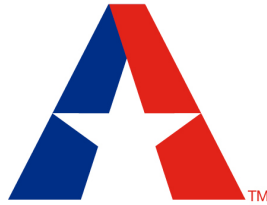


**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**REPLY COMMENTS**



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## SUMMARY

Here is a complete list of initial commenters that claim there are no diversity-related problems in the video marketplace: Comcast/NBCU, the National Cable and Telecommunications Association, the National Association of Broadcasters, and AT&T. For these commenters—all large conglomerates or trade associations representing large conglomerates—the video marketplace “is coming close to embodying the mythological horn of plenty.” Thus, they argue, the Commission need not act to preserve diversity. Every other commenter involved in the cable marketplace begs to differ with this assessment.

The divide in the comments reflects a distinction that the Commission should be making in defining “independence” for purposes of video diversity. The Commission has suggested that an “independent programmer” is one that is not vertically integrated. Vertical integration is, of course, important. But the more important distinction here is between those who possess market power and those who do not. And the real question presented here is more fundamental: shall those with market power act as gatekeepers for the programming MVPDs can deliver and subscribers can watch? The largest players claim that they cannot act as gatekeepers because the market is too “competitive.” They also say that, even if they *do* act as gatekeepers, they themselves provide sufficient diversity. They are wrong on both counts.

With respect to traditional MVPD carriage, the largest players’ claims simply cannot be squared with the experiences of others in the marketplace.

*Regarding forced bundling:*

- Large players claim that forced bundling does not occur. Numerous other commenters suggest otherwise, as do two declarations attached to these reply comments.
- Large players say that forced bundling benefits MVPDs and their subscribers. No other commenter sees such benefits.
- Large players suggest that they do not apply bundling requirements to capacity-constrained systems. While they exempt some of the very smallest systems, they do not exempt systems that are capacity constrained by any reasonable definition of the term.
- Large players say that forced bundling does not prevent carriage of independent networks. Independent networks and MVPDs alike say otherwise.
- Large players say that their own diversity efforts obviate the need for diverse offerings from independent programmers. This both exaggerates the diversity benefits they bring and ignores the harms from relying on the largest media conglomerate to be “diversity gatekeepers.”

*Regarding penetration requirements:*

- Large players say that MVPDs accept penetration requirements from them in exchange for something of value. In reality, no such bargaining occurs.
- Large players say that the “marketplace is sorting out” any diversity problems that might be caused by penetration requirements. Other commenters, however, suggest that penetration requirements increase the cost for

subscribers to access independent programming, which is often relegated to higher tiers.

*Regarding MFNs:*

- Large players concede that MFNs *can* be used to prevent carriage of diverse networks. They claim, however, that they do not actually use MFNs in this manner. The independent programmers subject to these MFNs disagree.

With respect to online video, the large players' observations *do* reflect the experiences of other commenters, including ACA and its members. Large players point to the tremendous diversity potential of online video, and ACA agrees. Yet the large players ignore their own role in hindering these very diversity benefits. When they prevent MVPDs from offering a "slim bundle," they prevent many subscribers from accessing the diverse programming available on the Internet. And to the extent they charge all of an MVPD's broadband subscribers for traditional or online programming, they raise the "entry cost" of online video.

ACA urges the Commission to proceed to a rulemaking in this proceeding. In the more immediate term, however, the Commission has ample authority to address some of these issues in *other* proceedings, and should do so.

1. The Commission should address forced bundling involving broadcasters under its good-faith negotiation rules. In this regard, it should adopt the bundling proposals submitted by ACA and others.
2. The Commission should adopt ACA's proposed revisions to the program access rules that would allow the National Cable Television Cooperative—by far the most widely used buying group in this space—to file complaints as Congress

intended. This would allow small cable operators (through NCTC) to address through enforcement action some of the activities described in this proceeding—which surely constitute “unfair methods of competition or unfair or deceptive acts or practices” against small cable operators.

In the longer term, the Commission should address conduct or proposals that harm broadband deployment—including forced bundling, penetration requirements, and unreasonable costs imposed on broadband access—pursuant to its authority under Section 706 of the Act, a source of authority not discussed in the *Notice*.

## TABLE OF CONTENTS

I.	Large Media Conglomerates and Smaller Entities Have Very Different Perspectives on This Proceeding. ....	2
II.	Large Players' Statements about Cable Programming Do Not Comport with the Experiences of Other Marketplace Participants. ....	6
A.	Large Programmers' Statements about Forced Bundling Do Not Comport with the Experiences of Other Commenters. ....	6
1.	Forced bundling exists. ....	6
2.	Forced bundling does not benefit MVPDs or their subscribers. ....	8
3.	Large programmers apply forced bundling to capacity-constrained systems. ....	9
4.	Forced bundling prevents carriage of independent networks. ....	11
5.	Large programmers cannot solve these problems by offering a handful of diverse networks themselves. ....	14
B.	Large Programmers' Statements about Penetration Requirements Do Not Comport with the Experiences of Other Commenters. ....	16
1.	There is no real "bargaining process" to distort. ....	17
2.	Diversity-related problems pervade the video marketplace. ....	18
C.	Large MVPDs' Statements about MFNs Do Not Comport with the Experiences of Other Commenters. ....	19
III.	Large Players' Statements Extolling the Diversity Benefits of Online Video Ignore the Harms They Can Inflict on Such Diversity. ....	21
IV.	The Commission Has Ample Authority to Act Now. ....	25

EXHIBIT A Declaration of Judy Meyka, NCTC

EXHIBIT B Declaration of Chris Kyle, Shentel Broadband

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**REPLY COMMENTS**



The American Cable Association (“ACA”)<sup>1</sup> submits these reply comments in connection with the Notice of Inquiry issued in the above-captioned proceeding.<sup>2</sup> In response to the initial comments filed, ACA will demonstrate the following:

- Only a handful of the very largest players believe that the current marketplace adequately serves diversity interests.

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<sup>1</sup> ACA represents nearly 750 small and medium-sized cable operators, incumbent telephone companies, and municipal utilities. ACA members offer video, broadband, and voice services. These providers offer service to homes and businesses in smaller communities and rural areas, as well as in urban and suburban areas by overbuilding other providers. 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.

<sup>2</sup> *Promoting the Availability of Diverse and Independent Sources of Video Programming*, 30 FCC Rcd. 1610 (2016) (“Notice”). (“Notice”). Unless otherwise indicated, all pleadings cited in this reply were filed in MB Docket No. 16-41 on March 30, 2016.

- The claims that these large players make with respect to traditional MVPD service—including claims about bundling and penetration requirements—do not comport with the experiences of ACA and of other commenters.
- Large players’ odes to the diversity benefits of online programming ignore the actions these players are taking to hinder access to such programming.

The record in this proceeding provides more than ample basis for the Commission to proceed to a rulemaking. More immediately, it provides more than an ample basis for the Commission to act in *other* proceedings—and the Commission should do so. The Commission should address issues involving broadcasters under its retransmission consent rules by, among other things, adopting the bundling proposals offered by ACA and others. It should also adopt ACA’s proposal to update the Commission’s definition of a buying group under its program access rules. This would give the National Cable Television Cooperative (“NCTC”) the right to file complaints against cable-affiliated programmers that engage in the activities described in this proceeding. In the longer term, it should address these issues as they relate to broadband deployment by exercising its authority under Section 706 of the Act, a source of authority not discussed in the *Notice*.

**I. LARGE MEDIA CONGLOMERATES AND SMALLER ENTITIES HAVE VERY DIFFERENT PERSPECTIVES ON THIS PROCEEDING.**

The division in the initial comments is telling. Some of the very largest players in the media marketplace—Comcast/NBCU, the National Association of Broadcasters, the National Cable and Telecommunications Association, and AT&T—support the *status quo*. They argue that no changes are required whatsoever in connection with



“independent programming and the availability of such programming to consumers.”<sup>3</sup>

Rather, they argue that—to use Comcast/NBCU’s phrase—“the video programming marketplace is coming close to embodying the mythological horn of plenty.”<sup>4</sup> In such a marketplace, implies Comcast/NBCU, all programmers can reach their customers and all distributors can carry the programming they think their customers will want.

Every other commenter involved in the video sector, however, paints a very different picture of the marketplace—one in which independent programmers cannot share in the riches enjoyed by others.<sup>5</sup> To the contrary, “independent programmers—and the independent viewpoints they represent—are being squeezed out of the video marketplace, to the point where their very existence is in jeopardy.”<sup>6</sup>

Parts II and III of these comments elaborate on these different perspectives as they relate to traditional MVPD carriage and broadband video. At the outset, however, we wanted to discuss two respects in which the initial comments fail to account for the disparity between large and smaller players. In both cases, this failure muddies the debate, hindering the Commission from focusing on the key issues.

First, the largest players sometimes act as if other entities and their subscribers simply do not matter. In some cases—where NAB refers dismissively to “an MVPD

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<sup>3</sup> *Id.* ¶ 3.

<sup>4</sup> Comments of Comcast Corporation and NBCUniversal Media, LLC at 4 (“Comcast/NBCU Comments”).

<sup>5</sup> See *e.g.*, Hispanic Information and Telecommunications Network, Inc. at 3 (“HITN Comments”).

<sup>6</sup> Comments of INSP, LLC at 2 (“INSP Comments”).

serving under 1,000 subscribers in rural Wyoming,”<sup>7</sup> for example—indifference comes closer to something resembling contempt. The Commission, however, has repeatedly recognized the importance of small cable companies to a vibrant television marketplace,<sup>8</sup> and expressed specific concern here about obstacles smaller MVPDs face in carrying independent programming.<sup>9</sup> The implication that it does not matter whether the almost 19 million homes passed by ACA members can access independent and diverse programming suggests that these larger programmers may not fully understand the goals of this proceeding.

Second, some parties have taken at face value the Commission’s proposed definition of an “independent programmer” as “one that is not vertically integrated with a MVPD.”<sup>10</sup> To be fair, the *Notice* focuses on vertical integration. And ACA agrees that vertical integration is important—and that it can greatly exacerbate the harms to independent programmers caused by bundling and penetration requirements.<sup>11</sup> But the most important distinction with respect to independence and diversity is, and must be,

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<sup>7</sup> See Comments of the National Association of Broadcasters at 9 n.32 (“NAB Comments”) (“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.”).

<sup>8</sup> See, e.g., *Amendment to the Commission's Rules Concerning Effective Competition*, 30 FCC Rcd. 6574, ¶ 25 (2015) (describing particular need for revision of the effective competition rules for smaller cable operators).

<sup>9</sup> *Notice* ¶¶ 3, 12, 17.

<sup>10</sup> *Id.* ¶ 1 n.4.

<sup>11</sup> Comments of the American Cable Association at 25-26 (“ACA Comments”) (describing the incentives for vertically integrated programmers to charge artificially high prices to ACA members).

about something more than vertical integration with an MVPD.<sup>12</sup> It is between large entities with market power and those without—a distinction related to but not coextensive with vertical integration. Fox and Disney, for example, are not “independent” in any diversity-related sense of the term, and treating them as such permits commenters favoring inaction to create an illusion of thriving independence.<sup>13</sup> ACA urges the Commission to revise its proposed definition of “independence” as this proceeding moves forward.

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<sup>12</sup> Indeed, many of the practices the Commission expressed concern about in its Notice, such as bundling, are harmful to the marketplace for independent programming regardless of whether the programmer is vertically integrated or not. See *Notice* ¶¶ 15-17.

<sup>13</sup> *Compare* Comments of AT&T at 8 (“AT&T Comments”) (“DIRECTV and U-verse currently carry 448 different networks between them, over 93% of which are ‘independent’ as the Commission has defined the term”); Comcast/NBCU Comments at 7 (“Today, only about 11 percent of national cable networks—98 out of 900—are affiliated with a cable operator. Moreover, of the top 20 national cable networks by average 24-hour ratings, only two are affiliated with a top-five cable operator.”); *and* Comments of the National Cable and Telecommunications Association at 3 (“NCTA Comments”) (“Vertical integration between programming networks and cable operators remains at an historic low, with little change in the number of networks owned by the largest cable operators in recent years.”); *with* Comments of ITTA at 3 (“ITTA Comments”) (“[The Commission’s definition] is an overly broad definition, under which large programmers that are vertically integrated with broadcast networks and/or movie studios, such as Disney or Viacom, are lumped together with truly diverse start-up programming networks that are essentially stand-alone operations. As indicated in the discussion below, these large programmers have the same advantages and create the same roadblocks to consumer choice and programming diversity as MVPD-affiliated programmers and should not be considered ‘independent video programmers’ for purposes of this proceeding.”); Comments of the Writers Guild of America, West, Inc. at 5-6 (“Writers Guild Comments”) (“By [the Commission’s] definition, ESPN would be considered an independent programmer despite being a Disney subsidiary, an owner of ‘must-have’ programming, and a sibling of the ABC broadcast network and ABC’s O&O stations. Although independent from an MVPD, ESPN hardly needs special consideration from the Commission in carriage negotiations because of the multiple sources of leverage it brings to bear on MVPDs.”); *and* INSP Comments at 3 (“Today, of the 250 television networks measured by comScore/Rentrak, 162 (or almost 65 percent) are owned by eleven large media conglomerates, while only 88 (about 35 percent) of these networks are independently owned. For example, Disney and Viacom each own 21 networks, Liberty Media owns 18 networks, News Corp. owns 15, CBS owns 14, and Discovery owns 13 networks. As a practical matter, this means that the lion’s share of MVPD channel capacity is being consumed by a small number of media conglomerates, and this trend continues to grow.”).

In the end, the most important question posed in this proceeding is this: should a handful of the largest players serve as gatekeepers for the programming that MVPDs can provide and their subscribers can access? Those large players argue that they cannot act as gatekeepers because an “ultra-competitive environment”<sup>14</sup> prevents them from doing so. They also argue that, even if they do act as gatekeepers, the Commission should not worry because *they themselves* offer “diverse” programming.<sup>15</sup> They are wrong on both counts.

## **II. LARGE PLAYERS’ STATEMENTS ABOUT CABLE PROGRAMMING DO NOT COMPORT WITH THE EXPERIENCES OF OTHER MARKETPLACE PARTICIPANTS.**

In its initial comments, ACA described a variety of threats to independent programming in relation to traditional MVPD carriage. While large players dismiss these concerns, their breezy statements about the negotiating tactics they employ and their effect on diversity simply cannot be reconciled with the experiences of other marketplace participants.

### **A. Large Programmers’ Statements About Forced Bundling Do Not Comport with the Experiences of Other Commenters.**

Large programmers make a variety of statements about bundling and its effects, suggesting either that forced bundling does not occur or that it does not harm diversity. Other commenters, however, paint a very different picture of the marketplace.

**1. Forced bundling exists.** To begin with, some large players say that they do not require bundling at all. NAB, for example, asserts that “[p]rogrammers cannot

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<sup>14</sup> Comcast/NBCU Comments at 2.

<sup>15</sup> *E.g.*, NCTA Comments at 3-4, 11; Comcast/NBCU Comments at 21-23.

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.”<sup>16</sup> Even with respect to large MVPDs, the claim is dubious.<sup>17</sup> But particularly with regard to smaller MVPDs, commenters confirm that “take it or leave it” is the norm. *They* say that “[m]ost large media entities that offer video programming have one or more ‘must-have’ channels that they offer to MVPDs, particularly smaller new-entrant MVPDs with no market power or leverage, in a take-it-or-leave it bundle with numerous less popular channels.”<sup>18</sup>

Nor do NAB’s claims comport with the experiences of ACA members, which ACA described in its initial comments.<sup>19</sup> Attached hereto as **Exhibit A** is the declaration of Judy Meyka, Executive Vice President of Programming at NCTC. As Ms. Meyka explains, NCTC has sought standalone offers in negotiations with many of the largest programmers.<sup>20</sup> In response, the vast majority of those programmers have not even pretended to make a standalone offer, but instead have either ignored the request entirely or asserted that standalone rates exist, but that NCTC’s members would not be

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<sup>16</sup> NAB Comments at 2.

<sup>17</sup> See, e.g., Comments of the American Television Alliance, MB Docket No. 15-216, at 25-26 (filed Dec. 1, 2015) (“ATVA Good Faith Comments”) (coalition including large and small MVPDs describing instances of forced bundling by broadcasters); AT&T Comments at 14 (“The number of channels that AT&T can carry—from a capacity and a cost perspective—is limited. Some large programmers, however, insist that we carry their entire channel line-up in our most widely distributed packages as a condition of carriage of their most popular channels.”).

<sup>18</sup> ITTA Comments at 4; see also INSP Comments at 12-14.

<sup>19</sup> ACA Comments at 17.

<sup>20</sup> Meyka Decl. ¶ 3.

interested in them.<sup>21</sup> In the one case where NCTC was offered a purported standalone rate card, it considered that offer to be disingenuous—one in which, regardless of the channels desired, the rate was as much or more than the whole bundle.<sup>22</sup> NCTC concluded therefore, that the terms of the standalone rate card provided little or no real choice for its members.<sup>23</sup>

**2. Forced bundling does not benefit MVPDs or their subscribers.** Large players also argue that bundling provides powerful benefits to MVPDs and their subscribers. Comcast/NBCU, for example, claims that “[t]he bundling of programming networks is so pervasive because it has affirmative benefits, including efficiency of contracting and greater overall output that enhances consumer welfare.”<sup>24</sup> Those forced to accede to such bundling fail to see such “benefits.”<sup>25</sup> Free Press, for example, described bundling this way: “Incumbent programmers use bundling arrangements to tie their unpopular channels to must-have content, leveraging the popularity of marquee networks to force MVPDs to pay for less desirable programming that they might otherwise choose not to carry.”<sup>26</sup>

ACA members fail to see such benefits as well. For years, they have explained how forced bundling reduces consumer choice and raises prices.<sup>27</sup> NCTC’s Ms. Meyka

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Comcast/NBCU Comments at 32.

<sup>25</sup> See, e.g., ITTA Comments at 2.

<sup>26</sup> Comments of Free Press at 11 (“Free Press Comments”).

<sup>27</sup> ACA Comments at 13-22.

states that members consistently express their desire to carry a subset of channels rather than the forced bundle of channels the large programmers require them to carry, some of which have little or no subscriber interest. Members also express that, while they would prefer to launch more independent channels, they are unable to do so given the capacity and cost they must allocate to the channels of the large programmers.<sup>28</sup> NCTC members clearly do not consider bundling to be a benefit.<sup>29</sup>

Attached hereto as **Exhibit B** is the declaration of Chris Kyle, Vice President - Industry Relations & Regulatory at Shentel Broadband. Shentel serves more than 50,000 video subscribers in total, including low income customers in many small and rural communities in Virginia and West Virginia. Mr. Kyle conducts all of Shentel's programming negotiations. Mr. Kyle sees no benefit whatsoever from forced bundling, and would always prefer the option of carrying individual networks.<sup>30</sup>

**3. Large programmers apply forced bundling to capacity-constrained systems.** Large programmers claim they do not require bundling on capacity-constrained systems. Comcast/NBCU put it this way: "As for smaller MVPDs with technological capacity constraints (increasingly less of an issue as smaller cable operators switch to IPTV), programmers can and should be flexible to address such constraints in appropriate circumstances."<sup>31</sup>

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<sup>28</sup> Meyka Decl. ¶ 6.

<sup>29</sup> *Id.* ¶ 7.

<sup>30</sup> Kyle Decl. ¶ 2.

<sup>31</sup> Comcast/NBCU Comments at 33.

This too does not square with ACA members' experiences. ACA's initial comments described how large programmers fail to provide such "flexibility" for any systems other than those with the absolute lowest bandwidth.<sup>32</sup> NCTC's Ms. Meyka confirms that large programmers provide bundling relief only in limited circumstances to the systems that are extremely capacity constrained.<sup>33</sup> Shentel's Mr. Kyle explains that even 750 MHz systems face significant capacity constraints.<sup>34</sup> He even names multiple Shentel systems with *one Gigahertz* of capacity that have fewer than five channels of capacity that can be devoted to additional video or broadband.<sup>35</sup> Yet programmers fail to provide such systems with any relief.

As for Comcast/NBCU's claim that capacity constraints are "less of a constraint" because providers are transitioning to IPTV, ACA has its doubts. ACA described in its initial comments the expense and futility of investing in additional *video* capacity for many small cable operators.<sup>36</sup> For those operators, the only upgrades that make economic sense are those for broadband. Indeed, many of today's capacity constrained systems are run by operators that cannot financially afford to increase capacity *at all*. Very few of ACA's members have even started the transition to IPTV, much less completed it.<sup>37</sup>

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<sup>32</sup> ACA Comments at 18-19.

<sup>33</sup> Meyka Decl. ¶ 4.

<sup>34</sup> Kyle Decl. ¶¶ 3-4.

<sup>35</sup> *Id.* ¶ 4 (describing systems in Oakland, MD; Weston, WV; Summersville, WV; Webster Springs, WV; and the area of Anstead, Page and Scarbro, WV).

<sup>36</sup> ACA Comments at 21.

<sup>37</sup> Moreover, while IPTV may offer bandwidth savings in the long term, during the transition period IPTV and traditional systems need to run simultaneously, taking up *more* bandwidth.



**4. The forced bundling engaged in by larger programmers hinders carriage of independent networks.** Some large programmers suggest that, even if they *do* engage in forced bundling, such bundling has little effect on the carriage of independent networks. NAB, for example, suggests that increases in cable-system capacity “undermine arguments by MVPDs that channel capacity constraints restrict in any significant way their ability to offer more diverse and/or independent programming today. . . .”<sup>38</sup>

Independent networks, however, beg to disagree. They point out the same thing that ACA did—that forced bundling precludes carriage of independent networks both for capacity reasons<sup>39</sup> and for economic reasons.<sup>40</sup> Here are some examples:

- “Time and time again, we have encountered this very circumstance. 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. We have been asked to wait until negotiations with Viacom or retransmission consent negotiations have concluded to see if a channel might become available. When Viacom’s demands during the last renewal of its agreement with the National Cable Television Cooperative required more channels and more money than some smaller MVPDs could justify, channel capacity opened up when they deleted the Viacom bundle, and we were able to obtain carriage of one or more channels immediately.”<sup>41</sup>
- “Time and time again in its negotiations with small, mid-sized, and even larger MVPDs, Aspire and UP have been informed that their carriage opportunities are impeded by the bundling practices of well-established major distributors. . . . Notwithstanding plant improvements and advances in technology, many smaller MVPDs have limited channel capacity such that bundling simply precludes the

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<sup>38</sup> NAB Comments at 3.

<sup>39</sup> ACA Comments at 19-22.

<sup>40</sup> *Id.* at 22-26.

<sup>41</sup> Comments of KSE Media Ventures, LLC at 10-11 (“KSE Comments”).

carriage of independent programmers.”<sup>42</sup>

- “Forced bundling drives up the cost of linear television to MVPDs and ultimately to consumers and challenges the price elasticity of pay-TV. As consumers resist the upward price pressure created by wholesale bundling, MVPDs are forced to eliminate other programming options to cut costs. Independent programmers, without market leverage, bear the disproportional brunt of these cost cutting measures by being denied carriage, forced to accept carriage on less than market rates and terms, or dropped altogether from channel line ups. When independent programmers face structural obstacles to carriage that bundled networks do not, consumers lose. Consumers are offered fewer diverse channels at higher prices—a condition that could not exist in a truly free market.”<sup>43</sup>
- “With regard to direct broadcast satellite carriage, HITN was unable to secure access to scarce capacity through negotiated contracts, because larger programmers, vertically integrated programmers and those with bundling arrangements have soaked up available channel capacity. HITN has been told repeatedly that there is simply no available bandwidth for negotiated placement of small independent programmers within the Spanish Language Tier.”<sup>44</sup>
- “[I]ndependent programmers are often squeezed out of the market by program bundling. Specifically, large media conglomerates with multiple program offerings (e.g., CBS, Comcast-NBCUniversal, Disney, News Corporation, Time Warner, and Viacom) compel MVPDs to carry less desirable programming by bundling it with more popular programming. By forcing MVPDs to carry all of their channels—including those for which there is little or no consumer demand—these media conglomerates displace RFD-TV and other independent channels from or preclude them from being included in MVPDs’ channel lineups.”<sup>45</sup>
- “Large conglomerations of producers, broadcast and cable networks and local stations crowd independent programmers out of the wholesale programming market by leveraging their control over ‘must have’ programming into carriage of affiliated networks.”<sup>46</sup>

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<sup>42</sup> Comments of Aspire Channel, LLC and UP Entertainment, LLC at 2-3.

<sup>43</sup> Comments of TheBlaze, Inc. at 9 (“TheBlaze Comments”).

<sup>44</sup> HITN Comments at 4.

<sup>45</sup> Comments of RFD-TV at 20 (“RFD Comments”); *see also id.* at 9 (describing MVPDs that have dropped RFD, including Frontier, Wild Open West, and Cable One).

<sup>46</sup> Writers Guild Comments at 3-4.

- “Bundling also extends to conglomerate networks owned by companies that also own or control broadcast television stations with retransmission consent rights. These companies are widely known to tie the grant of retransmission consent rights for “must-have” broadcast stations to MVPDs’ agreement to carry undesired affiliated non-broadcast networks, and to broadcasters’ digital multicast channels, thereby further limiting access by independent networks to MVPD platforms.”<sup>47</sup>
- “RIDE TV was told by one head of programming for a major MVPD, ‘if you were a large programmer like Disney or Viacom, you could carry a big club and could force me to do a deal. But since you aren’t, I don’t have to do one. You don’t have [broadcast stations] or bundled channels to trade.’”<sup>48</sup>

Here again, ACA’s experiences match those of the independent programmers, not the large conglomerates. NCTC’s Ms. Meyka has negotiated numerous deals with independent programmers, but large-programmer bundling limits its members’ ability to opt into these deals.<sup>49</sup> Indeed, NCTC often forewarns independent programmers with which it negotiates not to expect widespread launches.<sup>50</sup> Mr. Kyle adds that Shentel would love to see how subscribers respond to new, independent channels, but because its capacity is taken up by bundled channels, it is not economically feasible.<sup>51</sup> Capacity constraints have led it not to carry multiple independent channels.<sup>52</sup>

Moreover, according to Mr. Kyle, the *price* of bundling impacts Shentel’s ability to carry independent channels.<sup>53</sup> As he explains:

“Shentel has a set programming budget each year, and when we are forced to pay for large numbers of channels that neither we nor our

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<sup>47</sup> INSP Comments at 13.

<sup>48</sup> Comments of Ride Television Network at 3 (“Ride TV Comments”).

<sup>49</sup> Meyka Decl. ¶ 7.

<sup>50</sup> *Id.*

<sup>51</sup> Kyle Decl. ¶ 5.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* ¶ 6.

subscribers want, it limits the money we can spend on other programming. 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."<sup>54</sup>

**5. Large programmers cannot solve these problems by offering a handful of diverse networks themselves.** Large programmers come close to arguing that none of the problems described above should matter because they themselves offer diverse programming—and (the argument goes) bundling aids in the distribution of such programming.<sup>55</sup> Nobody in this proceeding, however, has objected to large programmers' addition of some diverse programming to their stables. Any steps to promote diversity should be applauded, even if they are required by merger conditions.<sup>56</sup> Parties *do* object, however, to the notion that large programmers can set themselves up as “diversity gatekeepers” by controlling all of the programming carried by MVPDs. INSP perhaps put it best: “[T]he availability of a large number of channels, even if they covered every conceivable programming niche, would not fulfill Congress’ goal when the overwhelming majority of those channels are owned or controlled by a

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<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., Comcast/NBCU Comments at 32-33 (“Wholesale bundling of programming networks can create opportunities for valuable content—including diverse content that may not otherwise have an opportunity to fully flourish—to be carried. Including new, untested programming with special appeal to diverse audiences in programming bundles may encourage viewers to sample that programming, which in turn can help to grow the audience for such programming.”).

<sup>56</sup> *Cf.* Free Press Comments at 8 (criticizing Comcast/NBCU's implementation of merger conditions).

handful of media conglomerates.”<sup>57</sup> Comcast/NBCU’s bundle, for example, may indeed include a lot of programming. But all of that programming is selected by a single conglomerate—Comcast/NBCU—and forced in bulk upon MVPDs and viewers alike.

Commenters also point out that, whatever their efforts, large programming conglomerates are very unlikely to provide the same levels of diversity as do independent programmers:

- “[I]ndependent programmers, with their unique editorial and creative viewpoints, reflected virtually every face of our diverse American society. . . . [I]ndependents brought forth a cornucopia of diverse channels aimed at every conceivable focus of viewer interest, with specialized channels covering almost every conceivable genre, including books, horses, the space program, gay and lesbian life, martial arts and countless others—differentiation that rarely will be found among the channels controlled by media conglomerates.”<sup>58</sup>
- “[R]unaway media consolidation has left us with a broadcast dial dominated at the national and local level by a handful of owners, as well as a highly concentrated cable industry controlled by a cabal of incumbent video programmers and distributors. Instead of opening up their platforms for independent and diverse content, vertically integrated distributors have chosen to carry more of the same. . . . Even if Comcast[/NBCU] had lived up to its promises, diverse programmers have lost out on new opportunities as rising consolidation forced them out of the market or shut the door to entry in the first place.”<sup>59</sup>
- “A more open and vibrant video marketplace would most clearly benefit those voices which are underrepresented in traditional access outlets, and the people who want to hear those voices.”<sup>60</sup>

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<sup>57</sup> INSP Comments at 9; *see also id.* at 7-8 (“As the Commission considers these important issues, it is crucial to recall that what is at stake is not only the interests of independent programmers—who, in their own right, are worthy of protection as First Amendment speakers—but also the welfare of *American consumers*. The Commission should ensure that the viewing public will have access to *real* diversity in viewing *sources*, not just the illusion of choice presented when the overwhelming majority of networks to which viewers have access is controlled by a handful of content conglomerates, and MVPDs are either powerless or unwilling to resist such leverage.”) (emphasis in original).

<sup>58</sup> INSP Comments at 5.

<sup>59</sup> Free Press Comments at 7-8.

<sup>60</sup> Comments of Public Knowledge at 4 (“Public Knowledge Comments”).

ACA shares these views. Indeed, ACA would put this even more strongly. Even if a large programmer offers a modicum of diversity, it cannot match the diversity that would occur if, for example, *each* of ACA's nearly 750 members could independently choose the programming it thought its subscribers would want. Nor does any diversity provided by large conglomerates account for the ability of individual MVPDs to choose programming responsive to individual communities' needs.

Moreover, even when a bundled channel does offer programming geared towards a niche audience, there is no guarantee that it will continue to do so. Large programmers have repeatedly rebranded their bundled channels, forcing ACA members to carry channels the member not only does not want, but also did not even exist when they accepted the bundle. For example, Viacom's decision to rebrand The Nashville Network, which catered to country music fans, meant ACA members were suddenly carrying general entertainment channel Spike TV.<sup>61</sup>

**B. Large Programmers' Statements about Penetration Requirements Do Not Comport with the Experiences of Other Commenters.**

Large programmers say less about penetration requirements than they do about bundling. Comcast/NBCU, for example, says essentially two things: (1) any restrictions on penetration requirements would "distort the whole bargaining process"; and (2) "[t]o the extent there are any [diversity-related] issues [related to penetration requirements],

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<sup>61</sup> Jon Lafayette, *Spike Looks to Compete in General Entertainment*, BROADCASTING & CABLE (Mar. 22, 2013), <http://www.broadcastingcable.com/news/advertising-and-marketing/spike-looks-compete-general-entertainment/53132>.

the marketplace is sorting them out and is more than capable of resolving them. . . .”<sup>62</sup>  
ACA disagrees with both of these propositions.

1. **There is no real “bargaining process” to distort.** Comcast/NBCU argues that “[p]recluding a programmer from contractually establishing the carriage levels it can expect would produce a different deal, with different revenues, and would impede rather than assist a meeting of the minds.”<sup>63</sup> ACA, of course, has no objection to the idea that programmers and MVPDs can establish penetration levels by contract—or that contracts with certain penetration levels may differ from those with no such levels. Yet this notion presupposes that a “meeting of the minds” can in fact exist with respect to large programmer penetration requirements. That is, it presupposes that MVPDs accept penetration requirements from them *in exchange for something of value*.

This, however, is not how other commenters describe the marketplace. INSP, for example, puts it this way:

Conglomerate programmers also impose tier placement requirements on MVPDs that mandate carriage of the bundled, tag-along networks in MVPDs’ highly distributed tiers, with advantageous channel placement—treatment that often is unwarranted by the networks’ ratings—to the exclusion of independent programmers that are more highly desired by viewers, as demonstrated by ratings, but have no leverage. This relegates independents to less widely distributed tiers, or disadvantageous channel placement if they get carriage at all. Here too, this is accomplished either through conglomerate programmers’ direct demands or through pricing schedules that make it uneconomic for MVPDs to resist such demands. For example, in a recent carriage dispute between Viacom and Cablevision, Viacom demanded **one billion dollars more** in license fees for just Viacom’s most popular channels (Nickelodeon, MTV, BET and Comedy Central) than for its entire bundle of networks.<sup>64</sup>

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<sup>62</sup> Comcast/NBCU Comments at 34.

<sup>63</sup> *Id.*; see also NAB Comments at 7.

<sup>64</sup> INSP Comments at 6-7.

Ms. Meyka of NCTC confirms this in her declaration. Commenters urging agency inaction suggest that penetration requirements are exchanged for valuable consideration in a give-and-take. Yet she reports that penetration requirements are simply demanded—an essentially uniform result that belies the notion of individual substantive negotiation for individual deals.<sup>65</sup> For the most part, NCTC must accept the large programmer’s penetration requirements or there is no deal.<sup>66</sup> And she reports that NCTC members, to her knowledge, do not value such requirements.<sup>67</sup>

**2. Penetration requirements cause diversity problems.** Comcast/NBCU and other large programmers suggest that penetration requirements do not cause diversity problems—and, to the extent they do, “the marketplace is sorting them out.”<sup>68</sup> Yet diversity problems *do* exist, and the marketplace shows no signs of sorting them out.

In its initial comments, for example, ACA explained that penetration requirements increase the cost for subscribers to access independent programming, which is often relegated to higher tiers.<sup>69</sup> Here once more, other commenters reflect the viewpoint of ACA and its members.

- “[Penetration requirements] relegate[] independents to less widely-distributed tiers, or disadvantageous channel placement if they get carriage at all.”<sup>70</sup>

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<sup>65</sup> Meyka Decl. ¶ 8.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* ¶ 9.

<sup>68</sup> Comcast/NBCU Comments at 34.

<sup>69</sup> ACA Comments at 28-31.

<sup>70</sup> INSP Comments at 7.



- “[Bundling and penetration requirements] essentially preclude[] most independent program networks from the linear platforms of most MVPDs, and almost always from the most widely-distributed tiers, and clearly does not serve to promote the source diversity mandated by Congress in the Communications Act.”<sup>71</sup>
- “[T]iering practices have the effect of reducing the ability of independent programmers to obtain carriage. In some instances, RFD-TV is carried on sports tiers or other less penetrated tiers, which requires RFD-TV fans to pay more for tiers that they otherwise would not want, and reduces RFD-TV’s reach.”<sup>72</sup>
- “Few MVPDs are willing to add independent programmers to their most highly-penetrated tier(s) of service so that the independent programmer typically obtains only a limited portion of the major distributors’ basic subscribers.”<sup>73</sup>
- “Many independents are forced to accept limited penetration tiers that may represent only a fraction of an MVPD’s video subscriber base regardless of the demand and ratings of the network.”<sup>74</sup>

**C. Large MVPDs’ Statements about MFNs Do Not Comport with the Experiences of Other Commenters.**

Large MVPDs concede that MFNs *could* be used to hinder independent programmers, but assert that they generally are not actually used this way. AT&T offers that its MFN provisions are, “for the most part, ‘conditional,’” merely “respond[ing] to . . . uncertainty [and] giving us the confidence to make [a] significant investment in programming.”<sup>75</sup> For its part, Comcast/NBCU’s states, “There may be contexts when certain arrangements could have the purpose or effect of raising prices to consumers or inhibiting competition—when they are used as a sword rather than a shield. But that is *not* generally the case in the programming industry.”<sup>76</sup>

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<sup>71</sup> *Id.* at 13.

<sup>72</sup> RFD Comments at 21.

<sup>73</sup> KSE Comments at 7.

<sup>74</sup> Ride TV Comments at 3.

<sup>75</sup> AT&T Comments at 12.

<sup>76</sup> Comcast/NBCU Comments at 25-26.

Independent programmers, however, have seen more sword than shield. They describe MFNs as a tool enabling large MVPDs to “cherry pick” the best provisions from independent programmers’ deals with other providers, without taking on the responsibilities that the other provider accepted in exchange for the favorable contract terms.

- “Increasingly, MVPDs demand ‘unconditional MFNs’ and ‘cherry picker MFNs’, disproportionately so from independent networks. Under the terms of an unconditional MFN, the distributor is entitled to receive whatever special consideration or superior term that another distributor receives in a later deal without having to give the video programmer consideration equivalent to that which secured the superior term in the later deal.”<sup>77</sup>
- “MFNs often allow MVPDs to pick and choose the terms as to which they invoke MFN protection, and often provide that the MVPD does not have to satisfy conditions relating to the more favorable terms in order to receive their benefits. These provisions give no consideration to what was bargained for by another MVPD to receive the more favorable term(s). By allowing each MVPD to pick, on a provision-by-provision basis, terms from all of a network’s distribution contracts that are more favorable to another MVPD, the effect is that a network’s worst terms from any deal become its only terms in all contracts with *all* MVPDs.”<sup>78</sup>
- “The impact of these types of restrictive all-encompassing MFNs on the ability of independent programmers to operate and compete for new distribution outlets is apparent. For example, MFN provisions constrain the ability of independent programmers to provide their programming to new distribution technologies such as OTT platforms. Unless the OTT distributor develops packages that generally mirror the packages of existing MVPDs, an independent programmer that is able to obtain packaging commitments from large MVPDs cannot agree to different or less-penetrated OTT distribution because it potentially will lose its existing packaging commitments.”<sup>79</sup>

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<sup>77</sup> TheBlaze Comments at 5; see *also* KSE Comments at 5 (setting forth taxonomy of MFNs); Ride TV Comments at 3; HITN Comments at 4-5.

<sup>78</sup> INSP Comments at 18.

<sup>79</sup> KSE Comments at 5.

If a relatively large programmer like Univision finds itself unable to resist one-sided MFN provisions, truly independent programmers do not stand a chance.<sup>80</sup>

### III. **LARGE PLAYERS' STATEMENTS EXTOLLING THE DIVERSITY BENEFITS OF ONLINE VIDEO IGNORE THE HARMS THEY CAN INFLICT ON SUCH DIVERSITY.**

As described above, large players' depiction of the current MVPD marketplace is one ACA members and many other commenters do not recognize. Large players' comments about online programming, by contrast, *do* square with ACA's views and its members' experiences. As they say, online programming offers tremendous potential diversity benefits. Yet large players ignore the role that they themselves may play in killing the golden goose.

Comcast/NBCU, to take just one example, argues at length and with great persuasion that online video can contribute to video diversity.

- “Translating a great idea into a program accessible by audiences around the country and around the globe has never been easier than it is today. Decades ago, a content creator who wanted to reach consumers across the country had to be able to sell her idea to one of three major broadcast networks. . . . With the flourishing of the Internet as a means to consume video programming, a content creator can reach viewers directly and need not even deal with a network.”<sup>81</sup>
- “OVDs are emerging as a potential source of new distribution opportunities, for established programmers and new ones alike. Today, OVDs offer content to customers on both a live and an on-demand basis, including programming traditionally only available from an MVPD. . . . While the offerings on these distribution outlets are not nearly as robust as those offered by traditional MVPDs, they are a potential source of distribution for diverse and independent programmers.”<sup>82</sup>

ACA agrees with Comcast wholeheartedly.

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<sup>80</sup> See Comments of Univision Communications, Inc. at 8-10.

<sup>81</sup> Comcast/NBCU Comments at 5.

<sup>82</sup> *Id.* at 10.

Yet in extolling the virtue of online programming with respect to independent programmers, Comcast/NBCU ignores its own role—and that of other large programmers—in preventing subscribers from accessing this wealth of diverse programming. When large programmers eat up capacity on capacity-constrained systems, they prevent those systems from reallocating bandwidth to the broadband services necessary to deliver online video of sufficient quality and reliability. Shentel’s Mr. Kyle, for example, notes that, given the bandwidth demands of HD channels, bundling creates capacity constraints on a number of his systems and strains Shentel’s ability to offer the Internet service it considers a top priority.<sup>83</sup> According to NCTC’s Ms. Meyka, moreover, one large programmer even suggested recently that NCTC’s members should reallocate bandwidth from their broadband offering to video solely for the purposes of carrying the programmer’s additional low-rated networks.<sup>84</sup> The diversity promised by online video will be unfulfilled if the carriage of unwanted channels comes at the expense of Internet performance.

Moreover, when programmers like Comcast/NBCU require small cable operators to offer numerous channels in expanded basic, they make it impossible for these operators to offer a “skinny bundle” of cable programming to complement online video offerings. As independent programmers put it:

- “Relying on their substantial market power, incumbent programmers and MVPDs have formed a comfortable cabal that forces people to accept bloated bundles of channels.”<sup>85</sup>

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<sup>83</sup> Kyle Decl. ¶ 4.

<sup>84</sup> Meyka Decl. ¶ 5.

<sup>85</sup> Free Press Comments at 8.

- “The result [of penetration requirements] is a phenomenon known as ‘bundle bloat.’ Although large MVPDs have more leverage to resist such coercion than smaller MVPDs, that leverage more often goes to negotiating the license fee they will pay for the fat bundle, not to resisting the conglomerate’s demand that they carry all of the conglomerate’s channels.”<sup>86</sup>
- “As Verizon has detailed in other contexts, large programmers frequently negotiate distribution rights for must-have programming channels with demands to carry less desirable, affiliated channels, which can increase the rates for the programming and result in bloated packages that may be of little interest to most consumers. While offering a large and diverse array of programming is generally important for competitive MVPDs, ‘bundle inflation’ limits their discretion in selecting what they feel is the best lineup or package of channels for their subscribers, including limiting resources to add independent and minority programming to the mix of channels. Attempting to select only the most popular channels, leaving more room for discretionary selections, is frequently met with uneconomic pricing for the preferred, must-have channels. MVPDs can lose even more discretion when the program owner demands placement of the programming in widely-distributed service tiers.”<sup>87</sup>
- “[T]here is increasing consumer demand for on-demand, subscription streaming, and ‘skinny bundles,’ and provisions that prevent these sorts of business models from emerging may be harmful to consumers and the marketplace.”<sup>88</sup>

ACA and its members agree.<sup>89</sup> Mr. Kyle of Shentel, for example, states both that consumers want skinny bundles as a bridge to transitioning to broadband video service,<sup>90</sup> and that penetration requirements generally prevent him from offering such skinny bundles.<sup>91</sup> This, in turn, prevents Shentel subscribers from cord-shaving.<sup>92</sup> For

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<sup>86</sup> INSP Comments at 13.

<sup>87</sup> Comments of Verizon at 3-4.

<sup>88</sup> Public Knowledge Comments at 22-23.

<sup>89</sup> ACA Comments at 28, 31-33.

<sup>90</sup> Kyle Decl. ¶ 7.

<sup>91</sup> *Id.* ¶ 8.

<sup>92</sup> *Id.*

Shentel's customers, Comcast/NBCU's "horn of plenty"<sup>93</sup> remains beyond reach—because of the actions of players in Comcast/NBCU's position.

Comcast/NBCU's discussion of online programming also ignores the very real possibility that, sometime in the future, Comcast/NBCU could hinder access to that programming even further. Right now, Comcast/NBCU charges per cable subscriber for its bundle of broadcast and cable programming. ACA members report that they have been asked by large programmers to calculate fees for their traditional MVPD programming based not only on the member's number of *video* subscribers, but also based on its *broadband-only* subscribers. As programmers increasingly offer online-only services untethered from their MVPD offering, requirements on ISPs to pay based on broadband subscribers in order for their broadband customers to gain access to the online content may become more common. The Disney-owned ESPN3 already uses such a model, charging ISPs based on the number of broadband subscribers and barring internet users from accessing the service if their ISPs have not paid for ESPN3, even if those users would willingly pay for ESPN3 directly.

As ACA indicated in its initial comments, the growth of such arrangements would harm diversity interests.<sup>94</sup> Comcast/NBCU says, correctly, that in an online world a "content creator can reach viewers directly and need not even deal with a network."<sup>95</sup> If broadband subscribers, however, have to pay for Comcast/NBCU (and yet more for Fox, Viacom, etc.) *as part of their broadband fees*, they will have little money left for

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<sup>93</sup> See Comcast/NBCU Comments at 4.

<sup>94</sup> ACA Comments at 37.

<sup>95</sup> Comcast/NBCU Comments at 5.

online content creators. Much of the promise of online video depends on it being available for purchase separately from broadband access, and policy-makers must remain vigilant to ensure that the market stays this way. If Comcast/NBCU and other large programmers—or even edge providers like Google, Facebook, or Netflix—disturb this model, they undercut the very virtues Comcast/NBCU cites.

#### **IV. THE COMMISSION HAS AMPLE AUTHORITY TO ACT NOW.**

In its initial comments, ACA focused on creating a factual record, rather than discussing legal authority. It did so for two reasons. First, it seems to ACA that any ultimate legal dispute in this area will largely be resolved based on the facts. Thus, to take one example, Comcast/NBCU argues that any action in this area would not survive a First Amendment challenge.<sup>96</sup> It bases this claim, however, on a factual proposition—namely, that any such action would serve only to “promot[e] even more diversity than now exists.”<sup>97</sup> If the facts really were as Comcast/NBCU describes them, its legal claim might be correct. Yet, as noted throughout this reply, the material facts are very different than Comcast/NBCU describes them.

More importantly, there will be time enough to argue about the two sources of authority identified by the Commission—Sections 257(b) (related to diversity) and 616(a) (related to program carriage)—if and when the Commission proceeds to a specific diversity rulemaking, as we believe it should.<sup>98</sup> When it does, we can more fully

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<sup>96</sup> *Id.* at 36.

<sup>97</sup> *Id.*

<sup>98</sup> 47 U.S.C. 257(b); *id.* § 536(a); *Notice*, ¶ 23.

discuss Comcast/NBCU's claims that the Commission lacks authority under these two sections.<sup>99</sup>

We think, however, that the Commission can and should act *now*. At least two proceedings offer it the opportunity to do so. ACA and others have offered proposals for action in both. These proposals would help the Commission address the diversity

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<sup>99</sup> We would anticipate discussing the following, among other subjects:

- While Comcast/NBCU asserts that Section 257 is essentially a dead letter, Comcast/NBCU Comments at 37-38, the very first Commission report on the implementation of Section 257 treated the implementation of the section as an ongoing project. *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 12 FCC Rcd. 16802, ¶ 2 (1997) (“*Section 257 1997 Report*”) (“This Report summarizes the Commission's implementation of Section 257, describes our strong commitment to continue to achieve its statutory goals, and outlines steps we plan to take in the future.”).
- While Comcast/NBCU expresses doubt that the section's reference to “telecommunications services and information services” encompasses cable, Comcast/NBCU Comments at 38, that same report makes clear that the Commission has always considered cable to be within the section's ambit. *See Section 257 1997 Report* ¶ 11 (explaining that the report would first “discuss obstacles to entry identified by commenters that affect small telecommunications businesses as a whole” and then would address “obstacles that relate to particular types of communications services,” including cable services). The report goes on to discuss some specific problems small cable operators have in obtaining access to programming. *Id.* ¶¶ 47-48. While the Commission ultimately declined to impose regulations regarding these practices, it did not do so on the basis that it lacked authority under Section 257. *Id.* ¶ 49; *see also Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, 13 FCC Rcd. 6353, ¶ 11 (1998) (“Finally, we believe that amendment of our rules promotes the national policy goals set forth in Section 257 of the Communications Act by enabling the small cable systems to comply with the Emergency Alert System (EAS) requirements by allowing them an extended period of time to install the EAS equipment.”).
- As the ACA has noted before, the scope of Section 616(a) is limited to vertically-integrated MVPDs associated with video programmers. Comments of the American Cable Association, MB Docket No. 11-131 (filed Nov. 28, 2011). Nevertheless, with regard to those MVPDs that are vertically integrated, Section 616(a) gives the Commission additional authority to regulate “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). While the statute goes on to list several specific terms that the regulations “shall . . . include,” the text does not indicate that the broad regulatory authorization is limited only to these areas. *Id.*



issues raised in this proceeding as well as the competition related issues raised in those proceedings.

First, the Commission should address bundling involving broadcast stations through its retransmission consent rules. Indeed, the Commission can do so in the context of an individual complaint even without a change in the rules—although it would have to overcome a presumption in favor of bundling in order for it to do so. Or it could adopt one of the bundling proposals in the ongoing good-faith rulemaking, including the proposals submitted by ACA<sup>100</sup> and the American Television Alliance (in which ACA is a member).<sup>101</sup> As ACA and ATVA have each described, the Commission possesses more than sufficient legal authority to do so.<sup>102</sup> The Commission should act on these proposals this year.

Second, the Commission should adopt ACA's proposal to update its program access rules to allow NCTC—the buying group used by more than 800 small and medium-sized cable operators—to bring complaints. As ACA has explained, out-of-date rules allow “buying groups” to bring complaints, but do not allow NCTC to do so.<sup>103</sup> As the entity primarily responsible for negotiating with programmers on behalf of small cable companies, NCTC is in a unique position to raise issues with the negotiating practices of cable-affiliated programmers, and the Commission's current rules

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<sup>100</sup> Comments of the American Cable Association, MB Docket No. 15-216 at 15-33 (filed Dec. 1, 2015) (“ACA Good Faith Comments”).

<sup>101</sup> ATVA Good Faith Comments at 44-47.

<sup>102</sup> *Id.* at 5-9; ATVA Good Faith Comments at 51-59; Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 15-216 (filed Mar. 15, 2016).

<sup>103</sup> *E.g.*, Comments of the American Cable Association, MB Docket No. 12-68 (filed Dec. 17, 2012).

effectively bar them from doing so. By adopting ACA's proposal, the Commission will allow small cable operators (through NCTC) to address many of the behaviors in this proceeding—which surely constitute “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.”<sup>104</sup>

In the longer term, as ACA has observed,<sup>105</sup> the Commission could also exercise its authority under Section 706 of the Act—a source of authority not identified in the *Notice*. That section gives the Commission ample authority to regulate conduct in the cable marketplace that inhibits the deployment of broadband.<sup>106</sup> Section 706 directs the Commission to “take immediate action” in the event that advanced telecommunications capability is not being deployed in a reasonable and timely fashion.<sup>107</sup> To encourage the deployment of advanced telecommunications, the Commission is authorized to employ “measures that promote competition in the local telecommunications market, or

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<sup>104</sup> 47 U.S.C. 548(b).

<sup>105</sup> Reply Comments of the American Cable Association, GN Docket No. 14-126, at 6-8 (filed Apr. 6, 2015); Comments of the American Cable Association, GN Docket No. 14-126, at 2-3, 10 (filed Mar. 6, 2015).

<sup>106</sup> Other commenters in this proceeding agree. See, e.g., TheBlaze Comments at 11; ITTA Comments at 9-10.

<sup>107</sup> 47 U.S.C. § 1302(b); see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, 25 FCC Rcd. 9556, ¶¶ 2-3 (2010); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, 30 FCC Rcd. 1375, ¶ 12 (2015) (“2015 Broadband Progress Report”).

other regulating methods that remove barriers to infrastructure investment.”<sup>108</sup> The Commission has recognized that this authority includes the power to regulate practices involving the provision of video service if those practices indirectly hinder broadband deployment.<sup>109</sup>

That is exactly the situation here. The record makes clear that the negotiating tactics large programmers engage in require cable operators to devote scarce bandwidth to little-watched channels, instead of to the faster broadband that cable operators and their customers would prefer.<sup>110</sup> Mr. Kyle’s declaration confirms this fact.<sup>111</sup> The aggressive bundling practices of large programmers particularly hobble smaller cable operators, which are disproportionately located in the rural communities that most urgently need additional broadband deployment.<sup>112</sup> Preventing cable programmers from forcibly larding up the bandwidth of small cable providers is critical to ensuring that the investments providers make to increase their bandwidth for broadband do not go to waste.

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Contrary to the claims of the largest actors in the media marketplace, but consistent with the information supplied by every other commenter in this proceeding,

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<sup>108</sup> 47 U.S.C. § 1302(a).

<sup>109</sup> See *City of Wilson, N. Carolina Petition for Preemption of N. Carolina Gen. Statute Sections 160A-340 et seq.*, 30 FCC Rcd. 2408, ¶¶ 79 (2015).

<sup>110</sup> ACA Comments at 19.

<sup>111</sup> Kyle Decl. ¶ 4.

<sup>112</sup> *2015 Broadband Progress Report* ¶ 5 (“A digital divide persists between urban and non-urban parts of the country. The data show that this divide exists for broadband service at a variety of speeds. The data also show that the problem is one of supply, not demand. Consumers in rural America adopt broadband at the same rates as consumers in urban areas.”)

the conduct described in ACA's initial comments is real—and highly detrimental to the diversity interests identified by the Commission. The Commission can act now through its good-faith and program-access rules to address some of this conduct. It should also proceed to a rulemaking in this docket in order to begin to consider more broadly effective remedies.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**



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# Exhibit A

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Promoting the Availability of Diverse and  
Independent Sources of Video Programming

MB Docket No. 16-41

**DECLARATION OF JUDY MEYKA**

I, Judy Meyka, declare the following:

1. My name is Judy Meyka. I am the Executive Vice President of Programming at the National Cable Television Cooperative (“NCTC”), a buying group for small cable operators. In that capacity, I have negotiated master agreements for NCTC members with all of the largest programming groups, as well as with many independent programmers. Once negotiated, NCTC members may elect to opt in to these agreements.

2. NCTC currently has master agreements with the nine largest programming groups, namely Disney/ESPN, 21st Century Fox, NBCU/Comcast, Turner, Viacom, A&E Television Networks, AMC, Discovery, and Scripps. These large programming groups represent well over 100 different networks or channels. To some degree, all large programmers bundle their services by only allowing NCTC members to carry must-have programming networks if they also carry multiple other networks, many of which are far less desirable channels. As a result, an NCTC member seeking to distribute just one network from each of the large programmers would be required to carry up to 65 channels in total, and potentially more in certain circumstances.

3. NCTC has sought standalone rate cards in negotiations with many of the largest programmers. The vast majority of those programmers either ignored the requests entirely or dismissively claimed that while standalone rates existed, NCTC members would not be interested in them. In the one case where NCTC was offered a purported standalone rate card, it was a disingenuous offer where regardless of the channels desired, the rate was as much as or more than the entire bundle. There was no economic rationale for the rate card given by the programmer, and NCTC concluded that it provided little or no real choice for members.

4. The large number of bundled channels take up a tremendous amount of bandwidth, which is particularly problematic for systems with limited capacity. Programmers provide narrow exceptions from forced bundled carriage only in limited circumstances for systems that have not been upgraded or rebuilt, but they do not go far enough to adequately address the issue for many systems with serious capacity limitations. Systems that do not satisfy the narrow exceptions must carry the entire bundle.

5. Programmers are very aggressive in protecting their ability to force cable operators to take their full bundle. In fact, one programmer suggested that NCTC members reallocate bandwidth from their broadband offering to their video offering solely for the purposes of carrying the programmer's additional low rated networks.

6. For NCTC members, bundling represents an abuse of the enormous leverage large programmers have over them. Members consistently express frustration about the number and quality of the bundled channels they are required to carry under the agreements with the large programmers. Particularly concerning are those channels with

low ratings, virtually no subscriber demand and with no connection to the member's subscriber demographics. Forced bundling takes up bandwidth that could be utilized for other programming or services and even further limits the available bandwidth of capacity-constrained systems. Members also state that, while they would prefer to carry independent programmers, particularly those targeting an audience that matches the demographics of their systems, they are unable to do so given the capacity and cost they must allocate to the bundled channels of the large programmers. Nonetheless, the need to carry must-have programming means that NCTC members overwhelmingly must accept the forced bundles including the undesired channels.

7. While bundling gives the channels associated with large programmers a free pass to widespread carriage, independent programmers pay the price. NCTC has negotiated numerous deals with independent programmers, but members say they lack the funds or capacity to carry these channels. NCTC routinely advises independent programmers that enter into agreements with NCTC of the challenges members face in carrying independent channels, and warn them not to expect widespread launches.

8. Penetration requirements by large programmers also harm independent programmers. While some commenters in this proceeding have suggested that penetration requirements are flexibly negotiated and exchanged for valuable consideration, that has not been the experience for NCTC members. Most large programmers demand significant penetration requirements and generally refuse to treat these requirements as the subject of much negotiation. For the most part, NCTC must accept the penetration rate demanded or there is no deal.



9. To my knowledge, NCTC members do not value penetration requirements. Instead these requirements are widely considered an abuse of a programmer's market power and viewed as detrimental to a member's ability to support programming diversity and consumer choice. Members consistently express their concern about penetration requirements, which limit their ability to offer other independent programming in highly penetrated packages or to create video offerings their customers want, especially lower-cost smaller packages of programming. Programmers, however, have made clear they do not consider these constraints an unfortunate side-effect of the penetration requirements – they are the entire point of the requirements. Penetration requirements protect programmers' existing distribution or gain programmers distribution they otherwise would not have, often at the expense of independent programmers and consumers alike.

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I declare under penalty of perjury that the foregoing declaration is true and correct. Executed on April 19, 2016.

  
Judy Meyka

## **Exhibit B**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Promoting the Availability of Diverse and  
Independent Sources of Video Programming

MB Docket No. 16-41

**DECLARATION OF CHRIS KYLE**

I, Chris Kyle, declare the following:

1. My name is Chris Kyle. I am the Vice President of Industry Relations & Regulatory at Shentel, which provides cable service to more than 50,000 subscribers, including low income customers in many small and rural communities in Virginia and West Virginia. Shentel receives some of its cable programming by negotiating directly with programmers, which is part of my job, and some by opting in to master agreements negotiated by the National Cable Television Cooperative (“NCTC”).

2. In both the NCTC deals and those Shentel negotiates itself, programmers demand burdensome penetration requirements that require Shentel to carry numerous unwanted channels. In my experience, these bundles are always included as part of take-it-or-leave it offers, and they consistently harm Shentel, which would always prefer the option of carrying only the individual networks its subscribers actually want to watch. We find that much of the programming that comes bundled is a poor fit with the interests of our subscribers, and would prefer to pick independent channels that better serve their needs.

3. Five years ago, Shentel embarked on a plan to build the best network for Internet service it could, with the expectation that the future of the video marketplace lies

in online programming. As part of that process, we have invested heavily to improve our systems. About half of our systems are now completely digital, and all our systems have 750 MHz of bandwidth or more.

4. Particularly given the bandwidth demands of HD channels, bundling creates capacity constraints even on these systems, and strains Shentel's ability to offer the Internet service it considers a top priority. Indeed, 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. Based on current data utilization trends, and increased Internet demand/penetration from residential customers in those markets, Shentel anticipates needing all remaining channels on these systems for broadband capacity. Though these systems are capacity constrained, they receive no relief from the bundling demands of programmers.

5. While we can take some steps to extract extra capacity from these systems, these steps are extremely expensive. We are investing, but we could spend millions to increase capacity and it would not be enough. We would love to see how subscribers respond to new, independent channels, but because our capacity is taken up by bundled channels, it is not economically feasible. Capacity constraints have led us not to carry multiple independent channels.

6. The price of bundling impacts our ability to carry independent channels as well. Shentel has a set programming budget each year, and when we are forced to pay for large numbers of channels that neither we nor our subscribers want, it limits the money we can spend on other programming. Due in large part to bundling, Shentel's

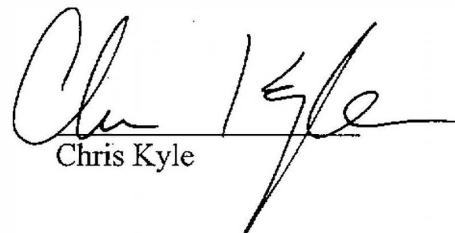
programming costs are rising faster than ever before. Shentel's subscribers are disproportionately lower income, and there are limits to how much cost we can pass on to them. When you are facing millions in increases in programming costs each year, and you are already forced to raise rates significantly 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.

7. Shentel's customers are increasingly calling for "skinny bundles" carrying only core cable channels at a lower price. Shentel is eager to provide this option, since it would serve as a tool for subscribers to gradually make the transition to getting much of their television content through broadband video. Shentel's hands are largely tied, however. Whether it is negotiating with Shentel or NCTC, large programmers insist on high penetration levels of 85 percent or more, which effectively force Shentel to carry a large number of channels (many of them barely watched) in an expanded basic tier. Comcast/NBCU, for example, requires Shentel to offer eight channels in expanded basic.

8. Because Shentel is reluctant to expand an expanded basic tier that is already bloated and needlessly expensive due to penetration requirements, our systems carry only a very small number of independent channels in expanded basic. And though Shentel would prefer for its subscribers to receive more of their video programming online, Shentel cannot generally offer subscribers the skinny bundle that would allow them to "cord shave."

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I declare under penalty of perjury that the foregoing declaration is true and correct. Executed on April 19, 2016.



Chris Kyle