

ALERT

FCC Considers Prohibiting Unconditional MFNs and Unreasonable ADMs

September 30, 2016

At its September 29, 2016 open meeting, the Federal Communications Commission (FCC or Commission) adopted a Notice of Proposed Rulemaking (NPRM) in which it proposes rules prohibiting “certain practices some multichannel video programming distributors (MVPDs) use in their negotiations for carriage of video programming” that the Commission believes “may impede competition, diversity, and innovation in the video marketplace.” Comments will be due 60 days after the NPRM is published in the Federal Register.

In the NPRM, the FCC proposes to prohibit the use of so-called “unconditional” most favored nation (MFN) provisions and “unreasonable” alternative distribution method (ADM) clauses in contracts between MVPDs and independent programmers. As described by the Commission, an “unconditional” MFN clause entitles a pay TV provider to receive favorable contract terms that a programmer has given to another programming distributor, without requiring the pay TV provider to assume any corresponding obligations from the other distribution agreement. The agency describes an ADM clause as generally prohibiting or limiting a programmer from putting its programming on alternative video distribution platforms, such as online platforms. The FCC focuses on these two provisions based on the record developed in response to a Notice of Inquiry issued in February 2016. The Commission characterizes the record as revealing that:

certain MVPDs have used their bargaining leverage vis-à-vis independent programmers to exact unconditional MFN clauses and/or unreasonable ADM provisions that hamper the ability of programmers to experiment with online distribution. Such contractual provisions make it challenging for programmers to achieve a

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profitable level of carriage, or to secure carriage without contracting away their freedom to present content to a broader audience via the Internet. Restrictions placed on programmers by unconditional MFN and unreasonable ADM obligations in turn create barriers to entry and hinder the growth of OVDs by restraining their access to content and precluding them from entering into mutually beneficial agreements with independent programmers.

Definition of an Independent Programmer

The first question the Commission asks in the NPRM is whether the term “independent video programming vendor” should be defined 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.” Specifically, the FCC asks whether “independent video programming vendor” should be defined as a programmer not affiliated with a broadcast network, movie studio or MVPD, or whether the term should be defined based upon a programmer’s annual gross revenue or total assets. Only programming vendors falling within this definition would be entitled to the protection of the rules that the Commission proposes to adopt.

Unconditional MFNs

The FCC next proposes to adopt a rule prohibiting the inclusion of unconditional MFN provisions in carriage agreements between MVPDs and independent programmers. The Commission notes that MFNs in general “may have legitimate public interest justifications,” but that such justifications do not exist “for MFN provisions that are unconditional and thus permit ‘cherry picking’ of the best contract terms.” Accordingly, the Commission seeks comment on its proposal to define an unconditional MFN as “a provision that entitles an MVPD to contractual rights or benefits that an independent video programming vendor has offered or granted to another video programming distributor, without obligating the MVPD to accept any terms and conditions that are integrally related, logically linked, or directly tied to the grant of such rights or benefits in the other video programming distributor’s agreement, and with which the MVPD can reasonably comply technologically and legally.” The FCC asks whether this definition “is too narrow and thus would permit MVPDs to draft contract language that avoids application of the prohibition” and whether it should be “uniquely concerned” about the use of unconditional MFNs “to harm competition from nascent [online video distributors.]” Finally, the Commission seeks comment on which, if any, of the program carriage rules should be amended if the proposed rule is adopted and what remedies and penalties should be imposed on MVPDs that violate the rule.

Unreasonable ADM Provisions

The FCC also proposes to adopt a rule that prohibits the inclusion of unreasonable ADM provisions in carriage agreements between MVPDs and independent programmers. In so doing, the Commission states that, based on the record, “it appears that certain restrictive ADM provisions have no discernibly procompetitive justifications and have an adverse impact on the provision of diverse programming sources to consumers.” To determine whether a particular ADM provision is “unreasonable,” the FCC tentatively

concludes that it will consider, among other factors, the extent to which an ADM provision prohibits an independent programmer from licensing content to other distributors. Although the inquiry will be “fact-specific,” certain ADM provisions would be presumptively unreasonable, including those that:

- (i) bar an independent programmer from licensing content, for an extended time period or indefinitely, to an OVD that distributes content for free to consumers;
- (ii) bar an independent programmer from licensing content, for any period of time, to an OVD that distributes content to paying subscribers;
- (iii) bar an independent programmer from licensing content to an OVD unless or until the OVD meets conditions that are difficult to satisfy in a timely manner or are designed to undermine the OVD’s ability to compete; or
- (iv) provide for any pecuniary or non-pecuniary penalty or adverse impact on an independent programmer for the provision of its video programming to an OVD.

The Commission seeks comment on this framework, the types of evidence needed to rebut such presumptions, and whether any other kinds of ADM provisions should be deemed presumptively unreasonable.

The FCC does, however, propose to treat as presumptively *reasonable* ADM provisions that prohibit 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. The Commission asks for comment on the time frame (e.g., 30 days) that should apply. In addition, the Commission proposes to treat as presumptively reasonable ADMs that grant MVPDs the universally exclusive right to distribute an independent programmer’s content. This type of blanket exclusivity “has been common in the video programming industry and does not appear to raise the same competitive concerns as ADMs targeted at OVDs.” The Commission asks for comment on whether any other types of ADM provisions should be subject to a presumption of reasonableness, whether any program carriage rules should be amended if the proposed rule is adopted, and what remedies and penalties should be imposed on MVPDs that violate the rule.

The FCC seeks comment on a number of related issues, including:

- how to protect independent programmers that complain about unconditional MFNs or unreasonable ADMs from retaliation by MVPDs;
- how to protect consumers from programming disruptions resulting from an MVPD’s decision to drop an independent video programmer from its lineup; and
- whether bundling practices affect MVPDs’ ability to carry independent programmers.

Legal Authority Under Section 616

Finally, the Commission asks whether section 616 of the Communications Act gives it authority to prohibit the use of unconditional MFNs and unreasonable ADMs. The Commission asserts that section 616 can reasonably be read “to grant general rulemaking authority” to adopt the proposed rules and that the 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.’” However, the Commission notes that some commenters argue that the Commission’s authority under section 616 allows it to address only conduct that violates one of three specific proscriptions set forth in the subsections of section 616(a).

Commissioner Pai and O’Rielly Dissents

The NPRM was adopted at the Commission’s September 29, 2016 Open Meeting by a vote of 3-2. Commissioners Pai and O’Rielly dissented. Both criticized the Commission for issuing an Order masquerading as an NPRM and stated that the Commission has already made up its mind to adopt the rules “proposed” in the NPRM. Commissioner Pai also questioned whether section 616 gives the Commission authority to prohibit unconditional MFNs and unreasonable ADMs and noted that the rules could have unintended consequences, such as making it more likely that independent programmers will be dropped from MVPDs’ lineups.