Before the
Federal Communications Commission
Washington, DC 20554

In the matter of Status of Competition in the Market for the Delivery of Video Programming	MB Docket No. 15-158

COMMENTS OF PUBLIC KNOWLEDGE

The shift to online video is well underway. But a technical shift of this kind isn't in itself a benefit to consumers. Most TV viewers don't care if they watch programming via IP or QAM. The question is whether online video will help bring about a video marketplace that offers more choice to consumers and lower prices, while creating opportunities for new voices and new creators that the cable model never allowed. The answer is still uncertain.

One reason the TV marketplace hasn't always delivered what viewers want at a price that's fair is, in part, technological in nature. It is difficult to compete when competition requires a local franchise, construction permits, digging up streets, or launching a fleet of satellites. The high fixed costs and natural monopoly tendencies of the TV distribution marketplaces created problems that could only be managed, not solved, through regulation.

Online video has the potential to fix that. With lower barriers to entry, without the need to replicate the entire cable bundle, and with the ability to offer new kinds of video services, online video providers have an easier path to market, to the benefit of consumers. Online video's true value isn't that it will supplant traditional cable and satellite TV—those platforms have technological advantages, efficiencies, and scale enough to ensure they will be around for a while. Rather, the promise of online video is that new entrants in the video marketplace can introduce enough competition to force even the old guard to adapt.

Attempts by incumbent programmers and TV distributors to slow down online video have not only failed, they may have backfired. Due to high prices for content and inflexible bundles, many viewers have cut the cord (or have avoided ever being pay TV customers). Programmers may find that restricting their programming to high-dollar pay TV bundles, while profitable in the short term, is counterproductive in the long term: it both contributes to piracy while making some programming simply irrelevant to younger viewers. Cable companies may find themselves losing TV subscribers and unable to make up the lost revenue via broadband.

On the other hand, incumbents still have the willingness and the ability to slow competition, and to leverage their current advantages to ensure that they will retain their competitive advantage online. To forestall this, the Commission should take policy steps to ensure that the shift to online video brings about a fundamentally more competitive video marketplace.

Separate Comments on Video Devices

Public Knowledge has joined separate comments that have been filed in this docket with other members of the Consumer Video Choice Coalition that stress the importance of device choice to video and broadband competition and other issues. PK believes that the Commission's understanding of the state of video competition would be improved by a better understanding of the uncompetitive video device market, and that promoting more video device choice would improve both MVPD and online video competition.

General Observations on Data

The Public Notice requests that commenters provide empirical data as to the current state of the video industry. A data-driven understanding of the industry is necessary to formulate good public policies. In its most recent MVPD Competition Report, the Commission described the data sources it relied on as follows:

> The information and data presented in this Report are based, in part, on comments we received from interested parties in response to the notice of inquiry in this proceeding. In addition, we also rely on a variety of publicly available sources of industry information and data including: Securities and Exchange Commission filings; data from trade association and government entities; data from securities analysts and other research companies and consultants; company news releases and websites; newspaper and periodical articles; scholarly publications; vendor product releases; white papers; and various public Commission filings, decisions, reports, and data.[1]

Unfortunately, most of the most accurate data is held by companies with an interest in these policies, and since disclosures in this context appear to be voluntary, any data they turn over must be assumed to be strategic. Outside of companies themselves, private research firms often have the best picture of the current state of the industry—though their information is generally proprietary, and expensive. (There are of course exceptions, such as Pew—but this is the general trend.) Additionally, much of the public information on the state of the video industry comes from sell-side financial analysts, a profession known to sometimes have difficulties with conflicts of interest.[2] In fact, most of the best public information about companies and the state of various industries does not come from

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[1] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 14-16, Sixteenth Report, 30 FCC Rcd. 3253, ¶ 14 (2015).

[2] See, e.g., Securities and Exchange Commission, Press Release, *Ten of Nation's Top Investment Firms Settle Enforcement Actions Involving Conflicts of Interest Between Research and Investment Banking* (April 28, 2003); Lawrence D. Brown, Andrew C. Call, Michael B. Clement, & Nathan Y. Sharp, Inside the 'Black Box' of Sell-Side Financial Analysts (October 28, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228373.

private analysts and research firms or voluntary disclosures, but from the mandatory disclosures made by public companies to the SEC—disclosures that must be accurate, under penalty of law. This is similar to how some of the FCC's best broadband data comes not through voluntary public disclosures in public proceedings, but through mandatory Form 477 disclosures. The Commission should therefore consider whether it would be more appropriate for it to require that the companies it regulates turn over the information it needs and attest to its accuracy.

Video Competition and the Open Internet

The FCC's Open Internet rules do much to preserve the competitive potential of online video, and thus the video marketplace more broadly. However, a number of behaviors are not clearly prohibited by the Commission's rules. While actions such as the discriminatory use of data caps or abusive interconnection practices may violate the Commission's general conduct standard, in the absence of bright-line rules, current and potential video competition could be chilled. The record in the Comcast/Time Warner Cable merger proceeding provides just one place where organizations with a direct stake in these issues provided ample evidence that broadband practices such as interconnection are intimately connected to video competition.[3]

While in this proceeding, PK is not offering policy advice on broadband practices, the recent commitment by Charter Communications[4] to operate its interconnection activities in a nondiscriminatory way shows that there is a path forward on issues of this

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[3] E.g., Reply to Opposition to Petition to Deny of DISH, MB Docket No. 14-57, at 12 (December 22, 2014).
[4] *See* Letter from Charter Communications to FCC, July 15, 2015, *available at* http://apps.fcc.gov/ecfs/document/view?id=60001115477.

kind. When considering the *why* of the video marketplace, rather than just the *what*, the Commission should consider to what extent it can further refine its Open Internet policies to better address the challenges faced by online video.

Market Power Issues

When individual broadband and cable providers gain too much control of the nationwide marketplace, the consequences of their actions become all the more significant. For example, if a large broadband provider demands unfairly high interconnection fees from an online video provider, the provider might have no choice but to pay them or be prevented from delivering adequate service to a significant part of its customer base; by contrast, a smaller broadband provider does not have the ability to extract anticompetitive concessions. This issue plays out outside of the broadband pipe, as well. PK has spoken to numerous smaller content providers and programmers who have expressed frustration at contractual terms offered by larger MVPDs. Large MVPDs can prevent video programmers from distributing content online, or only under restrictive windowing conditions, and can extract "discounts" that have no basis in cost efficiencies and are derived entirely from the MVPD's bargaining power. Additionally, when large MVPDs do things like restrict their customers' ability to access "authenticated" content on the devices of their choice,[5] or when they offer their customers set-top boxes that do not allow them to access the online video options of their choice, they can harm competition to a worrying degree.

The use of "most favored nation" (MFNs) and "alternative distribution method" clauses in programming contracts is an area of great concern. As the Second Circuit

[5] For a more in-depth description of authentication, *see* Comments of Roku in GN 14-28 (July 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=752148133.

recently explained, "though surely proper in many contexts, [MFNs] can be 'misused to anticompetitive ends in some cases.'" United States v. Apple, 791 F.3d 290, 319 (2nd Cir. 2015) (citing Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir.1995)). Where, as appears likely to be the case in the TV market, MFNs are used to restrict new entry, they merit at least a careful examination by the Commission to determine if they are being used anticompetitively.

Regulatory Constraints on Competition

The Commission deserves great credit for some of its recent work in clearing away "regulatory underbrush"—rules that were adopted in response to market conditions that no longer apply, and that ended up having the effect of slowing the development of the video marketplace and protecting incumbents. Rules like the sports blackout rule, network nonduplication, and syndicated exclusivity serve primarily to give certain media companies an FCC "rocket docket" to enforce their privately-negotiated rights. The FCC's actions should provide added flexibility to the video marketplace that can help it evolve into a more consumer-friendly state.

However, there is more work to be done. The Commission's rules go further than is necessary, for instance, in creating "basic tier buy-through" obligations, which prevent viewers from slimming down their cable bundles by deciding not to pay for programming they can already receive, for free, over the air. The Commission's regulation implementing the buy-through requirement states that "Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming."[6] This means that all cable subscribers are required to buy the basic tier, and that broadcast stations may not be offered à la carte by cable systems.

However, the buy-through requirements in the statute itself apply only to cable systems for which there is no effective competition: the basic tier itself is defined as the "basic tier subject to rate regulation," and the prohibition on buy-through of other tiers is found in subsection (b) of 47 U.S.C. § 543, which pursuant to 47 U.S.C. §§ 543(a)(2) and (a)(2)(A) may only be used to regulate the rates of cable systems not subject to effective competition. Yet the Commission's implementation in 47 CFR § 76.920 has no such limitation. (A related provision, 47 CFR § 76.921, does.)

The Commission's reasoning in applying the buy-through prohibition to all video subscribers, not just subscribers of systems that do not face effective competition, was based on reading the basic tier regulation provisions in the context of must-carry rules. The Commission reasoned, agreeing with the National Association of Broadcasters, that since all cable systems must "provide" their subscribers with must-carry stations,[7] and because must-carry stations are part of the basic tier, that all cable customers must subscribe to the basic tier.[8]

However, this analysis was flawed. While it is true that cable systems in markets not subject to effective competition may not offer a version of the basic tier that consists only of must-carry stations, but are required to offer a basic tier that meets the "minimum

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[6] 47 CFR § 76.920.
[7] 47 U.S.C. § 534.
[8] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, *Report and Order and Further Notice Of Proposed Rulemaking*, 8 FCC Rcd 5631, ¶¶ 164-66 (1993).

contents" described in the statute, there is no such statutory requirement as to systems for which there is effective competition. Thus, even accepting the (debatable) interpretation that for a cable system to "provide" a must-carry station, all its customers must actually subscribe to it, there is no reason why customers in markets that are subject to effective competition should be required to pay for stations that elect retransmission consent, instead of simply using an antenna.

Additionally, even as to markets that are not subject to effective competition, the Commission should take note of how the market for retransmission of broadcast stations has changed since the early 1990s. When the 1992 Cable Act was passed, cable systems carried broadcast stations for free (paying only a statutory copyright license to the programmers, but not to the broadcaster itself). In that context, it was a reasonable consumer protection measure to make sure that cable systems offered those programs to their customers on a standalone basis, and did not require that subscribers first pay for access to premium programming to gain access to broadcast programming with their cable subscribers. But due to the provisions of the 1992 Act itself, the market has changed, and local broadcast stations now command a premium price from cable operators—a price which is ultimately paid by consumers. Given that digital broadcast television is available to many viewers for free, in HD quality, with the purchase of a low-cost antenna,[9] it makes no sense to *require* that customers pay for that programming with their cable subscriptions—

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[9] In fact, the Commission's buy-through rules have stymied the development of set-top boxes that seamlessly integrate over-the-air broadcast signals with cable programming—there is no reason for cable operators to offer such boxes given that all of their customers are required to pay for broadcast programming over cable anyway.

though of course they should be free to do so.[10] In addition to finding that buy-through requirements do not apply to cable systems for which there is effective competition, the Commission should use the statute's waiver provision[11] to find that the buy-through requirements do not apply even to cable systems for which there is no effective competition. While there are reasonable differences of opinion as to whether public policy should *require* that cable systems offer programming à la carte, it is absurd that Commission regulations, unsupported by a sound reading of the statute, currently *prohibit* it with regard to broadcast stations. For these reasons, the Commission should, at most, require only that consumers purchase a tier containing must-carry stations, not all broadcast stations.

Additionally, the Commission has not yet acted on its proposal to update its interpretation of the term "multichannel video programming distributor" to better reflect Congressional intent and promote competition.[12] As PK has explained before, allowing new entrants to benefit from the same protections that past new entrants (such as telco TV providers and DBS) relied on is a straightforward and time-tested way to improve the state of video competition.

Conclusion

The Commissipon has recently undertaken a number of positive steps with respect to the video marketplace, though in several areas it should do more. The annual video

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[10] Of course, customers should not be required to pay for any programming they don't want. It is simply particularly egregious when that same programming is available to them for free, sometimes in even higher quality than the often-compressed signals available via cable.
[11] 47 U.S.C. § 543(b)(8)(C).
[12] See Comments of Public Knowledge in MB 14-261 (March 3, 2015).

competition reports can be a valuable tool to help the Commission understand marketplace trends, but the variable quality of data available suggest the Commission should rely less on voluntary disclosures and better employ its powers as a regulator to obtain complete and accurate information on the state of the industry.

Respectfully Submitted,

/s John Bergmayer
Senior Staff Attorney
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