Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

In the Matter of	)	
	)	
Promoting the Availability of Diverse and	)	MB Docket No. 16-41
Independent Sources of Video Programming	)	

To: The Commission

COMMENTS OF UNIVISION COMMUNICATIONS INC.

Univision Communications Inc. ("Univision") submits these comments in response to the Notice of Inquiry (the "NOI") in the captioned proceeding.[1] The Commission seeks input on the state of the marketplace for independent video programming and, more particularly, on the challenges facing independent video programmers in securing carriage by multichannel video programming distributors ("MVPDs") sufficient to provide the scale required for them to emerge and compete with both larger and vertically integrated programmers.[2]

Univision's comments focus on two key issues raised in the NOI: *first,* the critical importance of independent programmers in serving the needs, interests and concerns of historically underserved minority communities and, *second*, the harmful effects on competition and innovation of the increasingly expansive most-favored nation clauses ("MFNs") frequently required by MVPDs in their affiliation negotiations with independent programmers.

I. UNIVISION UNIQUELY SERVES THE NEEDS, INTERESTS AND CONCERNS OF HISTORICALLY UNDERSERVED COMMUNITIES.

Univision is a leading independent programmer offering a suite of program networks serving Hispanic viewers, including the Univision and UniMás networks broadcast by

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[1] Promoting the Availability of Diverse and Independent Sources of Video Programming, Notice of Inquiry, FCC 16-19 (rel. Feb. 18, 2016).

Univision's owned-and-operated television stations and independently-owned television station affiliates; Galavisión, the most popular Spanish-language cable network in the United States; and Univision Deportes Network, the most watched Spanish-language sports network.[3] Through its ongoing investment in the acquisition and production of high-quality content, including award-winning news and informational programming, and devoting substantial resources to a wide range of public service and community empowerment initiatives serving Latinos, Univision has become the most recognized and trusted brand in the U.S. Hispanic community.

Univision plays a unique role in both the U.S. media marketplace and the U.S. Hispanic community. The Univision broadcast network has informed, entertained and empowered generations of U.S. Hispanics and is now one of the top five networks in any language. And Univision's deep engagement with its viewers enables it to provide critical support to underserved and sometimes vulnerable communities, from facilitating access to educational services and healthcare to fostering civic engagement, such as Univision's 2016 voter registration efforts.

In recent years, Univision has also brought other communities within the scope of its fundamental mission to inform, entertain and empower. For example, in 2013, Univision, in partnership with The Walt Disney Company, launched Fusion, a television and digital network featuring news and lifestyle content serving English-speaking, multicultural millennials, with a goal of reflecting and promoting a culture of inclusion — embracing not only young, English-

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[2] *Id.* at 2 (¶ 2).

[3] Univision also owns 59 full-power, Class A, and low-power television stations across the United States, most of which are affiliates of its Univision and UniMás broadcast networks. Univision also owns and operates 67 Spanish-language radio stations covering 75 percent of the U.S. Hispanic population and reaching more than 15 million listeners per week. Univision's local television and radio stations and their employees are part of the fabric of the U.S. Hispanic community.

speaking Hispanics, but also other communities of color and the LGBT community. Then, in May 2015, Univision acquired The Root, a leading digital network for news and commentary directed to the African-American community. Meanwhile, Univision has developed services such as Flama, an English-language digital network targeting an audience interested in Latin culture, and is a strategic investor in El Rey Network, an English-language cable network developed by filmmaker Robert Rodriguez that targets both Latinos and culturally diverse viewers.

Univision also has been recognized as a diversity leader in the media industry. The company employs more than 3,000 Hispanics in the United States. Minorities comprise 80 percent of the company's overall workforce and 98 percent of Univision's total production employee base. Meanwhile, as the number of hours of programming produced domestically by Univision continues to grow — to more than 22,000 hours per year of national and local news, sports and entertainment programming — it is creating additional opportunities for U.S. multicultural producers, writers and talent.

Univision competes for content, viewers, advertisers and employees with a wide variety of entities, including vertically integrated programming services such as the Telemundo Network (owned by Comcast) and other Spanish-language cable and satellite-delivered news and entertainment networks such as CNN en Español, ESPN Deportes, Fox Deportes, and Discovery en Español, the latter of which may become an affiliate of Charter Communications, Inc. if the merger among Charter, Time Warner Cable and Bright House Networks is approved.[4]

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[4] *See* Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 14-57.

Moreover, because a majority of Hispanics in the United States are bilingual, Univision's competition is not limited to Spanish-language service. Thus, Univision competes not only with Telemundo, but also with NBC. Nor is Univision's competition limited to traditional forms of media and entertainment. For example, Univision competes against Internet portals such as Google, Yahoo! (which also has Spanish-language portals in the United States), and AOL (now owned by Verizon), and streaming sites such as Hulu and Netflix, all of which have vast resources to develop their own content, while their extensive online presence ensures that their content reaches consumers.

Significantly, although Univision offers a suite of networks serving a range of interests and tastes — all focused on addressing the needs and interests of multicultural communities — many MVPDs do not carry all of these networks, even though they are highly valued by the communities they serve. For example, two of the nation's largest MVPDs do not carry Fusion, and another two do not carry El Rey Network. One does not carry Univision's Foro network, which provides U.S. Latinos with news from Mexico.[5] Simply stated, and in contrast to MVPDs' allegations that programmers bundle their network offerings in order to extract unreasonable carriage terms,[6] Univision does not have the power to require MVPDs to carry its entire suite of networks.

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[5] Persons of Mexican ancestry account for approximately 65 percent of the total U.S. Hispanic population. *See* Ana Gonzalez-Barrera & Mark Hugo Lopez, *A Demographic Portrait of Mexican-Origin Hispanics in the United States*, Pew Research Ctr. (May 1, 2013), http://www.pewhispanic.org/2013/05/01/a-demographic-portrait-of-mexican-origin-hispanics-in-the-united-states.

[6] *See, e.g.*, Comments of Cablevision Systems Corporation at 8, Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test, MB Docket No. 15-216 (filed Dec. 1, 2015); Comments of Charter Communications Inc. at 5-6, Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test, MB Docket No. 15-216 (filed Dec. 1, 2015); Comments of Time Warner Cable Inc. at 18-22, Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test, MB Docket No. 15-216 (filed Dec. 1, 2015).

II. INDEPENDENT PROGRAMMERS ARE CRITICAL TO MAINTAINING DIVERSITY IN THE VIDEO PROGRAMMING MARKET.

Over the past few years, the MVPD sector has become increasingly concentrated, just as it has undergone, and is continuing to undergo, significant horizontal consolidation and vertical integration.[7] This has given cable and satellite behemoths a dominant role in the media marketplace. One not need look too far for proof: the top five MVPDs — namely, AT&T/DirecTV, Comcast/NBCU, DISH Network, Verizon/AOL and, if their merger is consummated, the Charter/Time Warner/Bright House entity (which will be affiliated with Discovery Networks) — collectively serve 85 million video subscribers (representing approximately 85 percent of pay-TV households in the United States)[8] and have an aggregate market capitalization of more than $700 *billion*.[9]

Although the consolidation of programming and distribution outlets hampers the ability of all independent programmers to gain carriage, it has a disproportionate impact on

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[7] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Sixteenth Report, 30 FCC Rcd. 3253 (¶ 34) (2015) ("Sixteenth Video Competition Report") (finding that 98 national networks are affiliated with the top five cable MVPDs and 62 national networks are affiliated with a satellite MVPD); Press Release, AT&T Inc., AT&T Completes Acquisition of DIRECTV (July 24, 2015), http://about.att.com/story/att_completes_acquisition_of_directv.html; Press Release, Comcast Corp., Comcast and GE Complete Transaction to Form NBCUniversal, LLC (Jan. 29, 2011), http://corporate.comcast.com/comcast-voices/comcast-and-ge-complete-transaction-to-form-nbcuniversal-llc-2.

[8] *See* Mike Farrell, *Eat or Be Eaten: Consolidation Creates a Top-Heavy List of 25 Largest MVPDs*, Multichannel News (Aug. 17, 2015), http://www.multichannel.com/sites/default/files/public/pdf/Coverstory_8_17_15_0.pdf.

[9] *See AT&T, Inc.*, Yahoo! Finance, http://finance.yahoo.com/q?s=T (last visited Mar. 28, 2016) (showing AT&T with a market capitalization of $239.90 billion); *Comcast Corporation*, Yahoo! Finance, http://finance.yahoo.com/q?s=CMCSA (last visited Mar. 28, 2016) (showing Comcast with a market capitalization of $146.54 billion); *Dish Network Corp.*, Yahoo! Finance, http://finance.yahoo.com/q?s=DISH (last visited Mar. 28, 2016) (showing DISH Network with a market capitalization of $22.15 billion); *Verizon Communications Inc.*, Yahoo! Finance, http://finance.yahoo.com/q?s=VZ (last visited Mar. 28, 2016) (showing Verizon with a market capitalization of $218.12 billion); *Charter Communications, Inc.*, Yahoo! Finance, http://finance.yahoo.com/q?s=CHTR (last visited Mar. 28, 2016) (showing Charter with a market capitalization of $22.37 billion); *Time Warner Inc.*, Yahoo! Finance, http://finance.yahoo.com/q?s=TWX (last visited Mar. 28, 2016) (showing Time Warner with a market capitalization of $57.18 billion). Because Bright House is a private company (and, therefore, does not have publicly traded stocks), the combined market capitalization of the top five MVPDs after the consummation of the Charter-Time Warner-Bright House merger will be even greater than the figure cited above.

programmers whose economic and cultural purpose is tied to offering programming directed toward minority and other historically underserved communities.[10] Given its mission to serve precisely these viewers, Univision understands the value of cultivating a video programming marketplace that is reflective of the multiplicity of voices found throughout the country. Hispanic Americans — who comprise Univision's historical core audience — currently make up approximately 18 percent of the U.S. population, a figure that is projected to rise to nearly 25 percent by 2065.[11] The shift toward multiculturalism will not be attributable to an increase in the Hispanic population alone, however; indeed, the U.S. African American and Asian American communities similarly are predicted to grow over the next fifty years.[12]

These demographic changes will make it imperative from both a business and a social perspective for independent programmers to gain distribution for programming that serves a racially and ethnically diverse audience. Failure to obtain carriage results in the loss not only of subscriber fees, but also of potential advertising revenue for program services that are advertiser-supported, which includes all of the networks in the Univision portfolio. Accordingly, it is critically important for independent programmers, especially those that cater to historically underserved communities across cultural and ethnic groups, to be able to achieve distribution to allow them to continue to reach viewers today and in the future. The public interest demands no less.

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[10] *See* Reply Comments of Free Press at 9, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269 (filed Aug. 28, 2009).

[11] *See* D'Vera Cohn, *Future Immigration Will Change the Face of America by 2065*, Pew Research Ctr. (Oct. 5, 2015), http://www.pewresearch.org/fact-tank/2015/10/05/future-immigration-will-change-the-face-of-america-by-2065.

[12] *See id*.

III. BROAD AND UNCONDITIONAL MFNS IN AFFILIATION AGREEMENTS ARE HARMFUL TO COMPETITION AND DIMINISH INNOVATION.

The Communications Act assigns to the Commission an affirmative obligation to promote a video programming marketplace that is marked by robust competition and technological innovation.[13] The largest MVPDs' requirements and demands for increasingly expansive MFNs as a condition of carriage pose a significant threat to both of these objectives.

While MFNs are common in commercial contracts and may be appropriate in certain limited circumstances, the courts have found that these provisions can be "misused to anticompetitive ends in some cases."[14] This is because an MFN, by its very purpose, entitles a contracting party to modify the terms of its agreement to take advantage of more favorable terms to which its counterparty has agreed with an unrelated third party — often a competitor.

In the pay TV and online video context, MFN provisions allow an MVPD to take advantage of a provision that a competing MVPD or online video distributor negotiated with a programmer, often to the detriment of both the competitor and the programmer. Large MVPDs that have substantial market power can induce independent programmers to agree to MFNs by leveraging their size and promising programmers access — or continued access — to a large and desirable subscriber base.[15] Moreover, generally the scope of an MFN provision is substantially tied to an MVPD's size and market power and the programmer's lack thereof: the larger the MVPD and the smaller the network in terms of distribution, the more expansive the required MFN, and the more restrictive that MFN will be on both the programmer's business and the

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[13] *See* 47 U.S.C. § 257(b).

[14] *United States v. Apple*, 791 F.3d 290, 320 (2d Cir. 2015) (quoting *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995)).

[15] *See* Reply Comments of Media Access Project and Public Knowledge at 10, Revision of the Commission's Program Carriage Rules, MB Docket No. 11-131 (filed Jan. 11, 2012).

MVPDs' competitors. That means that the independent networks whose purpose is to open up access to underserved communities will likely be shut out from expanding access on new platforms because of such MFN handcuffs. Given the proliferation of MFNs in affiliation agreements, concessions made by a programmer to one MVPD also are likely to cause a "domino effect in the programmers' contracts [with] other MVPDs."[16]

In recent years, and especially noteworthy given the pace of consolidation among MVPDs, the scope of MFNs demanded during negotiations has expanded significantly. For example, while economic MFNs always have been common, lengthy lists of economic and unconditional non-economic terms now are the norm with large MVPDs (sometimes including MFNs on MFNs, which assure an MVPD that it will always have the most favorable MFN). Further, with the advent of new distribution platforms and new business models (*e.g.*, Netflix, Hulu), some MVPDs require that all distributors of a programmer's content, regardless of business model, be taken into account for MFN purposes. Such expansive protections fundamentally require that, instead of exploring new types of creative, innovative deals for new entrants, programmers force new competitors into traditional business models and consumer offerings, precisely in order not to nullify the terms and conditions they negotiated with the largest MVPDs.[17]

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[16] *Id.* at 11.

[17] *See The Future of Video: Hearing Before the Subcomm. on Commc'ns & Tech. of the Comm. on Energy and Commerce*, 112th Cong. 43 (2012) (statement of Gigi B. Sohn, President, Public Knowledge) (noting that "while it's unlawful for incumbent providers to behave anticompetitively towards each other, they are free to keep their content away from online services, and to use exclusionary contracts and 'most favored nation' clauses to limit the online distribution of independent programming").

Thus, faced with growing competition from over-the-top ("OTT") distribution models and with their gatekeeper role diminishing,[18] MVPDs use MFNs to reinforce their market position artificially by, for example, effectively prohibiting a programmer from granting advantageous conditions to a new OTT entrant with a relatively small subscriber base, or effectively preventing a programmer from making its programming more widely available on an on-demand basis.[19] As a result, potential market entry may be foreclosed and new business models stifled, with a net negative impact on both competition and innovation.

This fundamental competitive problem becomes even more acute where the MFN is "unconditional," meaning that it enables the MVPD to "cherry pick" provisions in an affiliation agreement between the programmer and another distributor without taking on any of the other distributor's reciprocal obligations.[20] Affiliation agreements typically are heavily negotiated, and their terms are the product of the parties' mutual trades and compromises. Giving MVPDs the power to coopt contractual terms from other deals at will without having to incur any of the attendant transactional costs or deliver any additional value to the programmer

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[18] *See* Sixteenth Video Competition Report ¶ 83 (explaining that "[a]lthough MVPDs may consider other MVPDs their foremost rivals, MVPDs increasingly compete with OVDs for viewing time, subscription revenue, and advertising revenue" and that "[i]ndividual consumers may perceive OVDs as a substitute, a supplement, and a complement to their MVPD video service").

[19] *See, e.g.*, Petition to Deny of Public Knowledge, Common Cause, Consumers Union, and Open Mic at 13, Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership For Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 15-149 (filed Oct. 13, 2015); Comments of the Tennis Channel, Inc. at 8, Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261 (filed Mar. 13, 2015); Ex Parte Letter from Stephen A. Weiswasser & Gerard J. Waldron, Covington & Burling LLP, to Marlene Dortch, Sec'y, Fed. Commc'ns Comm'n 1, Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261 (Nov. 6, 2015); Ex Parte Letter from Stephen A. Weiswasser & Gerard J. Waldron, Covington & Burling LLP, to Marlene Dortch, Sec'y, Fed. Commc'ns Comm'n 2, Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261 (Oct. 7, 2015).

[20] *Ex Parte* Letter from F. William LeBeau, Holland & Knight LLP, to Marlene Dortch, Sec'y, Fed. Commc'ns Comm'n 2, Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90 (July 30, 2014).

quite literally deprives the programmer of the benefit of its initial bargain.[21] What is more, unconditional MFNs are effectively "self-enforcing:" out of fear of stepping outside the bounds of the MFN, a programmer is likely to refuse to grant certain terms to competing distributors, notwithstanding the fact that the terms may be better suited to the deal at hand.

The chilling effect of such broad, unconditional MFNs is obvious: during negotiation of any given deal, a programmer must examine each term of the deal individually to determine whether it is more favorable to a competing distributor than the comparable term is to the incumbent. If a term arguably is more favorable (and therefore would have to be offered to the incumbent under the MFN), the programmer must determine whether extending that term to the incumbent would be detrimental to its business. If it would be, then the MFN has effectively foreclosed the programmer's ability to offer the term to the competing distributor.

MVPDs also use MFNs to acquire visibility into other distributors' agreements. Particularly when MFNs reach distribution platforms and business models that the incumbents do not use today, they provide incumbents with visibility into not only their actual competitors' agreements, but their potential future competitors' agreements as well.

CONCLUSION

The Commission is required under the Communications Act to "seek to promote . . . policies and purposes . . . favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[22] In service of this obligation, the Commission should ensure that all independent programmers,

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[21] *See* Comments of TheBlaze Inc. at 9, Application of Comcast Corp. and Time Warner Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57 (filed Aug. 25, 2014).

[22] 47 U.S.C. § 257(b).

especially those targeting minority and other underserved audiences, have access to the widest possible distribution on non-discriminatory terms and conditions.

Respectfully submitted,

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