



Goodfriend Government Affairs

September 16, 2016

Marlene Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

RE: Notice of *Ex Parte* Communication In the Matter of MB Docket No. 16-41
Promoting the Availability of Diverse and Independent Sources of Video Programming

Dear Ms. Dortch:

Yesterday, the undersigned along with Michael Schwimmer, CEO of FUSE Media (“FUSE”), Ellen Stutzman, Senior Director of Research and Public Policy, Garrett Andrew Schneider, Research and Public Policy Analyst, and Corrina Freeman, Political Director, of the Writers Guild of America West (“WGAW”), spoke by telephone with David Grossman, Chief of Staff and Media Policy Advisor, Office of Commissioner Clyburn.

Both FUSE and WGAW stated that the Commission should adopt a Notice of Proposed Rulemaking (“NPRM”) in this docket that asks questions beyond the scope of ADM and MFN clauses, including by addressing issues more fundamental to the survival of independent programming generally (see Attachment). One of the key priorities for the Commission should be to establish the ultimate policy goals regarding independent programmers, including whether to maintain existing numbers of independent programmers and/or ensure greater programming diversity.

Mr. Schwimmer pointed out that within the last year, several independent programmers have ceased operation and others have reported greater difficulty obtaining financing given lenders’ doubts that independent programmers can survive in today’s consolidated pay-TV market. He said that any attempt to address programming diversity must tackle the issue of bundling by major media conglomerates and the crowding out effect on smaller, independent programmers. Even if some distributors were able to work around policies designed to address this problem, said Mr. Schwimmer, the net impact on the market would be beneficial to consumers and competition. Moreover, one cannot overstate the impact current bundling practices have had on curtailing the availability of investment capital for startup and established independent programmers, said Mr. Schwimmer; funding is “drying up.” Addressing only the ADM and MFN issues would not remedy the situation, he concluded.

Ms. Stutzman added that the Commission must define “independent” programmer carefully to ensure that any relief is targeted at the programmers who need it most. She referred to the questions proffered in the Attachment. She also said that fostering programming diversity leads to more opportunities for content creators and more choice for consumers.

In response to Mr. Goldman’s question regarding statutory authority to address the bundling issue, the undersigned stated that (a) the primary request in this instance is to raise questions like that in the Notice so that parties may respond on the record, and (b) the Commission has ample statutory authority not only under “Title VI” provisions but also through incentive-based regulatory constructs whereby regulatory relief or Commission action sought by a distributor could be conditioned on actions designed to increase programming diversity.

Incorporating the proposed questions, attached, would send a positive signal to the independent programmer community and capital markets that the Commission indeed has a real commitment to preserve and promote independent programming and true programming diversity in ownership and content.

Respectfully submitted,

/s/

David Goodfriend

cc: David Goldman, Chief of Staff and Media Policy Adviser, Commissioner Mignon Clyburn

Attachment: Questions the Commission Should Ask in its Programming Diversity NPRM

**Questions the Commission Should Ask in its
Programming Diversity NPRM**

1. Should the Commission establish as a goal the survival of independent programmers in the pay-TV market and, if so, what policy actions would be required to achieve that goal?
 - a. Pivot, Poker Central, Al Jazeera America, and other independent programmers have shut down recently. Does this indicate a trend portending the end of independent programmers or a healthy market in which new independent programmers will start up to take the place of failed ones?
 - b. If survival of a material number of independent programmers is to be realized, what are the necessary, most effective policy options available to the Commission to achieve that goal? What about the introduction of new independent programming services, as opposed to the preservation of existing ones? Does that require a different set of policy options?
2. How should the Commission define “independent programmer?”
 - a. For purposes of our Program Access and Program Carriage rules, the Commission historically has defined “independent” to mean a programmer in which an MVPD does not have an attributable interest. This definition, however, would mean that programmers under common ownership with broadcasters (e.g., ESPN) or large media conglomerates (e.g., TNT) would be considered “independent programmers.”
 - b. Does the Commission’s current narrow definition of an independent programmer make sense in today’s media market? Does it help to promote diversity? Would the Commission better target any rules designed to increase diversity in the media market by excluding from the definition of “independent programmer” any programmer under common ownership with a broadcast licensee, broadcast network, or video programming vendor over a certain revenue threshold or other benchmark?
3. Should the Commission’s “diversity” goals expressly include racial, ethnic, religious, gender, sexual identity, and/or other demographic characteristics?
 - a. Should such diversity goals apply to network ownership, content, or both? If so, is there evidence of actual or de facto discrimination against minority-owned and/or minority-oriented independent programmers that would justify an express set-aside?
 - b. Under current law, are there sufficiently impactful race-neutral mechanisms for achieving such diversity goals?
 - c. Under current law, do contemporary market conditions reflecting a relative paucity of ownership diversity justify remedial action by the Commission?
4. Would a channel set-aside and non-discrimination requirement serve to increase programming diversity?
 - a. Congress and the Commission historically have used set-aside requirements to foster programming diversity in highly concentrated video markets, as demonstrated by the Direct Broadcast Satellite set-aside rule (4% of activated channel capacity used for noncommercial, educational channels) or the then-applicable financial syndication (“fin syn”) rule.
 - b. Does the highly concentrated multichannel video programming market and relative paucity of small, independent programmers merit the establishment of an express

channel set-aside for such programmers? If so, what would be an appropriate percentage of channel capacity? Would existing programming agreements, through their “force majeure” or other clauses, allow MVPDs to drop some non-independent programming services in order to meet an independent channel set-aside?

- c. What non-discrimination principles would have to be included in such a set-aside rule in order to make the rule effective? Would set-aside channels have to be made available on the most widely-penetrated programming tier, as is the case with the DBS set-aside? Would set-aside channels be subject to comparable rates, terms, and conditions? Would they appear on electronic program guides and programming search results in comparable fashion to other channels of the same genre? Would set-aside channels be accorded comparable treatment on an MVPD’s proprietary OTT platform as that of non-independent programmers?
- d. Would a programmer have to meet a threshold measure of viability, such as financial support, executive experience, audience, or other metric, in order to qualify for a set-aside?