

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| In the Matter of |) | |
| |) | |
| Leased Commercial Access |) | MB Docket No. 07-42 |
| |) | |
| Modernization of Media Regulation Initiative |) | MB Docket No. 17-105 |
| |) | |
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COMMENTS OF AMERICAN INDEPENDENT MEDIA, INC. (AIM)

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I. Introduction and Summary

American Independent Media, Inc. (“AIM”), a Colorado non-profit corporation formed in 2018 to promote independent voices from diverse political, demographic, and non-conglomerate sources in a highly concentrated media market, respectfully submits these comments in the above-captioned proceeding. The current pay-TV market increasingly hinders independent¹ media companies’ ability to compete effectively and serve customers. If this trend continues, the public will be deprived of authentic, diverse voices and forced to consume content from a small corporate elite.

AIM believes that the 1992 Cable Act’s leased access provision² at issue in this proceeding, if implemented thoughtfully, could help to maintain and enhance independent voices in the pay-TV and video markets, but that the current leased access rules³ have been insufficient to achieve that end. The statute unambiguously requires the Commission, through the leased access regime, “to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.”⁴ To live up to its statutory mandate, the Commission should reform the current leased access rules such that cable operators must establish reasonable lease rates that allow small, independent firms to achieve a basic level of distribution; provide efficiency and promptness in

¹ The leased access rules refer to an independent programmer as one “unaffiliated” with the cable operator in question. 47 C.F.R. 76.970(a). AIM broadly refers to “independent” media as any linear video programming service unaffiliated with a pay-TV distributor or broadcast licensee.

² 47 U.S.C. §532.

³ 47 C.F.R. §§ 76.970-977

⁴ 47 U.S.C. §532(a)

the dispute resolution process; and generally strengthen the leased access rules so that independent media voices can serve cable subscribers throughout the U.S.

II. Massive consolidation on both the distribution and content sides of the pay-TV market threatens the future viability of independent video programmers.

A. The Pay-TV market currently is dominated by four distributors, any one of which can decide the fate of independent programmers.

AT&T/DIRECTV, Charter, Comcast, and DISH Network control the vast majority of pay-TV subscriptions in the U.S. and possess sufficient market power to extract one-sided terms from small and independent programmers. The recent consolidation of pay-TV distribution into four dominant companies means that any one of those distributors is in a position to impact materially and adversely the competitiveness of small and independent media organizations. The four largest distributors collectively represent about 75% of pay-TV households; the two largest comprise almost 50% of that market.⁵

The Commission asks in this proceeding whether alternative means of video distribution provide leased access programmers with more options.⁶ With regard to the long-term survival of existing and aspiring independent programmers, they do not. As the Commission correctly observed in the Media Diversity Docket,⁷ the behavior of large pay-TV distributors thwarts

⁵ At the completion of AT&T's acquisition of DirecTV, the company's video subscriber tally reached 26.3 million customers, giving them a 26% market share. As second largest, Comcast has 22.3 million subscribers and 22% of the pay-TV market and with 13.9 million subscribers DISH maintains 14%. Charter (after acquiring Time-Warner Cable and Bright House Networks) hold 17.2 million subscribers, or about 17% of the market. Percentages are based on a total MVPD market size of 99.4M. See Nielsen: Pay-TV Homes Down 0.7% in September Broadcastingcable.Com, <https://www.broadcastingcable.com/news/nielsen-pay-tv-homes-down-07-september-159108> (last visited Jul 24, 2018)

⁶ *Leased Commercial Access and Modernization of Media Regulation Initiative*, Further Notice of Proposed Rulemaking, FCC No. 18-80, MB Docket Nos. 07-42 and 17-105 (rel. June 8, 2018), <https://ecfsapi.fcc.gov/file/0608615311303/FCC-18-80A1.pdf> (last visited Jul 20, 2018) at para. ¶14 p. 7 (hereafter "Leased Access FNPRM")

⁷ *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, FCC No. 16-129, MB Docket No. 16-41 (rel. September 29, 2016),

competition in video programming, even despite expansive trends in the video marketplace, such as Online Video Distributors (“OVDs”) and wireless-based services.⁸

Major cable operators’ bargaining power in traditional, linear pay-TV video enables them to restrict independent programmers’ distribution under innovative business terms or on new, emerging technological platforms, such as “Over-the-Top” (OTT) services and direct-to-consumer distribution online. Most affiliation agreements with major distributors expressly prohibit the independent programmer from distributing its programming online, despite the fact that many large, conglomerate programmers make their most popular programming available directly to consumers without any authentication from a pay-TV provider.⁹

The presence of online distribution platforms does not change the fact that cable operators define marketplace realities. If a major cable operator, such as Comcast or Charter, drops an independent programming service from its channel lineup, other pay-TV providers, including OVDs and virtual MVPDs, will tend to follow suit. Anyone can post on YouTube or create a website for streaming video, but today’s fragmented media environment makes it impossible to break through or reach an audience without massive investment. Leased access is the best way to access the traditional, linear video market. Linear programming on pay-TV

https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-129A1.pdf (last visited Jul 23, 2018), (hereafter “Notice”)

⁸ Notice at para. ¶6.

⁹ HBO, Starz, CBS, Showtime and CW are among several channels that have launched direct-to-consumer apps. See, HBO launches Netflix rival CNET.Com, <https://www.cnet.com/news/hbo-launches-netflix-rival/> (last visited Jul 26, 2018); see Starz Launches OTT Subscription App Multichannel.Com, <https://www.multichannel.com/news/starz-launches-ott-subscription-app-403843> (last visited Jul 25, 2018); see, also, The CW Launching App To Watch Their Shows For Free IGN.Com, <http://www.ign.com/articles/2016/09/20/the-cw-launching-app-to-watch-their-shows-for-free> (last visited Jul 27, 2018); see, also, CBS launches expansive digital subscription service CBSNews.Com, <https://www.cbsnews.com/news/cbs-launches-digital-subscription-service-cbs-all-access/> (last visited Jul 25, 2018); see, also, Showtime Unleashes Stand-alone OTT Service Multichannel.Com, <https://www.multichannel.com/news/showtime-unleashes-standalone-ott-service-391985> (last visited Jul 27, 2018).

platforms remains a vital part of the media marketplace. Justin LaPorte, Vice President of Audience Insights at Nielsen, put it this way: “linear TV is not dead.” According to LaPorte, Nielsen’s Q4 2017 Local Watch Report dispels the myth of linear TV’s demise. “Traditional programming shows impressive resilience in today’s digital age. Even the heaviest of streamers can’t seem to shake broadcast viewing.”¹⁰ “In fact, the average streamer aged 25-54 consumed over 121 hours of cable and broadcast TV in November [2017], which breaks down to 4 hours, 20 minutes per day.”¹¹

B. Vertical integration of major distributors increases the incentive and ability of major distributors to favor their own programming over competing independent programmers.

The threat to media diversity posed by concentration on the distribution side of the pay-TV market only worsens in light of the incentive and ability of vertically integrated pay-TV providers such as Comcast/NBCU and AT&T/Time Warner. In approving the Comcast/NBCU merger in 2010, the Commission noted in great detail that the combination of the nation’s largest cable operator with a premiere content creator posed a direct threat to independent programmers¹² and adopted conditions designed to ameliorate that threat, including a

¹⁰ Nielsen, The Nielsen Local Watch Report: A Focus On Streaming Trends In Our Cities (Q4:2017) (The Nielsen Company) (2018), <http://www.nielsen.com/us/en/insights/reports/2018/local-watch-report--q4-2017.html> (last visited Jul 24, 2018)

¹¹ Traditional TV rolls with the times, remains a viable entertainment channel to both viewers and advertisers MarTechToday.Com, <https://martechtoday.com/traditional-tv-rolls-with-the-times-remains-a-viable-entertainment-channel-to-both-viewers-and-advertisers-217313> (last visited Jul 25, 2018)

¹² “Several parties contend that the proposed transaction would increase Comcast’s ability and incentive to reduce competition from rival video programming networks/providers by withholding carriage of such programming or imposing unreasonable terms or conditions of carriage. We agree that the vertical integration of Comcast’s distribution network with NBCU’s programming assets will increase the ability and incentive for Comcast to discriminate against or foreclose unaffiliated programming. We conclude that the adoption of a non-discrimination requirement, a condition to make ten channels available to independent programmers over a period of time, and a narrowly tailored neighborhooding requirement will mitigate any potential public interest harms.” *See Applications of Comcast Corporation, General Electric Company and NBCUniversal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, FCC No. 11-4, MB Docket No. 10-56 (rel. January 20,

requirement that Comcast place independent business news channels in the same channel “neighborhood” as CNBC,¹³ and that Comcast launch new independent channels.¹⁴

The conditions adopted by the Commission to address that threat, however, will sunset in October of this year.¹⁵ This means that in the absence of merger conditions, the leased access rules are perhaps the last, best hope for independent programmers to maintain or obtain carriage on Comcast.

2011), <https://docs.fcc.gov/public/attachments/FCC-11-4A1.pdf> (last visited Jul 25, 2018) (hereafter “Comcast NBCU M&O”)

¹³ See *Comcast NBCU M&O* at para. ¶4 p. 3 “In light of the significant additional programming Comcast will control—programming that may compete with third-party programming Comcast carries on its MVPD service—we require that Comcast not discriminate in video programming distribution on the basis of affiliation or non-affiliation with Comcast-NBCU. Moreover, we require that, if Comcast “neighborhoods” its news (including business news) channels, it must include all unaffiliated news (or business news) channels in that neighborhood. We also adopt as a condition of the transaction Comcast’s voluntary commitment to provide 10 new independent channels within eight years on its digital tier.”

¹⁴ See *id.*; see, also, *Comcast NBCU M&O* at Appendix A: Conditions, Subsection III: Conditions Concerning Carriage of Unaffiliated Video Programming, pp. 121-122 “Comcast shall add ten new independently owned-and-operated channels to its digital (D1) tier on customary terms and conditions as follows: (i) one channel within 18 months of the Order Date; (ii) two additional channels within two years of the Order Date; (iii) one additional channel within three years of the Order Date; (iv) two additional channels within six years of the Order Date; and (v) four additional channels within eight years of the Order Date. For purposes of this Condition, independent entities deemed to be eligible for such channels are those networks that are not carried by Comcast and not an Affiliate of Comcast or a top 15 programming network, as measured by annual revenues.” See, also, Memorandum Of Understanding between Comcast Corporation, NBCUniversal and the African American leadership organizations, <https://ecfsapi.fcc.gov/file/7020924324.pdf> (last visited Jul 27, 2018) at p. 9 “Enhancing Programming Diversity. Comcast is expanding its joint commitment with GE and NBC regarding the addition of independently-owned and -operated channels to its digital line-up, which appears in the FCC Public Interest Statement of January 28, 2010, as follows. (i) Comcast has committed to add at least ten (10) new independently owned and-operated programming services over the next eight (8) years following closing of the transaction.”

¹⁵ Comcast NBCU Merger Conditions show that conditions expiring seven years following the January 20, 2011, the Order’s release date. See, *Comcast NBCU M&O* at Appendix A: Conditions, Subsection XX: Term, p. 144 “Except as expressly stated, these Conditions shall remain in effect for seven years following the date of this Order.”

In the case of AT&T/Time Warner, despite a currently unsuccessful attempt by the Department of Justice Antitrust Division to block the merger,¹⁶ the Commission had no opportunity to decide whether the combination served the public interest, convenience, and necessity because the acquisition of Time Warner, Inc. by AT&T did not involve any FCC license transfers. Regardless of any conclusions reached under antitrust law, the public therefore did not receive the benefit of any diversity-enhancing actions by the Commission, leaving the nation's largest pay-TV distributor, AT&T, free to favor its own content over that of competing independent programmers.¹⁷

C. Consolidation on the content side of the market squeezes independent programmers because conglomerate media companies possess market power to demand greater distribution and higher fees at the expense of independent programmers.

Major pay-TV distributors often tell independent programmers during affiliation agreement renewal negotiations that the increasing leverage and demands of conglomerate media companies for higher fees and more channels necessitates cutting fees paid to independents or dropping independent networks altogether. Despite the obvious fact that independent programmers' licensing fees are a fraction of those charged by NBC/Universal, Disney, 21st

¹⁶ *United States of America v. AT&T Inc. et al.*, Civil Case No. 17-2511 (RJL), United States District Court for the District of Columbia, (filed. June 12, 2018), <http://www.dcd.uscourts.gov/sites/dcd/files/17-2511opinion.pdf> (last visited Jul 27, 2018). *See, also*, *United States of America v. AT&T Inc., DIRECTV Group Holdings, LLC, and Time Warner Inc.*, Notice of Appeal (filed. July 12, 2018), Case No. 1:17-cv-02511-RJL, <https://pmcdeadline2.files.wordpress.com/2018/07/filed-notice-of-appeal-us-v-att-12-july-2018.pdf> (last visited Jul 27, 2018)

¹⁷ *See Comcast NBCU M&O* at para. ¶110 p. 45 “Several parties contend that the proposed transaction would increase Comcast’s ability and incentive to reduce competition from rival video programming networks/providers by withholding carriage of such programming or imposing unreasonable terms or conditions of carriage. We agree that the vertical integration of Comcast’s distribution network with NBCU’s programming assets will increase the ability and incentive for Comcast to discriminate against or foreclose unaffiliated programming. We conclude that the adoption of a non-discrimination requirement, a condition to make ten channels available to independent programmers over a period of time, and a narrowly tailored neighborhooding requirement will mitigate any potential public interest harms.”

Century Fox, or Time Warner, pay-TV distributors will find cost and capacity savings wherever they can when faced with demands from large, “must have” programmers.

The consolidation trend among major conglomerate programmers is accelerating, as illustrated by the recent announcement of Disney’s proposed acquisition key programming assets from 21st Century Fox.¹⁸ The Department of Justice Antitrust Division’s approval of the transaction¹⁹ and Comcast’s apparent retreat from making a competing bid²⁰ seem to make consummation of the combination a near certainty. An expanded Disney, with a second major film studio in its portfolio and a strategy to increase direct-to-consumer distribution,²¹ will wield even greater leverage to demand of cable operators expanded carriage at higher rates for its myriad programming services. The result for independent programmers will be less carriage and lower fees, a direct threat to programming diversity.

D. Cable operators’ dominance in providing residential broadband incentivizes them to devote capacity to high-margin broadband services over independent video programming services.

The Commission consistently finds that cable operators provide the majority of high-speed residential broadband connections in the U.S.²² Cable operators often tell independent

¹⁸ See The Walt Disney Company To Acquire Twenty-First Century Fox, Inc., After Spinoff Of Certain Businesses, For \$52.4 Billion In Stock TheWaltDisneyCompany.Com, <https://www.thewaltdisneycompany.com/walt-disney-company-acquire-twenty-first-century-fox-inc-spinoff-certain-businesses-52-4-billion-stock> (last visited Jul 25, 2018)

¹⁹ United States of America v. The Walt Disney Company, and Twenty-First Century Fox, Inc., (filed. June 27, 2018). Case No. 1:18-cv-05800, United States’ Explanation of Consent Decree Procedures, <https://www.justice.gov/opa/press-release/file/1075086/download> (last visited Jul 26, 2018)

²⁰ Comcast Drops Bid for Fox Assets, Will Focus on Pursuit of Sky WSJ.Com, <https://www.wsj.com/articles/comcast-drops-bid-for-fox-assets-will-pursue-sky-1532004447> (last visited Jul 26, 2018)

²¹ Disney will pull its movies from Netflix and start its own streaming services CNBC.Com, <https://www.cnbc.com/2017/08/08/disney-will-pull-its-movies-from-netflix-and-start-its-own-streaming-services.html> (last visited Jul 29, 2018)

²² See Industry Analysis Division Media Bureau & Wireless Competition Bureau, Internet Access Services: Status as of December 31, 2016 (Federal Communications Commission) (2018),

programmers during affiliation renewal negotiations that higher profit margins for broadband service means that the cable operator would prefer to replace an independent programmer with digital broadband capacity.

In addition, the Commission's decision to vacate the anti-blocking, anti-throttling, and anti-discrimination Net Neutrality rules²³ allows cable operators to prohibit independent, unaffiliated programmers from serving cable broadband subscribers with competitive alternatives via the Internet. Thus, the role of cable operators as both major providers of linear video and dominant providers of residential broadband only heightens the need today for strong, effective leased access rules.

The Commission should strengthen the leased access rules to meet the statutory purpose of assuring that the widest possible diversity of information sources are available on cable systems and to maintain a basic level of diversity in the pay-TV market.

As Congress made clear in the leased access statute, and as echoed by the Commission in this proceeding,²⁴ the purpose of the leased access regime is to “promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity

https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0207/DOC-349074A1.pdf (last visited Jul 28, 2018) at p. 22 Figure 24 includes a pie graph displaying residential fixed connections at least 25 Mbps downstream and 3 Mbps upstream by Technology as of December 31, 2016, the data shows the share of residential Cable Modem connections at 82.8%. *See, also*, Figure 23, which displays a table on residential fixed connections at least 25 Mbps downstream and 3 Mbps upstream by Technology 2014-2016 (in thousands), the data show Cable Modem connections at 49,310 as of December 2016.

²³ Restoring Internet Freedom Order Takes Effect, <https://docs.fcc.gov/public/attachments/DOC-351481A1.pdf> (last visited Jul 30, 2018)

²⁴ *See Leased Access FNPRM* at para. ¶13 p. 6 “The stated purpose of the leased access statute “is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.””

of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.”²⁵

The leased access rules, which apply to cable and not other video distribution platforms, provide a necessary bulwark for independent voices by establishing a minimum channel set-aside of 15% of major operators’ channel capacity for unaffiliated programmers.²⁶ In the process, the rules also help to set the market for independent programmers on other platforms, such as DBS, OVDs, and virtual MVPDs.

Given major cable operators’ tendency to curtail independent programmers’ distribution, either due to an incentive and ability to favor the cable operator’s affiliated programming services, a desire to replace video programming with broadband data services, or acquiescence to the demands of large, conglomerate programmers, the leased access channel set-aside allows independent programmers to maintain a foothold in the pay-TV market.

First, the formula for determining leased access rates must live up to Congress’ vision of maintaining the “widest possible diversity of information sources” on cable systems. The statute instructs the Commission to “promote” competition and “assure the widest possible diversity” of programming sources, then acknowledges that the Commission must do so “in a manner consistent with the growth and development” of cable systems.²⁷

This presents a balancing test for the Commission between promoting diversity and competition, on the one hand, and acting consistent with cable operators’ typical commercial

²⁵ 47 U.S.C. §532(a)

²⁶ 47 U.S.C. §532(b)(1)(C) (cable operator with more than 100 activated channels must set aside 15% of such channels for leased access).

²⁷ 47 U.S.C. §532(a)

incentive towards growth, on the other. If the Commission's rate formula, in an effort to meet the statute's commercial prong, presents a de facto barrier to entry for a significant number of independent programmers, then the Commission has eviscerated the diversity and competition prong of its statutory mandate. AIM believes this to be the case today and should impel the Commission to discard its current formula, which tries to approximate a cable operator's profit margin, in favor of a rate that allows a sufficient number of independent programmers to gain carriage on major cable operators.

Second, the dispute resolution process must be prompt and efficient. Cable operators should be required to respond to leased access programmers in a timely and substantive fashion. Unresponsiveness in dispute resolution undermines the leased access program as a whole because cable operators can delay compliance indefinitely, or at least until the independent programmer complainant goes out of business.²⁸ The Commission should look for guidance in the myriad examples of "rocket docket" procedures used by courts of law and administrative agencies to achieve rapid results, as well as arbitration services used to quickly resolve commercial disputes.²⁹

²⁸ See *Leased Access FNPRM* at para. ¶23. The Commission invites comment on dispute resolution procedures and more generally on the Commission's rules governing complaints.

²⁹ See Insights and News Motions Practice In The Rocket Docket HarveyBinnall.Com, <https://www.harveybinnall.com/insights-news/northern-virginia-practice-procedure-motions-practice/> (last visited Jul 30, 2018) "The U.S. District Court for the Eastern District of Virginia is able to keep cases moving quickly enough that it is known as the Rocket Docket and has the fastest average filing to trial time of all federal courts in the nation partly because of its motions practice guidelines. The rules for motions differs between the various divisions, but they all generally allow for motions to be heard and decided quickly. This is especially true in the Alexandria Division, which operates on a motions day system, and allows the parties to immediately know when their motions will be heard." See Eastern District of Virginia Pretrial Procedures, <http://www.uscourts.gov/file/3364/download> (last visited Jul 29, 2018) "The Rocket Docket places a heavy premium on developing and executing a purposeful discovery plan. It is not unusual in complex cases, for example, for counsel to double-or triple-track depositions in various parts of the country while some team members are working simultaneously on written discovery and others are working on dispositive motions. Also, bear in mind that motions to expand the number of interrogatories will be granted sparingly, and you can expect only a modest increase in the number of

Finally, the application fees and deposits, like the rate formula, should not present a de facto bar to small independent programmers. The fees and deposits should be equivalent to the lowest dollar amounts required by the Commission in any other context.

III. Conclusion

In conclusion, the current pay-TV market increasingly hinders independent media companies' ability to compete effectively and serve customers. The future of independent video programmers is wholly threatened by media consolidation on the distribution side of the market as well as on the content side. The consolidation trend among major conglomerate programmers is accelerating and the result for independent programmers will be less carriage and lower fees, a direct threat to programming diversity. To live up to its statutory mandate, the Commission should reform the current leased access rules such that cable operators must establish reasonable lease rates that allow small, independent firms to achieve a basic level of distribution; provide efficiency and promptness in the dispute resolution process; and generally, strengthen the leased access rules so that independent media voices can serve cable subscribers throughout the U.S.

Respectfully Submitted,

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permitted depositions.” *See also*, United States District Court For The EDVA (EDVA) “Rocket Docket” Frequently Asked Questions (“FAQ”), https://www.leclairryan.com/files/Uploads/Documents/Rocket%20Docket%20FAQ%20revised%20mjk%2002_19_13.pdf (last visited Jul 30, 2018). /<http://www.uscourts.gov/file/3364/download>