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	)	

NOTICE OF PROPOSED RULEMAKING

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Comment Date: (60 days after date of publication in the Federal Register)
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By the Commission: Chairman Wheeler and Commissioners Clyburn and Rosenworcel issuing separate statements; Commissioners Pai, and O'Rielly dissenting and issuing separate statements.

I. INTRODUCTION

1. By this Notice of Proposed Rulemaking (NPRM), we propose to adopt rules that prohibit certain practices some multichannel video programming distributors (MVPDs) use in their negotiations for carriage of video programming that may impede competition, diversity, and innovation in the video marketplace. Specifically, we propose to prohibit the inclusion of (i) "unconditional" most favored nation (MFN) provisions[1]; and (ii) unreasonable alternative distribution method (ADM) provisions in program carriage agreements between MVPDs and independent video programming vendors.[2]

2. This NPRM is an outgrowth of a Notice of Inquiry that sought comment on the principal obstacles that independent video programmers face in obtaining carriage and possible regulatory actions to address them.[3] The record from the *NOI* reveals that MVPDs have increasingly insisted that video

[1] In general, an MFN provision entitles an MVPD to more favorable economic or non-economic contract terms that a video programming vendor has provided to another video programming distributor, whether a traditional MVPD or an alternative, non-traditional video distributor. MFN rights can be conditional or unconditional. A conditional MFN provision entitles an MVPD to certain contractual rights that the video programming vendor has offered or granted to another video programming distributor, subject to the MVPD's acceptance of related terms and conditions contained in that other distributor's agreement. By contrast, an unconditional MFN provision does not require that the MVPD accept any related terms and conditions in order to be entitled to receive the contractual rights and benefits granted to the other video programming distributor. *E.g.*, *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 9131, 9218-19, para. 228 & n.655 (2015) (*AT&T-DIRECTV Order*).

[2] An ADM provision generally prohibits or restricts a video programming vendor from exhibiting its programming on alternative, non-traditional video distribution platforms (*e.g.*, online platforms), often for a specified period of time (sometimes referred to as a "holdback period" or "window") following the programming's original linear airing, or until certain conditions are met. *E.g.*, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd 1610, 1615, para. 10 (2016) (*NOI*). "Linear programming" or "linear video" is a stream of video programming that is prescheduled by the programmer. *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995, 16003 (2014). ADM provisions restrict distribution on non-MVPD platforms. They differ from contractual provisions that prohibit or restrict a video programming vendor from licensing its content to another MVPD (*i.e.*, a provision that affords exclusive rights to the contracting MVPD), which are prohibited in certain circumstances under section 616(a)(2) of the Communications Act of 1934, as amended (the Act), and the Commission's program carriage rules. 47 U.S.C. § 536(a)(2); 47 CFR § 76.1301(b).

[3] *NOI*, 31 FCC Rcd 1610.

programmers, particularly those that are small and independent, accept restrictive MFN and ADM provisions in order to secure carriage of their programming. The record also suggests that these types of provisions cause a variety of harmful effects. Consumers ultimately feel these negative effects most acutely. Because restrictive contract provisions limit the incentives and ability of independent programmers to experiment with innovative carriage terms and to license their content on alternative, innovative platforms, they deprive consumers of the benefits that otherwise would flow from enhanced competition in the video programming and distribution marketplace. These benefits would include expanded choice in the sources and variety of video programming, technological innovation, greater flexibility in the means and manner of accessing program content, and lower prices for video programming services.[4]

3. By proposing rules that would prohibit certain types of MFN and ADM contract provisions, we seek to remove marketplace obstacles that may hinder independent programmers from reaching consumers. As discussed below, we seek comment on whether the Commission has authority to adopt such rules pursuant to section 616(a) of the Act. In addition, we seek comment on other actions the Commission could take to promote distribution of independent and diverse programming to consumers. We commence this rulemaking in furtherance of our statutory obligation to promote competition, programming diversity, and innovation in the public interest.[5]

II. BACKGROUND

4. In February 2016, the Commission issued a Notice of Inquiry "to start a fact-finding exercise on the current state of programming diversity" and "to assess how the Commission or others could foster greater consumer choice and enhance diversity in the evolving video marketplace by eliminating or reducing any barriers faced by independent programmers in reaching viewers."[6] In particular, the Commission sought comment on the general state of the marketplace for independent programming, including the extent to which independent programmers are carried by MVPDs as compared to online video distributors (OVDs)[7]; whether independent networks encounter greater challenges in securing carriage on certain MVPDs relative to others (*e.g.*, small vs. large MVPDs); and whether large MVPDs have market power that affects the ability of some independent networks to obtain carriage.[8] In addition, the Commission sought comment on the chief obstacles that independent programmers currently face, such as demands by MVPDs for certain contract provisions, including MFN

[4] *E.g.*, INSP Comments at 16, 20-22; Public Knowledge Comments at 13-20.

[5] *See, e.g.,* 47 U.S.C. § 157 (establishing the policy of the United States "to encourage the provision of new technologies and services to the public"); 47 U.S.C. § 257 (directing the Commission "to promote . . . policies . . . favoring diversity of media voices, vigorous economic competition, [and] technological advancement"); 47 U.S.C. § 548 (stating that the purpose of this section is "to promote the public interest . . . by increasing competition and diversity in the multichannel video programming market . . . and to spur the development of communications technologies"); 47 U.S.C. § 1302 (directing the Commission "to take immediate action to accelerate deployment of [advanced telecommunications capability] by removing barriers to infrastructure investment and by promoting competition in the telecommunications market" if certain conditions are met).

[6] *NOI*, 31 FCC Rcd at 1610-11, para. 2. *See infra* paras. 16-17 (seeking comment on how to define "independent programmer" for the purpose of applying the proposed rules). As we noted in the *NOI*, we do not address in this proceeding issues relating to retransmission consent negotiations between MVPDs and broadcast stations. *NOI*, 31 FCC Rcd at 1612, para. 4, n.8.

[7] For purposes of this proceeding, an OVD is an entity that distributes video programming: (1) by means of the Internet or other Internet Protocol (IP)-based transmission path; (2) not as a component of an MVPD subscription or other managed video service; and (3) not solely to customers of a broadband Internet access service owned or operated by the entity or its affiliates. *Applications of Charter Communications, Inc. et al. For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, MB Docket No. 15-149, 2016 WL 2858801, at *9, n.83 (*Charter-TWC Order*).

[8] *NOI*, 31 FCC Rcd at 1611-12, para. 3.

and ADM clauses, that can thwart the development of competition and consumer choice.[9] In connection with the *NOI*, the Commission held two public workshops to examine the state of competition, diversity, and innovation in the marketplace.[10] The first workshop, held in March 2016, featured several panels that explored trends in the video marketplace and challenges faced by distributors of video programming.[11] The second workshop, held in April 2016, examined marketplace obstacles that affect the provision of independent and diverse video programming to consumers.[12]

5. The *NOI* yielded thousands of comments from a broad range of interested parties, including individuals, consumer groups, content creators (*e.g.*, broadcasters, small and/or independent non-broadcast programmers, established non-broadcast programmers, and PEG channels), small and large MVPDs, and other types of content distributors.[13] Although the record reflects divergent views about whether Commission action to address MFN and ADM provisions would serve the public interest, parties overwhelmingly agree that the video marketplace is in the midst of major changes that are transforming how Americans access and consume video programming. For example, MVPDs and content providers, including broadcast networks and sports leagues, now offer subscribers linear programming through Internet and wireless-based services.[14] In addition, OVDs now offer consumers video programming choices that may either complement their MVPD services or compete with some portion of the services MVPDs offer, such as video on-demand.[15] These trends suggest that the video marketplace is evolving toward greater competition, diversity, and innovation.

6. Despite these pro-consumer trends, the record indicates that certain participants in the video marketplace, particularly independent content producers and OVDs, are facing significant challenges.[16] Many of the obstacles faced by OVDs reportedly stem from contractual provisions in

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[9] *Id.* at 1612-16, paras. 5-12. Although this NPRM focuses on the marketplace obstacles created by MFN and ADM provisions, we note that the *NOI* sought comment on a broader range of issues including program bundling, access to public, educational, and governmental (PEG) channels, and other industry practices that have the potential to impede competition, diversity and innovation in the marketplace. This NPRM does not propose actions to address those issues.

[10] *Media Bureau Announces Public Workshop on the State of the Video Marketplace*, Public Notice, DA 16-228 (MB Mar. 1, 2016); *Media Bureau Announces Second Public Workshop on the State of the Video Marketplace*, Public Notice, DA 16-318 (MB Mar. 25, 2016).

[11] *Media Bureau Announces Agenda for Public Workshop on the State of the Video Marketplace on March 21, 2016*, Public Notice, DA 16-270 (MB Mar. 11, 2016).

[12] *Media Bureau Announces Agenda for Second Public Workshop on the State of the Video Marketplace on April 25, 2016*, Public Notice, DA 16-395 (MB Apr. 12, 2016). Several of the panelists that participated in those workshops submitted written remarks, slide presentations and/or other materials that are relevant to the issues raised in the *NOI*. Thus, we have included such materials in the record of this proceeding.

[13] We note that the vast majority of submissions filed in this proceeding were informal letters from individuals complaining about the loss of the network RFD-TV from their subscription television package.

[14] Tasneem Chipty, Written Remarks, Second Media Bureau Workshop on the State of the Video Marketplace, at 2 (Apr. 25, 2016) (Chipty Written Remarks).

[15] *Charter-TWC Order*, 2016 WL 2858801, at *41, para. 152 ("Given the development of additional and new OVD services and the proliferation of new technologies and devices that allow consumers to view video programming sold by OVDs on their computers, phones, and televisions, we acknowledge that OVDs have the potential to become substitutes for MVPD services with a market presence that is sufficient to counter an increase in price or decrease in quality by a hypothetical monopolist.").

[16] *See* Tasneem Chipty Remarks, Second Media Bureau Workshop on the State of the Video Marketplace, at 15:15 (Apr. 25, 2016), https://www.fcc.gov/news-events/events/2016/04/second-media-bureau-workshop-state-video-marketplace#acc2 (Chipty Remarks) ("While there appear to be more opportunities to reach viewers today than ever before, it is unclear whether a [smaller] programmer . . . can succeed without carriage by a sufficiently large number of MVPDs."); Tasneem Chipty, Position Statement, Media Bureau Workshop on the State of the Video

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carriage agreements between independent programmers and MVPDs that severely limit the programmer's ability to license its content to other distributors, especially OVDs.[17] Although large MVPDs defend these provisions as procompetitive and pro-consumer,[18] rival distributors and independent programmers argue that such provisions stifle competition between OVDs and MVPDs[19] and ultimately limit the choices available to consumers for accessing video programming.[20]

7. Based on the record, it appears that two of the principal tools used by MVPDs that impede competition and consumers' access to independent programming sources are MFN and ADM provisions. In particular, the record reveals that certain MVPDs have used their bargaining leverage vis-à-vis independent programmers to exact unconditional MFN clauses and/or unreasonable ADM provisions that hamper the ability of programmers to experiment with online distribution. Such contractual provisions make it challenging for programmers to achieve a profitable level of carriage, or to secure carriage without contracting away their freedom to present content to a broader audience via the Internet. Restrictions placed on programmers by unconditional MFN and unreasonable ADM obligations in turn create barriers to entry and hinder the growth of OVDs by restraining their access to content and precluding them from entering into mutually beneficial agreements with independent programmers.[21] We set forth below an overview of arguments in the record concerning: (i) the evolution of MFN and ADM provisions and their use by MVPDs; and (ii) the effects of MFN and ADM provisions on the development of competition, diversity, and innovation.

8. *Evolution and Use of MFN and ADM Provisions*. Parties supporting Commission action to address MFN provisions, principally independent programmers and consumer groups, assert that MFN clauses in recent years have become exceedingly complex, onerous, and one-sided in favor of MVPDs.[22] These parties contend that while MFN provisions have been a longstanding fixture in the industry, such

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Marketplace, at 6-7 (Mar. 21, 2016) (Chipty Position Statement) (stating that the survival rates of smaller networks suggest that such networks face greater entry barriers than networks launched by larger owners); *U.S. v. Charter Communications, Inc.*, *et al.,* Competitive Impact Statement, Civil Action No. 1:16-cv-00759 (RCL) at 14 (2016) (DOJ Charter-TWC Competitive Impact Statement) (stating that OVDs are the most likely prospect for significant competitive entry into the video distribution market, but that OVDs face multiple barriers to entry, including obtaining access to a sufficient amount of content to become a viable distribution business).

[17] *See, e.g.*, RFD-TV Comments at 2-3, 21 (arguing that MFN provisions that govern price prevent the programmer from securing distribution deals with new distributors and limit their ability to grow their affiliate revenues and that ADM provisions restrict the network's ability to enter deals with OVDs and distribute its content online).

[18] *E.g.*, AT&T Services, Inc. Comments at 12-13 (AT&T Comments); Comcast Corp. and NBCUniversal Media, LLC Comments at 26 (Comcast-NBCU Comments).

[19] *See, e.g.*, Chipty Written Remarks at 3 (explaining that ADM provisions can slow down competition from online services); INSP Comments at 22 (contending that MFN provisions inhibit entry of new competitors into the distribution marketplace by deterring novel distribution arrangements with early adopters and creating barriers to entry by others seeking to introduce new alternatives to MVPD services (*e.g.*, new entrant OVDs)).

[20] *E.g.*, beIN SPORTS Reply at 11, 15.

[21] *See e.g.*, Free Press Reply at 4 (contending that the expanding scope of MFN provisions allows MVPDs to hinder growing OVD competition and access to content); INSP Comments at 22; KSE Media Ventures Comments at 4; Pac-12 Network Reply at 4 (arguing that because MFN clauses do not allow for unique or novel carriage agreements, they make it difficult for new competitors, such as OVDs, to enter the marketplace); KSE Media Ventures Comments at 5-6 (asserting that the windows imposed under ADM provisions preclude distribution by OVDs).

[22] *See, e.g.,* beIN SPORTS Comments at 2; beIN SPORTS Reply at 6; INSP Comments at 16-19 (arguing that the disproportionate bargaining power between independent networks and MVPDs forces independent networks to accept clauses that solely benefit the MVPD).

provisions have grown more restrictive in several respects, including: (i) their financial scope[23]; (ii) the number and range of other carriage agreements to which they apply[24]; (iii) the number and range of terms and conditions within a given carriage agreement to which they apply[25]; (iv) their degree of conditionality (*i.e.*, conditional vs. unconditional)[26]; and (v) their enforcement and penalty provisions.[27] In addition, parties assert that MVPD demands for MFN provisions have become pervasive in the industry,[28] and that their proliferation results in a "domino effect" whereby a single term in an agreement with one distributor triggers the MFN obligations in a programmer's agreements with other distributors.[29]

9. The record indicates that ADM clauses have evolved in a similar manner.[30] For example, parties claim that unlike "windowing" practices historically used in the industry,[31] ADM clauses in today's marketplace impose confining limitations not only on the distribution of content via other platforms, but also on the time, place and manner of content consumption.[32] At one end of the spectrum,

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[23] *See, e.g.*, KSE Media Ventures Comments at 2-4 (arguing that MFN provisions originally applied only to rate card and launch/promotional support, but now apply to the "net effective rate," which includes all financial transactions between the parties regardless of whether such transactions are covered by the distribution agreement).

[24] *See, e.g.,* INSP Comments at 18 (asserting that MFN clauses in today's marketplace are both prospective and retroactive, covering all of a programmer's existing carriage agreements as well as those executed in the future); KSE Media Ventures Comments at 2-4 (asserting that while MFN provisions originally were size-based, they now apply to all distributors, regardless of size).

[25] *See, e.g.,* INSP Comments at 17 (claiming that MFN clauses today apply not only to economic terms of carriage (including prices, discounts, launch support, marketing support and revenue splits), but also to non-economic terms (such as tier placement, packaging, technology rights and distribution on alternative platforms)); KSE Media Ventures Comments at 2-4 (arguing that MFN provisions originally applied only to financial terms and conditions, but now apply separately to every term in the agreement without regard to any other term).

[26] *See, e.g.,* KSE Media Ventures Comments at 2-4 (asserting that MFN provisions originally were conditional, entitling an MVPD to a more favorable term if the MVPD was willing to accept obligations associated with that term (*e.g.*, lower rate for expanded distribution), but are now unconditional, entitling the MVPD to a more favorable term without reciprocal obligations or a commitment to key conditions); Public Knowledge Reply at 2 (claiming that MVPDs increasingly are using unconditional MFNs). *But see* AT&T Comments at 12 (asserting that the MFN provisions in AT&T's contracts are mostly conditional as defined by the Commission).

[27] *See, e.g.,* INSP Comments at 19 (arguing that MFN clauses give MVPDs the right to conduct regular audits to ensure compliance with MFN obligations, which burden independent networks that struggle to generate revenue to support the production of original programming); KSE Media Ventures Comments at 2-4 (asserting that MFN provisions originally allowed the programmer to self-certify compliance, but now typically provide for audit rights and penalties, including interest, audit costs, and damages).

[28] *See, e.g.*, TheBlaze Comments at 4; Hispanic Information and Telecommunications Network, Inc. Comments at 4 (HITN Comments); INSP Comments at 3; Public Knowledge Reply at 2 (all claiming that MFN clauses are widespread and routinely imposed on independent programmers). *See also* INSP Comments at 17 (stating that a local television market will typically have DIRECTV, DISH, a cable operator and if present, a telephone company, which combined will hold at least 90% of the market share, and that all of those MVPDs will have MFN provisions in their agreements with each of the several hundred networks they distribute, even the very largest; thus, MFN provisions will cover nearly all of a program network's distribution in any market).

[29] *E.g.*, HITN Comments at 4.

[30] *See, e.g.*, *id.* at 4; KSE Media Ventures Comments at 5; Public Knowledge Reply at 3 (all asserting that MVPD demands for restrictive ADM provisions have increased in recent years).

[31] As noted above, such "windowing" provisions historically have limited distribution on alternative, non-MVPD platforms for a specified period of time following the programming's original linear airing. *Supra* note 2. *See also* Comcast-NBCU Comments at 25, 30 (asserting that windowing is a practice employed by content producers for nearly a century, and can increase consumer access to pay-TV programming).

[32] *See, e.g.*, beIN SPORTS Reply at 10 (arguing that, in response to changes in the marketplace that have enabled consumers to increasingly access content "where, when, and how they choose," MVPDs impose excessively

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the most restrictive ADM provisions preclude any online distribution of specified content for an extended time period or indefinitely.[33] Other clauses may allow for a limited amount of content, *e.g.*, a maximum of ten minutes, to be distributed on alternative platforms under specified conditions.[34] Other ADM clauses reserve to the MVPD the right to distribute content via alternative platforms and to monetize that distribution.[35]

10. *Marketplace Effects of MFN and ADM Provisions.* Independent programmers assert that restrictive MFN and ADM provisions thwart competition, diversity, and innovation in the marketplace and thus are contrary to the public interest. For example, some parties argue that MFN provisions hinder independent programmers from securing the widest possible carriage by deterring them from licensing their content to alternative video programming distributors.[36] As a consequence, some parties argue, MFN provisions hamper the ability of independent programmers to grow their revenues and launch new or innovative program offerings.[37] This, they assert, ultimately leads to the demise or weakening of independent networks, resulting in less diversity in the sources and variety of programming available to consumers, including minority and underserved audiences.[38] Similarly, some parties claim that, because MVPDs exact MFN and ADM clauses from independent programmers that are far more restrictive than those obtained from programmers with more bargaining leverage,[39] such clauses hamper the ability of independent content creators to compete with more established programmers, thereby undermining program diversity.[40] Parties similarly contend that ADM provisions threaten the viability of independent programmers by impeding their ability to secure broader distribution that would enable them to showcase or promote content to potential customers, investors, and viewers, which is critical to attract investment essential to their survival.[41]

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restrictive ADM provisions, such as provisions restricting online distribution, that “restrict the time, place and manner of consumption”). *See also* beIN SPORTS Comments at 2; KSE Media Ventures Comments at 5-6; T-Mobile USA, Inc. Reply at 6 (T-Mobile Reply).

[33] *See, e.g.*, HITN Comments at 5 (arguing that ADM clauses restrict Internet distribution for 12-18 months from the date of MVPD distribution); INSP Comments at 25 (asserting that some ADM clauses can extend indefinitely); KSE Media Ventures Comments at 5-6 (asserting that some ADM provisions prohibit Internet distribution, with or without a fee, for 18 months or longer).

[34] Brian Newton Remarks, Second Media Bureau Workshop on the State of the Video Marketplace, at 130:53 (Apr. 25, 2016), https://www.fcc.gov/news-events/events/2016/04/second-media-bureau-workshop-state-video-marketplace#acc2 (Newton Remarks).

[35] *E.g.*, INSP Comments at 25. *See also* TheBlaze Comments at 6-8 (asserting that some ADM provisions also prevent independent programmers from monetizing content via syndication on their own websites and applications).

[36] *See, e.g.*, American Cable Association Comments at 33-34 (ACA Comments) (arguing that, as a result of MFNs imposed by large MVPDs, independent programmers are deterred from executing carriage agreements with smaller MVPDs because those programmers cannot give smaller MVPDs the flexibility they need); beIN SPORTS Reply at 8 (asserting that although both smaller traditional MVPDs and OVDs have offered carriage at fees lower than those paid by other distributors, it has declined such offers due to MFN provisions that would obligate it to offer the same rate terms to existing distributors, thereby reducing revenue); T-Mobile Reply at 4-5 (highlighting concerns that MFN provisions make it difficult for programmers to make carriage deals with new or smaller distributors).

[37] *E.g.*, INSP Comments at 21.

[38] *See, e.g.*, ACA Comments at 33 (arguing that MFN provisions imposed by large MVPDs hinder small cable operators from offering diverse content to their subscribers); beIN SPORTS Reply at 9-10 (contending that MFN provisions lead to fewer choices for consumers, especially minority and niche audiences).

[39] *E.g.*, beIN SPORTS Reply at 6, 10, 12-14; TheBlaze Comments at 4, 7; Herring Networks, Inc. Comments at 3 (Herring Comments); INSP Comments at 3, 18; Public Knowledge Reply at 3-4.

[40] *E.g.*, beIN SPORTS Reply at 10-11; Public Knowledge Reply at 3-5; T-Mobile Reply at 6.

[41] *E.g.*, TheBlaze Comments at 6-7.

11. Parties contend that, in addition to the adverse impact on independent programmers, restrictive MFN and ADM clauses, especially when enforced in tandem,[42] stifle competition and innovation in the marketplace for programming distribution.[43] Parties maintain that to the extent that MFN and ADM clauses deter programmers from offering unique or favorable terms to OVDs,[44] such clauses impede the development of new and diverse platforms, technologies, service offerings, and business models.[45] In addition, some commenters assert that restrictive MFN provisions are anticompetitive because they facilitate standardization of carriage terms and collusion among MVPDs.[46] Such standardization, they contend, is reinforced by MFN audits,[47] which ensure that otherwise competing MVPDs receive uniform benefits under their respective MFN provisions.[48]

12. Parties express particular concern about "unconditional" MFN clauses, which they assert have a profoundly negative impact on competition, programming diversity and innovation.[49] Because this category of MFN provisions entitles an MVPD to receive the best terms and conditions from another distribution agreement without obligating it to agree to the reciprocal obligations of the other distributor that were the consideration for such terms and conditions, parties argue, such provisions unduly limit programmers' flexibility to develop creative ways to grow their business.[50] For example, programmers claim that unconditional MFN clauses make it prohibitively costly for them to expand their viewership by offering special terms or inducements to alternative distributors in exchange for higher per-subscriber carriage fees or other consideration.[51] This is because doing so would require the programmers to provide the same or equivalent terms to distributors with unconditional MFN rights, without receiving the corresponding consideration from those distributors.[52] Parties assert that unconditional MFN provisions

[42] KSE Media Ventures Comments at 5-6 (contending that this interplay between ADM and MFN provisions precludes online distribution at any rate or experimentation with new distribution models).

[43] *See, e.g.*, beIN SPORTS Reply at 16; INSP Comments at 16, 21; Public Knowledge Reply at 4, 19-20; T-Mobile Reply at 5-6 (arguing that MFN and ADM clauses delay innovative methods of content distribution and result in less competition in the video marketplace).

[44] *E.g.,* beIN SPORTS Reply at 10-11; TheBlaze Comments at 6. *See also* Public Knowledge Comments at 19 (arguing that MFN provisions have the same effect as ADM provisions that keep programming off of online platforms and prevent market evolution).

[45] *E.g.*, beIN SPORTS Reply at 8; TheBlaze Comments at 2; Common Cause Comments at 4; KSE Media Ventures Comments at 4-5.

[46] *E.g.*, INSP Comments at 3, 21; KSE Media Ventures Comments at 5; Public Knowledge Reply at 4.

[47] *See, e.g.*, INSP Comments at 21 ("Because distributors generally are able to impose 'MFNs on MFNs,' the MFNs of each major MVPD in the market often will have very similar scope and coverage. 'MFNs on MFNs' lead to standardization among competing MVPDs not only of MFN provisions, but of most of the material economic and non-economic terms of distribution agreements. This standardization can serve as a surrogate for collusion. Standardization is further reinforced by 'MFN audits,' a feature of every MFN, because such audits ensure that competing MVPDs are each receiving the standardized benefits of their respective, standardized MFNs.").

[48] *E.g.*, INSP Comments at 21; KSE Media Ventures Comments at 5.

[49] *E.g.,* TheBlaze Comments at 5-6; T-Mobile Reply at 5.

[50] *See, e.g.*, HITN Comments at 5; RFD-TV Comments at 2-3, 21 (claiming that obligations created by MFN provisions hinder programmers' ability to negotiate creative distribution agreements).

[51] *E.g.,* beIN SPORTS Reply at 10-11; TheBlaze Comments at 5-6; INSP Comments at 19-20.

[52] *E.g.*, beIN SPORTS Comments at 4; T-Mobile Reply at 85. For example, an unconditional MFN provision related to the packaging of networks could effectively inhibit a programmer's ability to grant an OVD the rights to carry its programming as part of a "slimmer" bundle of networks, even on an experimental basis, for fear that the same unbundling rights would flow back to the incumbent MVPD for no incremental compensation.

are contrary to the public interest because they effectively restrict the ability of consumers to access diverse content from the provider of their choice.[53]

13. Large MVPDs, by contrast, generally defend the use of MFN and ADM provisions as procompetitive and pro-consumer.[54] They maintain that MFN provisions do not prevent programmers from licensing content to OVDs or other distributors, but rather, ensure that MVPDs are able to secure the same rights and service offerings as other distributors on the same terms and conditions, thereby allowing them to respond to changes in consumer demand and remain competitive.[55] For example, to the extent that MFN provisions enable MVPDs to adjust contract terms if there is a decline in the value of the programming, these parties contend, such provisions act as an "insurance policy" for them.[56] According to these MVPDs, the ability to adjust contract terms benefits independent programmers by increasing their chances of achieving carriage and by facilitating longer term carriage arrangements,[57] which ultimately benefits consumers.[58] Moreover, Comcast-NBCU argues that MFN provisions promote candor between the negotiating parties and facilitate improved contracts based on mutually well-informed positions.[59] It also maintains that programmers are unlikely to forgo lucrative licensing opportunities with OVDs by agreeing to inflexible MFN provisions with MVPDs,[60] and that MFN provisions have been found to impart public interest benefits.[61]

14. In defending the use of ADM provisions, AT&T asserts that such provisions are intended to allow MVPDs to protect their investment in programming, not to foreclose competition from alternative distributors.[62] AT&T maintains that MVPDs would not pay for the right to distribute content if programmers were able to distribute that content online for free at essentially the same time because consumers would not subscribe to MVPD services to view that content.[63] For the same reason, AT&T contends, an MVPD must have the right to distribute content through the same media (*e.g*., online) and on the same terms (*e.g*., *a la carte*) as other distributors, including the programmer itself.[64] Comcast-NBCU

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[53] *E.g.,* T-Mobile Reply at 5.

[54] *E.g.*, AT&T Comments at 12-13; Comcast-NBCU Comments at 26.

[55] Comcast-NBCU Comments at 27-28. *See also* AT&T Comments at 13 (arguing that MFN provisions are not a means of precluding competition, but rather, a means of ensuring that MVPDs can compete fairly).

[56] AT&T Comments at 12 (maintaining that MFN provisions give an MVPD confidence to invest in programming because such provisions ensure that its financial commitment is reflective of the then-applicable market value for such content by entitling it to adjust its rate to that included in a more recent contract if there is a decline in the value of the content); Comcast-NBCU Comments at 24-26 (contending that MFN provisions reduce the transaction costs, risks and uncertainties associated with carrying cable networks).

[57] AT&T Comments at 12-13; Comcast-NBCU Comments at 24-26.

[58] AT&T Comments at 13.

[59] Comcast-NBCU Comments at 29.

[60] *Id.* at 29.

[61] *Id.* at 26-27, 31 (quoting *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995), in arguing that MFN provisions are "standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. . . . [T]hat is the sort of conduct that the antitrust laws seek to encourage.").

[62] AT&T Comments at 13 (asserting that windowing, as used by AT&T, prevents a programmer from giving away for free content for which AT&T has paid licensing fees for a limited period after AT&T distributes that content); Comcast-NBCU Comments at 25, 30 (claiming that the use of ADM provisions is a longstanding industry practice that allows content creators to be fully compensated for their investment and is critical to the business economics of the content production industry).

[63] AT&T Comments at 13.

[64] *Id.* at 13-14.

contends that while the scope of ADM provisions has evolved, such provisions do not present significant problems in the marketplace warranting Commission action.[65] Comcast-NBCU claims, for example, that ADM provisions that prevent any online exhibition are "largely a thing of the past."[66]

III. DISCUSSION

A. Proposed Rules

15. We propose to adopt rules that prohibit the inclusion of unconditional MFN and unreasonable ADM provisions in carriage agreements between MVPDs and independent video programming vendors.[67] We seek comment in Section III.C below on our authority to adopt these rules pursuant to section 616(a) of the Act, which directs the Commission to "establish regulations governing program carriage agreements and related practices between [MVPDs] and video programming vendors."[68] We believe that our proposed rules will serve the objectives of section 616 and the public interest by removing obstacles to enhanced competition, programming diversity, and innovation in the marketplace.

1. Application to "Independent Video Programming Vendors"

16. We propose to apply the following rules to program carriage agreements between MVPDs[69] and "independent video programming vendors."[70] In the *NOI*, we defined "independent programmer" as a programmer that is not vertically integrated with an MVPD.[71] Several commenters pointed out, however, that for purposes of this proceeding, we should define that term more narrowly to exclude established programmers that control a significant share of the video programming marketplace and therefore have bargaining leverage in carriage negotiations.[72] Given this, we seek comment on whether, for purposes of the proposed rules, the term "independent video programming vendor" should be defined more narrowly to reflect that certain large programmers that are not vertically integrated with an

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[65] Comcast-NBCU Comments at 30-31.

[66] *Id.* at 31.

[67] The prohibitions we propose herein are targeted only at contract clauses that harm competition, diversity and innovation while providing no apparent public interest benefits. If these proposals are adopted, independent programmers and MVPDs would have latitude to include conditional MFN and reasonable ADM provisions in their carriage agreements.

[68] 47 U.S.C. § 536(a).

[69] *Id.* § 522(13) (defining the term "multichannel video programming distributor" to mean "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase by subscribers or customers, multiple channels of video programming"); 47 CFR § 76.1000(e) (defining MVPD as "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.").

[70] Under this proposal, an "independent video programming vendor" would be a subset of the "video programming vendors" covered by section 616 of the Act. 47 U.S.C. § 536. *See also Liberman Broadcasting, Inc. v. Comcast Corporation*, MB Docket No. 16-121, Memorandum Opinion and Order, 2016 WL 4494601, at *1 (finding, among other things, that a broadcast licensee is not a "video programming vendor" within the meaning of section 616 and thus lacks standing to bring a program carriage complaint). As noted in the *NOI*, we do not address in this proceeding issues relating to retransmission consent negotiations between MVPDs and broadcast stations. *NOI*, 31 FCC Rcd at 1612, n.8.

[71] *Id.* at 1610, n.4.

[72] *E.g.*, ACA Comments at 3, n.4; American Cable Association Reply at 5 n.13 (ACA Reply); ITTA-The Voice of Mid-Sized Communications Companies Comments at 3 (ITTA Comments); One World Sports Reply at 1, n.1 (OWS Reply); Writers Guild of America, West, Inc. Comments at 6-7 (WGAW Comments).

MVPD do not confront the same obstacles in securing carriage for their content as smaller or niche programmers.[73]

17. For example, as suggested by ITTA, should we define an independent video programming vendor as a video programming vendor that is not affiliated with a broadcast network, movie studio or MVPD?[74] Alternatively, or in combination with this approach, should we define an independent video programming vendor based on whether such vendor earns less than a threshold amount of annual gross revenue?[75] If we were to define an independent programmer based on its annual gross revenue, what is the appropriate revenue threshold? Should we consider adopting a revenue threshold that is based solely on programming license fees and/or advertising revenue? Or are there other sources of revenue that we should consider? An alternative to using a threshold based on revenue is to define an independent programmer based on a programmer's total assets or a combination of revenue and total assets.[76] Under this approach, what is the appropriate threshold for determining that a programming vendor is "independent," and how should that threshold be calculated? If we were to define independent programmer based on its revenue and/or assets, should a programmer that is affiliated with a MVPD, a broadcaster, or another video programming vendor be attributed with the revenue and/or assets of such affiliated entities?[77] Or, instead, should we exclude from the definition any programmer that is affiliated with an MVPD, a broadcaster, or another video programming vendor, regardless of its annual revenue or total assets? We also seek comment on how a programmer could establish that it satisfies whatever definition of independent video programming vendor we adopt. In addition, we seek input on whether excluding larger programmers from the protections that would be afforded by our proposed rules would have any adverse impact on the video marketplace or consumers. To what extent are larger programmers subject to the types of contract provisions we are proposing to prohibit? Given the costs involved in bringing a complaint to the Commission, would larger programmers be more likely than smaller

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[73] *See, e.g.*, Letter from Michael Nilsson, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-41, at 9 (filed Aug. 26, 2016) (asserting that the definition proposed in the NOI fails to take into consideration large programmers such as Disney and Fox, and that the Commission should seek comment on a more appropriate definition of independent programmer) (ACA August 26 *Ex Parte* Letter); beIN Sports Reply at 4 (arguing that to better reflect the market and distinguish between programmers with maximum leverage and those without, the definition of "independent" should not include those in which MVPDs or broadcasters have an attributable ownership interest); Free Press Reply at 3-4 (explaining findings that 80% of the 99 most widely distributed networks are affiliated with incumbent MVPDs or conglomerates, 85% of the top 20 most widely distributed cable networks are affiliated with an MVPD or another large media conglomerate, and arguing that it is clear that the pay-TV market provides more opportunities for carriage for affiliated programmers); ITTA Comments at 3 (arguing that the NOI's definition of independent programmer is too broad and miscategorizes networks vertically integrated with broadcast networks and/or movie studios (*e.g.*, Disney, Viacom) that have the same advantages and create the same barriers to consumer choice and programming diversity as MVPD-affiliated programmers).

[74] *Id.*

[75] *See, e.g.,* Letter from David Goodfriend, Goodfriend Government Affairs, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-41, at 4 (filed Sept. 1, 2016) (asserting that the "Commission [could] better target any rules designed to increase diversity in the media market by excluding from the definition of 'independent programmer' any programmer under common ownership with a broadcast licensee, broadcast network, or video programming vendor over a certain revenue threshold or other benchmark").

[76] *See* 47 CFR § 24.709(a)(1) (1994) (setting the threshold for small entities at an annual gross revenue of less than $125 million and total assets of less than $500 million).

[77] The Commission has stated that, for the purpose of determining whether a video programming vendor is affiliated with an MVPD under section 616, it would apply the attribution standards applicable to its program access rules. *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming and Distribution*, Second Report and Order, 9 FCC Rcd 2642, 2650, para. 19 (1993) (*Program Carriage Second Report and Order*).

programmers to pursue relief through the filing of a complaint? We seek comment on any other potential way to define "independent video programing vendor" and on how any such definition would further the objectives of this proceeding.[78] Finally, we seek comment on whether certain of the possible definitions of independent programmer would raise First Amendment concerns.

2. Prohibition on "Unconditional" MFN Provisions

18. We propose to adopt a rule that prohibits the inclusion of unconditional MFN provisions[79] in carriage agreements between MVPDs and independent video programming vendors. For the purpose of applying this rule, we propose to define an unconditional MFN provision as "a provision that entitles an MVPD to contractual rights or benefits that an independent video programming vendor has offered or granted to another video programming distributor,[80] without obligating the MVPD to accept any terms and conditions that are integrally related, logically linked, or directly tied[81] to the grant of such rights or benefits in the other video programming distributor's agreement, and with which the MVPD can reasonably comply technologically and legally."[82]

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[78] *See* Letter from Alexander Maltas, Counsel to RFD-TV, Hogan Lovells, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-41, at 1 (filed Sept. 19, 2016) (RFD-TV *Ex Parte* Letter) (asserting that any definition of diverse and independent programming should include programming aimed at serving rural America and senior citizens).

[79] *Supra* note 1 (defining an unconditional MFN provision). The following example illustrates the difference between a conditional and an unconditional MFN provision: A video programming vendor enters into an agreement with MVPD A for a three year term and a license fee of $0.25 per subscriber, per month. The agreement also contains an MFN clause. Subsequently, the same video programming vendor enters into an agreement with MVPD B for a 10-year term and a license fee of $0.15 per subscriber, per month. If the agreement with MVPD A contains a conditional MFN clause, MVPD A cannot take advantage of the lower license fee contained in MVPD B's agreement unless it also agrees to the 10 year term. If the agreement with MVPD A contains an unconditional MFN clause, MVPD A can take advantage of the lower license fee contained in MVPD B's agreement without agreeing to the longer term that MVPD B agreed to in exchange for the lower license fee. In this example, the programming vendor would have less incentive to negotiate a lower per subscriber fee with MVPD B if its contract with MVPD A contains an unconditional MFN clause. As a consequence, the programming fee MVPD B pays likely would be no lower than the fee paid by MVPD A. MVPD A's unconditional MFN rights would raise the overall cost of programming through the higher per subscriber fees (resulting from the fact that such fees would not fall below those paid by MVPD A). In addition, those unconditional MFN rights would lead to increased transaction costs associated with more frequent negotiations (because the term of the programmer's carriage contracts likely would be three, rather than ten, years). These increased costs would be either partially or fully passed onto MVPD subscribers in the form of higher prices for subscription television service.

[80] The term "video programming distributor" as used herein includes both traditional MVPDs and alternative distributors of video programming, such as OVDs. *See* ACA August 26 *Ex Parte* Letter at 1, 8 (asserting that Commission action targeting MFN provisions should address provisions directed at both MVPDs and OVDs).

[81] The phrase "integrally related, logically linked, or directly tied" derives from DOJ's Proposed Final Judgment in its review of the Charter Communications-Time Warner Cable (Charter-TWC) transaction. *U.S. v. Charter Communications, Inc. et al.,* Proposed Final Judgment, Civil Action No. 16-cv-00759 at 5, Section IV.B.2.i. (2016) (DOJ Charter-TWC Proposed Final Judgment). The relevant merger condition, among other things, bars Charter-TWC from entering into any agreement with a video programmer that creates incentives to limit such programmer's provision of programming to OVDs, including agreements that entitle Charter-TWC to receive contractual benefits granted to an OVD "without requiring [Charter-TWC] to also accept any obligations, limitations, or conditions . . . that are *integrally related, logically linked, or directly tied* to the . . . grant of such . . . benefits." *Id.* (emphasis added). DOJ used this phrase in crafting this condition because it found that such language is consistent with that contained in conditional MFN provisions industrywide. DOJ Charter-TWC Competitive Impact Statement at 17, n.8.

[82] The phrase "reasonably comply technologically and legally" also derives from DOJ's Proposed Final Judgment in the Charter-TWC transaction. DOJ Charter-TWC Proposed Final Judgment at 6, Section IV.B.2.ii. The relevant provision, which DOJ also found to be consistent with conditional MFN provisions throughout the industry, generally relieves Charter-TWC from having to comply with related terms and conditions if it is unable to do so for

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19. In proposing this rule, we acknowledge that MFN provisions, which have long been common in the industry, may have legitimate public interest justifications, such as facilitating efficient negotiations by enabling well-informed positions, encouraging investment in programming by enabling MVPDs to adjust contract terms after an initial agreement is executed, and broadening MVPD subscribers' access to video content by allowing MVPDs to secure additional rights to programming.[83] However, we are not persuaded based on the record that such justifications exist for MFN provisions that are unconditional and thus permit "cherry picking" of the best contract terms. Because, as noted above, unconditional MFN provisions entitle an MVPD to the most favorable terms granted to other distributors without obligating the MVPD to provide the same or equivalent consideration in exchange for those terms, such provisions appear designed to discourage or foreclose the wider distribution of video content, including on online platforms.[84]

20. The record reflects, moreover, that this category of MFN provisions can apply upward pressure on both wholesale and retail prices for program content by reducing a programmer's incentive to cut its carriage rates to any one distributor out of fear that doing so would require it to reduce the rates charged to distributors with unconditional MFN status without receiving any reciprocal benefits.[85] As a consequence, unconditional MFN provisions effectively limit the flexibility of content providers to enter into unique deals with new and emerging distributors, thereby impeding entry into program production and distribution marketplaces and reducing consumer choice.[86] We also note that agreements resulting

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technological or regulatory reasons. DOJ Charter-TWC Competitive Impact Statement at 17, n.8. *See also* DOJ Charter-TWC Proposed Final Judgment at 6 (clarifying that the merged entity will be deemed able to "reasonably comply technologically" if it is "able to implement an obligation, limitation, or condition in a technologically equivalent manner").

[83] *See, e.g.*, AT&T Comments at 12-13; Comcast-NBCU Comments at 27 (asserting that the ability to adjust contract terms bestowed by MFN provisions benefits independent programmers by increasing the chances of their carriage and by facilitating longer term carriage arrangements, which ultimately benefits consumers); *id.* at 24-26 (contending that MFN provisions ensure that MVPDs obtain the same rights on the same terms and conditions as other distributors). *See also Charter-TWC Order*, 2016 WL 2858801, at *63, para. 220 (acknowledging arguments that MFN and ADM clauses can result in more efficient negotiations, protect investments in programming, and provide subscribers with more access to content). We note, however, that courts have recognized that these clauses also may be anticompetitive in certain cases. *See, e.g., United States v. Apple*, 791 F.3d 290, 320 ("[W]e are breaking no new ground in concluding that MFNs, though surely proper in many contexts, can be 'misused to anticompetitive ends in some cases.'") (quoting *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, J.)).

[84] As previously noted, an unconditional MFN provision likely would reduce a programmer's economic incentive to grant certain rights to an online distributor because doing so would obligate it to offer such rights to an MVPD with MFN status for no incremental consideration. *Supra* para. 12.

[85] *E.g.,* Chipty Remarks at 22:20; Duke Milunovich Remarks, Second Media Bureau Workshop on the State of the Video Marketplace at 61:45 (Apr. 25, 2016), https://www.fcc.gov/news-events/events/2016/04/second-media-bureau-workshop-state-video-marketplace#acc2 (Milunovich Remarks). *See also* KSE Media Ventures Comments at 4; Public Knowledge Reply at 2 (asserting that the high costs of complying with MFN provisions lead to higher retail prices for subscription video service).

[86] *See, e.g.,* Milunovich Remarks at 62:03; Newton Remarks at 130:30 (asserting that restrictive MFN clauses limit flexibility to negotiate or develop unique service offerings). *See also Charter-TWC Order*, 2016 WL 2858801, at *63, para. 221 (finding that even if a programmer were to license its content online notwithstanding the disincentive created by unconditional MFN provisions, the MVPD with MFN status would obtain the same rights as the OVD, thereby lessening product differentiation that otherwise would expand consumers' options). The Commission has rejected the argument that MFN provisions included in agreements between cable operators and local franchising authorities reduce the incentives of a local franchising authority to agree to a more favorable deal with overbuilders new to the market. *See, e.g., Implementation of Section 621(A)(1) of The Cable Communications Policy Act Of 1984, as amended by The Cable Television Consumer Protection and Competition Act Of 1992*, Order on Reconsideration, 30 FCC Rcd 810, 814 n.39 (2015) ("MFN provisions have no effect on market entry; they merely
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from the exercise of unconditional MFN rights may not reflect marketplace conditions because they disregard the balance struck in bilateral negotiations between the programmer and rival distributor. While some MVPDs generally defend MFN clauses on the basis that they provide certain pro-consumer benefits,[87] no party has identified any public interest benefits that accrue from making such provisions unconditional. For these reasons, and consistent with conditions imposed by the Department of Justice in approving the Charter-TWC transaction,[88] we tentatively conclude that the potential harms to competition, diversity and innovation resulting from unconditional MFN provisions outweigh any potential public interest benefits.[89]

21. We seek comment on this tentative conclusion and on whether the purposes of section 616 and the public interest would be served by adopting the proposed rule. In addition, we seek comment on our proposed definition of unconditional MFN provision and on any alternative definitions. Should we be concerned that the proposed definition is too narrow and thus would permit MVPDs to draft contract language that avoids application of the prohibition? If so, how should we address such concerns? Should any rules we adopt address MFN provisions that are partially unconditional or effectively discourage or foreclose wider distribution of content? We also seek input on our proposal to ban unconditional MFN provisions that entitle an MVPD to contractual rights that an independent programmer has negotiated with any other video programming distributor. Should we be uniquely concerned about the use of unconditional MFN provisions to harm competition from nascent OVDs? Accordingly, should we prohibit only unconditional MFN provisions that apply to terms an independent programmer has negotiated with an OVD? Recent merger conditions adopted in DOJ's Proposed Final Judgment in the Charter-TWC merger have precluded only unconditional MFN provisions that apply to terms negotiated with OVDs.[90] Should we take a similar approach in this proceeding, or is it in the public interest to prohibit unconditional MFN provisions that apply to a broader range of video programming distributors? We seek comment on the costs and benefits of the rules proposed above and any other rules

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allow an incumbent to obtain the same franchise terms that already applied to their new competitors."). We note the distinction between the incentives and interests of government entities such as local franchising authorities (among them, public interest concerns such as consumer costs) and those of commercial programmers (for example, profit maximization). In the context of wireline competition, the Commission has concluded that allowing competitive local exchange carriers (CLECs) to cherry-pick terms and conditions of service from incumbent local exchange carriers' (ILECs) interconnection agreements with other ILECs impeded give-and-take negotiations between ILECs and resulted in "largely standardized agreements with little creative bargaining," whereas requiring CLECs to accept all terms of an agreement between an ILEC and another party ("all-or-nothing" approach) would encourage ILECs to make trade-offs in negotiations that they were reluctant to make under the "pick and choose" approach. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 FCC Rcd 13494, 13501-02, paras. 10-12 (2004), *aff'd*, *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1109–10 (9th Cir. 2006).

[87] *Supra* para. 13 (discussing MVPD arguments that MFN provisions ensure that MVPDs are able to respond to changes in consumer demand and remain competitive, facilitate longer term carriage arrangements that prevent consumers from experiencing programming disruptions, promote candor between the negotiating parties and facilitate improved contracts).

[88] *See, e.g.*, DOJ Charter-TWC Proposed Final Judgment at 5, Section IV.B.2. (prohibiting Charter-TWC from entering into or enforcing any agreement that grants it unconditional MFN status with respect to OVDs). *But see AT&T-DIRECTV Order*, 30 FCC Rcd at 9222, para. 237 (declining to impose conditions on the use of MFN provisions based on the Commission's finding that the proceeding did not have a record to establish that the competitive impact of MFN provisions warranted a general condition restricting their use). Although the Commission, in the AT&T-DIRECTV merger proceeding, declined to adopt a transaction-specific condition due to the absence of a supporting record, we have since developed through the instant proceeding a record that demonstrates the competitive harms resulting from unconditional MFN provisions.

[89] As noted above, the record reveals no public interest benefits that result from unconditional MFN provisions.

[90] DOJ Charter-TWC Proposed Final Judgment at 5-6, Section IV.A-C.

that commenters assert would better serve the public interest. To the extent possible, commenters should quantify any identified costs and benefits. Are there any circumstances in which unconditional MFN provisions may be beneficial to competition or programming diversity? If so, are the potential public interest benefits of allowing such provisions outweighed by the benefits of our proposed prohibition?

22. We also seek comment on which, if any, of the Commission's program carriage rules would need to be amended if we adopted the proposed rule.[91] What remedies and penalties should we impose on an MVPD that violates the proposed prohibition on unconditional MFN provisions?[92] For example, would it be appropriate to order that the unconditional MFN provision would be unenforceable starting on the effective date of any new rule, or that it be replaced with a conditional MFN provision?[93] If we preclude MVPDs from enforcing unconditional MFN provisions in existing contracts, should we also afford parties some period of time to reform their contracts before the Commission will take enforcement action? To what extent, if at all, would costs, or other concerns, associated with pursuing a program carriage complaint affect the ability of independent programmers to obtain relief?[94] Finally, we seek comment on what types of circumstances could justify waiver of a rule precluding the use of unconditional MFN provisions. Given the potential detrimental impact that such provisions have on competition, programming diversity and innovation in the marketplace, what, if any, situations would constitute "good cause" for permitting MFN provisions that otherwise would be precluded under our proposed rules?[95]

3. Prohibition on "Unreasonable" ADM Provisions

23. We also propose to adopt a rule that prohibits the inclusion of an unreasonable ADM provision in a carriage agreement between an MVPD and an independent video programming vendor. As with MFN clauses, we recognize that ADM provisions, which are a form of exclusivity,[96] can have valid public interest justifications. For example, they may incentivize MVPDs to invest in new or emerging programming sources, including independent or niche content and/or content targeted to underserved audiences.[97] We also recognize that, as with MFN provisions, the use of ADM clauses is a longstanding industry practice, and that there is a broad variety of ADM restrictions in programming contracts today.[98] Based on the record, however, it appears that certain restrictive ADM provisions have no discernibly pro-competitive justifications and have an adverse impact on the provision of diverse programming sources to

[91] 47 CFR §§ 76.1300-1302. In particular, we seek comment on whether any rule revisions would be needed in addition to, or instead of, those set forth in Appendix A.

[92] We note that section 616 of the Act and its implementing rules authorize the Commission to prescribe appropriate penalties and remedies, including carriage, for a violation of the program carriage provisions. *See* 47 U.S.C. § 536(a)(5); 47 CFR § 76.1302(j).

[93] *See* DOJ Charter-TWC Proposed Final Judgment at 5, Section IV.A. (prohibiting defendants from entering into or enforcing any agreement with a programmer under which they forbid, limit, or create incentives to limit the video programmer's provision of its video programming to one or more OVDs).

[94] *See, e.g.,* TheBlaze Comments at 10-11 (arguing that relying on the program carriage rules to protect against ADM provisions may lead to litigation costs that few independent programmers can afford). *See also infra* para. 32 (seeking comment on whether the Commission should adopt additional provisions to protect against retaliation).

[95] *See* 47 CFR § 1.3 (providing for waiver of any Commission rule for good cause shown).

[96] *See* Chipty Remarks at 18:43 (asserting that ADM provisions grant a form of exclusivity by restricting distribution of a programmer's content via an alternative distribution method that reaches the MVPD's service territory for a specific period of time).

[97] *See* Chipty Written Remarks at 3-4; Chipty Remarks at 19:50 (asserting that ADM provisions can foster incentives to invest in programming by providing more certainty about the rights purchased and protecting against erosion of the programming's value).

[98] *Supra* para. 9.

consumers.[99] As DOJ has found, such provisions also "negatively affect OVDs' business models and undermine their ability to provide robust video offerings that compete with the offerings of traditional MVPDs,"[100] which can lead to "lower-quality services, fewer consumer choices, and higher prices."[101]

24. We tentatively conclude that in determining whether a particular ADM provision is "unreasonable," we will consider, among other factors, the extent to which an ADM provision prohibits an independent programmer from licensing content to other distributors, including OVDs. Although the issue of whether a particular ADM clause is "unreasonable" would be fact-specific and determined in the context of a complaint proceeding brought under section 616 of the Act under our proposal,[102] certain ADM provisions appear unlikely to yield any procompetitive benefits that would outweigh the attendant public interest harms. Such ADM provisions include those that: (i) bar an independent programmer from licensing content, for an extended time period or indefinitely, to an OVD that distributes content for free to consumers[103]; (ii) bar an independent programmer from licensing content, for any period of time, to an OVD that distributes content to paying subscribers[104]; (iii) bar an independent programmer from licensing content to an OVD unless or until the OVD meets conditions that are difficult to satisfy in a timely manner or are designed to undermine the OVD's ability to compete[105]; or (iv) provide for any pecuniary or non-pecuniary penalty or adverse impact on an independent programmer for the provision of its video programming to an OVD.[106] We tentatively conclude that ADM provisions that include any of these factors should be deemed presumptively unreasonable.

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[99] *See, e.g.,* beIN SPORTS Reply at 10 (noting that while it is reasonable for MVPDs to protect their investment in programming by limiting distribution via alternative platforms, ADM restrictions typically surpass what is necessary to preserve the value of the programming, hindering independent programmers' competitiveness); DOJ Charter-TWC Competitive Impact Statement at 10 (finding that traditional MVPDs have sought to restrain nascent OVD competition by using their bargaining leverage to restrict programmers' ability to license content to OVDs).

[100] DOJ Charter-TWC Competitive Impact Statement at 14.

[101] *Id.*

[102] 47 CFR § 76.1302.

[103] *See* DOJ Charter-TWC Competitive Impact Statement at 12 (stating that "some ADMs prohibit a video programmer from licensing content to OVDs for an extended period of time after the content is first aired on traditional MVPDs – permanently blocking OVDs from being able to offer current-season content from those programmers").

[104] The only type of ADM provisions permissible under DOJ's Proposed Final Judgment in *Charter-TWC* are those that restrict the free distribution of programming online. The Proposed Final Judgment therefore restricts all ADM provisions that apply to paid distribution online. DOJ Charter-TWC Proposed Final Judgment at 5-6, Section IV.B-C.

[105] DOJ cited this as another example of a problematic ADM provision in its review of the Charter-TWC transaction. For example, DOJ noted one instance in which an ADM clause in one MVPD's contract with a video programmer prohibited the programmer from licensing its content to any OVD unless the OVD offered a package that included 35 channels, including at least two channels each from three out of a list of six large programmers. DOJ Charter-TWC Competitive Impact Statement at 12, n.5. *See also* Richard Greenfield Remarks, Media Bureau Workshop on the State of the Video Marketplace, at 71:58 (Mar. 21, 2016), https://www.fcc.gov/news-events/events/2016/03/media-bureau-workshop-state-video-marketplace#acc2 (observing that MVPDs have imposed contractual restrictions that tell a programmer "you cannot sell your content to X provider (meaning an over-the-top provider) unless that provider has X number of channels or X number of other groups of channels" and arguing that these agreements "basically make it impossible for companies to do deals with Apple . . . or companies like Apple, without them paying full freight for an incredible number of channels they don't want to actually carry").

[106] For example, such penalties could include rate reductions, re-tiering or repositioning penalties, termination rights for the MVPD, or loss or waiver of any rights or benefits otherwise available to the video programmer. DOJ Charter-TWC Proposed Final Judgment at 5, Section IV.B.1.

25. We believe that our proposed rule, which proscribes only "unreasonable" ADM provisions, would ensure that MVPDs cannot use ADM provisions to harm the development of nascent competition, while preserving independent programmers' and distributors' respective incentives to develop quality program content and invest in independent and diverse programming sources. Or would prohibiting such ADM provisions make it less likely that MVPDs would agree to carry independent programmers or would seek to enter into exclusive programming agreements with them that would limit rather than expand their carriage opportunities? We seek comment on our tentative conclusions and proposed framework for determining whether an ADM clause is unreasonable. How should we define an "extended time period" for the purpose of our first proposal in the preceding paragraph? In addition, we seek comment on how an MVPD could rebut an independent programmer's showing that the ADM provisions noted above are unreasonable.

26. In addition, we tentatively conclude that an ADM provision that prohibits an independent video programming vendor from distributing programming, for which the MVPD has agreed to pay, to consumers for free over the Internet for a limited period after the programming's initial airing on a linear MVPD service should be deemed presumptively reasonable. Establishing such a presumption would be consistent with conditions imposed in the Comcast-NBCU and Charter-TWC merger proceedings that permit the respective combined entities to prevent a programmer from making its content available on the Internet for free for 30 days after its initial airing, if such entities paid a fee for that content.[107] We seek comment on this proposed presumption and on the time frame that should apply if we adopt it. Should it be presumptively reasonable for a carriage agreement to include an exclusivity window of 30 days vis-à-vis the free provision of programming online, or should the window be shorter or longer? Is allowing an MVPD to restrict free online distribution for 30 days generally consistent with industry practice? In addition, does a 30-day limit adequately balance our interest in ensuring ADM provisions do not inhibit the development of OVDs, while at the same time affording MVPDs a reasonable opportunity to protect their investment in high quality programming? Should the specified window (*e.g.*, 30 days) apply only to certain types of programming (*e.g.*, scripted programming)? Would a different time period be more reasonable in the case of "time sensitive" programming (*e.g.*, live sports or news) that may lose its value to the public before thirty days after its initial airing?

27. We also seek input on the type of evidence that would be needed to rebut a positive presumption. What type of showing should be sufficient to overcome the presumption of reasonableness? As an alternative to establishing rules based on presumptions, should we adopt a bright line rule that defines and expressly prohibits certain types of ADM provisions?

28. We also tentatively conclude that an ADM provision that grants an MVPD the universally exclusive right to distribute an independent video programming vendor's content should be deemed presumptively reasonable. We recognize that this type of blanket exclusivity long has been common in the video programming industry and does not appear to raise the same competitive concerns as ADMs targeted at OVDs.[108] This type of presumption also would be consistent with the conditions

[107] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4361, App. A, Condition IV.B.3.a. (*Comcast-NBCU Order*); DOJ Charter-TWC Proposed Final Judgment at 6, Section IV.C.1. In its review of the Charter-TWC transaction, DOJ explained that such limitations on free distribution were "ubiquitous in the industry" and that there was "no evidence that such provisions are harmful to competition." DOJ Charter-TWC Competitive Impact Statement at 17. *See also* Comcast-NBCU Comments at 31 (stating that it "has lived comfortably for years within the reasonable ADM limitations in the NBCUniversal merger conditions," and that a 30-day exclusivity window is reasonable).

[108] *AT&T-DIRECTV Order*, 30 FCC Rcd at 9198, para. 179 ("We recognize that, depending on the factual circumstances, exclusive contracts may be procompetitive or anticompetitive.").

imposed by DOJ in the Charter-TWC merger proceeding.[109] We seek input on this proposed presumption. What type of showing would be sufficient to overcome this presumption of reasonableness? As an alternative to establishing this presumption, should we deem an ADM provision that grants an MVPD the universally exclusive right to distribute independent programming content to be outside the scope of the proposed rule, and thus permissible?

29. We also seek comment on whether adoption of a rule prohibiting unreasonable ADM provisions and our proposed framework for the rule would warrant any rule revisions besides those set forth in Appendix A. In particular, which, if any, of the Commission's program carriage rules would need to be amended if we adopted the proposed rule? What remedies and penalties should we impose on an MVPD that violates the proposed prohibition on unreasonable ADM provisions?[110] For example, would it be appropriate for the Media Bureau to order that an unreasonable ADM provision not be enforced or be replaced with an ADM provision with reasonable terms? If we adopt rules prohibiting the use of certain types of ADM clauses, should we preclude MVPDs from enforcing existing contracts that include such a clause? If we preclude MVPDs from enforcing unreasonable ADM provisions in existing contracts, would it be necessary to require them to amend their contracts? If so, how much time should be afforded for these amendments?

30. To what extent, if at all, would the costs associated with pursuing a program carriage complaint affect the ability of independent programmers to obtain relief?[111] We seek comment on the costs and benefits of the proposals above and any others that commenters assert would better serve the public interest. To the extent possible, commenters should quantify any identified costs and benefits. We also seek comment on whether there are any circumstances in which the kinds of ADM provisions we propose to prohibit are beneficial to competition or programming diversity. If so, are the potential public interest benefits of allowing such provisions outweighed by the benefits of a prohibition?

31. In addition, we seek comment on whether there are other kinds of ADM provisions that we should deem to be presumptively reasonable or presumptively unreasonable. We also invite comment on what circumstances could justify waiver of a rule prohibiting the use of unreasonable ADM provisions in agreements between MVPDs and independent video programming vendors. In light of the potential detrimental impact that unreasonable ADM provisions have on competition, diversity, and innovation in the marketplace, what, if any, situations would constitute "good cause" for permitting an MVPD to include in a carriage contract an ADM provision that otherwise would be precluded under our proposed rules?

B. Additional Rules

32. We also seek comment on whether, if we were to adopt the rules proposed above, we should adopt additional provisions that protect against retaliation by MVPDs if independent programmers bring complaints with regard to unconditional MFN or unreasonable ADM provisions.[112] Alternatively,

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[109] DOJ Charter-TWC Proposed Final Judgment at 6, Section IV.C.2. ("Notwithstanding the foregoing, nothing in this Final Judgment shall prohibit Defendants from . . . entering into and enforcing an agreement under which the Video Programmer provides Video Programming exclusively to Defendants, and to no other MVPD or OVD.").

[110] In implementing section 616, the Commission stated that if it were to find that a carriage agreement "includes a coerced . . . exclusivity requirement in violation of section 616, the appropriate remedy may simply be to determine that such terms are unenforceable by the [MVPD], and to revise the existing agreement, ordering carriage on the same terms negotiated in that agreement without the . . . coerced promise of exclusivity." *Program Carriage Second Report and Order*, 9 FCC Rcd at 2653, n.47.

[111] *See* TheBlaze Comments at 10-11 (arguing that relying on the program carriage rules to protect against ADM provisions may lead to litigation costs that few independent programmers can afford). *See also infra* para. 32 (seeking comment on whether the Commission should adopt additional provisions to protect against retaliation).

[112] We note that the Commission in 2011 proposed to amend its rules to prohibit an MVPD from, among other things, retaliating against a video programming vendor for filing a program carriage complaint if the effect of such

(continued….)

should we consider adopting a rule that prohibits a broader range of retaliatory conduct by MVPDs, including retaliation against programmers that refuse to agree to unconditional MFN clauses, unreasonable ADM clauses, or other carriage-related demands?[113] We note, for example, that conditions imposed in the Comcast-NBCU and Charter-TWC transaction proceedings include provisions that bar retaliatory conduct by the combined entities.[114] Such rules also would be harmonious with section 616(a)(2) and its implementing rules, which prohibit MVPDs from, among other things, retaliating against video programming vendors for failing to provide exclusive rights against other MVPDs as a condition of carriage.[115] Parties urging the adoption of rules to address retaliatory conduct should specify the kinds of actions that should be restricted or prohibited. Should we adopt other rules designed to protect independent programmers from retaliation, such as rules that provide for a heightened level of confidentiality when a programmer brings a complaint to the Commission?[116]

33. We also seek comment on what, if any, additional rules we should consider to advance competition, diversity, and innovation in the marketplace. In particular, are there other specific actions we can take to provide greater opportunities for distribution of programming from new video programming vendors, including minorities and women, or programming directed at minority, underserved, or female viewers?[117] Are there any actions we can take to protect consumers from programming disruptions resulting from an MVPD's decision to drop an independent video programmer from its lineup? For example, would the public interest be served, as RFD-TV suggests,[118] by adopting a rule that permits MVPD subscribers to cancel, without penalty, a subscription television package within a

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conduct is to unreasonably restrain the ability of the video programming vendor to compete fairly. *Revision of the Commission's Program Carriage Rules,* MB Docket Nos. 07-42, 11-131, Second Report and Order and Notice of Proposed Rulemaking, 26 FCC Rcd 11494, 11534-37, paras. 60-67 & App. D (2011) (*Program Carriage NPRM*).

[113] *See, e.g.*, Letter from Charles P. Herring, President, Herring Networks, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-41, at 3 (filed June 13, 2016) (urging the Commission to prohibit MVPD retaliation against independent programmers that assert their legal rights); Letter from Farid Ben Amor, Director of Business Development, Pluto, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-41, at 1-5 (filed June 17, 2016) (urging the Commission "to adopt safeguards to protect programmers against the restrictions, penalization and retaliation by legacy MVPDs relating to the distribution of programming by emerging online video services").

[114] *See Comcast-NBCU Order*, 26 FCC Rcd at 4363-64, App. A, Condition IV.G.1.d. (barring Comcast and NBCU from retaliating against any person for (i) exercising or attempting to exercise any rights under the merger order; (ii) participating in the proceeding resulting in the merger order; or (iii) licensing video programming to any person or entity); *id.* at 4287, para. 121 (stating that the order prohibits retaliation for bringing a program carriage complaint); DOJ Charter-TWC Competitive Impact Statement at 18-19 (prohibiting Charter-TWC from, among other things, "discriminating against, retaliating against, or punishing any [v]ideo [p]rogrammer for providing programming to any OVD").

[115] 47 U.S.C. § 536(a)(2); 47 CFR § 76.1301(b). *See also* H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 110 (1992) (House Report) (stating that "[t]he regulations [to implement section 616(a)(2)] should be designed to prevent a cable operator from taking any kind of retaliatory action against a programmer for refusing to grant exclusivity to the operator"); H.R. Rep. No. 102-862, 102d Cong., 2d Sess. at 83 (1992) (Conference Report) (stating that "the FCC would be required to implement regulations to prevent [an MVPD] from retaliating against a video programming vendor for failing to provide exclusive rights to programming").

[116] *See, e.g.*, Letter from Christopher Ruddy, CEO, Newsmax Media, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-41, at 1 (filed Aug. 11, 2016) (urging the Commission to exempt presentations of independent programmers from the "permit but disclose" *ex parte* rules due to concerns about retribution or reprisal from MVPDs).

[117] As noted above, the Media Bureau has interpreted the term "video programming vendor" in section 616 to exclude broadcast programmers, *supra* note 70, and we do not address in this proceeding issues relating to retransmission consent negotiations between MVPDs and broadcast stations. *Supra* note 6.

[118] RFD-TV Comments at 28; RFD-TV *Ex Parte* Letter at 2.

specified time period, *e.g.*, 90 days, after the MVPD has dropped such programmer from its lineup?[119] In addition, we seek comment on whether MVPDs engage in other negotiating practices that hamper the ability of independent programmers to secure distribution of their content. To the extent MVPDs engage in such practices, we seek comment on whether the public interest would be served by requiring MVPDs to negotiate carriage agreements with independent video programming vendors in good faith.[120] We also seek further comment on bundling practices by video programming vendors.[121] Specifically, how, if at all, do bundling practices affect MVPDs' ability to carry independent programmers? Is bundling by large programmers as widespread as some in the record suggest?[122] Do small MVPDs face greater demands to accept bundles than large MVPDs? Do programmers act differently in their negotiations with buying groups, such as the National Cable Television Cooperative (NCTC), than they do in negotiations with MVPDs that negotiate on their own behalf? Do programmers insist on bundling even with respect to capacity constrained MVPDs, or do they provide relief for such systems?[123] What is the impact of bundling on small MVPDs relative to large MVPDs?[124] How does bundling impact consumer costs, choice, and access to diverse programming?[125] Are there other marketplace conditions that magnify the effects (harmful or beneficial) of bundling?

C. Legal Authority

34. We seek comment on the Commission's legal authority under section 616 of the Act[126] to adopt rules prohibiting the use of unconditional MFN and unreasonable ADM provisions in program carriage agreements between MVPDs and independent video programming vendors, as proposed above. Section 616(a) provides, in relevant part, that "the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors."[127] We believe this provision reasonably can be read to grant general rulemaking

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[119] We note that the rules currently require customers to be notified of any changes in rates, programming services, or channel positions as soon as possible in writing, and with an advanced notice of 30 days or more if the change is within the operator's control. 47 CFR § 76.1603(b).

[120] We note that in the 2011 *Program Carriage NPRM,* the Commission proposed to adopt a good faith negotiation requirement under section 616 of the Act that would apply to vertically integrated MVPDs. *Program Carriage NPRM*, 26 FCC Rcd at 11537-40, paras. 68-71.

[121] *NOI*, 31 FCC Rcd at 1616-18 (seeking comment on the practice of bundling).

[122] *See* ACA August 26 *Ex Parte* Letter at 2 (asserting that the largest nine programmers require the bundling of 65 networks).

[123] *Id.* at 3, citing Comcast-NBCU Comments at 33.

[124] *See, e.g.*, *id.* (claiming that bundling forces small cable operators to devote capacity to undesirable programming that could be used to carry independent networks or increase broadband performance); OWS Reply at 9, 12-13 (arguing that forced bundling creates a particularly acute problem for small and mid-sized cable operators, which are often capacity constrained and have no negotiating leverage to resist bundling demands from large media conglomerates).

[125] *See, e.g.*, Free Press Comments at 12 (arguing that bundling crowds out capacity and strains the financial resources that MVPDs could commit to independent and diverse programs, the costs of which are passed on to consumers through bloated basic cable packages that most consumers do not watch); RFD-TV *Ex Parte* Letter at 2 (asserting that because MVPDs are forced to carry large bundles of programming and distribute them on widely penetrated tiers, independent channels are relegated to less penetrated tiers and consumers must pay extra to access such channels). *But see* Todd Juenger Remarks, Media Bureau Workshop on the State of the Video Marketplace, at 141:28 (Mar. 21, 2016), https://www.fcc.gov/news-events/events/2016/03/media-bureau-workshop-state-video-marketplace#acc2 (asserting that consumers want choice, and the only way consumers can have choice is by having more networks).

[126] 47 U.S.C. § 536.

[127] *Id.* § 536(a). Section 616(a), in its entirety, provides:

(continued….)

authority to the Commission to adopt a prohibition on unfair, unreasonable, and/or anticompetitive practices employed by MVPDs when negotiating carriage agreements, including the use of certain contract provisions in agreements with independent programmers.[128]

35. Specifically, we seek comment on whether the Commission's grant of authority under section 616(a) to adopt rules "governing program carriage agreements and related practices between [MVPDs] and video programming vendors" is sufficiently broad to enable us to prohibit the use of unconditional MFN or unreasonable ADM provisions. As noted above, the rules we propose will apply to agreements between MVPDs and "independent video programming vendors," which are encompassed within the term "video programming vendor."[129] We believe these rules will advance Congress's intent in enacting section 616 "to stem and reduce the potential for abusive or anticompetitive actions [by MVPDs] against programming entities."[130] Congress expressed concern that MVPDs may be able "to extract concessions from programmers" which "could discourage entry of new programming services, restrict competition, impact adversely on diversity, and have other undesirable effects on program quality and viewer satisfaction."[131] Consistent with the intent of section 616, our proposals are designed to enhance

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> Within one year after the date of enactment of this section, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators and multichannel video programming distributors and video programming vendors. Such regulations shall –
>
> (1) include provisions designed to prevent a cable operator or other [MVPD] from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;
>
> (2) include provisions designed to prohibit a cable operator or other [MVPD] from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other [MVPDs] as a condition of carriage on a system;
>
> (3) contain provisions designed to prevent a [MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;
>
> (4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;
>
> (5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and
>
> (6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

Id. In addition, section 616(b) defines the term "video programming vendor" as "a person engaged in the production, creation, or wholesale distribution of video programming for sale." *Id.* § 536(b).

[128] ITTA Comments at 8-9 (arguing that section 616 gives the Commission "sweeping" authority to adopt regulations governing program carriage agreements and related practices). *Cf.* AT&T Comments at 17-18 (arguing that section 616 confers on the Commission limited authority with respect to MVPDs' agreements with programmers, and that the introductory text of section 616(a) does not supply an independent grant of authority); National Cable & Telecommunications Association Comments at 8 (NCTA Comments) (asserting that section 616 cannot lawfully be viewed as a "broad catch-all grant of jurisdiction" to regulate the conduct of MVPDs and program networks as it chooses).

[129] 47 U.S.C. § 536(b).

[130] House Report at 27.

[131] *Id.* at 42-43.

competition in the video programming marketplace and are predicated on the belief that "competition is essential both for ensuring diversity in programming and for protecting consumers from potential abuses by cable operators possessing market power" and other MVPDs.[132]

36. Some commenters argue that section 616 is only a limited grant of authority to the Commission.[133] For example, AT&T contends that the Commission has authority under section 616 only to address conduct that violates one of three proscriptions set forth in the subsections of section 616(a).[134] Consistent with our previous determination that "[section 616] does not preclude the Commission from adopting additional requirements beyond the six listed in the statute," we are not persuaded that Congress intended to limit the Commission's regulatory authority to only those practices specifically listed in section 616(a).[135] The introductory language in section 616(a) grants the Commission broad authority to "establish regulations governing program carriage agreements and related practices between cable operators and multichannel video programming distributors and video programming vendors," and nothing in the statute expressly precludes the Commission from establishing rules besides those specifically listed.[136] Furthermore, the subsections relating to substantive requirements, subsections 616(a)(1)-(a)(3), are introduced by the verbs "include" or "contain," which suggests that such requirements are not exhaustive. Where Congress intends to limit the Commission's rulemaking authority to specified areas, it has done so expressly.[137]

37. Although the first sentence of section 616(a) directs the Commission to adopt implementing rules "[w]ithin one year after October 5, 1992,"[138] we do not believe that the timing requirement in section 616(a) means that the Commission's rulemaking authority under that section expired more than 20 years ago. As we have explained previously, the Commission's authority under a statutory provision does not expire when a statutory deadline for implementation passes.[139] Indeed, the view that the Commission's authority expires with passage of a deadline would be at odds with judicial precedent regarding statutory deadlines, which are generally considered directory rather than mandatory.[140]

38. We also believe that our proposed rules are consistent with the overall structure and intent of section 616(a). Although sections 616(a)(1) and 616(a)(2) prohibit an MVPD from "requiring"

[132] *Id.* at 43.

[133] *E.g.*, AT&T Comments at 17-18; NCTA Comments at 8.

[134] *See* AT&T Comments at 17 (citing 47 U.S.C. § 536(a)(1)-(a)(3)).

[135] *Program Carriage NPRM*, 26 FCC Rcd at 11536, para. 65.

[136] *See generally* 47 U.S.C. § 536.

[137] *See, e.g., id.* §§ 613(f)(1), (2) (directing the Commission to reinstate its video description regulations adopted in *Report and Order,* 15 FCC Rcd 15230 (2000), and to modify those rules "only as follows").

[138] *Id.* § 536(a).

[139] *Review of the Commission's Program Access Rules,* First Report and Order, 25 FCC Rcd 746, 752, n.23 (2010), *aff'd in part and vacated in part on other grounds, Cablevision v. FCC,* 649 F.3d 695 (2011). *See also Connect America Fund et al.,* Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17918, para. 767, n.1381 (2011); *Brock v. Pierce County*, 476 U.S. 253, 260, 262 (1986) (finding that mere use of the word "shall" not enough to remove Secretary of Labor's power to act after lapse of a deadline, and "[w]hen . . . there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act"); *Gottlieb v. Peña*, 41 F.3d 730, 733 (D.C. Cir. 1994) (holding that mandate that Secretary of Transportation act by certain deadline was directory, not mandatory).

[140] We note that, although the Commission amended its program carriage rules several times after October 5, 1993, no party has challenged those actions on the grounds that the Commission lacked authority to adopt or revise such rules after that date.

or "coercing" programmers to accept certain terms as a condition of carriage on its systems,[141] we do not believe that our rulemaking authority under section 616(a) is limited to those practices delineated in the subsections. In any case, based on the record, we find that independent programmers generally do not agree to unconditional MFN or unreasonable ADM provisions voluntarily, but rather, are forced to accept such provisions because they lack sufficient bargaining leverage to resist MVPDs' demands for such provisions.[142] Thus, we find it reasonable to conclude that independent programmers agree to unconditional MFN and unreasonable ADM provisions only because MVPDs require them as a condition of carriage. We seek comment on this analysis. Does the use of the terms "requiring" and "coercing" in the subsections of 616(a) affect the scope of our rulemaking authority under this provision? We also seek comment on whether or to what extent Congress's particular concerns about vertical integration as expressed in section 616's legislative history should factor into our determination about the scope of our authority to prohibit the use of unconditional MFN and unreasonable ADM provisions under section 616.[143] In addition, we seek comment on any constitutional issues that we should consider in determining whether to adopt the proposed rules.[144]

39. We seek comment on whether other provisions of the Act provide an alternative or an additional basis for the adoption of rules addressing restrictive MFN and ADM provisions. For example, does section 616(a)(3) of the Act provide a basis for proscribing restrictive MFN and ADM provisions? Section 616(a)(3) directs the Commission to adopt rules "designed to prevent [an MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[145] Is the Commission authorized under that provision, for example, to adopt rules that prohibit vertically integrated MVPDs from including unconditional MFN and unreasonable ADM clauses in carriage agreements with independent video programming vendors, where such MVPDs do not include the same clauses in carriage agreements with affiliated programming networks? If so, would the application of such rules only to vertically integrated MVPDs adequately address the competition and diversity concerns raised by restrictive MFN and ADM clauses? Would a nondiscrimination requirement be effective given that an MVPD could enter into the same restrictive MFN and/or ADM provision with both the affiliated and unaffiliated programming network but simply not exercise its rights with respect to the affiliated network? To the extent that parties assert that section 616(a)(3) authorizes adoption of the proposed rules, we seek comment on whether an independent video

[141] 47 U.S.C. § 536(a)(1)-(a)(2).

[142] *See, e.g.*, beIN SPORTS Reply at 7 (explaining that MVPDs typically demand that MFN provisions, including those that are unconditional, be included in affiliation agreements as a condition of distribution); Herring Comments at 3 (explaining that independent networks, even those with strong brands, are forced to accept unfavorable terms and conditions, including broad MFN and ADM provisions); INSP Comments at 16-17 (arguing that virtually all distribution agreements between MVPDs and program networks include "non-negotiable" MFN clauses that provide one-sided benefits to MVPDs); KSE Media Ventures Comments at 4 (asserting that all of the largest MVPDs demand MFN provisions that are "increasingly complex and one-sided"); RFD-TV *Ex Parte* Letter at 1 (maintaining that independent programmers are forced to accept broad MFN provisions with no opportunity for renegotiation upon expiration of an agreement); Ride Television Network Comments at 3-4 (contending that independent networks must accept oppressive conditions such as MFN and ADM provisions).

[143] *See, e.g.*, S. Rep. No. 102-92, 102d Cong., 2d Sess., at 24-29 (1991) (Senate Report) (discussing concerns that certain cable operators abuse their market power to the detriment of programmers and competitors, and that such concerns are exacerbated by vertical integration); House Report at 41 (referencing testimony that vertically integrated operators can reduce diversity in programming by threatening the viability of rival cable programming services).

[144] *See, e.g.,* Comcast-NBCU Comments at 35-36 (contending that the marketplace is competitive and diverse at all levels; thus, constitutionally sound justifications for regulation are unlikely to exist).

[145] 47 U.S.C. § 536(a)(3).

programming vendor would have ready access to the kind of information needed to prove unlawful program carriage discrimination under section 616(a)(3), given that such clauses are contained in carriage contracts that are not generally subject to public disclosure.

40. We also seek input on whether any provisions of section 628 serve as a valid basis for establishing rules to address restrictive MFN and ADM provisions. Consistent with the goal of our proposed rules, we note that the purpose of section 628 is to "increase[e] competition and diversity in the [MVPD] market . . . and to spur the development of communications technologies."[146] In addition, section 628(b) prohibits "a cable operator . . . or a satellite broadcast programming vendor [from engaging] in 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 [MVPD] from providing . . . programming to subscribers or consumers."[147] And section 628(c)(1) directs the Commission to "prescribe regulations to specify particular conduct that is prohibited by [section 628(b)]" in order to "increase[e] competition and diversity in the [MVPD] market and the continuing development of communications technologies."[148] Given that section 628(b) appears to target only methods, acts, and practices that adversely affect MVPDs, can the Commission lawfully invoke this provision to proscribe, as an "unfair" method, act or practice, the use of certain MFN and ADM provisions in agreements between MVPDs and independent video programming vendors? For example, could section 628(b) be invoked based on evidence that such MFN and ADM provisions adversely affect small MVPDs?[149] Given that direct broadcast satellite (DBS) carriers are not subject to the provisions of section 628,[150] would reliance on that provision to limit the use of restrictive MFN and ADM provisions lead to a disparity in regulatory treatment among MVPDs? Finally, we seek comment on whether there are other provisions of the Act that potentially vest the Commission with authority to adopt rules addressing restrictive MFN and ADM provisions.[151]

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[146] *Id.* § 548(a).

[147] *Id.* § 548(b). The term "satellite broadcast programming vendor" means "a fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming." *Id.* § 548(i)(4); 47 CFR 76.1000(g).

[148] 47 U.S.C. § 548(c)(1).

[149] The record in this proceeding suggests that small MVPDs are adversely affected by restrictive MFN and ADM provisions imposed on programmers by large MVPDs. *See, e.g.*, ACA Comments at 33 (maintaining that MFN provisions prevent programmers from entering into agreements with smaller operators); Heather McCallion, Position Statement, Second Media Bureau Workshop on the State of the Video Marketplace, at 7-8 (Apr. 25, 2016) (reporting one instance in which Atlantic Broadband, a small MVPD, has been harmed by a restrictive MFN clause that effectively prevented it from carrying a new independent programmer due to penetration requirements that had been imposed by a large MVPD); *id.* at 8 (relating one case where a program network that historically had not charged for carriage began to impose a license fee as the result of a restrictive MFN); Judy Meyka Remarks, Second Media Bureau Workshop on the State of the Video Marketplace at 70:26 (Apr. 25, 2016), https://www.fcc.gov/news-events/events/2016/04/second-media-bureau-workshop-state-video-marketplace#acc2 (asserting that independent programmers consistently tell NCTC members that, due to MFN provisions in agreements with larger MVPDs, such programmers cannot provide the flexibility that smaller MVPDs need).

[150] *AT&T-DIRECTV Order*, 30 FCC Rcd at 9194-95, para. 169 (noting that DBS providers are not currently subject to the program access provisions in section 628 of the Act).

[151] Although we suggested in the *NOI* that section 257 of the Act could provide a basis for adopting such rules, we note that section 257(a) directs the Commission, among other things, to "complete a proceeding for the purpose of identifying and eliminating, *by regulations pursuant to its authority under this Act (other than [section 257])*, market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications and information services, or in the provision of parts or services to providers of telecommunications services and information services." 47 U.S.C. § 257(a) (emphasis added). We read this provision, therefore, to authorize the adoption of rules to eliminate the specified entry barriers only if such rules are expressly authorized by provisions of the Act other than section 257. *But see* theBlaze Comments at 10 (asserting that the Commission has authority under section 257 "to regulate both MFNs and ADMs, as they are structural

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D. Initial Regulatory Flexibility Act Analysis

41. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[152] the Commission has prepared an Initial Regulatory Flexibility Act Analysis ("IRFA") relating to this NPRM. The IRFA is set forth in Appendix B.

E. Initial Paperwork Reduction Act Analysis

42. This document does not contain proposed new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). In addition, therefore, it does not contain any new or modified "information burden for small business concerns with fewer than 25 employees" pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

F. *Ex Parte* Rules

43. Permit-But-Disclose. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[153] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

G. Filing Requirements

44. Comments and Replies. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.

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market entry barriers impacting the entrepreneurs and small businesses that operate independent networks"). We seek comment on our interpretation.

[152] 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

[153] 47 CFR §§ 1.1200 *et seq.*

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

45. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C. 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

46. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

H. Additional Information

47. For additional information on this proceeding, contact Raelynn Remy or Calisha Myers of the Policy Division, Media Bureau, at raelynn.remy@fcc.gov, calisha.myers@fcc.gov, or (202) 418-2120.

IV. ORDERING CLAUSES

48. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 4(j), 157, 257, 303(r), 616 and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 157, 257, 303(r), 536 and 548, this Notice of Proposed Rulemaking **IS ADOPTED.**

49. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

For ease of review, proposed additions are shown below in **bold**.

PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1300 is amended to read as follows:

§ 76.1300 Definitions

* * * * *

(b) *Alternative distribution method provision.* The term “alternative distribution method provision” means a provision that prohibits or restricts a video programming vendor from exhibiting its programming on alternative, non-traditional video distribution platforms for a specified period of time following the programming’s original linear airing, or until certain conditions are met.

* * * * *

(e) *Multichannel video programming distributor.* The term “multichannel video programming distributor” means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

(f) *Unconditional most favored nation provision*. The term “unconditional most favored nation provision” means a provision that entitles a multichannel video programming distributor to contractual rights or benefits that an independent video programming vendor has offered or granted to another video programming distributor, without obligating the multichannel video programming distributor to accept any terms and conditions that are integrally related, logically linked, or directly tied to the grant of such rights or benefits in the other video programming distributor’s agreement, and with which the multichannel video programming distributor can reasonably comply technologically and legally.

(g) *Video programming vendor*. The term “video programming vendor” means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

3. Section 76.1301 is amended by adding new paragraphs (d) and (e) to read as follows:

§ 76.1301 Prohibited Practices

* * * * *

(d) *Unconditional Most Favored Nation Provisions.* No multichannel video programming distributor shall enter into an agreement with an independent video programming vendor that contains an unconditional most favored nation provision.

(e) *Unreasonable Alternative Distribution Method Provisions.* No multichannel video programming distributor shall enter into an agreement with an independent video programming vendor that contains an unreasonable alternative distribution method provision.

(1) The following alternative distribution method provisions shall be deemed to be presumptively unreasonable:

(i) A provision that prohibits an independent video programming vendor from licensing content, for an extended time period or indefinitely, to an online video distributor that distributes content for free to consumers;

(ii) A provision that prohibits an independent video programming vendor from licensing content, for any period of time, to an online video distributor that distributes content to paying subscribers;

(iii) A provision that prohibits an independent video programming vendor from licensing content to an online video distributor unless or until such distributor meets conditions that are difficult to satisfy in a timely manner or are designed to undermine such distributor's ability to compete; or

(iv) A provision that imposes any pecuniary or non-pecuniary penalty or adverse impact on an independent video programming vendor for the provision of its video programming to an online video distributor.

(2) The following alternative distribution method provisions shall be deemed to be presumptively reasonable:

(i) A provision that prohibits an independent video programming vendor from distributing programming, for which the multichannel video programming distributor has agreed to pay, to consumers for free over the Internet for a limited period after the programming's initial linear airing; and

(ii) A provision that grants a multichannel video programming distributor the universally exclusive right to distribute an independent video programming vendor's content.

APPENDIX B

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Act Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in the Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. In the Notice of Proposed Rulemaking, we propose to adopt rules that prohibit certain practices used by some multichannel video programming distributors (MVPDs) in their negotiations for carriage of video programming that impede competition, diversity and innovation in the video marketplace. Specifically, we propose to prohibit the inclusion of: (i) "unconditional" most favored nation (MFN) provisions; and (ii) unreasonable alternative distribution method (ADM) provisions in program carriage agreements between MVPDs and independent video programming vendors.

3. The NPRM is an outgrowth of a Notice of Inquiry (*NOI*) that sought comment on the principal obstacles that independent video programmers face in obtaining carriage and possible regulatory actions to address them.[4] The record from the *NOI* reveals that in recent years, MVPDs increasingly have insisted that video programmers, particularly those that are small and independent, accept restrictive MFN and ADM provisions in order to secure carriage of their programming, and that such provisions can cause a variety of harmful effects. By proposing rules that would prohibit certain types of MFN and ADM contract provisions, the NPRM seeks to remove marketplace obstacles that may hinder independent programmers from reaching consumers. The NPRM seeks comment on whether the Commission has authority to adopt such rules pursuant to section 616(a) of the Act. In addition, the NPRM seeks comment on other actions the Commission could take to advance distribution of independent and diverse programming sources to consumers.

B. Legal Basis

4. The proposed action is authorized pursuant to sections 4(i), 4(j), 157, 257, 303(r), 616 and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 157, 257, 303(r), 536, and 548.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[5] The RFA generally

[1] 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

[2] 5 U.S.C. § 603(a).

[3] *Id*.

[4] *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd 1610 (2016).

[5] 5 U.S.C. § 603(b)(3).

defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[6] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[7] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[8] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Wired Telecommunications Carriers*. The U.S. Census Bureau defines this industry as "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

7. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[9] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[10] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

8. *Cable Companies and Systems.* The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rate regulation rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[11] According to SNL

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[6] *Id.* § 601(6).

[7] *Id.* § 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.*

[8] *Id.* § 632.

[9] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2, *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[10] *Id*.

[11] 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7410, para. 31 (1995).

Kagan, there are 1,258 cable operators.[12] Of this total, all but 10 incumbent cable companies are small under this size standard.[13] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[14] Current Commission records show 4,584 cable systems nationwide.[15] Of this total, 4,012 cable systems have fewer than 20,000 subscribers, and 572 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

9. *Cable System Operators* (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[16] There are approximately 56.4 million incumbent cable video subscribers in the United States today.[17] Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[18] Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.[19] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[20] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

[12] Data provided by SNL Kagan to Commission staff upon request on March 25, 2014. Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, para. 24 (2013) (*15th Annual Video Competition Report*).

[13] SNL Kagan, U.S. Multichannel Top Cable MSOs, http://www.snl.com/interactivex/TopCableMSOs.aspx (last visited June 26, 2014). We note that when this size standard (*i.e.*, 400,000 or fewer subscribers) is applied to all MVPD operators, all but 14 MVPD operators would be considered small. *15th Annual Video Competition Report*, 28 FCC Rcd at 10507-08, paras. 27-28 (subscriber data for DBS and telephone MVPDs). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222, 17245-46, para. 37 (2011) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

[14] 47 CFR § 76.901(c).

[15] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on July 1, 2014. A cable system is a physical system integrated to a principal headend.

[16] 47 U.S.C. § 543(m)(2); 47 CFR § 76.901(f) & nn.1-3.

[17] NCTA, Industry Data, Cable Video Customers (2012), http://www.ncta.com/industry-data (last visited Aug. 30, 2013).

[18] 47 CFR § 76.901(f); Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (CSB Jan. 24, 2001).

[19] NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), http://www.ncta.com/industry-data (last visited Aug. 30, 2013).

[20] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. 47 CFR § 76.901(f).

10. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[21] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[22] Census data for 2007 shows that there were 3,188 firms that operated for the entire year.[23] Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.[24] Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." The 2002 definition of Cable and Other Program Distribution provided that a small entity is one with $12.5 million or less in annual receipts.[25] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.[26] Each currently offers subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[27] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[28] Census data for 2007 shows that there were 31,996 establishments that operated that year.[29] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[30] Therefore, under this size standard, the majority of such businesses can be considered small.

[21] 13 CFR § 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 6, above.

[22] *Id.*

[23] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5, *available at* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

[24] *Id*.

[25] 13 CFR § 121.201; NAICS code 517510 (2002).

[26] *15th Annual Video Competition Report*, 28 FCC Rcd at 10507, para. 27.

[27] 13 CFR § 121.201; NAICS code 517110 (2007).

[28] *Id.*

[29] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2, *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[30] *Id*.

12. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.[31] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[32] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[33] Therefore, under this size standard, the majority of such businesses can be considered small.

13. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[34] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[35] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[36] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[37] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not

[31] 13 CFR § 121.201; NAICS code 517110 (2007).

[32] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[33] *Id*.

[34] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

[35] 47 CFR § 21.961(b)(1).

[36] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[37] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.[38] Auction 86 concluded in 2009 with the sale of 61 licenses.[39] Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

14. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based EBS. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services."[40] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[41] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[42] Therefore, under this size standard, the majority of such businesses can be considered small entities. In addition to Census data, the Commission's internal records indicate that, as of September 2012, there were 2,241 active EBS licenses.[43] The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.[44]

15. *Fixed Microwave Services.* Microwave services include common carrier,[45] private-operational fixed,[46] and broadcast auxiliary radio services.[47] They also include the Local Multipoint

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[38] *Id.* at 8296.

[39] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[40] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110. Examples of this category are: broadband Internet service providers (*e.g.*, cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (CCTV) services; VoIP providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

[41] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2, *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[42] *Id*.

[43] http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp.

[44] The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

[45] 47 CFR Part 101, Subparts C and I.

[46] *Id.*, Subparts C and H.

Distribution Service (LMDS),[48] the Digital Electronic Message Service (DEMS),[49] and the 24 GHz Service,[50] where licensees can choose between common carrier and non-common carrier status.[51] At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.[52] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[53] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 show that there were 11,163 firms that operated that year.[54] Of those, 10,791 had fewer than 1000 employees, and 372 firms had 1000 employees or more. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

16. *Open Video Systems.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[55] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[56] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[57] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 3,188 firms that operated for the entire year.[58] Of this total, 2,940 firms had fewer than 100

(Continued from previous page)

[47] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. 47 CFR Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[48] 47 CFR Part 101, Subpart L.

[49] *Id.*, Subpart G.

[50] *Id.*

[51] *Id.* §§ 101.533, 101.1017.

[52] 13 CFR § 121.201; NAICS code 517210.

[53] 13 CFR § 121.201; NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[54] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

[55] 47 U.S.C. § 571(a)(3)-(4). *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, 24 FCC Rcd 542, 606, para. 135 (2000) (*13th Annual Video Competition Report*).

[56] 47 U.S.C. § 573.

[57] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[58] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5, *available at*

(continued….)

employees, and 248 firms had 100 or more employees.[59] Therefore, under this size standard, the majority of such businesses can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[60] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.[61] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

17. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[62] The SBA has developed a small business size standard for this category, which is: all such businesses having $38.5 million dollars or less in annual revenues.[63] Census data for 2007 shows that there were 3,188 firms that operated for the entire year.[64] Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.[65] Thus, under this size standard, the majority of such businesses can be considered small entities.

18. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[66] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[67] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

[59] *Id*.

[60] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[61] *13th Annual Video Competition Report*, 24 FCC Rcd at 606-07, para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[62] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[63] 13 CFR § 121.210; 2012 NAICS code 515210.

[64] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5, *available at* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

[65] *Id*.

[66] 15 U.S.C. § 632.

[67] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 CFR § 121.102(b).

19. *Incumbent Local Exchange Carriers (ILECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[68] Census data for 2007 shows that there were 3,188 firms that operated for the entire year.[69] Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.[70] Therefore, under this size standard, the majority of such businesses can be considered small entities.

20. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[71] Census data for 2007 shows that there were 31,996 establishments that operated that year.[72] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[73] Therefore, under this size standard, the majority of such businesses can be considered small entities.

21. *Internet Publishing and Broadcasting and Web Search Portals.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in (1) publishing and/or broadcasting content on the Internet exclusively or (2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users."[74] The SBA has developed a small business size standard for this category, which is: all such businesses having 500 or fewer employees.[75] Census data for 2007 shows that there were 2,705 firms that operated for the entire year.[76] Of this total, 2,682 firms had fewer than 500 employees,

[68] 13 CFR § 121.201; 2007 NAICS code 517110.

[69] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; *available at* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

[70] *Id*.

[71] 13 CFR § 121.201; 2007 NAICS code 517110.

[72] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2, *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[73] *Id*.

[74] U.S. Census Bureau, 2012 NAICS Definitions, "519130 Internet Publishing and Broadcasting and Web Search Portals" at http://www.census.gov/cgi-bin/sssd/naics/naicsrch. Examples of this category are: Internet book publishers, Internet sports sites, Internet entertainment sites, Internet video broadcast sites, Internet game sites, Internet news publishers, Internet periodical publishers, Internet radio stations, Internet search portals, Web search portals, and Internet search web sites.

[75] 13 CFR § 121.201; NAICS code 519130.

and 13 firms had between 500 and 999 employees.[77] Therefore, under this size standard, the majority of such businesses can be considered small.

22. *Television Broadcasting*. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."[78] The SBA has created the following small business size standard for such businesses: those having $38.5 million or less in annual receipts.[79] The 2007 U.S. Census indicates that 808 firms in this category operated in that year. Of that number, 709 had annual receipts of $25,000,000 or less, and 99 had annual receipts of more than $25,000,000.[80] Since the Census has no additional classifications on the basis of which to identify the number of stations whose receipts exceeded $38.5 million in that year, the Commission concludes that the majority of television stations were small under the applicable SBA size standard.

23. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,387 stations.[81] Of this total, 1,221 stations (or about 88 percent) had revenues of $38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 2, 2014. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 395.[82] NCE stations are non-profit, and therefore considered to be small entities.[83] Based on these data, we estimate that the majority of television broadcast stations are small entities.

24. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[84] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

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[76] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Firms for the United States: 2007 – 2007 Economic Census," NAICS code 519130, Table EC0751SSSZ5, *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[77] *Id*.

[78] U.S. Census Bureau, 2012 NAICS Definitions, "515120 Television Broadcasting," *available at* http://www.census.gov./cgi-bin/sssd/naics/naicsrch.

[79] 13 CFR § 121.201; 2012 NAICS code 515120.

[80] U.S. Census Bureau, Table No. EC0751SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2007* (515120), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

[81] Press Release, FCC, *Broadcast Station Totals as of June 30, 2014* (July 9, 2014) (*Broadcast Station Totals*) at https://apps.fcc.gov/edocs_public/attachmatch/DOC-328096A1.pdf.

[82] *Broadcast Station Totals*, *supra*.

[83] 5 U.S.C. §§ 601(4), (6).

[84] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 CFR § 21.103(a)(1).

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

25. *Reporting Requirements.* The NPRM does not propose to adopt reporting requirements.

26. *Recordkeeping Requirements.* The NPRM does not propose to adopt recordkeeping requirements.

27. *Other Compliance Requirements.* The NPRM proposes to prohibit use of the following contract provisions in program carriage agreements between MVPDs and independent video programming vendors:

- unconditional MFN provisions; and
- unreasonable ADM provisions.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

28. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."[85]

29. Although the rules proposed in the NPRM would apply to all MVPDs, including those that are small, we do not believe such rules would have a significant economic impact on a substantial number of small MVPDs. The record indicates that small MVPDs do not appear to obtain the kinds of contractual restrictions the proposed rules would proscribe. In addition, the NPRM seeks comment on what circumstances could justify waiver of the proposed rules. We note further that to the extent small MVPDs are aggrieved by contractual restrictions imposed by larger MVPDs, small MVPDs would have standing to seek relief by filing a program carriage complaint under our existing rules.[86]

30. With regard to the impact on other small video programming distributors (such as online video distributors), and small video programming vendors (including independent content creators), based on the record, such small entities generally would benefit from Commission action addressing unconditional MFN and unreasonable ADM provisions. Because such entities likely would support the rules proposed in the NPRM, we find that no further analysis of alternatives on their behalf is necessary.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

31. None.

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[85] 5 U.S.C. § 603(c)(1)-(c)(4).

[86] 47 CFR § 76.1302(a) (providing that "[a]ny video programming vendor or *multichannel video programming distributor* aggrieved by conduct that it believes constitute a violation of the [program carriage] regulations may commence an adjudicatory proceeding . . . to obtain enforcement of the rules through the filing of a complaint") (emphasis added).

STATEMENT OF
CHAIRMAN TOM WHEELER

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41.

The Commission is committed to fostering diversity, competition, innovation, and consumer choice in the programming marketplace. To that end, we are proposing rules today that would promote the availability of diverse and independent programming to consumers by limiting practices that inhibit the introduction and expansion of such programming.

This is part of what has been a continuing, year-long process. In February, the Commission issued a Notice of Inquiry that sought comment on the state of programming diversity and how best to promote the availability to consumers of diverse and independent sources of video programming. The NOI was followed by two workshops that examined the state of the video marketplace, challenges faced by distributors of video programming, and marketplace obstacles that affect the provision of independent and diverse programming to consumers.

In the Notice of Proposed Rulemaking before us today, we propose to prohibit certain negotiating practices used by multichannel video programming distributors (MVPDs) that could impede competition, diversity, and innovation in the marketplace.

First, we would end "unconditional" Most-Favored Nation (MFN) provisions, which entitle an MVPD to receive the best terms and conditions from another distribution agreement without requiring the MVPD to assume reciprocal obligations from that other agreement. Second, we propose eliminating "unreasonable" Alternative Distribution Method (ADM) provisions, which prohibit or restrict a video programmer, in an unreasonable manner, from exhibiting its programming on non-pay-TV video distribution platforms.

These provisions limit the incentives and ability of independent programmers to experiment with innovative carriage terms and to license their content on alternative platforms. Such a reality hurts programmers who have fewer ways to grow their business. Ultimately, consumers are deprived of the benefits that otherwise would flow from enhanced competition in the video programming and distribution marketplace. As more independent programmers are dropped by MVPDs, alternative distribution becomes necessary for survival.

Commissioner Clyburn deserves special recognition for her leadership on this issue. Thank are also due to small programmers for being willing to tell their stories about how hard it is to get carriage and how hard it is to share their programming the way they want to.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming,* MB Docket No. 16-41.

"You've been dropped!"

Three of the most paralyzing words a small or independent programmer could ever hear. They render a content provider powerless and frustrated. As for the consumer? With little or no warning, they suddenly discover that a favorite network or show has been removed from their channel lineup, leaving them with little or no alternative means for accessing 'niche content.'

But what some may call 'niche programming' is that customer's preferred viewing. Strong ratings? Rave reviews? Neither of these seem to matter. Their favorite station is now missing from the programming line-up, because the cruel reality is that independent programmers live by a different set of rules. Some understandable. Others quite perplexing.

Just last month, as part of my office's #ConnectingCommunities tour, I visited one such programmer in a small town called Indian Land, South Carolina, an unincorporated community just south of Charlotte. There I toured the facilities and met with the leadership of INSP, a family-focused content provider that reaches more than 80 million U.S. households. INSP, like countless other independent programmers I have heard from, faces a number of significant challenges that make it difficult to compete on a level playing field, though they will be the first to admit that comparatively speaking, they are quite fortunate.

And it is because of INSP and dozens of others not as fortunate, that I urged seven months ago, for the adoption of a Notice of Inquiry (NOI) that enabled the Commission to embark on a fact-finding mission on the current state of programming diversity, consumer choice and the evolving video marketplace. Just what did we learn from this exercise? After combing through more than 36,000 filings and reviewing the transcripts of two public workshops, several themes emerged. Most notably, independent programmers from all ends of the ideological spectrum told us that they regularly must accept clauses in their program carriage agreements, including most favored nation (MFN) and alternative distribution method (ADM) provisions that inhibit their ability to grow and innovate.

Now I must admit, that when we launched the NOI in February, I was unsure of what path, if any, we would tread. I knew that there were significant problems facing independent programmers, but I was always aware that tackling these issues head on, would require a robust docket, and clear legal authority. Building on the extensive record and the authority granted under Section 616 of the Communications Act, the NPRM we consider today, appropriately targets two troubling practices: "unconditional" MFNs and unreasonable ADMs.

For those outside of the communications law space, imagine that as an independent programmer eager to grow subscribership, you strike a carriage deal in which you agree to accept a lower rate per subscriber in exchange for say, better channel placement. Now in negotiating with another distributor, you are told, that because of your previous deal with the other entity, that they will not only take your discounted rate, but put your channel in a tier with just a quarter of the subscribers you thought you were negotiating for. How fair does that sound? Similarly, what if you were told, that to strike a carriage deal with a traditional pay-TV provider, you must agree to a clause that will forever prevent you from striking similar agreements in the future, with online video distributors or what we call OVDs? These are very real scenarios independent programmers face each and every day.

But do not just take my word, when it comes to the nature of these practices. Look at what the Department of Justice (DOJ) said in its review of the Charter-Time Warner Cable deal earlier this year. DOJ stated that ADMs and other contractual provisions have the effect of making OVDs "less competitive." As a result of this determination, the DOJ imposed conditions on New Charter that prohibit the company from entering into or enforcing ADMs with programmers as well as MFNs if they are inconsistent with this underlying prohibition.

I am also pleased that this NPRM asks about potential recourse when customers' find, that their favorite programming network has been dropped from the channel lineup. For many consumers who are locked into a multi-year contract, the prospect of finding another pay-TV provider that carries their favorite channel (if one even exists), means paying stiff cancellation penalties. The NPRM at my urging also asks a series of questions about other practices such as bundling that may prevent independent programmers from gaining carriage. For new entrants, some who are even willing to initially offer free carriage, it can be a challenge just to get their telephone call returned.

In sum, I respectfully ask this body: Are we satisfied with a few large conglomerates dominating the paid TV channel lineup? Do we believe that independent and diverse voices have a place in a vibrant media landscape? Do these voices play a role in a strong democracy? The adoption of today's NPRM ensures that these questions and more are addressed, and for that I sincerely thank the Chairman for his support of this fact-finding exercise, the Media Bureau staff, including Michelle Carey, Martha Heller, Raelynn Remy and Calisha Myers for diving into the complex issues surrounding carriage agreements and producing this NPRM, and my adviser David Grossman, for his keen attention to detail.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41.

So much content. So many ways to watch. So few hours in the day.

This is what viewing now feels like for me—and probably a lot of other people too. We have a dizzying array of channels. We have programming available anytime, anywhere, and on any screen. New platforms are multiplying at a rapid clip. Keeping up with a show, a season, a meme, a hashtag—it's exhausting.

While all kinds of content is now available to exhaust and excite us, for those who create it breaking through—and being seen—is hard. Cutting through the crowd often requires securing space on the channel line-up on cable and satellite systems. Although there are new ways to watch, these platforms still dominate viewing. As a result, they remain an important part of building an audience. Building an audience, in turn, is essential for new investment—which provides opportunity to create new and diverse content.

Today's Notice of Proposed Rulemaking takes a hard look at this situation. It asks about carriage agreements programmers sign to get on cable and satellite systems. In particular, it seeks comment on the operation of certain clauses in those agreements known as unconditional most favored nation provisions and alternative distribution method provisions. In practice, these clauses can make it tough for new and independent programming to get on the channel line-up of satellite and cable systems and online, as well. We ask about our authority to address these difficulties and seek ideas for ways to give new and diverse programming a fair shot at being seen. I look forward to the record that develops—and thank my colleague Commissioner Clyburn for encouraging us to get this dialogue going.

DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41.

As an FCC Commissioner and as a citizen, I believe that our media ideally should reflect the diversity of the country in which we live. And when it comes to the video marketplace, we have made a lot of progress over the last decade. There are now more outlets through which creators of video content can distribute their programming than ever before. Over-the-top video, in particular, has been a game changer: It's given diverse voices a new way to be heard, and it has given Americans access to novel content they might never have previously seen.

In my statement on the *Notice of Inquiry* in this proceeding, for example, I discussed the second episode of *Master of None*, a Netflix series starring Aziz Ansari, who is also its co-creator and co-writer. That episode focused on the relationship between Asians who came to this country in the 1960s and 1970s and their American-born children. As an American-born son of Indian immigrants, that episode really hit home with me. It told a story I had never really seen before on American television.

Evidently, that episode impacted a lot of other people as well. Earlier this month, it won the Emmy for Outstanding Writing for a Comedy Series. I'm sure that most of the Emmy voters weren't the children of Asian immigrants, which just goes to show that compelling storytelling has a universal appeal.

Given my support for greater diversity in the video marketplace, I had hoped that I would be able to support this Notice of Proposed Rulemaking (*Notice*). Indeed, it used to be the case that almost all FCC votes on Notices were unanimous. Notices were meant to represent the beginning of the rulemaking process, not its end. Their purpose was to identify all pertinent issues and ask the right questions so that the Commission would be able to make a decision about whether to move forward with new rules, and if so what those new rules should be, on the basis of a complete factual record. For this reason, Commissioners were generally able to add questions to draft Notices. Even if Commissioners were ultimately likely to disagree on how substantive issues should be resolved, I remember hearing many times within this building that "there's nothing wrong with asking a question."

Unfortunately, those days are long gone. Too often, Notices are now one-sided documents that leave little doubt that the Commission has already made up its mind on the issues about which it is purporting to seek the public's input. They suggest that the "comment" part of "notice-and-comment rulemaking" is merely an administrative hoop through which the Commission must jump rather than a critical component in shaping the FCC's decision-making. Accordingly, questions that could generate answers suggesting flaws with the Commission's pre-determined conclusions are excluded from the document. Efforts to bring balance by describing each side's arguments in a fair manner are rejected out of hand.

I was disappointed when the draft of this *Notice* that I received three weeks ago reflected that approach. As a result, I suggested a number of edits to make it less slanted—edits that would not have blocked the Commission's intended direction. I proposed a number of questions to ensure that all aspects of the issues raised in the document were explored. And I believe that it is especially critical to make one other point: Had my ideas been accepted, there still would have been adequate notice for adopting the final rules this *Notice*'s most vocal proponents favor. But the vast majority of my edits were rejected.

In critical respects, this is effectively an *Order* titled as a *Notice*. This is a *Notice* littered with statements indicating that the Commission has already decided many of the most important issues about which we are seeking comment. This is a *Notice* that doesn't include many questions that could yield answers the Commission might find inconvenient. And this is a *Notice* that I cannot support.

In particular, I would like to briefly discuss two of my most serious concerns.

First, I am not convinced that the FCC has the legal authority to adopt the proposals set forth in this *Notice*, prohibiting "unconditional" most favored nation (MFN) provisions and unreasonable alternative distribution method (ADM) provisions in program carriage agreements between multichannel video programming distributors (MVPDs) and independent video programming vendors.

The *Notice* contends that section 616(a) of the Communications Act gives the FCC general rulemaking authority over programming contracts. In particular, the Commission points to the part of that provision that reads, "the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors." Section 616(a) goes on to list six specific things that those regulations should "include," "contain," or "provide." The Commission claims that regulations promulgated under section 616(a) need not be limited to those six things and may include others, such as prohibiting unconditional MFN and certain types of ADM provisions. But I have my doubts.

To begin with, in the almost quarter-century since section 616(a) was enacted into law, the Commission has never issued regulations under this provision that go beyond the six requirements specified under the provision. We have only implemented the specific terms set forth in section 616(a)(1)–(6).

Moreover, if section 616(a) does give the Commission general rulemaking authority over programming agreements, what are the limits on that authority? No one has yet answered this question. The *Notice*'s interpretation simply gives the Commission carte blanche to regulate programming contracts. And I see no evidence that Congress intended to give the FCC such limitless authority.

I am also concerned that such an interpretation of section 616(a)(1) could give rise to serious constitutional difficulties. Under the non-delegation doctrine, Congress must provide agencies with an intelligible principle upon which to base its regulations. But under the portion of section 616(a) that the Commission believes provides it with general rulemaking authority, what is that intelligible principle?

Additionally, the *Notice* fails to ask about the significance (if any) of the contrast between the structure of section 616(a) and that of section 628(c). In section 628(c)(1), Congress directed the FCC to establish regulations to prohibit cable operators and others from engaging in 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 MVPD from providing satellite cable programming or satellite broadcast programming to consumers. Then, in section 628(c)(2), Congress specified four different types of regulations that the Commission must adopt. This provision, however, is entitled "Minimum Contents of Regulations," thus signaling that Congress did not intend for the FCC's rulemaking power under section 628(c)(1) to be cabined by the particular regulations discussed in section 628(c)(2).[1]

Consequently, Congress, in Title VI of the Communications Act, clearly knew how to indicate that particular regulatory mandates established a floor for the Commission's authority rather than a ceiling. Such an indication is found in section 628(c), but not within section 616(a). Moreover, section 628(c) contains a clearly intelligible principle that can be used to guide a general grant of rulemaking authority. Section 616(a), by contrast, does not appear to include any such principle. Shouldn't these differences impact the Commission's interpretation of section 616(a)?

[1] *See also Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, MB 07-51, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20258, para. 48 (2007) (title of section 628(c)(2) "strongly suggests that the rules the Commission was required to implement had to cover the conduct described in Sections 628(c)(2) at the *least*, but that the Commission's authority under Section 628(b) was broader"), *aff'd*, *NCTA v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

Second, I am concerned that the proposals set forth in this *Notice* could have unintended consequences. In my meetings with independent programmers, I have heard their concerns about how unconditional MFN provisions as well as ADM provisions are impacting their businesses. And I have sympathy for their perspective, particularly with respect to unconditional MFNs.

But we need to consider fully the potential results of Commission action here. Remember that MVPDs are under no legal obligation to carry any particular independent programmers in the first place. So we have to consider whether banning unconditional MFN and certain types of ADM provisions would make it less likely that independent programmers would be able to secure carriage by MVPDs. Would banning such contract terms make it more likely that those independent programmers already being carried by MVPDs would be dropped? Or would prohibiting such provisions make it more likely that a large MVPD would insist on exclusive deals with independent programmers, thus limiting these programmers' reach? In short, would the Commission's proposals make it easier or harder for independent programmers to gain distribution? Unfortunately, it is evident from the *Notice* that the Commission has already fixed upon an answer before the record has been compiled.

One last point. I voted against the Charter-Time Warner Cable-Bright House merger because I was concerned numerous conditions imposed upon that transaction would, over time, be transformed into industry-wide rules. When I took that stand, I heard from many who insisted that this wouldn't be the case.

Yet less than five months after that vote, here we are: The FCC is already proposing in this *Notice* to impose, on an industry-wide basis, restrictions on programming agreements agreed to by the Department of Justice and a single company during a merger proceeding. Even before the use of the Time Warner Cable name has been completely phased out, we see the Commission's first effort to demand of the entire industry the regulatory tribute extracted from Charter. Mark my words: It won't be the last.

I dissent.

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming,* MB Docket No. 16-41.

Today's item takes up the cause of independent programmers, who want all of the benefits of cable distribution, including advertising revenues, while also seeking to prohibit certain distributor limits and acquire the ability to completely bypass their cable agreements to self-distribute. I understand why independent programmers would want this, it just shouldn't be the role of the government to further it. In the end, I suspect that this effort will not be as fruitful as anticipated, as independent programmers will face more difficulty getting underlying carriage, thereby reducing their viability and longevity. That means there will be fewer diverse programming sources, not more.

I do have some sympathy for independent programmers. They seek to fill niche consumer programming interests, often without diverse financial backing. In today's media environment, it's certainly difficult to generate such programming, survive a whirlwind of changing consumer tastes and technologies, and make the overall finances work. At the same time, distributors often take a chance to carry such independent programming when it would be easier and perhaps more lucrative to carry other channels. In exchange, distributors seek certain conditions to justify their risks of carriage.

With this item, the Commission seeks to improperly jump into the middle of programmer/distributor relationships and eliminate certain practices that the independent programmers have in the past – and continue to – voluntarily accept during private commercial negotiations. To argue that these are not free negotiations because it is an unbalanced negotiating table completely ignores the fact that such circumstances exist in so many other parts of our economy. For instance, if you want your product to be carried by Walmart, Marriott, or Home Depot, you have to deal with the potential for an unbalanced negotiating table. That is not illegal, inappropriate or necessarily worthy of government involvement.

Complicating this item is the simple fact that it is an extension of the conditions imposed on the merged Charter Communications in its acquisition of Time Warner and BrightHouse. Having been totally shut out of any involvement in the crafting of those conditions, I am now being told that we must burden the entire industry with the same. At least Charter got something in return for acquiescing to such market interference.

Some will argue that this item is merely an NPRM and thus just asking questions. But this Commission, under this leadership, has proven that sentiment totally laughable. Just think about this very subject matter. We were told that the NOI was to be very vague and sit out there for quite a while before any action was contemplated. And yet, here we are with a determined outcome and a march to completion.