FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 16-41; FCC 16-129]

Promoting the Availability of Diverse and Independent Sources of Video Programming

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) proposes to adopt rules that prohibit certain practices some multichannel video programming distributors (MVPDs) use in their negotiations for carriage of video programming that may impede competition, diversity, and innovation in the video marketplace. Specifically, the document proposes to prohibit the inclusion of "unconditional" most favored nation (MFN) provisions and unreasonable alternative distribution method (ADM) provisions in program carriage agreements between MVPDs and independent video programming vendors.

DATES: Comments are due on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**; reply comments are due on or before **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by MB Docket No. 16-41, by any of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/. Follow the instructions for submitting comments.
- Mail: Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: (202) 418-0530 or TTY: (202) 418-0432.

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

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking, FCC 16-129, adopted and released on September 29, 2016. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. This document will also be available via ECFS at https://ecfsapi.fcc.gov/file/0929819517733/FCC-16-129A1.pdf. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW, Room CY-B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an e-mail to fcc504@fcc.gov or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis

1. We propose to adopt rules that prohibit the inclusion of unconditional most favored nation and unreasonable alternative distribution method provisions in carriage agreements between MVPDs and independent video programming vendors.[1] We seek comment below on our authority to adopt these rules pursuant to Section 616(a) of the Act, which directs the Commission to "establish regulations governing program carriage agreements and related practices between [MVPDs] and video

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

programming vendors."[2] We believe that our proposed rules will serve the objectives of Section 616 and the public interest by removing obstacles to enhanced competition, programming diversity, and innovation in the marketplace.

2. **Application to "Independent Video Programming Vendors."** We propose to apply the following rules to program carriage agreements between MVPDs[3] and "independent video programming vendors."[4] In the NOI, we defined "independent programmer" as a programmer that is not vertically integrated with an MVPD.[5] Several commenters pointed out, however, that for purposes of this proceeding, we should define that term more narrowly to exclude established programmers that control a significant share of the video programming marketplace and therefore have bargaining leverage in carriage negotiations. Given this, we seek comment on whether, for purposes of the proposed rules, the term "independent video programming vendor" should be defined more narrowly to reflect that certain large programmers that are not vertically integrated with an MVPD do not confront the same obstacles in securing carriage for their content as smaller or niche programmers.

3. For example, as suggested by ITTA, should we define an independent video programming vendor as a video programming vendor that is not affiliated with a broadcast network, movie studio or MVPD? Alternatively, or in combination with this approach, should we define an independent video programming vendor based on whether such vendor earns less than a threshold amount of annual gross revenue? If we were to define an independent programmer based on its annual gross revenue, what is the appropriate revenue threshold? Should we consider adopting a revenue threshold

[2] 47 U.S.C. 536(a).
[3] Id. 522(13) (defining the term "multichannel video programming distributor" to mean "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase by subscribers or customers, multiple channels of video programming"); 47 CFR 76.1000(e) (defining MVPD as "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.").
[4] Under this proposal, an "independent video programming vendor" would be a subset of the "video programming vendors" covered by Section 616 of the Act. 47 U.S.C. 536. See also Liberman Broadcasting, Inc. v. Comcast Corporation, MB Docket No. 16-121, Memorandum Opinion and Order, 2016 WL 4494601, at *1. As noted in the NOI, we do not address in this proceeding issues relating to retransmission consent negotiations between MVPDs and broadcast stations. NOI, 81 FR at 10243, n.3.
[5] Id. at 10243, n.4.

that is based solely on programming license fees and/or advertising revenue? Or are there other sources of revenue that we should consider? An alternative to using a threshold based on revenue is to define an independent programmer based on a programmer's total assets or a combination of revenue and total assets.[6] Under this approach, what is the appropriate threshold for determining that a programming vendor is "independent," and how should that threshold be calculated? If we were to define independent programmer based on its revenue and/or assets, should a programmer that is affiliated with a MVPD, a broadcaster, or another video programming vendor be attributed with the revenue and/or assets of such affiliated entities?[7] Or, instead, should we exclude from the definition any programmer that is affiliated with an MVPD, a broadcaster, or another video programming vendor, regardless of its annual revenue or total assets? We also seek comment on how a programmer could establish that it satisfies whatever definition of independent video programming vendor we adopt. In addition, we seek input on whether excluding larger programmers from the protections that would be afforded by our proposed rules would have any adverse impact on the video marketplace or consumers. To what extent are larger programmers subject to the types of contract provisions we are proposing to prohibit? Given the costs involved in bringing a complaint to the Commission, would larger programmers be more likely than smaller programmers to pursue relief through the filing of a complaint? We seek comment on any other potential way to define "independent video programing vendor" and on how any such definition would further the objectives of this proceeding. Finally, we seek comment on whether certain of the possible definitions of independent programmer would raise First Amendment concerns.

4. **Prohibition on "Unconditional" MFN Provisions.** We propose to adopt a rule that prohibits the inclusion of unconditional MFN provisions in carriage agreements between MVPDs and independent video programming vendors. For the purpose of applying this rule, we propose to define an unconditional MFN provision as "a provision that entitles an MVPD to contractual rights or benefits that

---

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

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

an independent video programming vendor has offered or granted to another video programming distributor,[8] without obligating the MVPD to accept any terms and conditions that are integrally related, logically linked, or directly tied[9] 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."[10]

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

6. The record reflects, moreover, that this category of MFN provisions can apply upward pressure on both wholesale and retail prices for program content by reducing a programmer's incentive to

---

[8] The term "video programming distributor" as used herein includes both traditional MVPDs and alternative distributors of video programming, such as OVDs. See ACA August 26 Ex Parte Letter at 1, 8.

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

[10] The phrase "reasonably comply technologically and legally" also derives from DOJ's Proposed Final Judgment in the Charter-TWC transaction. DOJ Charter-TWC Proposed Final Judgment at 6, Section IV.B.2.ii. The relevant provision, which DOJ also found to be consistent with conditional MFN provisions throughout the industry, generally relieves Charter-TWC from having to comply with related terms and conditions if it is unable to do so for technological or regulatory reasons. DOJ Charter-TWC Competitive Impact Statement at 17, n.8. See also DOJ Charter-TWC Proposed Final Judgment at 6.

cut its carriage rates to any one distributor out of fear that doing so would require it to reduce the rates charged to distributors with unconditional MFN status without receiving any reciprocal benefits. As a consequence, unconditional MFN provisions effectively limit the flexibility of content providers to enter into unique deals with new and emerging distributors, thereby impeding entry into program production and distribution marketplaces and reducing consumer choice.[11] We also note that agreements resulting from the exercise of unconditional MFN rights may not reflect marketplace conditions because they disregard the balance struck in bilateral negotiations between the programmer and rival distributor. While some MVPDs generally defend MFN clauses on the basis that they provide certain pro-consumer benefits, no party has identified any public interest benefits that accrue from making such provisions unconditional. For these reasons, and consistent with conditions imposed by the Department of Justice in approving the Charter-TWC transaction,[12] we tentatively conclude that the potential harms to competition, diversity and innovation resulting from unconditional MFN provisions outweigh any potential public interest benefits.[13]

7. We seek comment on this tentative conclusion and on whether the purposes of Section 616 and the public interest would be served by adopting the proposed rule. In addition, we seek comment

---

[11] See, e.g., Milunovich Remarks at 62:03; Newton Remarks at 130:30. See also Charter-TWC Order, 2016 WL 2858801, at *63, para. 221. The Commission has rejected the argument that MFN provisions included in agreements between cable operators and local franchising authorities reduce the incentives of a local franchising authority to agree to a more favorable deal with overbuilders new to the market. See, e.g., Implementation of Section 621(A)(1) of The Cable Communications Policy Act of 1984, as amended by The Cable Television Consumer Protection and Competition Act of 1992, Order on Reconsideration, 30 FCC Rcd 810, 814 n.39 (2015). We note the distinction between the incentives and interests of government entities such as local franchising authorities (among them, public interest concerns such as consumer costs) and those of commercial programmers (for example, profit maximization). In the context of wireline competition, the Commission has concluded that allowing competitive local exchange carriers (CLECs) to cherry-pick terms and conditions of service from incumbent local exchange carriers' (ILECs) interconnection agreements with other ILECs impeded give-and-take negotiations between ILECs and resulted in "largely standardized agreements with little creative bargaining," whereas requiring CLECs to accept all terms of an agreement between an ILEC and another party ("all-or-nothing" approach) would encourage ILECs to make trade-offs in negotiations that they were reluctant to make under the "pick and choose" approach. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Second Report and Order, 69 FR 43762, 43764, paras. 10-12 (July 22, 2004), aff'd, New Edge Network, Inc. v. FCC, 461 F.3d 1105, 1109–10 (9th Cir. 2006).

[12] See, e.g., DOJ Charter-TWC Proposed Final Judgment at 5, Section IV.B.2. But see AT&T-DIRECTV Order, 30 FCC Rcd at 9222, para. 237. Although the Commission, in the AT&T-DIRECTV merger proceeding, declined to adopt a transaction-specific condition due to the absence of a supporting record, we have since developed through the instant proceeding a record that demonstrates the competitive harms resulting from unconditional MFN provisions.

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

on our proposed definition of unconditional MFN provision and on any alternative definitions. Should we be concerned that the proposed definition is too narrow and thus would permit MVPDs to draft contract language that avoids application of the prohibition? If so, how should we address such concerns? Should any rules we adopt address MFN provisions that are partially unconditional or effectively discourage or foreclose wider distribution of content? We also seek input on our proposal to ban unconditional MFN provisions that entitle an MVPD to contractual rights that an independent programmer has negotiated with any other video programming distributor. Should we be uniquely concerned about the use of unconditional MFN provisions to harm competition from nascent OVDs? Accordingly, should we prohibit only unconditional MFN provisions that apply to terms an independent programmer has negotiated with an OVD? Recent merger conditions adopted in DOJ's Proposed Final Judgment in the Charter-TWC merger have precluded only unconditional MFN provisions that apply to terms negotiated with OVDs.[14] Should we take a similar approach in this proceeding, or is it in the public interest to prohibit unconditional MFN provisions that apply to a broader range of video programming distributors? We seek comment on the costs and benefits of the rules proposed above and any other rules that commenters assert would better serve the public interest. To the extent possible, commenters should quantify any identified costs and benefits. Are there any circumstances in which unconditional MFN provisions may be beneficial to competition or programming diversity? If so, are the potential public interest benefits of allowing such provisions outweighed by the benefits of our proposed prohibition?

8. We also seek comment on which, if any, of the Commission's program carriage rules would need to be amended if we adopted the proposed rule.[15] What remedies and penalties should we impose on an MVPD that violates the proposed prohibition on unconditional MFN provisions?[16] For example, would it be appropriate to order that the unconditional MFN provision would be unenforceable

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

[15] 47 CFR 76.1300-1302. In particular, we seek comment on whether any rule revisions would be needed in addition to, or instead of, those set forth herein.

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

starting on the effective date of any new rule, or that it be replaced with a conditional MFN provision?[17] If we preclude MVPDs from enforcing unconditional MFN provisions in existing contracts, should we also afford parties some period of time to reform their contracts before the Commission will take enforcement action? To what extent, if at all, would costs, or other concerns, associated with pursuing a program carriage complaint affect the ability of independent programmers to obtain relief? Finally, we seek comment on what types of circumstances could justify waiver of a rule precluding the use of unconditional MFN provisions. Given the potential detrimental impact that such provisions have on competition, programming diversity and innovation in the marketplace, what, if any, situations would constitute "good cause" for permitting MFN provisions that otherwise would be precluded under our proposed rules?[18]

9. **Prohibition on "Unreasonable" ADM Provisions.** We also propose to adopt a rule that prohibits the inclusion of an unreasonable ADM provision in a carriage agreement between an MVPD and an independent video programming vendor. As with MFN clauses, we recognize that ADM provisions, which are a form of exclusivity, can have valid public interest justifications. For example, they may incentivize MVPDs to invest in new or emerging programming sources, including independent or niche content and/or content targeted to underserved audiences. We also recognize that, as with MFN provisions, the use of ADM clauses is a longstanding industry practice, and that there is a broad variety of ADM restrictions in programming contracts today. Based on the record, however, it appears that certain restrictive ADM provisions have no discernibly pro-competitive justifications and have an adverse impact on the provision of diverse programming sources to consumers. As DOJ has found, such provisions also "negatively affect OVDs' business models and undermine their ability to provide robust video offerings that compete with the offerings of traditional MVPDs,"[19] which can lead to "lower-quality services, fewer consumer choices, and higher prices."[20]

10. We tentatively conclude that in determining whether a particular ADM provision is

[17] See DOJ Charter-TWC Proposed Final Judgment at 5, Section IV.A.
[18] See 47 CFR 1.3.
[19] DOJ Charter-TWC Competitive Impact Statement at 14.
[20] Id.

"unreasonable," we will consider, among other factors, the extent to which an ADM provision prohibits an independent programmer from licensing content to other distributors, including OVDs. Although the issue of whether a particular ADM clause is "unreasonable" would be fact-specific and determined in the context of a complaint proceeding brought under Section 616 of the Act under our proposal,[21] certain ADM provisions appear unlikely to yield any procompetitive benefits that would outweigh the attendant public interest harms. Such ADM provisions include those that: (i) Bar an independent programmer from licensing content, for an extended time period or indefinitely, to an OVD that distributes content for free to consumers[22]; (ii) bar an independent programmer from licensing content, for any period of time, to an OVD that distributes content to paying subscribers[23]; (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[24]; 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.[25] We tentatively conclude that ADM provisions that include any of these factors should be deemed presumptively unreasonable.

11. We believe that our proposed rule, which proscribes only "unreasonable" ADM provisions, would ensure that MVPDs cannot use ADM provisions to harm the development of nascent competition, while preserving independent programmers' and distributors' respective incentives to develop quality program content and invest in independent and diverse programming sources. Or would

[21] 47 CFR 76.1302.

[22] See DOJ Charter-TWC Competitive Impact Statement at 12.

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

[24] DOJ cited this as another example of a problematic ADM provision in its review of the Charter-TWC transaction. For example, DOJ noted one instance in which an ADM clause in one MVPD's contract with a video programmer prohibited the programmer from licensing its content to any OVD unless the OVD offered a package that included 35 channels, including at least two channels each from three out of a list of six large programmers. DOJ Charter-TWC Competitive Impact Statement at 12, n.5. See also Richard Greenfield Remarks, Media Bureau Workshop on the State of the Video Marketplace, at 71:58 (Mar. 21, 2016), https://www.fcc.gov/news-events/events/2016/03/media-bureau-workshop-state-video-marketplace#acc2.

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

prohibiting such ADM provisions make it less likely that MVPDs would agree to carry independent programmers or would seek to enter into exclusive programming agreements with them that would limit rather than expand their carriage opportunities? We seek comment on our tentative conclusions and proposed framework for determining whether an ADM clause is unreasonable. How should we define an "extended time period" for the purpose of our first proposal in the preceding paragraph? In addition, we seek comment on how an MVPD could rebut an independent programmer's showing that the ADM provisions noted above are unreasonable.

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

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

to the public before thirty days after its initial airing?

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

14. We also tentatively conclude that an ADM provision that grants an MVPD the universally exclusive right to distribute an independent video programming vendor's content should be deemed presumptively reasonable. We recognize that this type of blanket exclusivity long has been common in the video programming industry and does not appear to raise the same competitive concerns as ADMs targeted at OVDs.[27] This type of presumption also would be consistent with the conditions imposed by DOJ in the Charter-TWC merger proceeding.[28] We seek input on this proposed presumption. What type of showing would be sufficient to overcome this presumption of reasonableness? As an alternative to establishing this presumption, should we deem an ADM provision that grants an MVPD the universally exclusive right to distribute independent programming content to be outside the scope of the proposed rule, and thus permissible?

15. We also seek comment on whether adoption of a rule prohibiting unreasonable ADM provisions and our proposed framework for the rule would warrant any rule revisions besides those set forth herein. In particular, which, if any, of the Commission's program carriage rules would need to be amended if we adopted the proposed rule? What remedies and penalties should we impose on an MVPD that violates the proposed prohibition on unreasonable ADM provisions?[29] For example, would it be appropriate for the Media Bureau to order that an unreasonable ADM provision not be enforced or be replaced with an ADM provision with reasonable terms? If we adopt rules prohibiting the use of certain

---

[27] AT&T-DIRECTV Order, 30 FCC Rcd at 9198, para. 179.

[28] DOJ Charter-TWC Proposed Final Judgment at 6, Section IV.C.2.

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

types of ADM clauses, should we preclude MVPDs from enforcing existing contracts that include such a clause? If we preclude MVPDs from enforcing unreasonable ADM provisions in existing contracts, would it be necessary to require them to amend their contracts? If so, how much time should be afforded for these amendments?

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

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

18. **Additional Rules.** We also seek comment on whether, if we were to adopt the rules proposed above, we should adopt additional provisions that protect against retaliation by MVPDs if independent programmers bring complaints with regard to unconditional MFN or unreasonable ADM provisions.[30] Alternatively, should we consider adopting a rule that prohibits a broader range of

[30] We note that the Commission in 2011 proposed to amend its rules to prohibit an MVPD from, among other things, retaliating against a video programming vendor for filing a program carriage complaint if the effect of such conduct is to unreasonably restrain the ability of the video programming vendor to compete fairly. Revision of the

retaliatory conduct by MVPDs, including retaliation against programmers that refuse to agree to unconditional MFN clauses, unreasonable ADM clauses, or other carriage-related demands? We note, for example, that conditions imposed in the Comcast-NBCU and Charter-TWC transaction proceedings include provisions that bar retaliatory conduct by the combined entities.[31] Such rules also would be harmonious with Section 616(a)(2) and its implementing rules, which prohibit MVPDs from, among other things, retaliating against video programming vendors for failing to provide exclusive rights against other MVPDs as a condition of carriage.[32] Parties urging the adoption of rules to address retaliatory conduct should specify the kinds of actions that should be restricted or prohibited. Should we adopt other rules designed to protect independent programmers from retaliation, such as rules that provide for a heightened level of confidentiality when a programmer brings a complaint to the Commission?

19. We also seek comment on what, if any, additional rules we should consider to advance competition, diversity, and innovation in the marketplace. In particular, are there other specific actions we can take to provide greater opportunities for distribution of programming from new video programming vendors, including minorities and women, or programming directed at minority, underserved, or female viewers? Are there any actions we can take to protect consumers from programming disruptions resulting from an MVPD's decision to drop an independent video programmer from its lineup? For example, would the public interest be served, as RFD-TV suggests, by adopting a rule that permits MVPD subscribers to cancel, without penalty, a subscription television package within a specified time period, e.g., 90 days, after the MVPD has dropped such programmer from its lineup?[33] In addition, we seek comment on whether MVPDs engage in other negotiating practices that hamper the ability of independent programmers to secure distribution of their content. To the extent MVPDs engage

---

Commission's Program Carriage Rules, MB Docket Nos. 07-42, 11-131, Second Report and Order and Notice of Proposed Rulemaking, 76 FR 60675, 60692-94, paras. 60-67 (Sept. 29, 2011) (Program Carriage NPRM).

[31] See Comcast-NBCU Order, 26 FCC Rcd at 4363-64, App. A, Condition IV.G.1.d.; id. at 4287, para. 121; DOJ Charter-TWC Competitive Impact Statement at 18-19.

[32] 47 U.S.C. 536(a)(2); 47 CFR 76.1301(b). See also H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 110 (1992) (House Report) (stating that "[t]he regulations [to implement Section 616(a)(2)] should be designed to prevent a cable operator from taking any kind of retaliatory action against a programmer for refusing to grant exclusivity to the operator"); H.R. Rep. No. 102-862, 102d Cong., 2d Sess. at 83 (1992) (Conference Report).

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

in such practices, we seek comment on whether the public interest would be served by requiring MVPDs to negotiate carriage agreements with independent video programming vendors in good faith.[34] We also seek further comment on bundling practices by video programming vendors.[35] Specifically, how, if at all, do bundling practices affect MVPDs' ability to carry independent programmers? Is bundling by large programmers as widespread as some in the record suggest? Do small MVPDs face greater demands to accept bundles than large MVPDs? Do programmers act differently in their negotiations with buying groups, such as the National Cable Television Cooperative (NCTC), than they do in negotiations with MVPDs that negotiate on their own behalf? Do programmers insist on bundling even with respect to capacity constrained MVPDs, or do they provide relief for such systems? What is the impact of bundling on small MVPDs relative to large MVPDs? How does bundling impact consumer costs, choice, and access to diverse programming? Are there other marketplace conditions that magnify the effects (harmful or beneficial) of bundling?

20. **Legal Authority.** We seek comment on the Commission's legal authority under Section 616 of the Act[36] to adopt rules prohibiting the use of unconditional MFN and unreasonable ADM provisions in program carriage agreements between MVPDs and independent video programming vendors, as proposed above. Section 616(a) provides, in relevant part, that "the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors."[37] We believe this provision reasonably can be read to grant general rulemaking authority to the Commission to adopt a prohibition on unfair, unreasonable, and/or anticompetitive practices employed by MVPDs when negotiating carriage agreements, including the use of certain contract provisions in agreements with independent programmers.

---

[34] We note that in the 2011 Program Carriage NPRM, the Commission proposed to adopt a good faith negotiation requirement under Section 616 of the Act that would apply to vertically integrated MVPDs. Program Carriage NPRM, 76 FR at 60694-95, paras. 68-71.

[35] NOI, 81 FR at 10244-45.

[36] 47 U.S.C. 536.

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

21. Specifically, we seek comment on whether the Commission's grant of authority under Section 616(a) to adopt rules "governing program carriage agreements and related practices between [MVPDs] and video programming vendors" is sufficiently broad to enable us to prohibit the use of unconditional MFN or unreasonable ADM provisions. As noted above, the rules we propose will apply to agreements between MVPDs and "independent video programming vendors," which are encompassed within the term "video programming vendor."[38] We believe these rules will advance Congress's intent in enacting Section 616 "to stem and reduce the potential for abusive or anticompetitive actions [by MVPDs] against programming entities."[39] 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."[40] Consistent with the intent of Section 616, our proposals are designed to enhance competition in the video programming marketplace and are predicated on the belief that "competition is essential both for ensuring diversity in programming and for protecting consumers from potential abuses by cable operators possessing market power" and other MVPDs.[41]

22. Some commenters argue that Section 616 is only a limited grant of authority to the Commission. For example, AT&T contends that the Commission has authority under Section 616 only to address conduct that violates one of three proscriptions set forth in the subsections of Section 616(a). Consistent with our previous determination that "[Section 616] does not preclude the Commission from adopting additional requirements beyond the six listed in the statute," we are not persuaded that Congress intended to limit the Commission's regulatory authority to only those practices specifically listed in Section 616(a).[42] 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

---

[38] 47 U.S.C. 536(b).
[39] House Report at 27.
[40] Id. at 42-43.
[41] Id. at 43.
[42] Program Carriage NPRM, 76 FR at 60693, para. 65.

nothing in the statute expressly precludes the Commission from establishing rules besides those specifically listed.[43] Furthermore, the subsections relating to substantive requirements, subsections 616(a)(1)-(a)(3), are introduced by the verbs "include" or "contain," which suggests that such requirements are not exhaustive. Where Congress intends to limit the Commission's rulemaking authority to specified areas, it has done so expressly.[44]

23. Although the first sentence of Section 616(a) directs the Commission to adopt implementing rules "[w]ithin one year after October 5, 1992,"[45] we do not believe that the timing requirement in Section 616(a) means that the Commission's rulemaking authority under that Section expired more than 20 years ago. As we have explained previously, the Commission's authority under a statutory provision does not expire when a statutory deadline for implementation passes.[46] Indeed, the view that the Commission's authority expires with passage of a deadline would be at odds with judicial precedent regarding statutory deadlines, which are generally considered directory rather than mandatory.[47]

24. We also believe that our proposed rules are consistent with the overall structure and intent of Section 616(a). Although Sections 616(a)(1) and 616(a)(2) prohibit an MVPD from "requiring" or "coercing" programmers to accept certain terms as a condition of carriage on its systems,[48] we do not believe that our rulemaking authority under Section 616(a) is limited to those practices delineated in the subsections. In any case, based on the record, we find that independent programmers generally do not agree to unconditional MFN or unreasonable ADM provisions voluntarily, but rather, are forced to accept such provisions because they lack sufficient bargaining leverage to resist MVPDs' demands for such provisions. Thus, we find it reasonable to conclude that independent programmers agree to unconditional

---

[43] See generally 47 U.S.C. 536.

[44] See, e.g., id. 613(f)(1), (2) (directing the Commission to reinstate its video description regulations adopted in Report and Order, 65 FR 54805 (Sept. 11, 2000), and to modify those rules "only as follows").

[45] Id. 536(a).

[46] Review of the Commission's Program Access Rules, First Report and Order, 25 FCC Rcd 746, 752, n.23 (2010), aff'd in part and vacated in part on other grounds, Cablevision v. FCC, 649 F.3d 695 (2011). See also Connect America Fund et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17918, para. 767, n.1381 (2011); Brock v. Pierce County, 476 U.S. 253, 260, 262 (1986); Gottlieb v. Peña, 41 F.3d 730, 733 (D.C. Cir. 1994).

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

[48] 47 U.S.C. 536(a)(1) through (a)(2).

MFN and unreasonable ADM provisions only because MVPDs require them as a condition of carriage. We seek comment on this analysis. Does the use of the terms "requiring" and "coercing" in the subsections of 616(a) affect the scope of our rulemaking authority under this provision? We also seek comment on whether or to what extent Congress's particular concerns about vertical integration as expressed in Section 616's legislative history should factor into our determination about the scope of our authority to prohibit the use of unconditional MFN and unreasonable ADM provisions under Section 616.[49] In addition, we seek comment on any constitutional issues that we should consider in determining whether to adopt the proposed rules.

25. We seek comment on whether other provisions of the Act provide an alternative or an additional basis for the adoption of rules addressing restrictive MFN and ADM provisions. For example, does Section 616(a)(3) of the Act provide a basis for proscribing restrictive MFN and ADM provisions? Section 616(a)(3) directs the Commission to adopt rules "designed to prevent [an MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[50] Is the Commission authorized under that provision, for example, to adopt rules that prohibit vertically integrated MVPDs from including unconditional MFN and unreasonable ADM clauses in carriage agreements with independent video programming vendors, where such MVPDs do not include the same clauses in carriage agreements with affiliated programming networks? If so, would the application of such rules only to vertically integrated MVPDs adequately address the competition and diversity concerns raised by restrictive MFN and ADM clauses? Would a nondiscrimination requirement be effective given that an MVPD could enter into the same restrictive MFN and/or ADM provision with both the affiliated and unaffiliated programming network but simply not exercise its rights with respect to the affiliated network? To the extent that parties assert that Section 616(a)(3) authorizes adoption of the proposed rules, we seek comment on whether an independent video

[49] See, e.g., S. Rep. No. 102-92, 102d Cong., 2d Sess., at 24-29 (1991) (Senate Report); House Report at 41.
[50] 47 U.S.C. 536(a)(3).

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

26. We also seek input on whether any provisions of Section 628 serve as a valid basis for establishing rules to address restrictive MFN and ADM provisions. Consistent with the goal of our proposed rules, we note that the purpose of Section 628 is to "increase[e] competition and diversity in the [MVPD] market . . . and to spur the development of communications technologies."[51] In addition, Section 628(b) prohibits "a cable operator . . . or a satellite broadcast programming vendor [from engaging] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing . . . programming to subscribers or consumers."[52] And Section 628(c)(1) directs the Commission to "prescribe regulations to specify particular conduct that is prohibited by [Section 628(b)]" in order to "increase[e] competition and diversity in the [MVPD] market and the continuing development of communications technologies."[53] Given that Section 628(b) appears to target only methods, acts, and practices that adversely affect MVPDs, can the Commission lawfully invoke this provision to proscribe, as an "unfair" method, act or practice, the use of certain MFN and ADM provisions in agreements between MVPDs and independent video programming vendors? For example, could Section 628(b) be invoked based on evidence that such MFN and ADM provisions adversely affect small MVPDs? Given that direct broadcast satellite (DBS) carriers are not subject to the provisions of Section 628, would reliance on that provision to limit the use of restrictive MFN and ADM provisions lead to a disparity in regulatory treatment among MVPDs? Finally, we seek comment on whether there are other provisions of the Act that potentially vest the Commission with authority to adopt rules addressing restrictive MFN and ADM provisions.[54]

---

[51] Id. 548(a).

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

[53] 47 U.S.C. 548(c)(1).

[54] Although we suggested in the NOI that Section 257 of the Act could provide a basis for adopting such rules, we note that section 257(a) directs the Commission, among other things, to "complete a proceeding for the purpose of

Initial Paperwork Reduction Act Analysis

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

A. Ex Parte Rules

28. Permit-But-Disclose. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules.[55] 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 (i) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (ii) 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

---

identifying and eliminating, by regulations pursuant to its authority under this Act (other than [Section 257]), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications and information services, or in the provision of parts or services to providers of telecommunications services and information services." 47 U.S.C. 257(a) (emphasis added). We read this provision, therefore, to authorize the adoption of rules to eliminate the specified entry barriers only if such rules are expressly authorized by provisions of the Act other than Section 257. But see TheBlaze Comments at 10. We seek comment on our interpretation.

[55] 47 CFR 1.1200 et seq.

ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

B. Filing Requirements

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

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

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

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

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

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

C. Additional Information

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

Initial Regulatory Flexibility Act Analysis

33. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[56] the Commission has prepared this present Initial Regulatory Flexibility Act Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in the Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[57] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[58]

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

34. In the NPRM, we propose to adopt rules that prohibit certain practices used by some multichannel video programming distributors (MVPDs) in their negotiations for carriage of video programming that impede competition, diversity and innovation in the video marketplace. Specifically,

[56] 5 U.S.C. 603. The RFA, 5 U.S.C. 601 through 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).
[57] 5 U.S.C. 603(a).
[58] Id.

we propose to prohibit the inclusion of: (i) "unconditional" most favored nation (MFN) provisions; and (ii) unreasonable alternative distribution method (ADM) provisions in program

B. Legal Basis.

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

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

36. 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.[59] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[60] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[61] A small business concern is one which: (i) Is independently owned and operated; (ii) is not dominant in its field of operation; and (iii) satisfies any additional criteria established by the SBA.[62] Below, we provide a list of such small entities.

- Wired Telecommunications Carriers
- Cable Television Distribution Services
- Cable Companies and Systems
- Cable System Operators

[59] 5 U.S.C. 603(b)(3).
[60] Id. 601(6).
[61] Id. 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." Id.
[62] Id. 632.

- Direct Broadcast Satellite (DBS)
- ServiceSatellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs)
- Home Satellite Dish (HSD) Service
- Broadband Radio Service and Educational Broadband Service
- Fixed Microwave Services
- Open Video Systems
- Cable and Other Subscription Programming
- Small Incumbent Local Exchange Carriers
- Incumbent Local Exchange Carriers (ILECs)
- Competitive Local Exchange Carriers
- Competitive Access Providers (CAPs)
- Shared-Tenant Service Providers
- Other Local Service Providers
- Internet Publishing and Broadcasting and Web Search Portals.
- Television Broadcasting.

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

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

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

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

- unconditional MFN provisions; and
- unreasonable ADM provisions.

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

40. 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): "(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (iii) the use of performance, rather than design standards; and (iv) an exemption from coverage of the rule, or any part thereof, for small entities."[63]

41. Although the rules proposed in the NPRM would apply to all MVPDs, including those that are small, we do not believe such rules would have a significant economic impact on a substantial number of small MVPDs. The record indicates that small MVPDs do not appear to obtain the kinds of contractual restrictions the proposed rules would proscribe. In addition, the NPRM seeks comment on what circumstances could justify waiver of the proposed rules. We note further that to the extent small MVPDs are aggrieved by contractual restrictions imposed by larger MVPDs, small MVPDs would have standing to seek relief by filing a program carriage complaint under our existing rules.[64]

42. With regard to the impact on other small video programming distributors (such as online video distributors), and small video programming vendors (including independent content creators), based on the record, such small entities generally would benefit from Commission action addressing

[63] 5 U.S.C. 603(c)(1) through (c)(4).
[64] 47 CFR 76.1302(a).

unconditional MFN and unreasonable ADM provisions. Because such entities likely would support the rules proposed in the NPRM, we find that no further analysis of alternatives on their behalf is necessary.

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

43. None.

44. We adopt this NPRM pursuant to the authority found in sections 1, 4(i), 4(j), 157, 257, 303(r), 616 and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 157, 257, 303(r), 536 and 548.

FEDERAL COMMUNICATIONS COMMISSION.

Gloria J. Miles,

Federal Register Liaison Officer.

Office of the Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 76 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, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1300 is amended by redesignating paragraphs (b), (c), (d), and (e) as paragraphs (c), (d), (e), and (g), and adding new paragraph (b) and paragraph (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 a video programming vendor from exhibiting its programming on alternative, non-traditional video distribution platforms for a specified period of time following the programming's original linear airing, or until certain conditions are met.

* * * * *

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

* * * * *

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

§ 76.1301 Prohibited Practices.

* * * * *

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

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

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

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

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

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

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

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

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

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

BILLING CODE 6712-01

[FR Doc. 2016-25568 Filed: 10/24/2016 8:45 am; Publication Date: 10/25/2016]