

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

In the Matter of)	
)	
Implementation of the Cable Television Consumer)	MB Docket No. 07-29
Protection and Competition Act of 1992)	
)	
Development of Competition and Diversity)	
In Video Programming Distribution:)	
Section 628(c)(5) of the Communications Act)	
)	
Sunset of Exclusive Contract Prohibition)	
)	
Review of the Commission’s Program Access)	MB Docket No. 07-198
Rules and Examination of Programming Tying)	
Arrangements)	

REPLY COMMENTS OF
JOHN STAURULAKIS, INC.

John Staurulakis, Inc. (“JSI”) submits these Reply Comments in response to the invitation of the Federal Communications Commission (“FCC” or “Commission”) to comment on issues related to program tying arrangements and other obstacles faced by small and rural video/cable operators in obtaining programming.¹ JSI is a consulting firm offering regulatory, financial and business development services to more than two hundred rate-of-return rural local exchange carriers (“LECs”) throughout the United States and consulting services for affiliates of these LECs, which include small and rural video/cable operators. In this role, JSI has been made aware of the undue leverage that broadcasters and providers of satellite cable programmers have

¹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket Nos. 07-29; 07-198; Report and Order and Notice of Proposed Rulemaking, FCC 07-169 (rel. Oct. 1, 2007) (“*Program Tying Arrangement NPRM*”).

in negotiating carriage of their programming, the practice of these programmers to “tie” desired programming with undesired programming and the “onerous and unreasonable conditions” imposed by some programmers for access to their content.² JSI urges the Commission to immediately take action to address these practices that are hindering the introduction of new entrants into the video marketplace in rural America.

In their comments, broadcasters make several assertions that are contrary to the reality experienced by many of JSI’s small and rural video provider client companies. For example, the National Association of Broadcasters (“NAB”) boldly states, “[t]here is no basis for the assertion by some cable operators that the retransmission consent process envisioned by Congress is somehow tilted in favor of broadcasters to the detriment of cable systems.”³ Further, NAB claims that “only a relatively small number of broadcast stations have succeeded in obtaining any cash compensation for retransmission consent” and asserts that “[t]here is no evidence that any cable operator has been compelled to carry *any* channel, whether a local broadcast channel or an allegedly ‘bundled’ affiliated programming channel, in exchange for retransmission content.”⁴ NAB also seeks to refute the fact that powerful broadcast companies have undue leverage in rural areas and smaller markets and claims that “[i]n actual retransmission consent agreements, broadcasters have frequently had to accept a number of egregious terms and conditions, especially terms related to digital carriage.”⁵

Likewise, providers of satellite cable programming seek to convince the Commission that these practices simply do not exist. For example, in its comments, Viacom asserts that it “does

² *Tying Arrangement NPRM* at 3.

³ NAB Comments at 3.

⁴ *Id.* at 16 and 18 (emphasis in the original).

⁵ *Id.* at 19 and 21.

not require any MVPD to purchase any channel that the MVPD does not want to carry,” that it “routinely acquiesces to specific requests of an MVPD if it feels that its content will be adequately protected” and that it “*is not* engaging in tying practices or ‘take-it-or-leave-it’ bargaining.”⁶

As evidenced by the record developed in this proceeding, small and rural video providers indeed do not possess the leverage to successfully negotiate terms with programmers.⁷ As new entrants into the marketplace and with rural service territories that represent a much smaller potential subscriber base, small and rural video providers are at the mercy of the programmers’ dictates regarding pricing and other conditions that the programmers place on access to their programming.

While assisting clients in negotiating retransmission agreements, it has been JSI’s experience that some broadcasters adopt a take-it-or-leave-it approach in their negotiations. For example, in some negotiations, the broadcaster has required excessive per-subscriber fees⁸ in addition to requiring the video provider to carry all digital (SD & HD) signals and requiring significant cross advertising and/or requiring the video provider to carry an additional non-broadcast signal that is wholly or partially owned by the broadcaster or its parent company.⁹ JSI anticipates that more broadcasters will require carriage of all digital channels as well as seek

⁶ Viacom’s Comments at 2, 3 & 4 (emphasis in the original).

⁷ See, e.g., *Tying Arrangement NPRM* at paras 119-133; Comments of OPASTCO, ITTA, WTA, RICA at 8. JSI notes that due to the existence of nondisclosure agreements, in most instances specific practices of programmers cannot be disclosed. This not only hinders providing the Commission with additional evidence that these practices exist but also prevents many small and rural video providers from filing complaints before the Commission to stop such practices.

⁸ As has been widely reported, in some cases, broadcasters have sought \$1.00 per subscriber per month for retransmitting the station’s signal. This makes the previously free must carry broadcast station become one of the most costly stations that the cable operator shows on their cable system.

⁹ In some instances, if the cable operator does not show this additional non-broadcast signal, they are required to pay a higher retransmission fee which is generally \$0.50 per subscriber per month.

increased compensation when retransmission agreement renewal negotiations commence near the end of this year, especially in light of the impending DTV Digital Transition deadline which will occur in early 2009 and with broadcasters successfully negotiating higher and higher per subscriber per month fees over the last few years.¹⁰

Further, the small and rural video providers that JSI assists are affiliated with rural telephone companies and do not possess the market power that the programmers claim in their comments. Contrary to the picture that NAB portrays that “highly clustered and consolidated cable companies” in small and large markets alike have forced broadcasters to “accept a number of egregious terms and conditions,”¹¹ JSI’s video provider clients generally have fewer than 3,000 subscribers. In almost all cases when negotiating retransmission agreements, these small and rural providers are negotiating with broadcasters that are owned by a large regional or nationally-owned conglomerate.

As further evidence of the harm to small and rural video providers and the subscribers that they serve and the “onerous and unreasonable conditions” imposed by some programmers for access to their content, JSI directs the Commission’s attention to an *ex parte* presentation which was conducted by one of JSI’s video provider clients before the Media Bureau in which several of these types of practices were summarized.¹²

¹⁰ JSI has observed that most video provider clients that began operations since the last broadcaster election date (*i.e.*, October 1, 2005) have been selected by the broadcaster to be a “retransmission consent” system and that most of these are paying at least one or more broadcasters a fee to air the broadcaster’s signal. These fees significantly increase the cable operator’s costs. Thus, NAB’s assertion that retransmission consent has not led to higher cable rates is false since the assertion is based on an outdated GAO study made in 2003.

¹¹ Comments of NAB at 21.

¹² See Letter from John Kuykendall, Director - Regulatory Affairs, JSI, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-29, 07-198 (filed Oct. 5, 2007) (summarizing *ex parte* meeting held by Mike Wallin of Ringgold Telephone Company with the Media Bureau in which examples of how the company’s video service is severely restricted because of tying arrangements and other unreasonable practices by programmers).

Accordingly, to ensure that the provision of video services continues to advance in rural America, the Commission should act expeditiously to address tying arrangements and other practices which negatively impact the ability of small and rural video providers in their attempts to obtain programming.

Respectfully submitted,

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By: /s/ John Kuykendall

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