

Before the Federal Communications Commission

In the matter of:

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<i>Notice of Inquiry on the Challenges</i>	}	MB Docket 16-41
<i>Independent Programmers Face</i>	}	
	}	

Comments of Common Cause
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Todd O'Boyle
Program Director
Common Cause

Rod Bauer
Fellow
Common Cause

Introduction

Programming diversity is a core public interest value. Common Cause¹ appreciates this opportunity to offer comment on the Commission's *Notice of Inquiry on the Challenges Independent Programmers Face*. We take a broad view of "diversity," which includes means ethnic, linguistic, and viewpoint diversity. Each of these aspects of diversity - and others - contributes to a more inclusive social discourse and, thus, a better informed electorate. A diverse programming environment also creates opportunities for traditionally marginalized communities to tell their own stories.

Changing market dynamics have significantly altered the landscape for independent programmers and thus make diversity a timely topic of inquiry. On the one hand, creeping consolidation in the multichannel video programming distributor (MVPD) space has increased distributor leverage in carriage negotiations, and threatened the business viability of many independent programmers. Smaller, niche, and diverse programmers have disproportionately suffered from increased MVPD scale.

Meanwhile, video programming is in the midst of a widely-recognized creative renaissance that offers tremendous new opportunities for creators and consumers alike. Over The Top (OTT) delivery, in particular, offers a unique opportunity to disrupt the status quo. However, the Commission must take care to ensure entrenched interests do not subvert - or otherwise foreclose - beneficent OTT innovation. Moreover, it should ask questions about whether its current policy regime adequately safeguards independent, diverse, niche, and minority-language programmers.

Market structure and contractual impediments to programming diversity

Historically, independent programmers have faced numerous challenges in the marketplace in obtaining carriage for their video programming. Many of these challenges have been exacerbated by factors including, by not limited to, MVPD consolidations, which have tended to reduce the presence of local, minority, and innovative voices in the cable landscape.

MVPD consolidation has have given distributors leverage in negotiating for distribution rights, which, when coupled with in-house content that competes directly with independent programmers, may unfairly hinder programmers in carriage negotiations, securing distribution rights, obtaining fair prices for content. Distributor-owned content may also reduce overall content production.²

¹ Common Cause is a nonpartisan grassroots organization dedicated to upholding the core values of American democracy, with more than 400,000 members in all 50 states. We work to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process. Because a vibrant communications ecosystem is essential to full participation in civic society, Common Cause advocates for strong public interest protections.

² See, e.g. ex parte letter from beIN SPORTS, MB Docket No. 14-57, at 3 (filed January 26, 2015), noting that even when beIN SPORTS offers competitive cash bids for U.S. distribution rights, large MVPDs can secure rights based solely on the tier placement of competing, proprietary sports channels; *Petition to Deny of Entravision Communications Corporation*, MB Docket No. 15-149, ex parte at 11 (filed October 13, 2015), arguing the

Large MVPDs have at times employed MFN and ADM clauses that intentionally or coincidentally have reduced the opportunities for carriage for diverse programmers.³ “Most favored nation” (MFN) clauses in programming deals typically entitle cable and satellite ops to receive the same or similar terms and conditions that content providers extend to others.⁴

Clauses that restrict the ability of a programmer to distribute content via a non-MVPD distribution method, such as an online platform, called “alternative distribution method” (ADM), have limited innovation in what otherwise would be a rapidly changing media environment that include numerous emerging OTT programmers. While we take no categorical position on the appropriateness of MFNs and ADMs with regard to the public interest, we note that clauses restricting alternate delivery over the top may keep diverse, independent, and minority-language content creators off of OTT platforms. Such a situation would not only deny viewers important sources of diversity, it could serve to exacerbate existing inequalities within the programming industry.

Public Educational and Governmental channels

Public Access Educational and Governmental (PEG) channel operators provide an important source of diverse, local content. They have often historically struggled to get information about accessibility, channel names or program names and descriptions into the channel guide⁵. The Commission should consider how a changing market landscape impacts PEG.

alternations in a dominant distributor’s market power diminishes its need to pay competitive prices and, in the short run, may result in less overall output and, subsequently, less production of the affected good. Also, because there are less input goods purchased and those that are purchased receive a lower price, over time, the input market shrinks and there is less incentive for those manufacturers to produce, innovate, or invest.

³ See, e.g., *Ex Parte Letter* from The Tennis Channel, MB Docket No. 14-261, at 1 (filed November 6, 2015), noting The Tennis Channel’s claim that the most-favored nation provisions have a pervasively deleterious effect on innovation and prevent the development of new and innovative over-the-top services; *Petition to Deny of Public Knowledge and Open Technology Institute*, MB Docket No. 14-57, at 42 (Aug. 25, 2014), arguing that MFNs limit the ability of independent programmers to preserve competition and foster new forms of distribution; *ReelzChannel Ex Parte* at 2, noting ReelzChannel’s argument that certain practices or proposals with respect to independent non-broadcast networks, including unconditional MFN provisions, will reduce competition, innovation and diversity of voices, to the detriment of consumers; see also *Ex Parte Letter* from Al Jazeera America, MB Docket No. 14-261, at 2 (filed Oct. 7, 2015), noting Al Jazeera America’s claim that the economic consequences of and limitations on innovation imposed by most-favored nation provisions frustrate the Commission’s goals of achieving a competitive, diverse and innovative system of content networks responsive to the needs of a U.S. audience. NB: Since it filed its ex parte submission, Al Jazeera America has announced that it is ceasing operations. Mike Farrell, *Al Jazeera America to Shut Down* (Jan. 13, 2016), <http://www.multichannel.com/news/networks/al-jazeera-america-shut-down/396526>.

⁴ See, e.g., *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, 30 FCC Rcd 9131, 9218–19, para. 228 (July 28, 2015). MFN rights can be conditional or unconditional. A conditional MFN provision entitles a distributor to certain contractual rights that the programmer has granted to another distributor, as long as the distributor also accepts equivalent or related terms and conditions contained in that other distributor’s agreement. An unconditional MFN provision, by contrast, contains no such requirement that the distributor entitled to MFN rights accept equivalent or related terms and conditions; it can elect to incorporate in its agreement any of the terms of the other distributor’s agreement that it wants to incorporate. *Id.* at 9219, n.655.

⁵ See, e.g. Reply Comments of Montgomery County, MB Docket 12-108, at 8 (March 20, 2014).

Conclusion

Large media companies are more likely to have the resources to push back against some of the challenging demands and contractual obligations from MVPDs. But too often the small, local, emerging, or minority programmer is forced to accept unfavorable terms, reducing ethnic and viewpoint diversity and undercutting the voices of historically marginalized groups. Other independent programmers may face the unpalatable decision to accept carriage on unsavory terms, or sell out to a larger programming conglomerate, gaining scale at the expense of independence.

Over The Top distribution offers an important pressure-valve for programmers who cannot get carriage on favorable terms. But just as important, OTT offers a tremendous boon to audiences who would like an alternative to the traditional linear programming bundle. It allows them to connect more directly to the content of their choosing. Creators, in turn, may be exploring exciting new thematic material that might have been thought too risky under the traditional regime. This flowering of creativity offer will only persist if the Commission takes care to prevent traditional cable gatekeepers from foreclosing on OTT's potential.