

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

In the Matter of
Fostering Independent and Diverse Sources of
Video Programming
MB Docket No. 24-115

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairwoman Rosenworcel issuing a statement; Commissioners Carr and Simington
dissenting and issuing separate statements.

I. INTRODUCTION

1. Video consumption has increased in recent years, expedited in part by changes in
watching brought on by the pandemic. In light of this increased demand, we launch this proceeding to
understand challenges related to distribution and supply, especially as it relates to independent
programming.

2. One of the Commission’s primary statutory objectives with respect to multichannel video
programming is to foster a diverse, robust, and competitive marketplace for the delivery of such
programming. We recognize that competition among distributors of video programming continues to

1 See, e.g., S. Dixon, COVID-19’s Impact On Video Consumption Worldwide 2020, Statista (Mar. 24, 2022),
https://www.statista.com/statistics/1215173/impact-of-covid-19-on-type-of-video-consumption/#statisticContainer;
Anjali Lai, Post-Pandemic Media Consumption: Online Streaming Accelerates A New Content Experience,
Forrester (June 21, 2021), https://www.forrester.com/blogs/post-pandemic-media-consumption-online-streaming-
accelerates-a-new-content-experience/; Falon Fatemi, How the Pandemic Has Changed Video Content and
Consumption, Forbes (Feb. 1, 2021), https://www.forbes.com/sites/falonfatemi/2021/02/01/how-the-pandemic-has-
changed-video-content-and-consumption/?sh=d28a3566ec00; Nielsen, Connected TV Usage Remains Above Pre-
COVID-19 Levels As Traditional TV Viewing Normalizes (June 2020),
https://www.nielsen.com/insights/2020/connected-tv-usage-remains-above-pre-covid-19-levels-as-traditional-tv-
viewing-normalizes.

2 See, e.g., 47 U.S.C. § 521 (“The purposes of this subchapter are to . . . (4) assure that cable communications
provide and are encouraged to provide the widest possible diversity of information sources and services to the
public.”); id. § 532(a) (“The purpose of this section is to promote competition in the delivery of diverse sources of
video programming and to assure that the widest possible diversity of information sources are made available to the
public from cable systems in a manner consistent with growth and development of cable systems.”); id. § 533(f)(2)
(“[T]he Commission shall, among other public interest objectives (A) ensure that no cable operator or group of cable
operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a
group of operators of sufficient size, the flow of video programming from the video programmer to the consumer;
(B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining
carriage on their cable systems or do not unreasonably restrict the flow of the video programming of such
programmers to other video distributors; . . . (G) not impose limitations which would impair the development of
diverse and high quality video programming.”); id. § 536 (directing the Commission to “establish regulations
governing program carriage agreements and related practices between cable operators or other multichannel video
programming distributors and video programming vendors”); id. § 548 (stating that the purpose of this section is “to

(continued....)

evolve, and consumers today have many video programming platforms from which to choose. Nevertheless, stakeholders continue to raise concerns that certain marketplace practices by distributors may hinder independent video programmers³ from reaching consumers and deprive them of access to their choice of diverse programming—one of the benefits of enhanced competition in the video marketplace. Specifically, independent programmers contend that their ability to thrive in the marketplace and reach consumers today depends on their ability to negotiate and secure carriage on multichannel video programming distributors (MVPDs) or online video distributors (OVDs).⁴ Despite the changes in the way that consumers access video programming—including via the growing number of platforms available to video consumers and the protracted decline in MVPD subscribers⁵—independent programmers have consistently asserted over the past several years that certain practices by incumbent

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promote the public interest ... by increasing competition and diversity in the multichannel video programming market ... and to spur the development of communications technologies”). See 1992 Cable Act § 2(a)(6) (finding that “[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media”); *id.* § 2(b)(1) (“[Policy to] promote the availability to the public of a diversity of views and information through cable television and other video distribution media...”); see also H.R. Conf. Rep. No. 102-862, at 2, 1992 U.S.C.C.A.N. 1231, 1232.

³ For purposes of this Notice of Proposed Rulemaking, we propose to define an “independent video programmer” or “independent programmer” as a non-broadcast programmer that (1) is not vertically integrated with an MVPD and (2) is not affiliated with a broadcast network or entity that holds broadcast station licenses. We also propose to use the definition of “affiliated” set forth in section 76.1300(a) of the Commission’s rules for purposes of this definition. 47 CFR 76.1300(a) (providing that “entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities”). We seek comment on these proposals.

⁴ See, e.g., AMC Networks, Inc. Comments, MB Docket No. 20-70, at 4 (rec. May 18, 2020) (asserting that MVPD distribution “is still the primary vehicle for programmers to attract and retain viewers, build viewer loyalty, and attract advertising”); at 2-3 (asserting that certain practices of vertically-integrated MVPDs can prevent independent programmers from innovating with OVDs or from licensing their content to OVDs at an advantageous rate). 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. *Communications Marketplace Report*, GN Docket No. 20-60, 36 FCC Rcd 2945, 3048, n.440 (2020) (*2020 Communications Marketplace Report*) (defining OVD); see also *Applications of Charter Communications, Inc. et al. For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, Memorandum Opinion and Order, 31 FCC Rcd 6327, 6340, para. 34, n.83 (2016) (*Charter-TWC Order*), set aside in part on other grounds, *Competitive Enterprises Institute v. FCC*, 970 F.3d 372 (D.C. Cir. 2020). OVD service offerings include Advertising-Based Video On Demand providers (AVODs), which allow consumers to access video programming free of charge; Subscription Video On Demand providers (SVODs), which charge consumers a recurring subscription fee for access to the provider’s video content; Transactional Video On Demand providers (TSODs), which allow consumers to purchase specific video content (movies, television programs, or live events) on a transactional or per program basis; and virtual Multichannel Video Programming Distributors (vMVPDs), which offer consumers access to a package of streaming linear channels. *2020 Communications Marketplace Report*, 36 FCC Rcd at 3057-61, paras. 178-85. Whether certain types of OVDs are MVPDs remains an open question, which this NPRM does not address.

⁵ *8 Million Homes Dump Big TV Channel Bundle In Last 12 Months*, nScreenMedia.com (Aug. 15, 2023), <https://nscreenmedia.com/8-m-homes-dump-big-tv-channel-bundle-q2-2023/> (noting that the decline in MVPD subscribership continues to accelerate, with a year-over-year decline from 8.1 percent in Q2 2022 to 13.3 percent in Q2 2023); *Communications Marketplace Report*, GN Docket No. 22-203, FCC 22-103, paras. 218-21 (Dec. 30, 2022) (*2022 Communications Marketplace Report*) (noting that MVPD subscribership has been declining since 2013, including a loss of 6.7 million video subscribers between the end of 2020 and 2021).

cable operators and other MVPDs have impeded their ability to reach consumers across all video platforms, leading to less competition and fewer choices for those who watch.⁶

3. Through this Notice of Proposed Rulemaking (NPRM), we initiate a new proceeding to seek comment on the current state of the marketplace for diverse and independent programming. We also seek comment on the obstacles faced by independent programmers seeking MVPD carriage and carriage on online platforms and how this impacts consumers. In order to alleviate marketplace obstacles that may hinder independent programmers from reaching consumers, we propose to prohibit two types of contractual provisions in program carriage agreements between independent programmers and MVPDs: (i) most favored nation (MFN) provisions, and (ii) unreasonable alternative distribution method (ADM) provisions. We also seek comment below on current program bundling practices.

II. BACKGROUND

4. In 2016, the Commission launched a proceeding in MB Docket No. 16-41 to examine how certain contractual provisions in carriage agreements between programmers and distributors, such as most favored nation (MFN) and alternative distribution method (ADM) clauses, impact programming competition, innovation, and diversity.⁷ 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 an MVPD or an OVD.⁸ An ADM provision generally

⁶ See, e.g., AMC Networks, Inc. Comments, MB Docket No. 20-70, at 2-3 (rec. May 18, 2020) (asserting that independent programmers routinely encounter demands from vertically integrated MVPDs that put them at a disadvantage to the MVPD's affiliated networks, including demands for most favored nation clauses, prohibitions on direct-to-consumer or a la carte offerings, subscription video-on-demand holdbacks, and rights of conversation and offer provisions that require the programmers to approach an MVPD and engage in a conversation with them before the programmer is permitted to conclude a deal with an online video distributor for new content licenses or content development); beIN Sports, LLC Reply Comments, MB Docket No. 20-70, at 5-6 (rec. June 1, 2020) (asserting that "[v]ertically integrated MVPDs use [most favored nation provisions] as levers to prevent independent programmers from obtaining the favorable rates and conditions of carriage from smaller MVPDs that they could otherwise obtain"); Ride Television Network, Newsmax TV, HDNet, LLC, KSE Outdoor Sportsman Group, WeatherNation TV Comments, MB Docket No. 20-70, at 2 (rec. May 18, 2020) (asserting that "[i]ndependent programmers are forced to agree to onerous most favored nation clauses which impede their ability to negotiate on a balanced playing field"). See also *2020 Communications Marketplace Report*, 36 FCC Rcd at 3137, para. 347 ("AIM also asserts that vertically integrated MVPDs impose onerous contract terms on programmers, including most favored nations requirements and restrictions on alternative means of content distribution that stifle innovation and reduce diversity and competition.").

⁷ The Commission initially issued a Notice of Inquiry in MB Docket No. 16-41 to explore the principal challenges independent video programmers face in gaining carriage of their content on both traditional and emerging distribution platforms and determine whether further action is needed to promote a diverse, robust, and competitive programming marketplace. *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Inquiry, 31 FCC Rcd 1610, 1611, para. 2 (2016) (*2016 Independent Programming NOI*). The Commission subsequently issued an NPRM to seek comment on proposals to prohibit certain practices used by some MVPDs in their negotiations for carriage of video programming that may impede the entry and growth in the marketplace of independent programmers. *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Proposed Rulemaking, 31 FCC Rcd 11352 (2016) (*2016 Independent Programming NPRM*).

⁸ *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion and Order, 30 FCC Rcd 9131, 9218-19, para. 228 & n.655 (2015) (*AT&T-DIRECTV Order*). 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. An unconditional MFN provision, by contrast, 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. *Id.* at 9219 n.655.

prohibits or restricts a video programming vendor from exhibiting its programming on OVDs, 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.⁹ In 2020, having not received any new comments in the proceeding in over two years, Commission staff terminated this proceeding under the dormant proceedings rule.¹⁰

5. Following the termination of the proceeding, the Commission released the *2020 Communications Marketplace Report* which identified the concerns of independent programmers indicating that MFN and ADM provisions continue to stifle innovation and reduce diversity and competition.¹¹ We conclude that it is appropriate to look anew at the issues raised in the MB Docket No. 16-41 proceeding to determine whether current circumstances warrant further action. While we intend to take a fresh look at the state of the marketplace for independent and diverse video programming in the instant proceeding, we recognize that the record in MB Docket No. 16-41 provides useful background and context.¹² Accordingly, we summarize below pertinent portions of the record in that proceeding.

A. NOI in MB Docket No. 16-41

6. In February 2016, the Commission issued a Notice of Inquiry (*NOI*) in MB Docket No. 16-41 to explore the state of independent and diverse programming.¹³ The proceeding was initiated in response to concerns raised by independent video programmers that some practices of cable operators and other MVPDs limit the ability of independent programmers to reach viewers.¹⁴ The *NOI* invited comment on a number of issues, including the state of the marketplace for independent programming;¹⁵ contractual barriers faced by independent programmers that can hinder the development of competition and consumer choice, such as demands by MVPDs for restrictive MFN provisions and ADM provisions in program carriage agreements;¹⁶ the impact of program bundling arrangements on the ability of independent

⁹ *2016 Independent Programming NOI*, 31 FCC Rcd at 1615, para. 10. The term “linear programming” is generally understood to refer to video programming that is prescheduled by the programmer. *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking, 29 FCC Rcd 15995, 16001 n.26 (2014). ADM provisions restrict distribution on OVD platforms. We note that an ADM provision would run afoul of section 616(a)(2) of the Communications Act of 1934, as amended (the Act), and the Commission’s program carriage rules if the contracting MVPD “coerc[ed] a video programming vendor to provide . . . exclusive rights against other [MVPDs] as a condition of carriage on a system.” 47 U.S.C. § 536(a)(2); 47 CFR § 76.1301(b).

¹⁰ *Termination of Certain Proceedings as Dormant*, CG Docket No. 20-158, Order, 35 FCC Rcd 10498 (CGB 2020) (*Termination of Certain Proceedings as Dormant*); *Consumer & Governmental Affairs Bureau Seeks Comment on Termination of Certain Proceedings as Dormant*, CG Docket No. 20-158, Public Notice, 35 FCC Rcd 5525 (CGB 2020). See 47 § CFR 0.141(h).

¹¹ *2020 Communications Marketplace Report*, 36 FCC Rcd at 3137, para. 347 (“AIM also asserts that vertically integrated MVPDs impose onerous contract terms on programmers, including most favored nations requirements and restrictions on alternative means of content distribution that stifle innovation and reduce diversity and competition.”).

¹² Given the time that has elapsed since the record in the MB Docket No. 16-41 proceeding closed, we do not intend to rely on the comments in that proceeding to support further action on the issues raised herein. Accordingly, we ask any interested parties that previously submitted comments in the MB Docket No. 16-41 proceeding to submit new comments that reflect current marketplace conditions in the instant docket.

¹³ *2016 Independent Programming NOI*, 31 FCC Rcd at 1611, para. 2.

¹⁴ *Id.* at 1612, para. 4.

¹⁵ *Id.* at 1611-12, para. 3.

¹⁶ *Id.* at 1612-16, paras. 5-14.

programmers to obtain carriage;¹⁷ and ways to alleviate marketplace obstacles faced by independent programmers.¹⁸

7. In their comments in response to the *NOI*, independent programmers indicated that although the video marketplace was evolving toward greater competition, diversity, and innovation, they have faced significant challenges to entry and growth in the marketplace, largely due to MFN and ADM provisions in carriage agreements with MVPDs that limit a programmer's ability to license its content to other distributors.¹⁹ Independent programmers asserted that MFN provisions hinder their ability to secure the widest possible carriage by deterring them from licensing their content to OVDs.²⁰ This in turn hampers the ability of independent programmers to grow their revenues and launch new or innovative program offerings.²¹ Commenters expressed particular concern about unconditional MFN clauses, which they claimed have a profoundly negative impact on competition, programming diversity, and innovation.²² Because unconditional MFN provisions entitle 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, commenters asserted that such provisions unduly limit programmers' flexibility to develop creative ways to grow their

¹⁷ *Id.* at 1616-18, paras. 15-18.

¹⁸ *Id.* at 1620, para. 22. In connection with the *NOI*, the Commission held two public workshops to examine the state of competition, diversity, and innovation in the marketplace. *Media Bureau Announces Public Workshop on the State of the Video Marketplace*, Public Notice, 31 FCC Rcd 1785 (MB 2016); *Media Bureau Announces Second Public Workshop on the State of the Video Marketplace*, Public Notice, 31 FCC Rcd 2191 (MB 2016). The first workshop, held in March 2016, focused on trends in the video marketplace and challenges faced by distributors of video programming. *Media Bureau Announces Agenda for Public Workshop on the State of the Video Marketplace on March 21, 2016*, Public Notice, 31 FCC Rcd 1975 (MB 2016). The second workshop, held in April 2016, examined marketplace obstacles to the provision of independent and diverse video programming to consumers. *Media Bureau Announces Agenda for Second Public Workshop on the State of the Video Marketplace on April 25, 2016*, Public Notice, 31 FCC Rcd 3525 (MB 2016).

¹⁹ beIN Sports LLC Comments, MB Docket No. 16-41, at 2 (rec. Mar. 30, 2016) (beIN Sports NOI Comments); INSP, LLC Comments, MB Docket No. 16-41, at 19-24 (rec. Mar. 30, 2016) (INSP NOI Comments); KSE Media Ventures, LLC Comments, MB Docket No. 16-41, at 2-4 (rec. Mar. 30, 2016) (KSE Media Ventures NOI Comments); RFD-TV Comments, MB Docket No. 16-41, at 2-3, 21 (rec. Mar. 30, 2016) (RFD-TV NOI Comments) (all asserting that restrictive MFN and ADM provisions constrain the ability of independent programmers to compete and limit distribution through alternative platforms).

²⁰ American Cable Association Comments, MB Docket No. 16-41, at 33-34 (rec. Mar. 30, 2016) (ACA NOI 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 LLC Reply, MB Docket No. 16-41, at 8 (rec. Apr. 16, 2016) (beIN Sports NOI Reply) (asserting that although both smaller 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 USA Inc. Reply, MB Docket No. 16-41, at 4-5 (rec. Apr. 16, 2016) (T-Mobile NOI Reply) (highlighting concerns that MFN provisions make it difficult for programmers to make carriage deals with new or smaller distributors).

²¹ INSP NOI Comments at 21. Commenters also asserted that by limiting independent programmers' growth, MFN provisions may lead to less diversity in the sources and variety of programming available to consumers, including minority and underserved audiences. ACA NOI Comments at 33 (arguing that MFN provisions imposed by large MVPDs hinder small cable operators from offering diverse content to their subscribers); beIN Sports NOI Reply at 9-10 (contending that MFN provisions lead to fewer choices for consumers, especially minority and niche audiences).

²² TheBlaze NOI Comments at 5-6; T-Mobile NOI Reply at 5.

business.²³ Commenters argued that ADM provisions similarly 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 necessary to their survival.²⁴ In addition to the adverse impact on independent programmers, commenters contended that restrictive MFN and ADM clauses, especially when enforced in tandem,²⁵ stifle competition and innovation in the marketplace for programming distribution.²⁶

8. Large MVPDs, by contrast, generally defended the use of MFN and ADM provisions as procompetitive and pro-consumer.²⁷ They maintained 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.²⁸ They also maintained that programmers are unlikely to forgo lucrative licensing opportunities with OVDs by agreeing to inflexible MFN provisions with MVPDs,²⁹ and that MFN provisions have been found to impart public interest benefits.³⁰ Large MVPDs asserted, moreover, that ADM provisions are intended to allow MVPDs to protect their investment in programming, not to foreclose competition from OVDs.³¹

9. In addition, a number of commenters asserted that vertically-integrated programmers and large media entities are able to leverage their marquee programming to force carriage of numerous, less

²³ Hispanic Information and Telecommunications Network, Inc. Comments, MB Docket No. 16-41, at 5 (rec. Mar. 20, 2016) (HITN NOI Comments); RFD-TV NOI Comments at 2-3, 21 (claiming that obligations created by MFN provisions hinder programmers' ability to negotiate creative distribution agreements). For example, programmers claimed that unconditional MFN clauses make it prohibitively costly for them to expand their viewership by offering special terms or inducements to OVDs in exchange for higher per-subscriber carriage fees or other consideration. beIN Sports NOI Reply at 10-11; TheBlaze NOI Comments at 5-6; INSP Comments at 19-20.

²⁴ TheBlaze NOI Comments at 6-7.

²⁵ KSE Media Ventures NOI 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).

²⁶ beIN Sports NOI Reply at 16; INSP NOI Comments at 16, 21; Public Knowledge NOI Reply at 4, 19-20; T-Mobile NOI 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). Commenters further argued that to the extent that MFN and ADM clauses deter programmers from offering unique or favorable terms to OVDs, such clauses impede the development of new and diverse platforms, technologies, service offerings, and business models. beIN Sports NOI Reply at 8; TheBlaze NOI Comments at 2; Common Cause Comments, MB Docket No. 16-41, at 4 (rec. Mar. 29, 2016) (Common Cause NOI Comments); KSE Media Ventures NOI Comments at 4-5.

²⁷ AT&T Comments, MB Docket No. 16-41, at 12-13 (rec. Mar. 30, 2016) (AT&T NOI Comments); Comcast Corp. and NBCUniversal Media, LLC Comments, MB Docket No. 16-41, at 26 (rec. Mar. 30, 2016) (Comcast-NBCU NOI Comments).

²⁸ Comcast-NBCU NOI Comments at 27-28. *See also* AT&T NOI 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).

²⁹ Comcast-NBCU NOI Comments at 29.

³⁰ *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.").

³¹ AT&T NOI 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 NOI 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).

desirable channels.³² Such forced bundling, they stated, reduces channel capacity and opportunities available for independent programmers.³³ On the other hand, large media companies defended the use of program bundling, arguing that content owners do not have the market power to force MVPDs into bundling;³⁴ that bundling helps new niche and diverse programming grow their audiences by encouraging consumers to sample such programming;³⁵ and that bundling lowers consumer prices through reduced transaction and information costs.³⁶

B. NPRM in MB Docket No. 16-41

10. In September 2016, the Commission issued an *NPRM* in MB Docket No. 16-41.³⁷ Based on the record received in response to the NOI, the *NPRM* proposed to adopt rules that prohibit certain practices some MVPDs use in their negotiations for carriage of video programming that may impede competition, diversity, and innovation in the video marketplace.³⁸

1. Proposed Prohibition on Unconditional MFNs Provisions

11. In the *NPRM*, the Commission proposed to adopt a rule prohibiting the inclusion of unconditional MFN provisions in carriage agreements between MVPDs and independent video programming vendors.³⁹ Although the Commission acknowledged that some MFN provisions may have

³² ACA NOI Comments at 13-14; AT&T NOI Comments at 14; Herring NOI Comments at 2-3; Free Press Comments, MB Docket No. 16-41, at 11 (rec. Mar. 30, 2016) (Free Press NOI Comments); INSP NOI Comments at 6-7; ITTA—The Voice of Mid-Size Communications Companies Comments, MB Docket No. 16-41, at 3-4 (rec. Mar. 30, 2016) (ITTA NOI Comments; T-Mobile NOI Comments at 7; One World Sports Reply Comments, MB Docket No. 16-41, at 2, 6, 10 (rec. Apr. 19, 2016) (OWS NOI Reply).

³³ ACA NOI Comments at 18; AT&T NOI Comments at 14-15; RFD-TV NOI Comments at 2, 20; Ride TV NOI Comments at 3; Aspire Channel, LLC and UP Entertainment, LLC Comments, MB Docket No. 16-41, at 2-3 (rec. Mar. 30, 2016) (Aspire/UP NOI Comments); INSP NOI Comments at 2-3; HITN NOI Comments at 4; TheBlaze NOI Comments at 8; OWS NOI Reply at 3, 13; MAVTV Motorsports Network Reply Comments, MB Docket No. 16-41, at 2 (rec. Apr. 18, 2016) (MAVTV NOI Reply); ITTA NOI Comments at 3-4; Free Press NOI Comments at 12; Free Press Reply Comments, MB Docket No. 16-41, at 5 (rec. Apr. 19, 2016) (Free Press NOI Reply). For example, Aspire/UP noted that rural MVPDs that want the 10 most requested channels must pay for and distribute as many as 120-125 additional networks, leaving little capacity available for independent channels. Aspire/UP NOI Comments at 2-3 (citing OPASTCO-NTCA). *See also* ACA NOI Comments at 24; AT&T NOI Comments at 14-15; Free Press NOI Comments at 12; Public Knowledge NOI Reply at 8; ITTA NOI Comments at 3-4; Verizon Comments, MB Docket No. 16-41, at 2-3 (rec. Mar. 30, 2016) (Verizon NOI Comments) (arguing that forced bundling results in increased costs for MVPDs, reducing financial resources that otherwise could be committed to independent channels).

³⁴ National Association of Broadcasters Comments, MB Docket No. 16-41, at 4 (rec. Mar. 30, 2016) (NAB NOI Comments); CBS Corp., The Walt Disney Co., Time Warner Inc., 21st Century Fox, Inc., and Viacom, Inc. Reply Comments, MB Docket No. 16-41, at 2 (rec. Apr. 19, 2016) (Content Companies NOI Reply).

³⁵ NAB NOI Comments at 6-7; Comcast/NBCU NOI Comments at 32-33; Content Companies NOI Reply at 4-5.

³⁶ NAB NOI Comments at 6; Comcast/NBCU NOI Comments at 32; Content Companies NOI Reply at 4-5.

³⁷ *2016 Independent Programming NPRM*, 31 FCC Rcd at 11352, para. 1.

³⁸ *Id.*

³⁹ *Id.* at 11362, para. 18. The Commission proposed 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, without obligating the MVPD 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 MVPD can reasonably comply technologically and legally.” *Id.*

legitimate public interest justifications,⁴⁰ it found that unconditional MFN provisions that permit an MVPD to “cherry pick” the most favorable contract terms “appear designed to discourage or foreclose the wider distribution of video content, including on online platforms.”⁴¹ Consistent with the conditions imposed by the Department of Justice in approving the Charter-TWC transaction,⁴² the Commission tentatively concluded that the potential harms to competition, diversity, and innovation resulting from unconditional MFN provisions outweighed any potential public interest benefits.⁴³

12. Commenters overwhelmingly supported the Commission’s proposal to prohibit unconditional MFN provisions.⁴⁴ They asserted that unconditional MFN provisions produce no public interest benefits⁴⁵ and inhibit independent programmers from entering into innovative, pro-consumer

⁴⁰ *Id.* at 11363, para. 19. For example, the Commission noted that some MFN provisions can facilitate efficient negotiations by enabling well-informed positions, encourage investment in programming by enabling MVPDs to adjust contract terms after an initial agreement is executed, and broaden MVPD subscribers’ access to video content by allowing MVPDs to secure additional rights to programming. *Id.* (citing AT&T NOI Comments at 12-13; Comcast-NBCU NOI 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), at 24-26 (contending that MFN provisions ensure that MVPDs obtain the same rights on the same terms and conditions as other distributors)).

⁴¹ *2016 Independent Programming NPRM*, 31 FCC Rcd at 11363, para. 19.

⁴² *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). In the *AT&T-DIRECTV Order*, the Commission declined to impose conditions on the use of MFN provisions, 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. *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, 9222, para. 237 (2015) (*AT&T-DIRECTV Order*). The Commission, however, concluded that the record in the MB Docket No. 16-41 proceeding demonstrated the competitive harms resulting from unconditional MFN provisions. *2016 Independent Programming NPRM*, 31 FCC Rcd at 11364 n.88.

⁴³ *2016 Independent Programming NPRM*, 31 FCC Rcd at 11364, para. 20.

⁴⁴ beIN Sports, LLC Comments, MB Docket No. 16-41, at 11 (rec. Jan. 26, 2017) (beIN Sports NPRM Comments); Cinemoi Comments, MB Docket No. 16-41, at 5 (rec. Jan. 26, 2017) (Cinemoi NPRM Comments); FUSE Media, Inc. Comments, MB Docket No. 16-41, at 1 (rec. Jan. 26, 2017) (FUSE NPRM Comments); KSE Media Ventures, LLC Comments, MB Docket No. 16-41, at 1 (rec. Jan. 26, 2017) (KSE Media Venture NPRM Comments); INSP, LLC Comments, MB Docket No. 16-41, at 23 (rec. Jan. 26, 2017) (INSP NPRM Comments); ITTA—The Voice of Mid-Size Communications Companies Comments, MB Docket No. 16-41, at 2 (rec. Jan. 26, 2017) (ITTA NPRM Comments); U.S. Senator Claire McCaskill Comments, MB Docket No. 16-41, at 1 (rec. Feb. 9, 2017) (McCaskill NPRM Comments); NTCA—The Rural Broadband Association Comments, MB Docket No. 16-41, at 7 (rec. Jan. 26, 2017) (NTCA NPRM Comments); RFD-TV Comments, MB Docket No. 16-41, at 9-10 (rec. Jan. 26, 2017) (RFD-TV NPRM Comments); Public Knowledge Reply Comments, MB Docket No. 16-41, at 2 (rec. Feb. 22, 2017) (Public Knowledge NPRM Reply); T-Mobile USA, Inc. Reply Comments, MB Docket No. 16-41, at 4 (rec. Feb. 22, 2017) (T-Mobile NPRM Reply); Writers Guild of America, West, Inc. Comments, MB Docket No. 16-41, at 9 (rec. Jan. 26, 2017) (WGAW NPRM Comments).

⁴⁵ Cinemoi NPRM Comments at 5; INSP NPRM Comments at iii; ITTA NPRM Comments at 8; KSE Media Ventures NPRM Comments at 4.

carriage deals with small MVPDs and OVDs.⁴⁶ Comcast-NBCU argued that the proposal to prohibit unconditional MFNs was misguided because they can be pro-competitive and pro-consumer.⁴⁷

2. Prohibition on Unreasonable ADM Provisions

13. The Commission further proposed 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.⁴⁸ The Commission tentatively concluded that in determining whether a particular ADM provision is “unreasonable,” it would consider, among other factors, the extent to which an ADM provision prohibits an independent programmer from licensing content to other distributors, including OVDs.⁴⁹ In addition, the Commission tentatively concluded that certain ADM provisions are unlikely to yield any procompetitive benefits that would outweigh the attendant public interest harms and should be deemed presumptively unreasonable.⁵⁰ The Commission also tentatively concluded that certain ADM provisions should be deemed presumptively reasonable such as those that bar an independent programmer from distributing programming, for which an 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,⁵¹ or grant an MVPD the exclusive right to distribute an independent video programming vendor’s content.⁵²

14. The majority of commenters that addressed the issue supported the Commission’s proposal to prohibit unreasonable ADM provisions, asserting that unreasonable ADMs harm independent programmers’ ability to compete on emerging online and mobile platforms.⁵³ Comcast-NBCU, however,

⁴⁶ beIN Sports NPRM Comments at 3; Fuse NPRM Comments at 1; Cinemoi NPRM Comments at 5; INSP NPRM Comments at 23; ITTA NPRM Comments at 2; KSE Media Ventures NPRM Comments at 3; NTCA NPRM Comments at 7; RFD-TV NPRM Comments at 10-11. Commenters also asserted that unconditional MFN provisions facilitate standardization of price and non-price terms and can facilitate *de facto* collusion among MVPDs and inhibit the entry of new competitors into the multichannel video distribution market. INSP NPRM Comments at 23; McCaskill NPRM Comments at 9. Additionally, commenters maintained that as a result of unconditional MFNs, independent programmers forfeit revenue growth and lose the ability to launch new or innovative program offerings, ultimately leading to less diversity in sources and programming available to consumers. beIN Sports NPRM Comments at 3; FUSE NPRM Comments at 1; INSP NPRM Comments at 23; ITTA NPRM Comments at 8.

⁴⁷ Comcast Corp. and NBCUniversal Media, LLC Comments, MB Docket No. 16-41, at 16-17 (rec. Jan. 26, 2017) (Comcast-NBCU NPRM Comments) (asserting that unconditional MFNs ensure that MVPD subscribers can enjoy the full value of their subscriptions and may increase the likelihood that an MVPD will take the risk of carrying an independent or diverse network). Comcast-NBCU also contended that unconditional MFNs can produce public interest benefits by, for example, ensuring that a programmer delivers streams of programming formatted in accordance with the most updated technology if the programmer is making programming available to other MVPDs in the updated format. *Id.* at 20.

⁴⁸ *2016 Independent Programming NPRM*, 31 FCC Rcd at 11365, para. 23. The Commission found, based on the record, that “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 consumers.” *Id.*

⁴⁹ *Id.* at 11366, para. 24.

⁵⁰ *Id.* Such ADM provisions included 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; (ii) bar an independent programmer from licensing content, for any period of time, to an OVD that distributes content to paying subscribers; (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; 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. *Id.*

⁵¹ *Id.* at 11367, para. 26.

⁵² *Id.* at 11367, para. 28.

⁵³ ACA NPRM Comments at 17; beIN Sports NPRM Comments at 13-14; Cinemoi NPRM Comments at 5-6; FUSE NPRM Comments at 7-8; McCaskill NPRM Comments at 1; INSP NPRM Comments at 25-26; KSE Media

(continued....)

maintained that prohibiting “unreasonable” ADMs, as defined by the Commission, would not serve the public interest because overly restrictive ADMs had largely fallen by the wayside as online distribution became a more valuable outlet for content companies.⁵⁴

3. Program Bundling and Other Marketplace Practices

15. The Commission requested comment in the *NPRM* on what, if any, additional rules it should consider to advance competition, diversity, and innovation in the marketplace.⁵⁵ For example, it requested further input on bundling practices by video programming vendors, including how bundling practices affect MVPDs’ ability to carry independent programmers, whether small MVPDs face greater demands to accept bundles than large MVPDs, and how bundling impacts consumer costs, choice, and access to diverse programming.⁵⁶ A number of commenters urged the Commission to address forced bundling, arguing that it consumes scarce resources, including bandwidth, channel capacity, and funds, resulting in the displacement of independent programming.⁵⁷ Commenters also asserted that forced bundling results in increased costs and less diversity of programming for consumers.⁵⁸ Large media groups, by contrast, argued that the Commission should reject calls to ban bundling practices.⁵⁹ These groups contended that the widespread industry practice of bundling packages of discounted content generates multiple pro-competitive and pro-consumer benefits, including reduced transaction costs, economies of scale, and enhanced program quality and diversity.⁶⁰

III. DISCUSSION

A. State of the Marketplace for Independent Programming

16. It has been almost seven years since the comment cycle in the MB Docket No. 16-41 proceeding closed in 2017,⁶¹ and we seek comment on developments and changes in the marketplace for

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Ventures NPRM Comments at 10; NTCA NPRM Comments at 7-8; RFD-TV NPRM Comments at 8-10; T-Mobile NPRM Reply at 5; WGAW NPRM Comments at 9. Examples of unreasonable ADM provisions cited by commenters include restrictions on the number of hours per month of content that may be provided online; restrictions on promoting or offering certain content online; restrictions on live streaming of sports and other highly desirable programming; and restrictions on the days and times when content may be made available on alternative platforms. beIN Sports NPRM Comments at 14; FUSE NPRM Comments at 8; INSP NPRM Comments at 26.

⁵⁴ Comcast-NBCU NPRM Comments at 21-22. Comcast asserted that ADMs at that time were usually limited to prohibiting free online distribution of substantial network content for a limited period of time during which an MVPD has program distribution rights for which it usually paid substantial licensing fees. *Id.* at 22.

⁵⁵ *2016 Independent Programming NPRM*, 31 FCC Rcd at 11369, para. 33.

⁵⁶ *Id.*

⁵⁷ ACA NPRM Comments at 3-5; beIN Sports NPRM Comments at 10; Cinemoi NPRM Comments at 3-4; FUSE NPRM Comments at 5; INSP NPRM Comments at 15; ITTA NPRM Comments at 2; NTCA NPRM Comment at 5; RFD-TV Comments at 12-13.

⁵⁸ beIN Sports NPRM Comments at 17; INSP NPRM Comments at 19-20; ITTA NPRM Comments at 2; NTCA NPRM Comment at 5; RFD-TV Comments at 13.

⁵⁹ Comcast-NBCU NPRM Comments at 40; CBS Corporation, The Walt Disney Company, Time Warner Inc., 21st Century Fox, Inc., and Viacom Inc. Comments, MB Docket No. 16-41, at 4 (rec. Jan. 26, 2017); National Association of Broadcasters Comments, MB Docket No. 16-41, at 2 (rec. Jan. 26, 2017).

⁶⁰ Comcast-NBCU NPRM Comments at 40; Content Companies NPRM Comments at 4; NAB NPRM Comments at 2-3. These groups further asserted that bundling of programming networks can create opportunities for new, diverse, and niche content to flourish by encouraging viewers to sample that programming. Comcast-NBCU NPRM Comments at 40; Content Companies NPRM Comments at 4; NAB NPRM Comments at 2-3; National Association of Broadcasting Reply Comments, MB Docket No. 16-41, at 3 (rec. Feb. 22, 2017) (NAB NPRM Reply).

⁶¹ *Termination of Certain Proceedings as Dormant*, 35 FCC Rcd at 10498.

independent programming and the availability of such programming to consumers. For example, what is the current state of the marketplace? Are independent programmers still experiencing the same obstacles to carriage that the record described in response to our inquiries in 2016?⁶² Has the availability of carriage on a variety of platforms, including OVDs and MVPDs, increased or decreased in the intervening years? Specifically, we seek information on how many independent programmers currently are carried exclusively by MVPDs, how many are carried exclusively by OVDs, and how many are carried by both MVPDs and OVDs. Has the number of independent programmers carried on each of these platforms increased or decreased since 2017? If it has decreased, what factor or factors have led to such decrease? Is there more or less independent and diverse programming available to consumers today than there was in 2017? Have changes in the marketplace exacerbated the difficulty of independent programmers in obtaining carriage? We note that in the *2022 Communications Marketplace Report*, NTCA asserts that a number of MVPDs have discontinued offering video service to its customers, and Rural Media Group contends that the vertical integration of MVPDs has restricted access to independent cable networks.⁶³ Does the continued decrease in MVPD subscribers have any effect on the ability of independent programmers to obtain carriage?⁶⁴

17. In addition, we seek comment on whether it is more difficult for independent programmers to obtain carriage on certain types of MVPDs (e.g., cable vs. non-cable MVPDs, or smaller vs. larger MVPDs). How does the level of competition among MVPDs impact the bargaining leverage of independent programmers in negotiations for carriage deals? To what extent does the ability of independent programmers to grow and thrive today depend on their ability to secure carriage on MVPDs? For each of these questions, we request that commenters support their responses with relevant information regarding specific independent program networks. We also seek comment on what, if any, difficulties independent programmers have experienced in gaining carriage on OVDs.

B. Marketplace Obstacles Faced by Independent Programmers

1. Most Favored Nation Provisions

18. As discussed above, MFN provisions generally authorize a contracting video programming distributor to modify a programming agreement to incorporate more favorable rates, contract terms, or conditions that the contracting programmer later agrees to with another distributor.⁶⁵ We seek comment on the current usage of MFN provisions, both conditional and unconditional,⁶⁶ in contracts for carriage of non-broadcast video programming. Has there been a notable change in the prevalence of MFNs provisions, particularly unconditional MFNs, since 2017? If unconditional MFN provisions are used less frequently today, what accounts for this change and is the downward trend in the use of such provisions expected to continue? Conversely, if unconditional MFN provisions are used more frequently today, what accounts for this change and is the upward trend in the use of such provisions expected to continue? Are conditional and unconditional MFN provisions typically only included in carriage agreements between independent programmers and MVPDs or are they also included in agreements with OVDs? Do both cable and non-cable MVPDs require MFN provisions? Are MFN provisions in general, and unconditional MFNs in particular, more likely to be included in carriage contracts with independent programmers than in carriage contracts with vertically integrated programmers? Do certain types of MFN provisions restrain the ability of independent programmers to compete fairly and, if so, what types and how? To what extent does the size of the MVPD or the number

⁶² See *supra* note 13.

⁶³ *2022 Communications Marketplace Report*, FCC 22-103, para. 413, 416.

⁶⁴ *Id.* at para 218 (noting MVPD subscribership has been declining since 2013, and that 51.3% of U.S. households subscribed to a traditional MVPD as of the end of 2021).

⁶⁵ *AT&T-DIRECTV Order*, 30 FCC Rcd at 9218-19, para. 228 & n.655. See *supra* para. 4.

⁶⁶ See *supra* note 8 (defining “conditional” and “unconditional” MFN provisions).

of channels offered by an independent programmer impact whether MFN provisions are included in carriage contracts? Do MFN provisions in carriage agreements between MVPDs and independent programmers cover the terms of both other MVPD agreements and OVD agreements? If so, how often do such MFN provisions extend to OVD agreements?

19. Additionally, we seek comment on the current costs and benefits of both conditional and unconditional MFN provisions. What impact do conditional and unconditional MFNs have on the development and distribution of diverse and niche programming today? To what extent do MFN provisions limit the ability of independent programmers to experiment with new or unique distribution models or to tailor deals with smaller MVPDs or online distributors? Are there particular types of conditional MFN provisions that hinder the development and distribution of such programming and, if so, how do they have this effect? What impact do audits and other mechanisms used to enforce MFN provisions have on independent programmers' ability to compete in the marketplace? What benefits are associated with conditional and unconditional MFN provisions? Are there specific types of MFN provisions that are pro-competitive and enhance independent programmers' ability to gain MVPD carriage, making more diverse programming offerings available for consumers? How do MFN provisions ultimately affect consumers? What, if any, consideration, economic or non-economic, do independent programmers receive from MVPDs in exchange for agreeing to MFN provisions? To what extent do the benefits of MFN provisions, either conditional or unconditional, outweigh any harmful effects of such provisions?

20. We propose to adopt a rule prohibiting the inclusion of MFN provisions, either conditional or unconditional, in carriage agreements between MVPDs and independent programmers. As discussed above, we propose to define "independent programmer" for purposes of this proceeding as "a non-broadcast programmer that (1) is not vertically integrated with an MVPD and (2) is not affiliated with a broadcast network or entity that holds broadcast station licenses."⁶⁷ For purposes of this rule, we propose to define "most favored nation provision" as "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 multichannel video programming distributor or online video distributor, either conditionally or unconditionally." For purposes of this rule, we also propose to define the terms (i) "conditionally" as "subject to the multichannel video programming distributor's acceptance of 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," and (ii) "unconditionally" as "without obligating the multichannel video programming distributor to accept any such terms and conditions." We seek comment on this proposal and the proposed definitions of "most favored nation provision," "conditionally," and "unconditionally." In particular, we seek comment on how the proposed prohibition would enhance the ability of independent programmers to obtain MVPD carriage and compete in the marketplace. We also seek comment on whether the proposed prohibition would benefit consumers by, for example, facilitating the development and distribution of more diverse and niche programming. Would the proposed prohibition result in other benefits to consumers? Are there particular types of MFN provisions that should be excluded or exempted from the proposed prohibition because they provide procompetitive benefits that outweigh any harmful effects? What are the costs and benefits of the proposed prohibition to MVPDs, particularly small entities?

⁶⁷ See *supra* note 3. Because the concerns that have been raised regarding the harmful effects of MFN provisions on independent programmers have not been raised with respect to MVPD-affiliated networks, we are not proposing to apply the proposed ban on MFN provisions to carriage agreements between an MVPD and the affiliated network of another MVPD. Similarly, because such concerns have not been raised with respect to programmers affiliated with a broadcast network or entity that holds broadcast station licenses, we are not proposing to apply the proposed ban on MFN provisions to carriage agreements between an MVPD and such programmers. We seek comment on this approach.

21. We seek comment on whether we should preclude MVPDs on a going forward basis from enforcing all MFN provisions in existing contracts. If so, should we afford parties some period of time to reform their existing contracts before the prohibition takes effect? How much time would be reasonable? Commenters should explain the rationale for any time period proposed. We propose that complaints alleging violations of the prohibition on MFN provisions would be addressed under the program carriage complaint procedures.⁶⁸ We seek comment on any amendments to the program carriage complaint procedures that would be necessitated by adoption of proposed prohibition on MFN provisions. What remedies and penalties should be imposed on an MVPD that violates the proposed prohibition on MFN provisions? To what extent, if any, would costs or other concerns associated with pursuing a program carriage complaint affect the ability of independent programmers to obtain relief if an MVPD violates the proposed prohibition?

C. Alternative Distribution Method Provisions

22. As described above, ADM provisions generally bar or restrict a video programming vendor from exhibiting its programming on alternative video distribution platforms (such as online platforms), often for a specified window of time following the programming's original linear airing, or until certain conditions are met.⁶⁹ We seek comment on the prevalence and scope of ADM provisions in contracts for carriage of non-broadcast video programming today. Has there been any change in the usage or scope of ADMs since 2017? If ADM provisions are less common today, what accounts for this change and is the downward trend in usage of these provisions expected to continue? If ADM provisions are used more frequently today, what accounts for this change and is the upward trend in such usage expected to continue? Are ADM provisions today generally included only in carriage agreements between independent programmers and MVPDs or are they also included in carriage agreements between independent programmers and OVDs? Do both cable and non-cable MVPDs require such provisions? Are ADM provisions more likely to be included in carriage contracts with independent programmers than in carriage contracts with vertically integrated programmers? Do certain types of ADM provisions restrain independent programmers from competing fairly? If so, what types of ADM provisions have this effect and how do such provision restrain independent programmers from competing fairly? Is there currently an industry standard for the windowing restrictions included in ADM provisions (i.e., is there a particular window of time that is typically required in agreements today)? Are certain windowing restrictions more harmful to independent programmers' ability to compete than other windowing restrictions, and if so, why, and how common are such restrictions?

23. We also seek comment on the current costs and benefits of ADM provisions. What effect do ADM provisions have on the video marketplace and the availability of independent programming today? Do ADM provisions thwart competition, diversity, or innovation? If so, how? Parties should describe in detail. To what extent are ADM provisions used to limit the ability of independent programmers to experiment with new or unique distribution models or to tailor deals with smaller MVPDs or OVDs, and how does that impact their ability to compete? For example, are certain types of ADM provisions aimed more at restricting new means of distribution than at facilitating efficient negotiations or protecting an MVPD's investment in programming? What benefits are associated with ADM provisions? Do independent programmers receive any consideration, economic or non-economic, from MVPDs in exchange for agreeing to ADM provisions? Do certain types of ADM provisions enhance independent programmers' ability to gain MVPD carriage and thereby increase the exposure of their programming by incentivizing MVPDs to carry new content? How are ADM provisions enforced? Are there particular enforcement mechanisms for ADM provisions that are more common to independent programmers than other enforcement mechanisms? Do certain types of enforcement mechanisms for ADM provisions have a uniquely harmful impact on independent programmers' ability to compete?

⁶⁸ See 47 CFR § 76.1302 (rules governing the conduct of program carriage complaint proceedings).

⁶⁹ 2016 *Independent Programming NOI*, 31 FCC Rcd at 1615, para. 10. See *supra* para. 4.

24. We propose to prohibit the inclusion of “unreasonable” ADM provisions in carriage agreements between MVPDs and independent programmers.⁷⁰ We further propose to define “alternative distribution method provision” to mean “a provision that prohibits or restricts a video programming vendor from exhibiting its programming on alternative, non-traditional video distribution platforms (such as OVDs) for a specified period of time following the programming’s original linear airing,⁷¹ or until certain conditions are met.” Under the proposed prohibition on “unreasonable” ADM provisions, the issue of whether a particular ADM clause is “unreasonable” would be fact-specific and decided in the context of a program carriage complaint proceeding brought under section 616 of the Act.⁷² In determining whether a particular ADM provision is “unreasonable,” we propose to consider, among other factors, the extent to which an ADM provision prohibits an independent programmer from licensing content to other alternative, non-traditional distributors, including OVDs. By prohibiting only those ADM provisions determined to be “unreasonable,” this proposal would recognize that some ADM provisions may serve the public interest by incentivizing MVPDs to invest in new or emerging programming sources, including independent or niche content, while other ADM provisions may have no pro-competitive justifications and hinder the provision of diverse programming to consumers.

25. We seek comment on the proposed prohibition on unreasonable ADM provisions. We seek comment on whether the proposed prohibition would enhance the ability of independent programmers, particularly small entities, to compete fairly in the marketplace for video programming. Alternatively, would prohibiting certain ADM provisions make it less likely that MVPDs would agree to carry independent programmers or incentivize MVPDs to seek exclusive programming arrangements with independent programmers (subject to the restrictions in 47 U.S.C. § 536(a)(2)) that would limit rather than expand their carriage opportunities? Additionally, we seek comment on how the proposed prohibition would affect consumers. Would it be expected to result in a greater choice of programming sources or lower costs for consumers? How would the proposed prohibition on unreasonable ADM provisions likely affect MVPDs, including small MVPDs? What costs and benefits are associated with the proposed prohibition for each of the affected parties? Should we provide additional guidance in this proceeding on what constitutes an “unreasonable” ADM provision or should we make such determinations on a case-by-case basis in the context of program carriage complaint proceedings as proposed above? In this regard, we seek comment on what factors should be considered in determining whether an ADM provision is “unreasonable.” Are there specific ADM provisions that should be deemed presumptively “unreasonable”? Conversely, are there certain ADM provisions that should be considered to be presumptively reasonable?

26. We seek comment on whether we should preclude MVPDs on a going forward basis from enforcing existing contracts that contain unreasonable ADM provisions and, if so, whether we should

⁷⁰ As discussed above, we propose to define “independent programmer” for purposes of this proceeding as “a non-broadcast programmer that (1) is not vertically integrated with an MVPD and (2) is not affiliated with a broadcast network or entity that holds broadcast station licenses.” See *supra* note 3. Because the concerns that have been raised regarding the harmful effects of unreasonable ADM provisions on independent programmers have not been raised with respect to MVPD-affiliated networks, we are not proposing to apply the proposed ban on unreasonable ADM provisions to carriage agreements between an MVPD and the affiliated network of another MVPD. Similarly, because such concerns have not been raised with respect to programmers affiliated with a broadcast network or entity that holds broadcast station licenses, we are not proposing to apply the proposed ban on unreasonable ADM provisions to carriage agreements between an MVPD and such programmers. We seek comment on this approach.

⁷¹ As explained above, “linear programming” is generally understood to refer to video programming that is prescheduled by the programmer. *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking, 29 FCC Rcd 15995, 16001 n.26 (2014). The programming’s “original linear airing” refers to the initial prescheduled airing of the programming by the programmer.

⁷² 47 U.S.C. § 536(a)(4) (requiring the Commission to prescribe procedures for the expedited review of program carriage complaints); 47 CFR § 76.1302 (rules governing the conduct of program carriage complaint proceedings).

afford the parties a specified period of time to revise their contracts to replace any unreasonable ADM provision with an ADM provision with reasonable terms before the prohibition takes effect. We also seek input on what, if any, amendments to the program carriage complaint procedures would be warranted if the proposed prohibition on unreasonable ADM provisions is adopted. In addition, we seek comment on what remedies and penalties should be imposed on an MVPD that violates the proposed prohibition on unreasonable ADM provisions. In such circumstances, would it be appropriate for the Media Bureau to simply order that an unreasonable ADM provision not be enforced or be replaced with an ADM provision with reasonable terms? Moreover, we seek comment on the extent to which costs or other concerns associated with pursuing a program carriage complaint would affect the ability of independent programmers to obtain relief if an MVPD violates the proposed ban on unreasonable ADM provisions.

1. Program Bundling

27. We seek comment on what the current program bundling practices are today and how such practices affect the ability of MVPDs to carry independent and diverse programming and competition in the video distribution market.⁷³ For example, is forced bundling prevalent today? What impact, if any, does the carriage of bundled channels have on the ability of MVPDs to carry independent channels? Are there examples of independent programmers being dropped or not carried at all due to the constraints placed on MVPD systems by bundling since 2017? To what extent does bundling have a greater impact on smaller MVPDs than it does on large MVPDs? How much has MVPD channel capacity (i.e., the number of MVPD channels available for programming) increased or decreased among both large and smaller MVPDs since 2017? To the extent there have been increases, will this alleviate the constraints placed on MVPD systems by bundling? Are there any plans for large and small MVPDs to increase capacity in the future? Alternatively, is MVPD capacity increasingly being used for broadband today, and does this consequently leave fewer additional channels available for independent programming? Are there other factors, such as financial resources, that continue to constrain the ability of MVPDs to carry independent programming as a result of bundling notwithstanding increases in channel capacity? How does bundling affect consumer choice? Does bundling raise or lower costs for consumers? What are the costs and benefits associated with program bundling? Commenters should describe the extent to which bundling may impede the ability of MVPDs to carry independent programming and whether this is outweighed by any associated benefits of this practice.

2. Other Marketplace Obstacles

28. We seek comment on other practices that may impede entry into the market by or growth of independent programmers, thereby harming competition and/or consumer choice. For example, what impact do tier placement and penetration requirements (i.e., requirements in some programming agreements that programming be placed on a particular tier or that specify a minimum percentage of

⁷³ See *2016 Independent Programming NOI*, 31 FCC Rcd at 1616-17, para. 15 (describing bundling as a practice in which large media entities with multiple program offerings, including vertically-integrated programmers, leverage their marquee programming, such as premium channels or regional sports programming, to force MVPDs to carry additional channels that have little or no consumer demand). See also *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of Circumstances Test*, MB Docket No. 15-216, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, 10339, para. 15 (2015) (describing bundling in the context of retransmission consent). We note that in other contexts, parties have claimed that harm to independent (non-broadcast) programmers from bundling may occur from retransmission consent negotiations when a television station demands carriage of affiliated networks and multicast streams because of the capacity consumed on MVPD facilities. See, e.g., Letter from the American Television Alliance to The Honorable Frank Pallone, Jr., Chairman, Committee on Energy and Commerce, U.S. House of Representatives, at 4 (June 3, 2019), <https://congress.gov/116/meeting/house/109584/documents/HHRG-116-IF16-20190604-SD006.pdf>; *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-216, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, 10339, para. 15 & n.67 (2015). Thus, while the focus of this NPRM is on non-broadcast programming, issues involving bundling extends beyond non-broadcast programming.

subscribers who must receive the programming) have on independent programmers? Are such requirements more typically found in programming agreements with independent programmers than in agreements with vertically-integrated programmers? Are there negotiation practices that hinder independent programmers' entry into the market? If so, what are these practices and how do they impede independent programmers' entry into the market? Do independent programmers that reject certain provisions or requirements in programming agreements face retaliatory conduct that impacts their ability to compete fairly? Are there other marketplace practices that limit the ability of independent programmers to reach consumers? What are the costs of such practices? In particular, do such practices have an adverse effect on diversity, competition, or innovation? What, if any, benefits do such practices offer and do the benefits outweigh the harms?

D. Legal Authority to Address Marketplace Obstacles to Independent Programming

29. We seek comment on the Commission's legal authority to take action to curb practices that may adversely impact the ability of independent programmers to compete fairly. In particular, we seek comment on the Commission's authority under section 616 of the Act⁷⁴ to adopt rules prohibiting the use of MFN provisions and unreasonable ADM provisions in program carriage agreements between MVPDs and independent programmers, as proposed above. Section 616(a) directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors."⁷⁵ 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 permit us to ban the use of MFN or unreasonable ADM provisions. We note that the prohibitions on MFN provisions and unreasonable ADM provisions proposed above would apply to agreements between MVPDs and independent programmers, which are encompassed within the term "video programming vendors."⁷⁶ Congress's goal in enacting section 616 was "to stem and reduce the potential for abusive or anticompetitive actions [by MVPDs] against programming entities."⁷⁷ Consistent with this objective, the proposed prohibitions on MFN provisions and unreasonable ADM provisions discussed above are intended to enhance competition in the video marketplace and reflect Congress's 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.⁷⁸

30. Moreover, we tentatively conclude that Congress did not intend to limit the Commission's authority under section 616(a) to the specific practices listed in that section. 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 apart from those specifically listed.⁷⁹ Further, sections 616(a)(1)-(a)(3)—the subsections relating to substantive requirements—are introduced by the verbs

⁷⁴ 47 U.S.C. § 536.

⁷⁵ *Id.* § 536(a).

⁷⁶ *Id.* § 536(b) (defining "video programming vendor" to mean "a person engaged in the production, creation, or wholesale distribution of video programming for sale"). The term "video programming," in turn, means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." *Id.* § 522(20).

⁷⁷ H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 27 (1992) (House Report). 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." *Id.* at 42-43.

⁷⁸ *Id.* at 43.

⁷⁹ 47 U.S.C. § 536.

“include” or “contain,” which suggests that such requirements are not exhaustive.⁸⁰ In instances where Congress intends to limit the Commission’s rulemaking authority to specified areas, it has done so expressly.⁸¹ We seek comment on this analysis.

31. We also seek comment on whether section 616(a)(3) provides a basis for our proposed bans on MFN provisions and unreasonable ADM provisions in carriage agreements between MVPDs and independent programmers. 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.”⁸² We seek comment on whether this provision authorizes the Commission to adopt rules that prohibit vertically integrated MVPDs from including MFN and unreasonable ADM clauses in carriage agreements with independent programmers, 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 such rules be effective given that an MVPD could enter into the same restrictive MFN and/or ADM clauses with both an affiliated programming network and an independent programmer but simply not exercise its rights with respect to the affiliated network?

32. We further seek comment on whether section 628 provides legal authority for adoption of our proposed rules. Similar to our proposed rules, the purpose of section 628 is to “increase[e] competition and diversity in the [[MVPD] market ... and to spur the development of communications technologies.”⁸³ Section 628(b) precludes a cable operator, a common carrier or its affiliate that provides video programming, and an Open Video System (OVS) operator, as well as a satellite-delivered programmer affiliated with one of those entities, 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.⁸⁴ 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.”⁸⁵ Considering that section 628(b) appears to target only methods, acts, and practices that adversely affect MVPDs, we seek comment on whether the Commission could 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 programmers. Given that direct broadcast satellite (DBS) carriers are not subject to the provisions of section 628,⁸⁶ we seek comment on whether reliance on that provision to limit the use of MFN and ADM provisions would result in a disparity in regulatory treatment among MVPDs.

33. Finally, we seek comment on whether there are other provisions in the Act that afford the Commission the authority to alleviate marketplace obstacles to the distribution of independent and diverse

⁸⁰ *Id.* § 536(a)(1)-(3).

⁸¹ *See, e.g., id.* §§ 613(f)(1), (2) (directing the Commission to reinstate its video description regulations adopted in *Video Description of Video Programming*, Report and Order, 15 FCC Rcd 15230 (2000), recon. granted in part and denied in part, 16 FCC Rcd 1251 (2001), and to modify those rules “only as follows”).

⁸² 47 U.S.C. § 536(a)(3).

⁸³ *Id.* § 548(a).

⁸⁴ *Id.* §§ 548(b), 548(g), 573(c)(1)(A).

⁸⁵ *Id.* § 548(c)(1).

⁸⁶ *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).

programming, including obstacles posed by MFN provisions and unreasonable ADM provisions. For example, section 335(a) provides the Commission with authority to “impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming.”⁸⁷ Do we have authority under other provisions of Title III?⁸⁸ We also seek comment on whether we have—and should exercise—ancillary authority under section 4(i) of the Act to address MFN and ADM provisions.⁸⁹

34. *Digital Equity and Inclusion.* The Commission, as part of its continuing effort to advance digital equity for all,⁹⁰ including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations⁹¹ and benefits (if any) that may be associated with the issues discussed herein. Specifically, we seek comment on how any Commission actions taken to address barriers to the distribution of independent and diverse programming may promote or inhibit advances in diversity, equity, inclusion, and accessibility.

IV. PROCEDURAL MATTERS

35. *Ex Parte Rules - Permit-But-Disclose.* The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁹² 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

⁸⁷ 47 U.S.C. § 335(a).

⁸⁸ See *Targeting and Eliminating Unlawful Text Messages*, Report and Order and Further Notice of Proposed Rulemaking, 2023 WL 2582658, para. 40 (2023) (noting the Commission’s authority under Sections 303(b), 307, and 316).

⁸⁹ 47 U.S.C. § 154(i).

⁹⁰ Section 1 of the Communications Act of 1934 as amended provides that the FCC “regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.” 47 U.S.C. § 151.

⁹¹ The term “equity” is used here consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. See Exec. Order No. 13985, 86 Fed. Reg. 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (January 20, 2021).

⁹² 47 CFR §§ 1.1200 *et seq.*

their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

36. *Filing Requirements—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://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent 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.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
 - Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.⁹³

37. *Regulatory Flexibility Act Analysis.* The Regulatory Flexibility Act of 1980, as amended (RFA),⁹⁴ requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."⁹⁵ Accordingly, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning potential rule and policy changes contained in this *Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix B.

38. *Paperwork Reduction Act.* This document proposes new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

39. *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 Consumer and Governmental Affairs Bureau at (202) 418-0530.

⁹³ See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020).

⁹⁴ See 5 U.S.C. § 603. The RFA, see 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. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

⁹⁵ *Id.* § 605(b).

40. *Providing Accountability Through Transparency Act*: Consistent with the Providing Accountability Through Transparency Act, Public Law 118-9, a summary of this document will be available on <https://www.fcc.gov/proposed-rulemakings>.⁹⁶

41. *Additional Information*. For additional information on this proceeding, please contact Kathy Berthot of the Media Bureau's Policy Division at Kathy.Berthot@fcc.gov or (202) 418-7454.

V. ORDERING CLAUSES

42. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 4(j), 303, 307, 316, 335, 616 and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303, 307, 316, 335, 536 and 548, this Notice of Proposed Rulemaking **IS ADOPTED**.

43. **IT IS FURTHER ORDERED** that, pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on the Notice of Proposed Rulemaking in MB Docket No. 24-115 on or before thirty (30) days after publication in the Federal Register and reply comments on or before sixty (60) days after publication in the Federal Register.

44. **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 Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁹⁶ 5 U.S.C. § 553(b)(4). The Providing Accountability Through Transparency Act, Pub. L. No. 118-9 (2023), amended section 553(b) of the Administrative Procedure Act.

APPENDIX A

Proposed Rules

For the reasons discussed herein, the Federal Communications Commission proposes to amend Part 76 of Title 47 of the Code of Federal Regulations (CFR) as follows:

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, 338, 339, 340, 341, 503, 521, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.1300 by redesignating paragraphs (b) and (c) as paragraphs (c) and (d) and adding new paragraph (b), redesignating paragraphs (d) and (e) as paragraphs (g) and (h) and adding new paragraphs (e) and (f) 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 an independent video programming vendor from exhibiting its programming on alternative, non-traditional video distribution platforms (such as online video distributors) for a specified period of time following the programming’s original linear airing, or until certain conditions are met. For purposes of this section, the term “original linear airing” refers to the initial prescheduled airing of the programming by the programmer.

* * * * *

(e) *Independent video programming vendor.* The term “independent video programming vendor” means “a non-broadcast programmer that (1) is not vertically integrated with a multichannel video programming distributor and (2) is not affiliated with a broadcast network or entity that holds broadcast station licenses.”

(f) *Most favored nation provision.* The term “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 multichannel video programming distributor or online video distributor, either conditionally or unconditionally. The term “conditionally” means “subject to the multichannel video programming distributor’s acceptance of terms and conditions that are integrally related, logically linked, or directly tied to the grant of such rights or benefits in the other multichannel video programming distributor’s or online video distributor’s agreement.” The term “unconditionally” means “without obligating the multichannel video programming distributor to accept any such terms or conditions.”

* * * * *

3. Amend § 76.1301 by adding paragraphs (d) and (e) to read as follows:

§ 76.1301 Prohibited Practices.

* * * * *

(d) *Most favored nation provisions.* No multichannel video programming distributor shall enter into an agreement with an independent video programming vendor that contains a 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.

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 Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rule changes proposed in the *Notice of Proposed Rulemaking (NPRM)*. The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in 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. One of the Commission's primary objectives with respect to multichannel video programming is to foster a diverse, robust, and competitive marketplace for the delivery of such programming.⁴ We recognize that competition among distributors of video programming continues to evolve and consumers today have a wealth of video programming platforms from which to choose. Nevertheless, stakeholders continue to raise concerns that certain marketplace practices by distributors may hinder independent video programmers⁵ from reaching consumers and deprive them of access to their choice of diverse programming—one of the benefits of enhanced competition in the video marketplace. Specifically, independent programmers contend that their ability to thrive in the marketplace and reach consumers today depends on their ability to negotiate and secure carriage on multichannel video programming distributors (MVPDs) or online video distributors (OVDs). Despite the changes in the way that consumers access video programming—including via the growing number of

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).

² 5 U.S.C. § 603(a).

³ *Id.*

⁴ *See, e.g.*, 47 U.S.C. § 521 (“The purposes of this subchapter are to . . . (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”); 47 U.S.C. § 532(a) (“The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.”); 47 U.S.C. § 533(f)(2) (“[T]he Commission shall, among other public interest objectives (A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer; (B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of the video programming of such programmers to other video distributors; . . . (G) not impose limitations which would impair the development of diverse and high quality video programming.”). *See* 47 U.S.C. § 521(a)(4), (b)(1)-(5) (finding that the cable industry was highly concentrated and vertically-integrated and that “there is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media”); *see also* H.R. No. 102-862, at 2, 1992 U.S.C.C.A.N. 1231, 1232.

⁵ For purposes of this Notice of Proposed Rulemaking, we propose to define an “independent video programmer” or “independent programmer” as a non-broadcast programmer that (1) is not vertically integrated with an MVPD and (2) is not affiliated with a broadcast network or entity that holds broadcast station licenses. We also propose to use the definition of “affiliated” set forth in section 76.1300(a) of the Commission’s rules for purposes of this definition. 47 CFR 76.1300(a) (providing that “entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities”).

platforms available to video consumers and the protracted decline in MVPD subscribers⁶—independent video programmers have consistently asserted over the past several years that certain practices by incumbent cable operators and other MVPDs, particularly most favored nation (MFN)⁷ and alternative distribution method (ADM) clauses⁸ in program carriage agreements, have impeded their ability to reach consumers across all video platforms, leading to less competition and fewer choices for those who watch.⁹

3. The *NPRM* seeks comment on the state of the marketplace for independent and diverse programming and the availability of such programming to consumers today. The *NPRM* also seeks comment on the obstacles faced by independent programmers in reaching consumers and the actions the Commission can take to alleviate such obstacles. Specifically, the *NPRM* seeks comment on the current usage of MFN provisions, both conditional and unconditional, in contracts for carriage of non-broadcast video programming and on the costs and benefits of conditional and unconditional MFN provisions. Additionally, the *NPRM* requests comment on the prevalence and scope of ADM provisions in contracts for carriage of non-broadcast video programming today and on the current costs and benefits of ADM provisions. The *NPRM* seeks comment on what the current program bundling practices are today and how such practices affect the ability of MVPDs to carry independent and diverse programming. Further, the *NPRM* seeks comment on other practices that may impede entry into the market by or growth of independent programmers. Finally, the *NPRM* invites comment on the need for Commission action to

⁶ *Communications Marketplace Report*, GN Docket No. 22-203, FCC 22-103, paras. 218-221 (Dec. 30, 2022) (*2022 Communications Marketplace Report*) (noting that MVPD subscribership has been declining since 2013, including a loss of 6.7 million video subscribers between the end of 2020 and 2021).

⁷ 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 an MVPD or an OVD. *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion and Order, 30 FCC Rcd 9131, 9218-19, para. 228 & n.655 (2015). 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. 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. *Id.* at 9219 n.655.

⁸ An ADM provision generally prohibits or restricts a video programming vendor from exhibiting its programming on OVD 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. *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Inquiry, 31 FCC Rcd 1610, 1615, para. 10 (2016).

⁹ *See, e.g.*, AMC Networks, Inc. Comments, MB Docket No. 20-70, at 2-3 (rec. May 18, 2020) (asserting that independent programmers routinely encounter demands from vertically integrated MVPDs that put them at a disadvantage to the MVPD's affiliated networks, including demands for most favored nation clauses, prohibitions on direct-to-consumer or a la carte offerings, subscription video-on-demand holdbacks, and rights of conversation and offer provisions that require the programmers to approach an MVPD and engage in a conversation with them before the programmer is permitted to conclude a deal with an online video distributor for new content licenses or content development); beIN Sports, LLC Reply Comments, MB Docket No. 20-70, at 5-6 (rec. June 1, 2020) (asserting that "[v]ertically integrated MVPDs use [most favored nation provisions] as levers to prevent independent programmers from obtaining the favorable rates and conditions of carriage from smaller MVPDs that they could otherwise obtain"); Ride Television Network, Newsmax TV, HDNet, LLC, KSE Outdoor Sportsman Group, WeatherNation TV Comments, MB Docket No. 20-70, at 2 (rec. May 18, 2020) (asserting that "[i]ndependent programmers are forced to agree to onerous most favored nation clauses which impede their ability to negotiate on a balanced playing field"). *See also* *Communications Marketplace Report*, GN Docket No. 20-60, FCC 20-188, para. 347 (Dec. 31, 2020) (asserting that "vertically integrated MVPDs impose onerous contract terms on programmers, including most favored nations requirements and restrictions on alternative means of content distribution that stifle innovation and reduce diversity and competition").

address any obstacles to the distribution of independent and diverse programming, as well as the Commission's legal authority to take action to curb program carriage practices that may adversely impact the ability of independent programmers to compete fairly.

4. In order to alleviate marketplace obstacles that may hinder independent programmers from reaching consumers, the *NPRM* proposes to prohibit the use of MFN provisions, either conditional or unconditional, in carriage agreements between MVPDs and independent programmers. In addition, the *NPRM* proposes to bar unreasonable ADM provisions in carriage agreements between MVPDs and independent programmers. The *NPRM* proposes that the issue of whether a particular ADM clause is "unreasonable" would be fact-specific and decided in the context of a program carriage complaint proceeding brought under section 616 of the Act,¹⁰ taking into account, among other factors, the extent to which an ADM provision prohibits an independent programmer from licensing content to other distributors, including OVDs. The *NPRM* also seeks comment on whether further guidance should be provided on the meaning of "unreasonable" in this context.

B. Legal Basis

5. The proposed action is authorized pursuant to sections 1, 4(i), 4(j), , 303, 307, 316,, 335, 616 and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303, 307, 316, 335, 536, and 548.

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

6. 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.¹¹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹² In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act (SBA).¹³ A small business concern is one that: (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.¹⁴

7. *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,"¹⁵ 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)).¹⁶ Wireless cable operators that use spectrum in the BRS

¹⁰ 47 U.S.C. § 536(a)(4) (requiring the Commission to prescribe procedures for the expedited review of program carriage complaints); 47 CFR § 76.1302 (rules governing the conduct of program carriage complaint proceedings).

¹¹ 5 U.S.C. § 603(b)(3).

¹² *See id.* § 601(6).

¹³ *See id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632(a)(1)). 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."

¹⁴ 15 U.S.C. § 632.

¹⁵ The use of the term "wireless cable" does not imply that it constitutes cable television for statutory or regulatory purposes.

¹⁶ *See* 47 CFR § 27.4; *see also* *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*

often supplemented with leased channels from the EBS, provide a competitive alternative to wired cable and other multichannel video programming distributors. Wireless cable programming to subscribers resembles cable television, but instead of coaxial cable, wireless cable uses microwave channels.¹⁷

8. In light of the use of wireless frequencies by BRS and EBS services, the closest industry with a SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite).¹⁸ The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.¹⁹ U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.²⁰ Of this number, 2,837 firms employed fewer than 250 employees.²¹ Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

9. According to Commission data as December 2021, there were approximately 5,869 active BRS and EBS licenses.²² The Commission's small business size standards with respect to BRS involves eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of BRS licenses, the Commission adopted criteria for three groups of small businesses. A very small business is an entity that, together with its affiliates and controlling interests, has average annual gross revenues exceed \$3 million and did not exceed \$15 million for the preceding three years, a small business is an entity that, together with its affiliates and controlling interests, has average gross revenues exceed \$15 million and did not exceed \$40 million for the preceding three years, and an entrepreneur is an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$3 million for the preceding three years.²³ Of the ten winning bidders for BRS licenses, two bidders claiming the small business status won 4 licenses, one bidder claiming the very small business status won three licenses and two bidders claiming entrepreneur status won six licenses.²⁴ One of the winning bidders claiming a small business status classification in the BRS license auction has

(Continued from previous page) _____

Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

¹⁷ Generally, a wireless cable system may be described as a microwave station transmitting on a combination of BRS and EBS channels to numerous receivers with antennas, such as single-family residences, apartment complexes, hotels, educational institutions, business entities and governmental offices. The range of the transmission depends upon the transmitter power, the type of receiving antenna and the existence of a line-of-sight path between the transmitter or signal booster and the receiving antenna.

¹⁸ See U.S. Census Bureau, *2017 NAICS Definition*, “517312 Wireless Telecommunications Carriers (*except* Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

¹⁹ See 13 CFR § 121.201, NAICS Code 517312.

²⁰ See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIRM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIRM&hidePreview=false>.

²¹ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

²² Based on a FCC Universal Licensing System search on December 10, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, “Match only the following radio service(s)”, Radio Service =BR, ED; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

²³ See 47 CFR § 27.1218(a).

²⁴ See Federal Communications Commission, Economics and Analytics, Auctions, Auction 86: Broadband Radio Service, Summary, Reports, All Bidders, <https://www.fcc.gov/sites/default/files/wireless/auctions/86/charts/86bidder.xls>.

an active licenses as of December 2021.²⁵

10. The Commission's small business size standards for EBS define a small business as an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than \$55 million for the preceding five (5) years, and a very small business is an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than \$20 million for the preceding five (5) years.²⁶ In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

11. *Cable and Other Subscription Programming.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis.²⁷ The broadcast programming is typically narrowcast in nature (e.g., limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources.²⁸ The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.²⁹ The SBA small business size standard for this industry classifies firms with annual receipts less than \$41.5 million as small.³⁰ Based on U.S. Census Bureau data for 2017, 378 firms operated in this industry during that year.³¹ Of that number, 149 firms operated with revenue of less than \$25 million a year and 44 firms operated with revenue of \$25 million or more.³² Based on this data, the Commission estimates that a majority of firms in this industry are small.

²⁵ Based on a FCC Universal Licensing System search on December 10, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match only the following radio service(s)", Radio Service =BR; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

²⁶ See 47 CFR § 27.1219(a).

²⁷ See U.S. Census Bureau, *2017 NAICS Definition*, "515210 Cable and Other Subscription Programming," <https://www.census.gov/naics/?input=515210&year=2017&details=515210>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See 13 CFR § 121.201, NAICS Code 515210 (as of 10/1/22, NAICS Code 516210).

³¹ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 515210, <https://data.census.gov/cedsci/table?y=2017&n=515210&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>. The US Census Bureau withheld publication of the number of firms that operated for the entire year to avoid disclosing data for individual companies (see Cell Notes for this category).

³² *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We note that the U.S. Census Bureau withheld publication of the number of firms that operated with sales/value of shipments/revenue in all categories of revenue less than \$500,000 to avoid disclosing data for individual companies (see Cell Notes for the sales/value of shipments/revenue in these categories). Therefore, the number of firms with revenue that meet the SBA size standard would be higher than noted herein. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see https://www.census.gov/glossary/#term_ReceiptsRevenueServices.

12. *Cable Companies and Systems (Rate Regulation)*. The Commission has developed its own small business size standard for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.³³ Based on industry data, there are about 420 cable companies in the U.S.³⁴ Of these, only seven have more than 400,000 subscribers.³⁵ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.³⁶ Based on industry data, there are about 4,139 cable systems (headends) in the U.S.³⁷ Of these, about 639 have more than 15,000 subscribers.³⁸ Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

13. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one 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."³⁹ For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 498,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator.⁴⁰ Based on industry data, only six cable system operators have more than 498,000 subscribers.⁴¹ Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.⁴² Therefore, 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.

14. *Competitive Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers.⁴³

³³ 47 CFR § 76.901(d).

³⁴ S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

³⁵ S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022); S&P Global Market Intelligence, *Multichannel Video Subscriptions, Top 10* (April 2022).

³⁶ 47 CFR § 76.901(c).

³⁷ S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

³⁸ S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022).

³⁹ 47 U.S.C. § 543(m)(2).

⁴⁰ *FCC Announces Updated Subscriber Threshold for the Definition of Small Cable Operator*, Public Notice, DA 23-906 (MB 2023) (*2023 Subscriber Threshold PN*). In this Public Notice, the Commission determined that there were approximately 49.8 million cable subscribers in the United States at that time using the most reliable source publicly available. *Id.* This threshold will remain in effect until the Commission issues a superseding Public Notice. *See* 47 CFR § 76.901(e)(1).

⁴¹ S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 06/23Q* (last visited Sept. 27, 2023); S&P Global Market Intelligence, *Multichannel Video Subscriptions, Top 10* (Apr. 2022).

⁴² 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(e) of the Commission's rules. *See* 47 CFR § 76.910(b).

⁴³ Competitive Local Exchange Service Providers include the following types of providers: Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP

(continued....)

Wired Telecommunications Carriers⁴⁴ is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.⁴⁵ U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.⁴⁶ Of this number, 2,964 firms operated with fewer than 250 employees.⁴⁷ Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 3,378 providers that reported they were competitive local exchange service providers.⁴⁸ Of these providers, the Commission estimates that 3,230 providers have 1,500 or fewer employees.⁴⁹ Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

15. *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 is included in the Wired Telecommunications Carriers industry which 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.⁵⁰ Transmission facilities may be based on a single technology or combination of technologies.⁵¹ 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.⁵² By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.⁵³

16. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.⁵⁴ U.S. Census Bureau data for 2017 show that 3,054

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Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, Local Resellers, and Other Local Service Providers.

⁴⁴ See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers,”* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁴⁵ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

⁴⁶ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

⁴⁷ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

⁴⁸ Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

⁴⁹ *Id.*

⁵⁰ See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers,”* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁵¹ *Id.*

⁵² See *id.* Included in this industry 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 service 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).

⁵³ *Id.*

⁵⁴ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

firms operated in this industry for the entire year.⁵⁵ Of this number, 2,964 firms operated with fewer than 250 employees.⁵⁶ Based on this data, the majority of firms in this industry can be considered small under the SBA small business size standard. According to Commission data however, only two entities provide DBS service - DIRECTV (owned by AT&T) and DISH Network, which require a great deal of capital for operation.⁵⁷ DIRECTV and DISH Network both exceed the SBA size standard for classification as a small business. Therefore, we must conclude based on internally developed Commission data, in general DBS service is provided only by large firms.

17. *Fixed Microwave Services.* Fixed microwave services include common carrier,⁵⁸ private-operational fixed,⁵⁹ and broadcast auxiliary radio services.⁶⁰ They also include the Upper Microwave Flexible Use Service (UMFUS),⁶¹ Millimeter Wave Service (70/80/90 GHz),⁶² Local Multipoint Distribution Service (LMDS),⁶³ the Digital Electronic Message Service (DEMS),⁶⁴ 24 GHz Service,⁶⁵ Multiple Address Systems (MAS),⁶⁶ and Multichannel Video Distribution and Data Service (MVDDS),⁶⁷ where in some bands licensees can choose between common carrier and non-common carrier status.⁶⁸ Wireless Telecommunications Carriers (*except Satellite*)⁶⁹ is the closest industry with a SBA small business size standard applicable to these services. The SBA small size standard for this industry classifies a business as small if it has 1,500 or fewer employees.⁷⁰ U.S. Census Bureau data for 2017

⁵⁵ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

⁵⁶ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

⁵⁷ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report*, Table III.A.5, 32 FCC Rcd 568, 595 (Jan. 17, 2017).

⁵⁸ See 47 CFR Part 101, Subparts C and I.

⁵⁹ See *id.* Subparts C and H.

⁶⁰ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 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.

⁶¹ See 47 CFR Part 30.

⁶² See 47 CFR Part 101, Subpart Q.

⁶³ See *id.* Subpart L.

⁶⁴ See *id.* Subpart G.

⁶⁵ See *id.*

⁶⁶ See *id.* Subpart O.

⁶⁷ See *id.* Subpart P.

⁶⁸ See 47 CFR §§ 101.533, 101.1017.

⁶⁹ See U.S. Census Bureau, *2017 NAICS Definition*, "517312 Wireless Telecommunications Carriers (*except Satellite*)," <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

⁷⁰ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

show that there were 2,893 firms that operated in this industry for the entire year.⁷¹ Of this number, 2,837 firms employed fewer than 250 employees.⁷² Thus under the SBA size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

18. The Commission's small business size standards with respect to fixed microwave services involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in fixed microwave services. When bidding credits are adopted for the auction of licenses in fixed microwave services frequency bands, such credits may be available to several types of small businesses based average gross revenues (small, very small and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in Part 101 of the Commission's rules for the specific fixed microwave services frequency bands.⁷³

19. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

20. *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 industry category of Wired Telecommunications Carriers.⁷⁴ The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.⁷⁵ U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated for the entire year.⁷⁶ Of this total, 2,964 firms operated with fewer than 250 employees.⁷⁷ Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

⁷¹ See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

⁷² *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

⁷³ See 47 CFR §§ 101.538(a)(1)-(3), 101.1112(b)-(d), 101.1319(a)(1)-(2), and 101.1429(a)(1)-(3).

⁷⁴ See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁷⁵ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

⁷⁶ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

⁷⁷ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

21. *Incumbent Local Exchange Carriers (Incumbent LECs)*. Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers. Wired Telecommunications Carriers⁷⁸ is the closest industry with an SBA small business size standard.⁷⁹ The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.⁸⁰ U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.⁸¹ Of this number, 2,964 firms operated with fewer than 250 employees.⁸² Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 1,212 providers that reported they were incumbent local exchange service providers.⁸³ Of these providers, the Commission estimates that 916 providers have 1,500 or fewer employees.⁸⁴ Consequently, using the SBA's small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

22. *Internet Publishing and Broadcasting and Web Search Portals*. 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).⁸⁵ The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast.⁸⁶ They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively.⁸⁷ 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.⁸⁸ The SBA small business size standard for this industry classifies firms having 1,000 or fewer employees as small.⁸⁹ U.S. Census Bureau data for 2017 show that there were firms that 5,117 operated for the entire year.⁹⁰ Of this total,

⁷⁸ See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁷⁹ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

⁸⁰ *Id.*

⁸¹ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

⁸² *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

⁸³ Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

⁸⁴ *Id.*

⁸⁵ See U.S. Census Bureau, *2017 NAICS Definition, "519130 Internet Publishing and Broadcasting and Web Search Portals,"* <https://www.census.gov/naics/?input=519130&year=2017&details=519130>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See 13 CFR § 121.201, NAICS Code 519130 (as of 10/1/22, NAICS Codes 516210 and 519290).

⁹⁰ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 519130, <https://data.census.gov/cedsci/table?y=2017&n=519130&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

5,002 firms operated with fewer than 250 employees.⁹¹ Thus, under this size standard the majority of firms in this industry can be considered small.

23. *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. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. OVS operators provide subscription services and therefore fall within the SBA small business size standard for the cable services industry, which is “Wired Telecommunications Carriers.”⁹² The SBA small business size standard for this industry classifies firms having 1,500 or fewer employees as small.⁹³ U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.⁹⁴ Of this total, 2,964 firms operated with fewer than 250 employees.⁹⁵ Thus, under the SBA size standard the majority of firms in this industry can be considered small. Additionally, we note that the Commission has certified some OVS operators who are now providing service and broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information for the entities authorized to provide OVS however, the Commission believes some of the OVS operators may qualify as small entities.

24. *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 included in the Wired Telecommunications Carriers’ industry which includes wireline telecommunications businesses.⁹⁶ The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.⁹⁷ U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.⁹⁸ Of this total, 2,964 firms operated with fewer than 250 employees.⁹⁹ Thus under the SBA size standard, the majority of firms in this industry can be considered small.

⁹¹ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

⁹² See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers,”* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁹³ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

⁹⁴ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPfirm, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

⁹⁵ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

⁹⁶ See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers,”* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁹⁷ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

⁹⁸ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPfirm, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

⁹⁹ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

25. *Television Broadcasting.* This industry is comprised of “establishments primarily engaged in broadcasting images together with sound.”¹⁰⁰ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.¹⁰¹ These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA small business size standard for this industry classifies businesses having \$41.5 million or less in annual receipts as small.¹⁰² 2017 U.S. Census Bureau data indicate that 744 firms in this industry operated for the entire year.¹⁰³ Of that number, 657 firms had revenue of less than \$25,000,000.¹⁰⁴ Based on this data we estimate that the majority of television broadcasters are small entities under the SBA small business size standard.

26. As of September 30, 2023, there were 1,377 licensed commercial television stations.¹⁰⁵ Of this total, 1,258 stations (or 91.4%) had revenues of \$41.5 million or less in 2022, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on October 4, 2023, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates as of September 30, 2023, there were 383 licensed noncommercial educational (NCE) television stations, 380 Class A TV stations, 1,889 LPTV stations and 3,127 TV translator stations.¹⁰⁶ The Commission, however, does not compile and otherwise does not have access to financial information for these television broadcast stations that would permit it to determine how many of these stations qualify as small entities under the SBA small business size standard. Nevertheless, given the SBA’s large annual receipts threshold for this industry and the nature of these television station licensees, we presume that all of these entities qualify as small entities under the above SBA small business size standard.

27. *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.¹⁰⁷ 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

¹⁰⁰ See U.S. Census Bureau, *2017 NAICS Definition, “515120 Television Broadcasting,”* <https://www.census.gov/naics/?input=515120&year=2017&details=515120>.

¹⁰¹ *Id.*

¹⁰² See 13 CFR § 121.201, NAICS Code 515120 (as of 10/1/22 NAICS Code 516120).

¹⁰³ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 515120, <https://data.census.gov/cedsci/table?y=2017&n=515120&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>.

¹⁰⁴ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see https://www.census.gov/glossary/#term_ReceiptsRevenueServices.

¹⁰⁵ *Broadcast Station Totals as of September 30, 2023*, Public Notice, DA 23-921 (rel. Oct. 3, 2023) (*October 2023 Broadcast Station Totals PN*), <https://docs.fcc.gov/public/attachments/DA-23-921A1.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers,”* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

services.¹⁰⁸ By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.¹⁰⁹ Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.¹¹⁰

28. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.¹¹¹ U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.¹¹² Of this number, 2,964 firms operated with fewer than 250 employees.¹¹³ Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 4,590 providers that reported they were engaged in the provision of fixed local services.¹¹⁴ Of these providers, the Commission estimates that 4,146 providers have 1,500 or fewer employees.¹¹⁵ Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

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

29. The rule changes proposed in the NPRM, if adopted, will impose compliance obligations on small, as well as other entities. Specifically, the NPRM proposes to prohibit MFN provisions, either conditional or unconditional, in carriage agreements between MVPDs and independent programmers. The NPRM also proposes to prohibit unreasonable ADM provisions in carriage agreements between MVPDs and independent programmers. The *NPRM* proposes that a determination of whether a particular ADM provision is “unreasonable” would be fact-specific and decided in the context of a program carriage complaint proceeding brought under section 616 of the Act.¹¹⁶

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

30. 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,

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Fixed Local Service Providers include the following types of providers: Incumbent Local Exchange Carriers (ILECs), Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, and Other Local Service Providers. Local Resellers fall into another U.S. Census Bureau industry group and therefore data for these providers is not included in this industry.

¹¹¹ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

¹¹² See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

¹¹³ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

¹¹⁴ Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

¹¹⁵ *Id.*

¹¹⁶ 47 U.S.C. § 536(a)(4) (requiring the Commission to prescribe procedures for the expedited review of program carriage complaints); 47 CFR § 76.1302 (rules governing the conduct of program carriage complaint proceedings).

rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.”¹¹⁷

31. The proposals to prohibit MFN provisions and unreasonable ADM provisions, if adopted, would be expected to benefit small independent programmers by enhancing their ability to compete in the video marketplace and to create new, innovative program offerings. These proposals would also likely benefit small MVPDs and OVDs by removing barriers to mutually-beneficial carriage deals between these small entities and independent programmers. Nevertheless, the Commission seeks comment in the *NPRM* on how these proposals would affect small entities and expects to more fully consider the impact of these proposals and any alternatives on small entities, following review of the comments received in response to the *NPRM*.

32. The *NPRM* proposes to use the existing program carriage complaint procedures to address any complaints regarding violations of the proposed bans on MFN provisions and unreasonable ADM provisions. The *NPRM* seeks comment on whether costs or other concerns associated with pursuing a program carriage complaint would affect the ability of independent programmers, including small entities, to obtain relief if an MVPD violates the proposed ban on MFN provisions or unreasonable ADM provisions and asks whether any modifications to the program carriage complaint procedures are warranted.

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

33. None.

¹¹⁷ 5 U.S.C. § 603(c)(1)-(c)(4).

**STATEMENT OF
CHAIRWOMAN JESSICA ROSENWORCEL**

Re: *In the Matter of Amendment of Fostering Independent and Diverse Sources of Video Programming*, MB Docket No. 24-115, Notice of Proposed Rulemaking.

The marketplace for video programming continues to evolve and provide consumers with new ways to watch. But the laws that govern this marketplace from Congress have not changed. What also has not changed is that independent programmers continue to express concern about the challenges they have getting their programming on the channel line-up of cable and satellite television. That is why we are taking a fresh look at these enduring issues. I look forward to the record that develops on these competition matters.

**DISSENTING STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *In the Matter of Amendment of Fostering Independent and Diverse Sources of Video Programming*, MB Docket No. 24-115, Notice of Proposed Rulemaking.

I am open to the FCC taking a fresh look at the authority Congress delegated to the agency over carriage agreements between multichannel video programming distributors (MVPDs) and video programming vendors in Section 616 of the Communications Act in light of the modern media landscape. But today's Notice of Proposed Rulemaking (NPRM) does not do that. Instead, it proceeds from a dated view of the marketplace that can only further tilt the regulatory playing field in a way that will not serve consumers' interests. It also offers up a series of expansive conclusions about our Section 616 authority that go beyond the specific provisions Congress included in that law.

It is no surprise that the NPRM starts from a legacy viewpoint. After all, the NPRM revives a 2016 FCC initiative that looked at these same issues. The Commission first launched that 2016 effort earlier that same year through a broad Notice of Inquiry, followed by public listening sessions, before ultimately proposing new rules in an NPRM adopted by a 3-2 vote.¹ The FCC never proceeded to adopt a final order on those proposed rules, and in 2020, the agency terminated the dormant proceeding after years of no new activity in the record.

In the intervening years, the video marketplace has continued to evolve dramatically. Consumers have more programming choices than they did in 2016, especially as over-the-top (OTT) streaming services have emerged and fundamentally altered the competitive landscape. Traditional MVPDs, meanwhile, have seen a sharp decline in market share as consumers continue to cut the cord. Indeed, the market shows signs of fierce competition—as the FCC's own NPRM today acknowledges.

This proceeding—whether intended or not—will only serve to widen the regulatory imbalance between traditional MVPDs and their OTT competitors. Since the FCC first went down this path in 2016, OTT streaming services, including those offered by Big Tech companies, have solidified their positions as the new 800lb gorillas. So it does not strike me that now is the time for the FCC to look at more heavily regulating traditional MVPDs through one-sided rules. At the moment the FCC moves forward with this proceeding, those traditional MVPDs are bleeding subscribers by the millions to their unregulated competitors. If the FCC's past is prologue, then the agency's piecemeal meddling will end up doing more harm than good. And from my perspective, the last thing we should be doing is further widening the gap between traditional MVPDs and Big Tech streaming services when it comes to regulation. Unless and until Congress decides to delegate additional authority to the FCC over OTT streaming, we should act with the appropriate dose of regulatory humility.

Regrettably, this isn't a one-off instance. We've seen in recent months the Biden Administration push for greater government control over the media landscape. A few months ago, for instance, the FCC took the unprecedented step of dictating how MVPDs advertise their prices. And in a separate proceeding, the FCC seems poised to regulate MVPD consumer contracts by restricting termination fees. These initiatives rested on dubious legal authority.

Today's NPRM appears to me to be part and parcel of that broader effort, which I cannot support. It relies on Section 616(a) of the Communications Act, which lists six very specific things the FCC can

¹ See *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Proposed Rulemaking, 31 FCC Rcd 11352, 11394-96 (2016) (dissenting statement of Commissioner Ajit Pai).

regulate in MVPD carriage agreements. That list provides a good clue of how Congress intended to circumscribe our statutory authority. But the NPRM asserts that we may go beyond that list and exercise freewheeling authority over private carriage agreements. I am dubious. A similarly expansive interpretation of Section 616(a) bogged down the Commission's 2016 efforts, so it is unfortunate to see it carried over here.

None of this is to suggest that diverse and independent programmers don't face real challenges to having their content reach wide audiences. I've long been sympathetic to those headwinds and remain open minded about potential paths forward. But I do not see one in this proceeding. I dissent.

**DISSENTING STATEMENT OF
COMMISSIONER NATHAN SIMINGTON**

Re: *In the Matter of Amendment of Fostering Independent and Diverse Sources of Video Programming*, MB Docket No. 24-115, Notice of Proposed Rulemaking.

A public notice refreshing the record, or a fresh notice of inquiry, would have been appropriate paths for the Commission to take up the questions posed by the notice of proposed rulemaking here. Instead, we opt to tentatively conclude a great deal about the structure of the video marketplace, and what public interest demands we do, on the basis of a stale record. I cannot support that approach and, accordingly, I dissent.