Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 17-214
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF INSP, LLC

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Dated: November 9, 2017

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INSP, LLC ("INSP"), an independently-owned cable television network, submits these reply comments to address the immense challenges facing independent cable networks in the current video delivery marketplace.

The Media Bureau's Public Notice requests comment in order "to enhance [the Commission's] analysis of competitive conditions, better understand the implications for the American consumer, and provide a solid foundation for Commission policy making with respect to the delivery of video programming to consumers."[1] No such analysis would be complete without consideration of the industry conditions facing independent networks such as INSP.

INSP has previously addressed the marketplace challenges facing independent networks in its comments in other Commission proceedings, including MB Docket No. 16-41, the Commission rulemaking related to promotion of independent and diverse sources of video programming;[2] GN Docket No. 16-142, the rulemaking related to the proposed transition to the

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1 *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, 32 FCC Rcd. 6654 (2017) ("Notice") at ¶ 1.

2 Comments of INSP, LLC, filed January 26, 2017, in *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, MB Docket No. 16-41 (rel. October 2, 2016), https://www.fcc.gov/ecfs/filing/10126013185310.

ATSC 3.0 broadcast standard;[3] and most recently in MB Docket No. 17-105, the Commission's initiative regarding the modernization of media regulation.[4] In each of those proceedings, INSP made specific recommendations to the Commission about desperately needed regulatory reforms that would assist independent networks to survive in today's "broken" marketplace, which is described below. INSP incorporates its comments filed in those proceedings by reference into these comments and the record of this proceeding.

II. BACKGROUND REGARDING INSP

INSP is an independently-owned cable television network. Launched in 1990, INSP exhibits wholesome, family-friendly, adventure based general entertainment programming, which is watched and welcomed by millions of American families in an era when much of the video content available to them on television, in movie theaters and online continues to grow more and more coarse. INSP currently is distributed by all major cable and satellite distributors to a total of approximately 81 million homes. Moreover, because its demographics trend older, its viewers are often "cord-cuddlers" rather than "cord-cutters." Of even greater significance, INSP consistently ranks in the top 35 highest-rated networks measured by Nielsen in average weekly C3 ratings. Its ratings are strong, continuing to grow, and indeed are higher than many networks owned by major conglomerate programmers.

While INSP's admirable development reflects the quality, appeal and popularity of its programming, it also is due in part to the fact that INSP, since its inception, has been distributed

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[3] Reply Comments of INSP, LLC, filed June 8, 2017 in *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Notice of Proposed Rulemaking, GN Docket No. 16-142 (rel. Feb. 24, 2017), https://www.fcc.gov/ecfs/filing/1060843974351.

[4] Reply Comments of INSP, LLC filed August, 8, 2017 in Modernization of Media Regulation Initiative, Public Notice, MB Docket No. 17-105 (rel. May 18, 2017), https://ecfsapi.fcc.gov/file/1080416032453/INSP%20Reply%20Cmnts%20-%20FCC%20Mod%20Init%20(8-4-17).pdf

on a license fee-free basis. In this regard, being extremely popular with non-cord-cutting consumers and offered on a license-free basis makes INSP arguably one of the best bargains in cable today. Yet, even as a free and highly-rated service, INSP has encountered very significant challenges in achieving its current distribution. The fact is that conglomerate-owned networks retain significant advantages in securing distribution and preferred channel position, even though their carriage agreements require MVPDs to pay them significant license fees. Going forward, INSP will face even greater challenges in retaining its distribution, promoting further growth, and evolving to an economic model that will enable it to increase production of its own high-quality and differentiated programming. INSP therefore is representative of scores of independent video programmers that face similar hurdles and are struggling to survive in the current television marketplace.

III. MARKETPLACE CHALLENGES FACING INDEPENDENT PROGRAM NETWORKS

In its opening comments, NCTA states that the "diversity of content … has increased exponentially."[5] In a similar vein, the Free State Foundation asserts that "today's nationwide video market is fully and effectively competitive."[6] INSP respectfully disagrees.

The current multichannel television marketplace can be fairly described as "broken." On a daily basis, INSP sees behemoth conglomerate programmers such as Time Warner, Viacom and Disney consume an ever-growing share of capacity on the dominant MVPD platforms. Because of those conglomerates' ownership of "marquee" networks and their tremendous bargaining leverage, they have the ability to impose tying and bundling requirements on

[5] Comments of NCTA – The Internet and Television Association filed in Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 17-214, filed October 10, 2017 at 9.

[6] Comments of Free State Foundation filed in Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 17-214, filed October 10, 2017 at 1.

MVPDs, which enables a handful of media conglomerates to occupy the overwhelming majority of MVPDs' channel capacity, to the exclusion of independent cable networks.

The state of the current marketplace for independent and diverse programmers is one characterized by: (1) increasing consolidation among conglomerate programmers,[7] MVPDs, and broadcasters;[8] (2) conglomerate programmers' insistence that MVPDs carry numerous unwanted and underperforming channels as a condition to access to the programmers' marquee, must-have networks; (3) broadcasters' coercive use of retransmission consent rights to force carriage of their multicast channels and affiliated cable networks by MVPDs;[9] (4) the anticompetitive effect of most favored nations provisions ("MFNs"), which result in an independent network's worst terms becoming its standard terms for all of its distributors; and (5) a reluctance among certain MVPDs to launch, and fairly and non-discriminatorily compensate, independent networks.

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[7] INSP uses the term "conglomerate programmer" to mean (1) companies that own large numbers of cable networks, and (2) media companies that own or are affiliated with multiple cable television program networks or with broadcast television stations and/or broadcast television networks.

[8] Any doubt about the power of retransmission consent to coerce MVPDs to provide capacity for carriage of broadcasters' affiliated channels is dispelled by the recent performance of Tennis Channel following its acquisition by Sinclair Broadcasting. In the eighteen months following its acquisition, thanks to Sinclair's retransmission consent leverage, and in a time when "new" launches are almost impossible to secure, Tennis Channel is reported to have added approximately 15 million MVPD viewers that it was unable to garner prior to its acquisition by Sinclair – an increase in its viewer base of nearly fifty percent, and to have forecasted that it would add another ten million in 2017. *See* For Sinclair, Acquisition of Tennis Channel is Game, Set, Match (Dec. 21, 2016), at https://www.mediavillage.com/article/forsinclair-acquisition-of-tennis-channel-is-game-set-match/.

[9] For example, INSP's reply comments in GN Docket No. 16-142 expressed related concerns over the impact that the proposed ATSC 3.0 regulations could have on independent programmers' ability to compete in a marketplace in which programming conglomerates threaten to occupy all available MVPD channel capacity. INSP explained how adoption of the ATSC 3.0 standard by broadcasters could have grave consequences for independent cable television networks. It pointed out that many of those networks very likely will be squeezed off of, or denied fair and nondiscriminatory access to, MVPDs' linear platforms due to the increased amount of MVPD channel capacity that will be consumed by broadcasters' higher resolution 3.0 signals and by MVPDs being coerced by broadcasters, in retransmission consent negotiations, to simulcast broadcasters' duplicating 3.0 and 1.0 signals during a long transition period.

As an illustration of the rapid demise of independent networks, today, of the 251 television networks measured by comScore/Rentrak, 167 (65 percent) are owned by only eleven large media conglomerates, while only 90 (35 percent) of these networks are independents or owned by smaller companies.[10] The pending acquisition by Discovery Networks of Scripps Networks – including HGTV, Food Network and four other networks – will increase this consolidation even further.[11] Other deals are rumored to be on the horizon, presaging further industry consolidation.[12] Presently, ***nearly nine out of every ten television viewing hours*** are on the networks owned by these conglomerates, despite the fact that independents have stronger ratings than many of the conglomerates' lesser viewed networks.[13]

As the size of conglomerate programmers has continued to increase, the number of independent programmers has declined. For example, in 2016, two more independent networks, each with more than 50 Million subscribers – Al Jazeera America and Pivot – ceased operations. Industry analyst Kagan predicts these were just the "beginning of a new wave of cable network shutdowns."[14] This trend does not bode well for independents.

While it is true that alternative distribution media are increasing, the fact is that traditional television remains the dominant form of distribution for all demographic groups.

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[10] June 2017 SNL Kagan ownership data aggregated by INSP.

[11] *Discovery Communications to Acquire Scripps Networks Interactive for $14.6 Billion*, Discovery Communications Press Release, July 31, 2017, available at: https://corporate.discovery.com/discovery-newsroom/discovery-communications-to-acquire-scripps-networks-interactive-for-14-6-billion/.

[12] For example, as of the date of these Reply Comments, Disney is reported to be in talks to acquire 21st Century Fox, which owns a host of cable programming networks including FX, Fox News, Fox Sports 1 and Fox Sports Regional Networks. *See, e.g.*, Ben Fritz, Joe Flint, and Keach Hagey, *Disney Approached 21st Century Fox to Buy Entertainment Assets*, The Wall Street Journal, November 6, 2017, available at: https://www.wsj.com/articles/disney-held-talks-to-acquire-assets-of-21st-century-fox-1509994869.

[13] Sources: viewership data – comScore/Rentrak National TV Essentials, June 2017; network ownership data – SNL Kagan, *Economics of Basic Cable Networks* (2016 ed.). Data aggregated by INSP.

[14] SNL Kagan, *Economics of Basic Cable Networks* (2016 ed.), at 150.

Nielsen data reports that, in the first quarter of 2017, on average 4.55 hours per day were spent by the average adult with television (both live and time-shifted). This contrasts with only one hour for Internet on PC.[15] The stark reality is that alternative media may be increasing but still trail television as a market factor in the big scheme of things. In short, traditional linear distribution by MVPDs remains absolutely essential for INSP and other independents.

The Commission's existing regulations, and the Commission's enforcement of those rules, are inadequate to protect independent networks from discrimination. While the Commission's program carriage rules theoretically are intended to prohibit discrimination by MVPDs against unaffiliated programmers, the rules' vague and nebulous standard of proof, endless delays, and unbearably costly adjudicatory proceedings have made the rules useless in practice. MVPDs openly and blatantly discriminate against unaffiliated programmers every day with zero repercussions.

In 2016, the Commission appeared poised to adopt new regulations that would have provided some relief and given independent programmers an opportunity to compete on fair and nondiscriminatory terms. However, the rulemaking proceeding in MB Docket 16-41 has languished, with no sign that activity will resume – much to the continued detriment of independent program networks.

IV. RECOMMENDED ACTION

INSP respectfully requests that the Commission include in its Nineteenth Report on the Status of Competition in the Market for the Delivery of Video Programming information about the challenges facing independent program networks, including the data provided by INSP in these comments and in the incorporated prior submissions to the Commission. INSP further

[15] Source: Nielsen Total Audience Report for the first quarter of 2017.

suggests that the Commission should conclude that (1) the survival of independent cable networks is in jeopardy, (2) strengthening of the Commission's program carriage regulations, and enforcement of those regulations, is necessary to ensure that such networks receive fair and nondiscriminatory treatment by MVPDs, and (3) conglomerate programmers should be forbidden from using bundling and tying, and other unfair practices, to coerce MVPDs to carry unwanted channels or to afford conglomerates with preferential carriage terms that disadvantage independent networks.

Respectfully submitted,

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