

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

In the Matter of)
)
Promoting Innovation and Competition in the) MB Docket No. 14-261
Provision of Multichannel Video)
Programming Distribution Services)
)

REPLY COMMENTS OF THE TENNIS CHANNEL, INC.

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April 1, 2015

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The Tennis Channel, Inc. (“Tennis Channel”) submits these reply comments to address comments filed pursuant to the Notice of Proposed Rulemaking (“NPRM”) in this proceeding.¹

Online video distributors have the potential to provide constructive competition to traditional “multichannel video programming distributors” (“MVPDs”) and thereby to contribute to vibrant and healthy video distribution and programming marketplaces. If that goal is to be achieved, online distributors require access to high value content appealing to their target audiences. By permitting online distributors to avail themselves of protections against anticompetitive conduct under the program access and program carriage rules, the Commission would take important steps toward preventing incumbent MVPDs from denying nascent distributors access to the program services they need. Extension of the protections should not, however, be tied to the distribution formats or business models the Internet-based distributors employ: a wide array of differently designed online services have the potential to change the

¹ *In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking (rel. Dec. 19, 2014).

face of electronic content distribution, and there is no basis for permitting incumbent MVPDs to engage in anticompetitive conduct to disadvantage any of them.

The Commission should also address other very serious anticompetitive techniques that incumbent MVPDS can employ to hamper nascent online distributors. Thus, Tennis Channel urges the Commission to issue a further notice of proposed rulemaking designed to explore how contractual restrictions in affiliation agreements and related conduct can permit incumbent MVPDs to limit the distribution of programming to potential online competitors, and thereby frustrate the Commission’s pro-competitive goals, notwithstanding any expansion of the program access and program carriage rules.

The NPRM also seeks comment on whether certain regulations should be waived or modified to exempt Internet-based distributors from the “burdens” of regulation.² Whatever merit there may be to the views expressed by some commenting parties that certain rules applicable to MVPDs should not be applied to fledgling Internet-based distributors because they could stifle competition, Tennis Channel suggests that there can be no justifiable basis for waiving or suspending the portion of the program carriage rules prohibiting vertically integrated MVPDs, Internet-based or not, from discriminating against programmers for the illegitimate purpose of protecting their own programming interests.

I. Extending Program Access and Carriage Rule Protections To Subscription Linear Distributors Is a Step In The Right Direction But Is By Itself Insufficient

A number of commenting parties agree with the Commission that access to high quality content will be critical to online distributors’ ability to compete with incumbent MVPDs.³ No

² *Id.*

³ *Id.* ¶ 5; Comments of Verizon, MB No. 14-261 (March 3, 2015), at 5 (“Content remains the lifeblood of the video distribution marketplace; this is true for emerging competitors as well as (continued...)”)

commenting party has challenged the proposition that without unfettered access to content nascent Internet-based distributors “cannot survive even when there is overwhelming consumer demand.”⁴ Many commenters also believe that at present Internet distributors have difficulty securing “access to programming,” thereby creating “a crucial bottleneck in the online video industry.”⁵

To help clear this “bottleneck” and facilitate Internet distributors’ access to content, Tennis Channel and a number of other commenters have expressed support for extending the protections in the program access and program carriage rules to this new category of MVPDs.⁶ Congress specifically adopted (1) the program access framework, which entitles MVPDs to non-discriminatory access to a vertically integrated operator’s affiliated programming, and (2) provisions of the program carriage framework, which prohibit MVPDs from demanding

existing MVPDs.”); Comments of Pluto, Inc., MB No. 14-261 (March 3, 2015) (“Pluto TV Comments”), at 4-5 (explaining that its ability to “attract viewers and advertisers depends on its access to high quality third-party content, including cable-affiliated programming”); Comments of FilmOn X, LLC, MB No. 14-261 (March 3, 2015) (“FilmOn X Comments”), at 3.

⁴ Comments of the Consumer Federation of America, MB No. 14-261 (March 3, 2015), at 1.

⁵ *Id.*; *see also* Comments of ITTA - The Voice of Mid-Size Communications Companies (“ITTA”), MB No. 14-261 (March 3, 2015) (“ITTA Comments”), at 7 (“To preserve and promote competition in the video distribution marketplace, the Commission must ensure that its rules permit all MVPDs to obtain access to vertically integrated programming, including [regional sports networks], on reasonable terms and conditions. Without access to such programming, competitive providers cannot offer a meaningful alternative for consumers.”).

⁶ *See e.g.*, ITTA Comments, at 5 (“Extending the program access rules to additional entities that meet the definition of MVPD would allow those providers access to critical programming needed to attract and retain subscribers.”); Comments of Public Knowledge, MB No. 14-261 (March 3, 2015) (“Public Knowledge Comments”), at 20 (“By ensuring that online MVPDs are protected by Section 628 and its program access rules, the FCC would promote a marketplace where much the same programming is available through online MVPDs as through facilities-based MVPDs.”); Public Knowledge Comments, at 27-28 (“Similarly, the program carriage rules protect consumers’ right to benefit from diverse content, by preventing MVPDs from discriminating against programmers on the basis of their affiliation, or requiring a financial interest in the programming vendor, or requiring that the programmer withhold programming from competing MVPDs.”).

exclusivity from programmers as a condition of carriage, for the very purpose of protecting against the anticompetitive harm such bottlenecks can cause.⁷ And no commenting party suggests a public policy rationale for affording facilities-based MVPDs with protections against anticompetitive exclusivity provisions and non-discriminatory access to programming, but not affording those same protections to this generation’s new-technology competitors. While some argue against the need for the Commission’s intervention at all because they believe that the marketplace will evolve without regulation, Tennis Channel believes that a distribution marketplace without such intervention is not likely to achieve the Commission’s goals.

Indeed, Tennis Channel believes that the current proposal to extend the program access and carriage frameworks to certain online distributors does not go far enough. Thus, the Commission’s proposal to extend protections only to those Internet-based distributors that make available continuous, linear streams of video programming on a subscription basis (“Subscription Linear” distributors)—but not to other categories of online distributors that “also confront[] daily the challenges facing new entrants seeking to compete with entrenched legacy [MVPDs] for viewers, content and advertising”—misconceives the marketplace.⁸ Just as it is anomalous to extend key protections against anticompetitive conduct to facilities-based MVPDs, but not Subscription Linear distributors, it is likewise anomalous to extend these protections to Subscription Linear distributors, but not to other categories of online distributors (such as Subscription On-Demand, Transactional On-Demand, Ad-based Linear and On-Demand, and

⁷ See 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-1004; 47 U.S.C. § 536; 47 C.F.R. §§ 76.1300-1302.

⁸ Pluto TV Comments, at 1.

Transactional Linear distributors)⁹ that have the same potential to add to a diverse and competitive distribution marketplace.

In addition, the program access and carriage rules themselves do not fully address the threat of anticompetitive conduct to a vibrant Internet distribution sector. Incumbent MVPDs have available a broad array of techniques to restrict the ability or willingness of third-party program entities to do business with new entrants. For that reason, Tennis Channel urged the Commission to issue a further notice of proposed rulemaking leading to rules that target and eliminate the contract-based restrictions and other techniques that incumbent MVPDs use to hamper new entrants, even as the Commission moves forward now to extend the program access and carriage rule protections to Internet-based distributors. These techniques are discussed at length in Tennis Channel’s comments and therefore are not repeated here.¹⁰

Other commenting parties have echoed Tennis Channel’s concerns. For example, one commenter noted that some incumbent MVPDs insist on contractual terms of carriage with program entities that expressly prohibit them from distributing content to Internet distributors, while others use contract provisions that discourage such competition indirectly by creating financial incentives or penalties applicable to content providers that seek to make deals with Internet distributors.¹¹ And as others suggested, MVPDs are able to use most-favored nation clauses in programming contracts to prevent a programmer from entering into innovative

⁹ *NPRM*, at ¶ 13.

¹⁰ *See* Comments of Tennis Channel, MB No. 14-261 (March 3, 2015), at 7-10.

¹¹ Comments of Writers Guild of America, West, Inc. (“WGAW”), MB No. 14-261 (March 3, 2015) (“WGAW Comments”), at 6 (quoting Brian Stelter, *Gatekeepers of Cable TV Try to Stop Intel*, *The New York Times* (Jun. 12, 2013), <http://www.nytimes.com/2013/06/13/business/media/gatekeepers-of-cable-tv-try-to-stopintel.html>).

arrangements with online distributors.¹² These anticompetitive contractual terms should not be permitted to undermine the Commission's goals of facilitating a vibrant distribution marketplace.

To fully achieve its goals of increasing competition in the video marketplace,¹³ the Commission should issue a second notice of proposed rulemaking that seeks comment on these anticompetitive techniques and examines the ways in which they threaten the development of competitive new entrants.

II. Vertically Integrated Internet-Based MVPDs Should Not Be Exempted from the Statutory Prohibition Outlawing MVPD Discrimination Against Unaffiliated Program Entities

Several commenters have cautioned the Commission against applying regulations applicable to legacy MVPDs to the new Internet-based MVPDs out of fear they could stifle innovation and thereby handicap these new entrants in a rapidly evolving marketplace.¹⁴ There may be merit to the view that some of the rules that regulate MVPDs are technologically ill-suited for, or would stifle competition if applied to, Internet-based MVPDs, and Tennis Channel agrees that the Commission should review its rules and policies and seek to find ways to waive or suspend those that could have such an effect. Tennis Channel does not believe, however, that there is any justification for waiving or suspending the portion of the program carriage rules that prevents vertically integrated MVPDs—whether Internet-based or otherwise—from denying access to their distribution platforms so that they can protect their own programming businesses against unaffiliated competitors.¹⁵ This is especially true now that legacy vertically integrated

¹² See Public Knowledge Comments, at 21.

¹³ *NPRM*, at ¶¶ 4-5.

¹⁴ See, e.g., Pluto TV Comments, at 2; FilmOn X Comments, at 24-25; Comments of the Digital Media Association, MB No. 14-261 (March 3, 2015), at 1, 5; Comments of the Computer & Communications Industry Association, MB No. 14-261 (February 27, 2015), at 4.

¹⁵ 47 C.F.R. 76.1301(c).

MVPDs are themselves entering the Internet distribution marketplace with their own products and platforms. There is no sensible public policy reason for permitting them to use new platforms to damage competitors to their programming businesses any more than they should be free to do so on traditional platforms. The effect of such behavior is to damage the very programming marketplace that the Commission is seeking to nurture.

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