

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

In the Matter of)	
)	
Implementation of the Cable Television)	
Consumer Protection and Competition Act of)	
1992)	
)	MB Docket No. 07-29
Development of Competition and Diversity)	
in Video Programming Distribution:)	
Section 628(c)(5) of the Communications Act:)	
)	
Sunset of Exclusive Contract Prohibition)	

**COMMENTS
of the
ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES
and the
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE**

I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)¹ and the Independent Telephone and Telecommunications Alliance (ITTA)² hereby submit these comments in the above-noted proceeding.³ OPASTCO and ITTA are also participating in this proceeding as part of the

¹ OPASTCO is a national trade association representing over 525 small telecommunications carriers serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve over 3.5 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37).

² ITTA represents mid-size local exchange companies that provide a broad range of high quality wireline and wireless voice, data, Internet, and video telecommunications services to more than 14 million customers in 49 states.

³ *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*, MB Docket No. 07-29, Notice of Proposed Rulemaking,

Coalition for Competitive Access to Content (CA2C), and submit this filing to supplement and expand upon comments made by that group.

Video services are an increasingly important part of OPASTCO and ITTA members' service offerings. Half of OPASTCO's members operate small cable television companies in their rural service areas. Often these communities are not lucrative enough to attract larger providers. Other OPASTCO members offer multichannel video programming distribution (MVPD) services via digital subscriber line (DSL) technology in their service area, and/or in neighboring territories where they have overbuilt facilities in order to provide superior service to consumers. Also, some OPASTCO members provide video satellite services, while an increasing number have deployed fiber to the home (FTTH) in an effort to offer an array of high-speed and advanced voice, video and data services to consumers. A number of ITTA members also offer video, serving some customers using DSL or FTTH.

The program access provision of Section 628(c)(2)(D) of the Communications Act of 1934, as amended,⁴ is intended to enable access to content that is essential to the viability of small MVPDs, especially rural LECs entering the video market. When rural providers bundle video services with advanced data services, more customers tend to subscribe to both, making the deployment of broadband more economically viable in rural areas. Therefore, the availability of "must-have" content not only facilitates video competition, it also spurs broadband deployment and penetration.⁵

FCC 07-7 (rel. Feb. 20, 2007) (NPRM).

⁴ 47 U.S.C. § 548(c)(5).

⁵ OPASTCO and ITTA agree with Chairman's Martin's recent statement that the "ability to deploy broadband networks rapidly and the ability to offer video to consumers are linked intrinsically." Remarks of FCC Chairman Kevin J. Martin, USTelecom Symposium (Dec. 6, 2006).

For this reason, the exclusivity provision of Section 628 should be extended for a minimum period of five years, and should be considered for renewal based upon a review of market conditions prior to the expiration of the extension. Furthermore, the Commission should address other unfair practices that hinder rural carriers' ability to compete in the video market. It should also establish procedures and timeframes to make its program access complaint process more functional.

II. THE ACCESS TO CONTENT PROVISION OF SECTION 628 SHOULD BE EXTENDED AS IT HAS PLAYED AN IMPORTANT ROLE IN PERMITTING RURAL LECs TO ENTER THE MVPD MARKET

The NPRM seeks comment on how the access to content provision of Section 628 has affected the status of MVPD competitors to cable operators, and also inquires about competitors' continued viability should the exclusivity prohibition sunset.⁶ According to a recent survey of rural LECs,⁷ 49 percent of respondents indicated that their video service faces competition from a cable operator; 12 percent reported competition from another telephone company; more than 67 percent compete against Direct Broadcast Satellite carriers; and just under three percent face competition from an overbuilder. Only one percent reported no effective competition.

In 2002, the Commission extended the program access provision.⁸ At the time,

⁶ NPRM, para. 6.

⁷ A survey conducted jointly by OPASTCO and Viodi LLC, a firm that specializes in video content acquisition and marketing for rural telephone companies, was sent to 705 rural incumbent LECs, including both members and non-members of OPASTCO. Seventy-three companies replied, for a response rate of over 10 percent. The results were reported to the Commission in OPASTCO Reply Comments, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189 (fil. Dec. 29, 2006) (OPASTCO Video Competition Replies), pp. 2 - 4.

⁸ *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*, CS Docket No. 01-290, Report and Order, 17 FCC Rcd 12124 (2002) (Sunset Report and Order).

the Commission found that programmers had the “ability and incentive”⁹ to discriminate against MVPDs such as rural LECs. The same is true today. If the exclusivity prohibition were permitted to sunset, rural LECs that serve as MVPDs and face video competition would, in essence, no longer be economically viable. Most of the video competition faced by rural LECs is from large, vertically integrated cable companies that have incentives to restrict their smaller rivals’ access to content. Even if a small, local video carrier provides better service and competitive prices, that provider could not compete in the market for long if its access to necessary content were restricted or cut off.

Furthermore, even those rural LECs that do not compete directly with cable companies could be unable to obtain content at affordable rates or under reasonable conditions, if the exclusivity prohibition were allowed to sunset. Vertically integrated programmers would have little independent incentive to supply content to rural MVPDs serving small markets that are insufficiently lucrative from the programmers’ perspective.

Without programming that appeals to consumers, rural MVPDs would be greatly hindered in their ability to bundle voice, video and data services. This, in turn, would create an additional barrier to the further deployment of broadband in rural markets, as the bundling of these services has been shown to improve the “take rate” for broadband services.

Therefore, OPASTCO and ITTA recommend that the exclusivity ban be extended for a minimum of an additional five years. OPASTCO and ITTA further recommend that prior to the expiration of the extension, the Commission again evaluate the status of the

⁹ *Ibid.*, 17 FCC Rcd at 12153.

MVPD marketplace to consider whether an additional extension is warranted, rather than permit the ban to automatically sunset. In addition, the Commission should not permit the provision to sunset upon the materialization of specific marketplace events.¹⁰

Technological developments and marketplace evolutions are occurring too frequently and rapidly for the Commission to accurately predict the consequences of allowing the rule to sunset without a thorough review.

III. ACCESS TO “MUST HAVE” PROGRAMMING REMAINS KEY TO THE VIABILITY OF SMALL MVPDS

The NPRM further inquires about whether access to “marquee” or “must have” vertically integrated programming remains necessary to the viability of competitive MVPDs.¹¹ The answer remains an unequivocal “Yes.” OPASTCO’s reply comments in the Commission’s recent proceeding on the status of video competition addressed the significant challenges rural LECs face when entering the MVPD market, largely due to the high costs and burdensome conditions associated with obtaining access to content.¹² These difficulties would doubtless become insurmountable if the exclusivity provision were permitted to sunset at this time. As noted above, the higher broadband subscribership rates that typically result when data services are bundled with video has made access to programming a vital driver to continued broadband deployment and penetration in difficult-to-serve rural areas.

The NPRM also seeks comment on the impacts of regional sports programming.¹³ Perhaps more than any other type of content, equitable access to regional sports

¹⁰ NPRM, para. 11.

¹¹ *Id.*, para. 8.

¹² OPASTCO Video Competition Replies, pp. 5 - 8.

¹³ NPRM, para. 8.

programming is essential to the viability of rural MVPDs. While marquee and sports content may be offered by programmers to rural MVPDs today, it is often done so under such onerous and unreasonable conditions that, as a practical matter, it is inaccessible. This can be especially true in the case of highly popular sports programming. In addition to high prices, demands often include mandatory non-disclosure agreements; hundreds of advertising slots; the forced carriage of less popular channels in specified (usually basic) tiers; and unwarranted security requirements that extend beyond the legitimate need to protect programming. Such actions not only deny consumer choice among video providers, but by discouraging entry into the MVPD market by rural LECs, they also impede the Commission's goal of increasing the diversity of MVPD providers.¹⁴ Moreover, these results further undermine the Commission's goal of greater broadband deployment and penetration in rural areas.

IV. RURAL LEC ENTRY INTO THE MVPD MARKET HAS BEEN SHOWN TO SPUR ADDITIONAL BROADBAND DEPLOYMENT IN RURAL AREAS

The NPRM seeks comment on the increase in the provision of MVPD services by LECs.¹⁵ Among rural LECs, the increase has been dominated by those using innovative broadband platforms to offer MVPD services, enabling them to bundle high-speed data services with their video offerings. As noted in OPASTCO's reply comments in the video competition proceeding,¹⁶ approximately 47 percent of respondents to the survey of rural LECs indicated that they provide video via traditional coaxial cable while 73

¹⁴ *Id.*, para. 10.

¹⁵ *Id.*, para. 7.

¹⁶ OPASTCO Video Competition Replies, pp. 2 - 3.

percent of respondents provide video using DSL or FTTH.¹⁷

This latter figure represents an eight percent increase from the previous year, signifying that rural LECs continue to invest in robust networks capable of delivering high-bandwidth advanced services, such as video. While 30 percent of respondents indicated that they do not provide video currently, only 15 percent indicated that they do not expect to provide video within the next 18 months. In addition, 52 percent of respondents indicated that they offer a discount on their video services when bundled with high-speed Internet access services.¹⁸ Therefore, there is a demonstrated link between the provision of video services and the deployment of broadband. Should the Commission allow the exclusive content prohibition provision to sunset, it would erect a significant barrier to further broadband deployment in areas served by rural LECs.

V. FURTHER PROGRAM ACCESS CONCERNS SHOULD BE ADDRESSED

The NPRM inquires about any other issues relevant to its examination of Section 628.¹⁹ OPASTCO raised several issues in its reply comments in the video competition proceeding.²⁰ These include practices such as forced carriage of unwanted programming, forced inclusion of programming in certain tiers, mandatory nondisclosure provisions, higher retransmission consent fees, and predatory pricing by large video providers. All of these practices serve as barriers to rural LECs' ability to deliver video services to their

¹⁷ The survey asked respondents to identify the specific technology they use to provide video services. The results were as follows: Coaxial cable/Hybrid Fiber Coax – 46.58%; ADSL (Internet Protocol (IP)) – 24.66%; VDSL (IP) – 1.37%; ADSL (Asynchronous Transfer Mode (ATM)) – 9.59%; VDSL (ATM) – 6.85%; FTTH (Radio Frequency (RF)) – 12.33%; FTTH (IP) – 17.81%; Terrestrial Wireless (Multichannel Multipoint Distribution Service (MMDS)) – 1.37%. OPASTCO Video Competition Replies, fn. 7.

¹⁸ OPASTCO Video Competition Replies, p. 3.

¹⁹ NPRM, para. 12. The NPRM also noted that the focus of Congress in enacting the section was to encourage entry into the MVPD market by making available the programming necessary to enable new entrants to become viable competitors; NPRM, para. 2.

²⁰ OPASTCO Video Competition Replies, pp. 5 - 14.

communities and need to be addressed by the Commission. Furthermore, the Commission should establish that the use of shared head-ends, which are an economical means for providing video in high-cost areas, may not serve as an excuse to impose inordinately high rates or unwarranted encryption restrictions beyond those necessary for a reasonable degree of protection.

VI. THE CURRENT PROGRAM ACCESS COMPLAINT PROCESS IS INADEQUATE

The Commission is to be commended for inquiring about the adequacy, or lack thereof, of the current program access complaint process.²¹ The current process is so time consuming and costly that rural carriers have, in essence, no practical recourse in the event of a complaint. Lacking the staff and resources to pursue a lengthy and intensive complaint process, rural MVPDs are typically forced to forgo filing any complaint at the Commission.

Although Section 628(d) authorizes MVPDs to seek Commission relief, the Commission has not provided timeframes for resolution of alleged violations of the rules. Therefore, complaints may languish for an indefinite period with no prospect of relief for the aggrieved party. This situation discourages rural LECs from entering the MVPD market. The Commission should establish procedures that will provide for timely resolution of disputes, and consider other measures such as binding arbitration, with the aim of making the dispute resolution process worth undertaking in the event of a genuine violation of the Commission's rules.²²

²¹ NPRM, paras. 14 - 15.

²² The Coalition for Competitive Access to Content (CA2C) is filing more detailed comments on this

VII. CONCLUSION

The current program access rule should be extended for a minimum of five years, and a further extension should be considered prior to the expiration of that time. In 2002, the Commission concluded that an extension of the rule was warranted, and the same holds true today. If the extension is not renewed, access to necessary video content at reasonable rates and under reasonable terms will likely be denied to new entrants, including rural local exchange carriers (LECs) wishing to provide video services. This, in turn, would impede the ability of these carriers to further extend broadband services to more consumers. Furthermore, the current program access complaint process should be reformed to make the process worth undertaking for small carriers that encounter violations.

Respectfully submitted,

**THE ORGANIZATION FOR THE PROMOTION
AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES**

By: /s/ Stuart Polikoff
Stuart Polikoff
Director of Government Relations

By: /s/ Stephen Pastorkovich
Stephen Pastorkovich
Business Development Director/
Senior Policy Analyst

21 Dupont Circle, NW
Suite 700
Washington, DC 20036

(202) 659-5990

**THE INDEPENDENT TELEPHONE AND
TELECOMMUNICATIONS ALLIANCE**

By: /s/ Joshua Seidemann
Joshua Seidemann
Director of Regulatory Policy

975 F Street, NW
Suite 550
Washington, DC 20004

(202) 552-5846

April 2, 2007

CERTIFICATE OF SERVICE

I, Brian Ford, hereby certify that a copy of the reply comments by the Organization for the Promotion and Advancement of Small Telecommunications Companies was sent by first class United States mail, postage prepaid, or via electronic mail, on this, the 2nd day of April, 2007, to those listed on the attached sheet.

By: /s/ Brian Ford
Brian Ford

SERVICE LIST
MB Docket No. 07-29

Via E-mail:

Best Copy and Printing, Inc.
fcc@bcpiweb.com

Karen Kosar
Policy Division, FCC Media Bureau
Karen.Kosar@fcc.gov