiality provisions. See *CBS Corp. v. F.C.C.*, 785 F.3d 699 (D.C. Cir. 2015). Moreover, both ACA’s small cable operator members and independent programmers are understandably concerned about retaliation from large programmers and large MVPDs, respectively. Nonetheless, ACA members and independent programmers can document each of the factual claims made in these comments, and would be pleased to do so if ordered by the Commission and under an appropriate protective order. Also, ACA has worked with the National Cable Television Cooperative (“NCTC”) in the preparation of these comments, as ACA members are also members of NCTC. Accordingly, when we refer to factual assertions from “ACA members” herein, we intend to include NCTC even though NCTC itself is not an ACA member.

⁸ ACA NOI Comments at 14-15. NCTC negotiates standardized master agreements with programmers and allows its members to opt into them. Because NCTC acts as an interface between programmers and its members, it allows the programmer to deal with a single entity for purposes of negotiating contracts, determining technical standards, billing for payments, and collecting payments, along with other matters. Programmers benefit from working with NCTC because it reduces their transaction costs of dealing with small and medium-sized MVPDs so that they are comparable to the transaction costs of dealing with a single large MVPD. NCTC members benefit because they receive lower rates (sometimes significantly lower) than they would receive through direct deals, although the rates even NCTC can negotiate remain higher than those negotiated by the largest MVPDs in the market.

⁹ As ACA explained in its previous comments, the largest programmers not only require that ACA members carry their bundled channels, but also that they distribute these bundled channels to the vast majority of cable subscribers. ACA NOI Comments at 26-28. These

channels often duplicate the content on a programmer's other channels, or provide content completely at odds with what viewers in the cable operator's area want, only adds insult to injury.¹⁰⁾

This forced bundling places an enormous strain on carriage of independent channels. First, the "shelf-space" taken up by unwanted bundled channels means less "shelf-space" for independent channels. As one ACA member with a relatively low-capacity system described its bandwidth situation, "It's zero sum now. Anything we add, we have to take something away." Indeed, even moderate-bandwidth systems can easily become capacity constrained when heavy bundling demands are placed on top of existing customer demands for video programming and high-speed broadband service.¹¹ And even ACA members who have made heavy investments to increase their capacity universally report that the burden of carrying bundled channels limits their ability to carry diverse and independent programmers.¹²

Second, forced bundling takes up "shelf-space" that might be used to provide higher-performance broadband service. As ACA has explained, consumers demand more and more broadband capacity each year,¹³ much of which is devoted to

penetration requirements further harm programming diversity by raising the price of the basic tiers, discouraging purchases of the specialty tiers where independent programming can typically be found and hampering subscriber efforts to "cord shave." *Id.* at 28-33.

¹⁰ *Id.* at 20-21.

¹¹ *Id.* at 18-19.

¹² *Id.* at 19; see also ACA NOI Reply Comments, Exhibit B, Declaration of Chris Kyle ¶¶ 3-4 ("Kyle Declaration") (noting that, despite investing heavily to digitize its systems, "even some of Shentel's 1 GHz systems—in Oakland, MD; Weston, WV; Summersville, WV; Webster Springs, WV; and the area of Anstead, Page and Scarbro, WV—have no more than five channels left for video or increased internet capacity.").

¹³ ACA NOI Comments at 21-22.

broadband video. In order to prevent consumers from receiving a service less robust than promised, small cable operators must allocate existing channel capacity to broadband, or invest to increase the amount of system capacity available for broadband.¹⁴ To the extent ACA members must devote capacity to carrying large programmers' third, fourth, and fifth channels, they cannot reallocate this capacity for their broadband service, a platform that holds great promise for independent programmers. Moreover, each large programmer renewal invariably brings with it demands for *additional* carriage. Thus, those small cable operators that are not absolutely "channel locked" are forced to maintain a small "reserve" of video capacity for the addition of yet more spin-off channels, college-conference specific RSNs (or even *school-specific* RSNs), and the like. As Michael Fletcher, the CEO of RIDE TV, attests, this means that cable operators repeatedly tell independents they cannot launch new channels because they never know what will be "forced down their throats" by the large national programmers next.¹⁵

Third, as the Commission has repeatedly found, bundling of "must-have" programming permits large programmers to raise prices.¹⁶ This, in turn, makes it more

¹⁴ *Id.* at 21.

¹⁵ Ed Niemi, Vice President for Content Distribution at MAVTV, similarly has been told by both large and small cable operators that, due to fear of the future demands of large media companies, the operators "save" bandwidth for when those companies have renewal negotiations.

¹⁶ *Id.* at 22-24. As the Commission has repeatedly found, bundling of two sets of desirable programming raises programming costs by increasing the cost to the distributor of failing to reach agreement. *Comcast Corp., Gen. Elec. Co., and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 137 (2011) ("*Comcast-NBCU Order*"); William Rogerson, "Economic Analysis of the Competitive Harms of the Proposed Comcast-NBCU Transaction," at 14-17 (June 21, 2010), *attached to* Comments of the American Cable Association, MB Docket No. 10-56 (filed June 21, 2010); *see also* William Rogerson, "A Further Economic Analysis of the Proposed Comcast-NBCU Transaction," at 23-27 (Aug. 19, 2010), *attached to* Reply

difficult for small cable operators to afford independent programming. As one small cable operator put it, there are only “so many dollars in the system” for programming.¹⁷

The record also reflects that independent programmers overwhelmingly share ACA’s concerns. As KSE Media Ventures explained, “Time and time again, we have encountered [forced bundling]. MVPDs have expressed an interest in distributing channels with broad viewer interest, such as the Outdoor Channel, but point to large programmer bundling practices that eat up both channel capacity and programming budget dollars.”¹⁸ MAVTV,¹⁹ RIDE TV,²⁰ Aspire Channel and UP Entertainment,²¹

Comments of the American Cable Association, MB Docket No. 10-56 (filed Aug. 19, 2010). *Amendment of the Commission’s Rules Related to Retransmission Consent*, 29 FCC Rcd. 3351, ¶ 14 (2014). When large programmers raise prices through bundling, they harm diversity by making it harder for small cable operators to purchase independent programming.

¹⁷ ACA NOI Comments at 24. From an economic perspective, this means that the carriage of the bundled programming raises the marginal cost of carrying the independent programming. *Id.* As Chris Kyle of Shentel has explained, “Due in large part to bundling, Shentel’s programming costs are rising faster than ever before. Shentel’s subscribers are disproportionately lower income, and there are limits to how much cost we can pass on to them. When you are facing millions in increases in programming costs each year, and you are already forced to raise rates significantly each year, there is absolutely no room to spend another penny on programming that isn’t mandated. That effectively means that adding independent channels is not feasible.” Kyle Declaration ¶ 6.

¹⁸ Comments of Altitude Sports & Entertainment, Outdoor Channel, Sportsman Channel and World Fishing Network, MB Docket No. 16-41 at 10-11 (filed Mar. 30, 2016) (“KSE NOI Comments”).

¹⁹ Comments of MAVTV Motorsports Network, MB Docket 16-41 at 2 (filed Apr. 18, 2016) (“MAVTV Comments”) (“When the large programmers force their less desirable networks on the MVPDs, it not only takes up valuable bandwidth but those networks that are forced upon the MVPDs are not free causing the MVPD’s programming costs go up as well.”).

²⁰ Comments of Ride Television Network, MB Docket No. 16-41 at 3 (filed Mar. 30, 2016) (“RIDE NOI Comments”).

²¹ Comments of Aspire Channel, LLC and UP Entertainment, LLC, MB Docket No. 16-41 at 2-3 (filed Mar. 30, 2016) (“Aspire NOI Comments”).

TheBlaze,²² HITN,²³ and RFD²⁴ all told the Commission about the detrimental impact bundling has on independent and diverse programming.²⁵ Moreover, the negative effects of bundling were highlighted by virtually every panelist at the Media Bureau's second workshop on the state of the video marketplace.²⁶

B. Addressing Bundling Remains ACA and Independent Programmers' Highest Priority.

ACA members and independent programmers agree that bundling practices cause orders of magnitude more harm to independent and diverse programmers than do unconditional MFNs or unreasonable ADMs. No other practice is so uniformly an obstacle to carrying independent programming. As one independent programmer ACA spoke to noted: "Ninety percent of the time we have a carriage problem, it is because of bandwidth issues caused by bundling. All the holes we have right now [in carriage] are because of that."

²² Comments of TheBlaze, Inc., MB Docket No. 16-41 at 9 (filed Mar. 30, 2016) ("TheBlaze NOI Comments").

²³ Comments of Hispanic Information and Telecommunications Network, Inc., MB Docket No. 16-41 at 4 (filed Mar. 30, 2016) ("HITN NOI Comments").

²⁴ Comments of RFD-TV, MB Docket No. 16-41 at 20 (filed Mar. 30, 2016) ("RFD NOI Comments").

²⁵ Other commenters shared this view. See Comments of the Writers Guild of America, West, Inc., MB Docket No. 16-41 at 3-4 (filed Mar. 30, 2016) ("Writers Guild NOI Comments"); Comments of Free Press, MB Docket No. 16-41 at 12 (filed Mar. 30, 2016) ("Free Press NOI Comments").

²⁶ Video recording: Second Media Bureau Workshop on the State of the Video Marketplace, held by the FCC Media Bureau (Apr. 25, 2016), available at <https://www.fcc.gov/news-events/events/2016/04/second-media-bureau-workshop-state-video-marketplace#acc3> ("FCC Second Workshop"). Panelists who spoke about the problems of bundling included Judy Meyka of NCTC, Heather McCallion of Atlantic Broadband, Chris Kyle of Shentel, Jimmy Todd of Nex-Tech, Daphna Ziman of Cinemoi, Patrick Gottsch of RFD-TV, and Craig Morris of RIDE TV.

NCTC's experience is telling with regard to where the Commission's priorities should lie. Though contractual provisions like MFNs certainly complicate negotiations, NCTC has managed to negotiate master agreements with many independents.²⁷ Bundling limits the practical effects of these agreements, however. As NCTC's Ms. Meyka recounted in an earlier declaration, NCTC members largely lack the funds or capacity to carry these independent channels because of bundling.²⁸ As a result, NCTC now lowers the expectations of independent programmers with whom it negotiates, warning them in advance not to expect an NCTC agreement to translate into widespread carriage among NCTC members.²⁹

Failure to address bundling will almost certainly prevent the Commission from achieving the stated goals of this proceeding. The Commission explains its proposal to regulate MFNs, for example, by noting that such provisions hamstring independent programmers as they try to enter creative or unique deals with distributors.³⁰ ACA can confirm that its members have experienced this problem. Yet small cable operators negotiating with independent programmers often do not even reach this hurdle.³¹ Meaningful carriage negotiations cannot begin if the cable operator lacks the capacity to carry the channel, regardless of the terms the programmer can offer. The additional

²⁷ ACA NOI Reply, Exhibit A, Declaration of Judy Meyka, ¶ 7.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Notice* ¶ 20.

³¹ Michael Fletcher of RIDE TV, for example, was told by one large MVPD, "We are only launching channels we are forced to carry." MFN-related issues never even arise in such circumstances, because bundling kills any negotiations at the outset.

negotiating freedom the Commission hopes to provide with its proposed rules cannot be realized unless action is taken on bundling.

Similarly, the Commission's proposed rules regarding ADM provisions are premised on understandable optimism about the promise online distribution holds for independent programming.³² But as the comments in this proceeding reflect, while online distribution indeed holds great promise, many independent programmers still depend on traditional linear carriage. INSP explained:

“[L]inear carriage remains the mainstay of distribution, and access to traditional MVPDs' linear bundles remains not just 'important' but essential for program networks. . . . The reality is that OTT is a viable distribution method only for extremely low budget programming or hobbyists, or as an adjunct to a content provider's broad distribution on traditional platforms. Today, and for the foreseeable future, OTT is merely additive to, but not a substitute for, linear distribution via MVPD systems, which remains absolutely essential for independent program networks.”³³

The Commission's proposed ADM restrictions offer the prospect of freeing independent programmers to seek additional viewers online. These restrictions, however, will do little good if nothing is done to help such programmers succeed on traditional MVPD platforms. Nor will they help much if small cable operators cannot offer broadband service capable of supporting online video because the needed bandwidth is consumed by unwanted programming networks owned by large programmers. Indeed, at least one programmer explicitly *demand*ed that cable operators reallocate bandwidth from

³² Notice ¶ 23.

³³ Comments of INSP, LLC, MB Docket No. 16-41 at 15 (filed Mar. 30, 2016) (“INSP NOI Comments”).

broadband to video to make room for low-rated television networks.³⁴ For ADM restrictions to have their desired effect, the Commission must first address bundling.

II. THE COMMISSION SHOULD MODIFY ITS PROPOSED MFN RULE.

While large-programmer bundling is by far the most important hindrance to MVPD carriage of independent programming, the proposed restriction on unconditional MFNs can also help independent programmers gain carriage—if crafted thoughtfully. Below, we suggest several modifications to the scope of the proposed restriction.³⁵

As formulated, the proposal would restrict unconditional MFNs between *all* MVPDs and *independent* programmers. This is both over- and under-inclusive.

- The Commission should restrict unconditional MFNs entered into between *large* MVPDs and *all* video programming vendors. As explained below, MFNs involving large MVPDs and large programmers can preclude carriage of independent programming—even though independent programmers are not parties to the MFN.
- The Commission should not, however, seek to regulate unconditional MFNs sought by small cable operators absent record evidence that they employ unconditional MFNs in the first place.
- The Commission should also examine unconditional MFNs sought by broadcasters.

³⁴ Remarks of Judy Meyka, National Cable Television Cooperative, FCC Diversity Workshop at 3 (April 25, 2016).

³⁵ ACA believes that at least some of the problems it has identified with respect to *conditional* MFNs can also occur with respect to *unconditional* MFNs, depending on how the conditions are drafted. The *Notice*, however, limits its scope to unconditional MFNs, and ACA and programmer signatories do so here, as well.

A. Unconditional MFNs Imposed by Large MVPDs Can Hinder Viewer Access to Independent Programming.

As described in ACA's initial comments³⁶—and confirmed by independent programmers³⁷—unconditional MFNs imposed on independent programmers by large MVPDs can preclude ACA members from carrying independent programming. Independent programmers routinely tell ACA members that, because they are bound by unconditional MFNs imposed upon them by large MVPDs, they cannot freely negotiate with ACA members. Any favorable provision they might offer to a small cable operator would be applied automatically to its deals with large MVPDs—without any corresponding obligation on the large MVPD.

To take the sort of example most frequently cited by independent programmers, suppose Big MVPD negotiates to give IndyChannel carriage on its expanded basic tier in exchange for paying no fees. Suppose further that Big MVPD requires IndyChannel to enter into an unconditional MFN on penetration. After entering this deal, IndyChannel seeks to be carried by SmallTown Cable, an ACA member. SmallTown Cable can only put IndyChannel on a digital tier, but is willing to pay a fee. Though this seems like a fair trade-off to IndyChannel, it cannot agree to the proposal. Because of Big MVPD's MFN, accepting a lower penetration rate would let Big MVPD move IndyChannel to a digital tier as well—but Big MVPD would not have to pay the fee SmallTown Cable paid. Without the flexibility to bend on penetration, IndyChannel and SmallTown Cable cannot

³⁶ ACA NOI Comments at 33-35; ACA NOI Reply at 19-21.

³⁷ HITN NOI Comments at 4; INSP NOI Comments at 20-21; RFD NOI Comments at 21; Comments of Univision Communications Inc., MB Docket No. 16-41 at 8-9 (filed Mar. 30, 2016) ("Univision NOI Comments").

arrive at a deal, and so IndyChannel loses out on the chance to reach SmallTown Cable's subscribers.

To be clear, the circumstances described above do not happen nearly as frequently as does forced bundling by large programmers. And unconditional MFNs do not have nearly the impact on small cable carriage of independent programmers as does forced bundling. Yet they do occur, and they do hinder carriage of independent programming. For this reason, ACA [and independent programmer signatories] generally support the Commission's approach.

B. The Commission Should Restrict Unconditional MFNs Involving All Video Programming Vendors.

As drafted, the Commission's MFN restrictions would only bar unconditional MFNs in carriage agreements between MVPDs and *independent* video programming vendors.³⁸ If the Commission seeks to shield independent programmers from the effects of unconditional MFNs, however, it must restrict unconditional MFNs involving *all* video programming vendors.³⁹

Unconditional MFNs between large MVPDs and large cable programmers can harm independent programmers every bit as much as unconditional MFNs entered into

³⁸ Notice ¶ 18.

³⁹ By its terms, the statute applies to "program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors." 47 U.S.C. § 536(a). A "video programming vendor" is "a person engaged in the production, creation, or wholesale distribution of video programming for sale." *Id.* § 536(b). The Media Bureau recently found that the term does not include broadcasters. See *Liberman Broadcasting, Inc. v. Comcast Corporation*, 31 FCC Rcd. 9551 (2016) (concluding that "Congress intended for provisions other than section 616—in particular, sections 614 and 325 (relating to must carry and retransmission consent, respectively) — to govern the relationship between cable operators and broadcasters seeking carriage of broadcast signals on MVPD systems"). The full Commission has yet to endorse this finding (which we do not contest here).

by independent programmers themselves. This is because large programmers often use the existence of such provisions as the justification for their own bundling and penetration demands—which in turn preclude carriage of independent programmers.

To explain why this is so, suppose we modify the example from above, so that SmallTown Cable is negotiating not with a small programmer, but with MegaProgrammer, a conglomerate that owns multiple channels. MegaProgrammer pushes SmallTown Cable to take on MegaProgrammer's entire bundle of channels. Because of bandwidth constraints, SmallTown Cable is reluctant to accept these terms. It seeks tiering relief, with the understanding that it might have to pay a higher rate per subscriber in order to obtain such relief. In theory, MegaProgrammer might accept such an arrangement. Yet it tells SmallTown Cable that it cannot do so, because it has entered into an unconditional MFN with Big MVPD governing bundling. If MegaProgrammer accepts SmallTown Cable's smaller-bundle/higher-rate proposal, it will have to let Big MVPD drop some of its bundled channels—but Big MVPD would have no obligation to pay MegaProgrammer the more favorable rate SmallTown Cable offered. MegaProgrammer wants to avoid that result, so it rejects SmallTown Cable's offer. So SmallTown Cable accepts the same bundle as everyone else, eating up needed capacity. Now lacking available bandwidth, SmallTown Cable cannot give carriage to IndyChannel, no matter how favorable IndyChannel can make its terms.

Just like the provisions the Commission proposes to bar, unconditional 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 foreclos[ing] the wider distribution of video content” from independent programmers.⁴⁰

C. The Commission Should Not Restrict Small MVPDs.

Common sense dictates that the Commission should only intervene to address conduct that actually occurs in the marketplace.⁴¹ As documented above, the record contains ample evidence that large MVPDs seek unconditional MFNs from programmers to the detriment of independent programming. Moreover, as discussed above, unconditional MFNs between large MVPDs and large programmers harm independent programmers.

In contrast, *no* record evidence exists to justify restricting unconditional MFNs sought by small cable operators—because no evidence exists that small cable operators actually seek such provisions.⁴² In fact, the record establishes the opposite. Several independent programmers explicitly distinguished in their comments between small cable operators and large MVPDs, which were identified as the culprits when it

⁴⁰ *Notice* ¶ 19.

⁴¹ Indeed, in passing the 1992 Cable Act, Congress specifically stated that its policy in the Act was to “rely on the marketplace, to the maximum extent feasible, to achieve” a diversity of views. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (“Cable Television Consumer Protection Act of 1992”). ACA has noted at several points that, given Congress’ stated purposes in adopting the Act, its restrictions do not apply to small cable operators. ACA NOI Reply at 26 n. 99; Comments of the American Cable Association, MB Docket No. 11-131 (filed Nov. 28, 2011) (“ACA Program Carriage Comments”).

⁴² In the absence of record evidence to the contrary, a small MVPD should be defined as one with less than 1,000,000 subscribers, or their buying groups.

comes to the most restrictive MFNs.⁴³ As KSE Media Ventures stated, “All of the largest MVPDs demand MFN provisions in their affiliation or distribution agreements with independent programmers. The largest distributors have required increasingly complex and one-sided MFNs, which are often unrelated to their contractually committed distribution.”⁴⁴ According to KSE, the largest MVPDs typically demand the most restrictive MFNs, including those that are unconditional and allow the MVPD to “cherry pick[.]”⁴⁵

In the absence of record evidence that small cable operators employ unconditional MFNs—much less that they exercise market power in doing so⁴⁶ or that they do so because of the distorting incentives of vertical integration⁴⁷—the Commission

⁴³ TheBlaze NOI Comments at 4 (noting that “the extent and severity of [MFN] clauses are generally conditional upon two major factors: the leverage of the programmer (or lack thereof) and the size of the MVPD. Emerging independent networks like TheBlaze, have little leverage to push back against the largest MVPDs.”); KSE NOI Comments at 2-3.

⁴⁴ KSE NOI Comments at 2.

⁴⁵ *Id.* at 2-3.

⁴⁶ In *Comcast Cable Communications, LLC v. F.C.C.*, Judge Cavanaugh wrote a concurring opinion arguing that Section 616’s use of the phrase “unreasonably restrain” was an antitrust term of art, and established that the statute applied only to those MVPDs who have market power. 717 F.3d 982, 988 (D.C. Cir. 2013) (Kavanaugh, J., concurring). Judge Cavanaugh also argued that the canon of constitutional avoidance reinforced his interpretation, since applying the statute more broadly would violate the First Amendment. *Id.* In addressing a facial challenge to the program carriage rules, the Second Circuit did not go as far as Judge Cavanaugh, deferring on whether a Section 616 “violation can ever be shown in the absence of market power.” *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 165 (2d Cir. 2013). The court nonetheless indicated that it was skeptical about the Commission’s power to apply its program carriage rules to MVPDs that lack market power, and that it “expect[ed] that the FCC will consider market power in evaluating the vast majority of future § 616(a)(3) complaints.” *Id.*

⁴⁷ ACA Program Carriage Comments at 4-5 (legislative history from passage of 1992 Cable Act establishes that program carriage rules only apply to vertically integrated cable operators) (citing Cable Television Consumer Protection Act of 1992 106 Stat.1460 1461, §2(a)(5) (1992)).

cannot reasonably apply its proposed MFN regulation to small cable operators.⁴⁸ The Commission should be particularly hesitant to do so here, moreover, in light of the numerous regulations that apply to small cable operators with little or outdated justification, and which collectively make it harder for small cable operators to compete with larger, better funded, and less regulated competitors.⁴⁹ To be clear, doing so would not materially change ACA member conduct. Yet, as a matter of regulatory prudence, the Commission should limit the scope of its regulation to conduct reflected in the record.⁵⁰

D. The Commission Should Also Examine MFNs Sought by Broadcasters.

The Commission should also be aware that MFNs are also sometimes employed by broadcasters against MVPDs in order to hinder carriage of independent programmers. This, too, acts to hinder carriage of independent programming.

In particular, broadcasters routinely insist on unconditional MFNs regarding multicast carriage with ACA members. Under such provisions, if SmallTown Cable carries one multicast stream from Big Broadcaster A, it must automatically carry one multicast stream from Big Broadcaster B, with whom it has an unconditional MFN. It

⁴⁸ See, e.g., *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (describing longstanding rule of reasoned decision-making that an agency “examine the relevant data and articulate a satisfactory explanation for its action”), citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁹ To take just one example, over-the-top providers—including those affiliated with large MVPDs—can offer local broadcast stations without complying with the must-carry rules applicable to cable operators and satellite carriers. 47 C.F.R. § 76.56 (cable); *id.* § 76.66 (satellite).

⁵⁰ See *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd. 1610 (2016), Statement of Commissioner Ajit Pai (urging the Commission to be cautious about the regulations it adopts with the goal of improving programming diversity).

must do so, moreover, no matter what other compensation it might have received from Big Broadcaster A in exchange for such carriage, or how desirable the various multicast streams might be. If SmallTown Cable carries two of Big Broadcaster A's multicast streams, it must likewise carry two of Big Broadcaster B's streams—again, without reference to the terms of its deal with Big Broadcaster A.

In practice, this means that an ACA member that actually desires one broadcaster's multicast channel (because, for example, it is affiliated with a "Big Four" network) winds up carrying other broadcasters' *undesirable* multicast channels. Depending on how many other broadcasters have unconditional MFNs, the addition of a single multicast channel can require a small cable operator to add numerous other channels. This works to preclude the ACA member from carrying independent programmers for the reasons described in Part I, regarding bundling.

III. THE COMMISSION SHOULD ACHIEVE A BETTER BALANCE IN ITS PROHIBITION ON UNREASONABLE ADMS.

As reflected in its earlier comments, ACA members believe that their MVPD business would not be harmed, and may even benefit from the existence of a diverse online video marketplace.⁵¹ As a result, many ACA members support restrictions on ADMs that unreasonably keep their broadband subscribers from accessing content online. Yet, as the Commission itself acknowledges, ADMs can both hinder and promote online distribution of programming—and programming diversity more generally. *Unreasonable* ADMs can preclude online distribution, with negative effects for programmers and consumers alike. *Reasonable* ADMs, however, can benefit

⁵¹ ACA NOI Comments at 8.

programming diversity by incentivizing MVPDs to invest in new programming sources or content catering to underserved audiences.⁵² To better address the problems of ADM provisions without curtailing their benefits, ACA urges the Commission to refine its proposal to bar the inclusion of “unreasonable” ADM provisions in carriage agreements between MVPDs and independent video programming vendors.⁵³

While ACA members have no interest in imposing draconian restrictions on the distribution methods programmers can use, members have identified the vagueness of the term “unreasonable” as a concern. The ambiguity of the term creates uncertainty about what contractual provisions MVPDs can seek, and raises worries about programmers filing complaints against MVPDs that (even when found to be meritless) are themselves burdensome.

Accordingly, if the Commission is to attempt to restrict “unreasonable” ADM clauses, it must be exceedingly careful in doing so. Though ACA recognizes that the evaluation of an ADM provision’s reasonableness must to some extent be fact specific,⁵⁴ the Commission can provide greater certainty and consistency by pairing its language about ADM provisions that are presumptively unreasonable⁵⁵ with an explanation of what provisions are presumptively *reasonable*.

If, for example, it is presumptively unreasonable to “bar an independent programmer from licensing content, for an extended time period or indefinitely, to an

⁵² Notice ¶¶ 23-25

⁵³ *Id.* ¶ 23.

⁵⁴ *Id.* ¶ 24.

⁵⁵ *Id.*

OVD that distributes content for free to consumers,”⁵⁶ then the Commission should define a period of time, such as a month, that is presumptively *reasonable*. This definition would provide MVPDs the assurance that they can negotiate for exclusive rights to distribute content for a sufficient period of time to give them the benefit of their bargain with programmers.

Additionally, based on their experience with programmers, ACA members are concerned that the Commission’s proposed rules could compound a problem they already experience, where they agree to pay a programmer a certain rate for content, only to have that programmer sell that same content to an online distributor at a lower rate. Again, ACA members do not seek to keep content from OVDs, but merely to ensure that they receive the benefit of the programming for which they have paid. Accordingly, if it is unreasonable to “bar an independent programmer from licensing content, for any period of time, to an OVD that distributes content to paying subscribers,”⁵⁷ then it should be *reasonable* to require the independent programmer to provide MFN-like rate protection. In other words, an MVPD should be able to negotiate for assurance that if the programmer enters a deal with an OVD distributor at a lower rate than the MVPD is receiving, the MVPD will obtain that rate, providing the MFN itself is not unconditional or otherwise unfair—or, at the very least, that the MVPD could terminate the carriage agreement if not offered the same rate.

⁵⁶ *Id.*

⁵⁷ *Id.*

IV. THE COMMISSION SHOULD ADOPT A SLIGHTLY MODIFIED VERSION OF ITTA'S DEFINITION OF "INDEPENDENT PROGRAMMER."

If, as ACA suggests, the Commission restricts unconditional MFNs between large MVPDs and all "video programming vendors," it would not need to define "independent programmer" for those purposes. Nonetheless, ACA appreciates the Commission's willingness to re-examine the definition to the extent it will be employed.⁵⁸ ACA has previously explained that the Commission's initial proposal to define an "independent programmer" as a programmer that is not vertically integrated with an MVPD was overbroad, and would treat large conglomerated programmers like Disney and Fox as independent.⁵⁹ As ACA has detailed, the nine largest programming conglomerates possess significant leverage to engage in conduct detrimental to other programmers. These programmers have the power to compel ACA members to adopt unreasonable contract terms, regardless of whether they are vertically integrated. Vertically integrated or not, it is clear that large, conglomerated programmers do not need the Commission's help. Nor do they deserve to be counted as evidence that independent programming is flourishing.⁶⁰

ITTA's formulation—defining "independent programmer" as one unaffiliated with MVPDs, broadcasters, or studios—accurately reflects many features that give certain

⁵⁸ *Id.* ¶¶ 16-17.

⁵⁹ ACA NOI Comments at 3 n.4; ACA NOI Reply at 4-5.

⁶⁰ As explained above, in order to improve the availability of diverse programming substantially, the Commission should bar large MVPDs from seeking unconditional MFNs from *all* programmers. This would reduce the practical impact of the Commission's distinction between programmers that are independent and those that are not. Nevertheless, a narrower description of what makes a programmer independent would still be valuable, as it would provide a more accurate understanding of the problems independent programmers face and of who the Commission's rules are designed to assist.

programmers significant power to insist on unfair carriage terms.⁶¹ We would suggest limiting ITTA's suggested term "movie studio" to six "major film studios," as there is no reason to apply regulations to a programmer affiliated with a mom-and-pop independent filmmaker.⁶² ITTA's definition, as modified, also has the advantage of being relatively simple to administer, compared to other proposed definitions.⁶³

* * *

With some refinements, the Commission's proposed regulations of unconditional MFN and unreasonable ADM provisions can represent positive steps towards improving the availability of independent programming. The diversity interests identified by the Commission, however, cannot be meaningfully protected without regulations addressing the unreasonable bundling practices of large programmers. ACA urges the Commission to include regulations limiting forced bundling by programmers in the rules adopted through this proceeding.

⁶¹ Comments of ITTA, MB Docket No. 16-41 at 3 (filed Mar. 30, 2016).

⁶² We would propose to define "major film studio" as the six diversified media conglomerates whose various film production and distribution subsidiaries collectively command a significant share of box office revenue in a given market. The "Big Six" major studios include Universal Entertainment Group (Comcast), Walt Disney Studios (The Walt Disney Company), Warner Bros. Entertainment (Time Warner), Fox Entertainment Group (21st Century Fox), Sony Pictures Motion Picture Group (Sony), and Paramount Motion Pictures Group (Viacom). See, e.g., Kristopher Tapley, Golden Globes: Major Studios Shut Out of Drama Best Picture Category, *Variety* (Dec. 12, 2016), available at <http://variety.com/2016/film/awards/golden-globes-major-studios-shut-out-of-drama-best-picture-category-1201939838/>.

⁶³ *Notice* ¶ 17. In seeking comment on how to potentially define "independent programmer" using asset or revenue numbers, the Commission asks 10 separate questions about how to administer such a distinction. *Id.*

Respectfully submitted,



By: _____

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road
Seven Parkway Center, Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Michael D. Nilsson
William B. Sullivan
Harris, Wiltshire & Grannis LLP
1919 M Street NW, Eighth Floor
Washington, DC 20036
(202) 730-1300

Attorneys for the American Cable
Association

Ross J. Lieberman
Senior Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

/s/ Robert E. Patison
President
MAVTV Motorsports Network
302 N. Sheridan St.
Corona, CA 92880
(951) 817-6664

/s/ Charles P. Herring
Charles P. Herring
President
Herring Networks, Inc.
One America News Network and AWE
4757 Morena Blvd
San Diego, CA 92117
(858) 270-6900

/s/ Michael Fletcher
Michael Fletcher
Chief Executive Officer
Ride Television Network, Inc.
1025 S. Jennings Avenue
Fort Worth, Texas 76104
817-984-3500

January 26, 2017