BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

COMMENTS OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

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Comcast Corporation ("Comcast") and NBCUniversal Media, LLC ("NBCUniversal") hereby respond to the above-captioned Notice of Inquiry.[1]

I. INTRODUCTION AND SUMMARY

For producers and consumers of video programming, it is the best of times. Any claim that it is also somehow the worst of times should be viewed with great skepticism. The NOI acknowledges – and the Commission's own video competition reports document – that content creators have more distribution outlets than ever before, that video competition is more robust than ever before, and that there is more programming available to consumers on "multiple competing platforms" than ever before. The quantity and quality of diverse, high-quality content from numerous sources – the vast majority of which are "independent" under the NOI's definition – are greater than ever before, and consumers are increasingly able to access that content anytime, anywhere, and on a growing array of devices. Programming networks and MVPDs have played an important role in bringing about and sustaining this "Golden Age of Television," built on decades of substantial private investment and successful private

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

negotiations between creators and networks and between networks and distributors. Comcast and NBCUniversal both provide robust platforms for independent and diverse content to flourish. But it is also important to note that, in today's marketplace, many content creators are reaching consumers via new pathways that bypass MVPDs and even traditional "networks" altogether.

Regrettably, the NOI still strains to see a glass half-empty, when in fact the glass is overflowing. The NOI does not fully appreciate these important marketplace dynamics, and instead focuses on "traditional . . . [MVPD] carriage" and then raises extraneous issues it deems "market obstacles" to such carriage. These range from pro-consumer contractual provisions in programming agreements, to routine programming bundling arrangements, to whether MVPDs offer sufficient financial support for PEG programming information to be included in programming guides. The NOI then asks how it can address these perceived "market obstacles" through "regulatory tools."

Yet, in this ultra-competitive environment, there is less reason than ever for governmental oversight or intrusion in the marketplace, or for singling out particular types of program carriage contractual provisions for scrutiny. It is a mystery why the Commission is focused on particular contractual provisions as if they are somehow imposed from on high and exert a gravitational pull on the marketplace, when instead these provisions are the product of an overall exchange of valuable consideration among sophisticated negotiators and have been used to help the current ecosystem grow and adapt and have evolved along with it. Given the strong and variegated flow of programming from content creators to consumers across numerous outlets, there is no marketplace evidence that such provisions have any negative effect on programming distribution or on the carriage of independent programming.

The other asserted "market obstacles" suffer a similar flaw; practices such as the bundling of multiple networks for a discounted price, the setting of a programmer's penetration level of carriage, or even defining how programming guides are populated with third-party programming data, are not "market obstacles," but the product of ordinary marketplace give-and-take in a complex, competitive, and highly dynamic ecosystem.

Notably, the First Amendment receives only a fleeting mention in the NOI; it deserves more attention. A governmental inquiry about particular classes of programming – especially one with regulatory expansion in mind – should be especially conscious of First Amendment strictures and tread lightly in this area. In all events, even setting aside likely First Amendment pitfalls, the proposal raised in the NOI of utilizing either Section 257 or Section 616 of the Act to adopt new regulations designed to benefit certain programmers would not withstand judicial scrutiny.[2]

[2] It is curious that, while the Commission is initiating this dialogue on independent and diverse programming, it is simultaneously rushing forward with a rulemaking that many independent and diverse programmers and content creators have explained would undermine the availability of such content. The Commission's recent navigation device proposal would give third parties access to this programming without any obligation to compensate programmers or adhere to carefully negotiated licensing terms in programming agreements such as a channel position and advertising. *See Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18 (Feb. 18, 2016). Numerous programmers have shared their concerns that the proposed rules would threaten the economic model that supports independent and diverse programming, and could allow third parties to relegate these networks to the "farthest reaches of the program guide" or to decline to carry them at all. *See, e.g.*, Alfred Liggins, *Protecting Consumer Choice, Not Special Interests, in Video*, The Tennessean (Dec. 3, 2015), http://www.tennessean.com/story/opinion/contributors/2015/12/03/protecting-consumer-choice-not-special-interests-video/76744898/; Press Release, Future of TV Coalition, 18 Independent Content Creators Join Chorus of Programmers in Opposing AllVid (Feb. 18, 2016), http://futureoftv.com/news-item/17-independent-content-creators-join-chorus-of-programmers-in-opposing-allvid/; Letter from Michael Schwimmer, CEO, Fuse Media, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-64 (Jan. 21, 2016); Letter from Rob Rader, General Counsel, Ovation LLC, to FCC Chairman and Commissioners, MB Docket No. 15-64 (Feb. 11, 2016); Letter from Ignacio Sanz de Acedo, CEO & General Manager, ¡HOLA! TV, to FCC Chairman Tom Wheeler, MB Docket No. 15-64 (Feb. 3, 2016); *see also* Letter from Multicultural Media, Telecom, and Internet Council (MMTC) et al., to FCC Chairman Tom Wheeler, MB Docket No. 15-64 (Feb. 11, 2016).

II. CREATORS AND PROGRAM NETWORKS PROVIDING INDEPENDENT AND DIVERSE CONTENT HAVE MORE WAYS TO REACH CONSUMERS THAN EVER BEFORE.

The video programming marketplace is coming close to embodying the mythological horn of plenty. Consumers have never had as many choices – not only choice of programming, but choice of outlets, and choice of devices – than they have today. As analyst Bruce Leichtman noted at the Commission's Workshop on the State of the Video Marketplace, "When we look at the video marketplace, what we see is businesses and business models adapting and innovating in this evolutionary environment. And we also see that consumers have more options and more choices than they've ever had before."[3] This time of abundance is also marked by significant change; in fact, the change is part of what is driving the abundance, although the decades of successful private negotiations and investment have built a still-strong model of value creation for all marketplace players.

The marketplace is so robust and diverse, in fact, that industry critics now spend intellectual capital wondering, as the *New York Times* recently posed the question, "Is There Too Much TV to Choose From?" One critic observed: "The quantity of fancy, expensive television is growing exponentially; the size of the total potential audience and the number of hours in the day in which they can watch are not." Another worried that "the diversity of offerings while catering to a diversity of tastes has also produced a splintering of experiences. I'm finding that even people who seem very much like me are watching different shows than I do."[4] The merits

[3] Bruce Leichtman, President and Principal Analyst, Leichtman Research Group, Workshop on the State of the Video Marketplace at 54:12 (Mar. 21, 2016).

[4] Room for Debate, *Is There Too Much TV to Choose From?*, N.Y. Times (Sept. 28, 2015), http://www nytimes.com/roomfordebate/2015/09/28/is-there-too-much-tv-to-choose-from (featuring contributions from, *inter alia*, Robert Thompson and Barry Schwartz, quoted here).

of these concerns aside, such philosophical musings about the video programming marketplace are only possible in an age of unparalleled abundance and diversity.

A. Distribution Opportunities Have Skyrocketed over the Past Decade, Both on MVPDs and on an Ever-Increasing Number of Online Platforms.

Translating a great idea into a program accessible by audiences around the country and around the globe has never been easier than it is today. Decades ago, a content creator who wanted to reach consumers across the country had to be able to sell her idea to one of three major broadcast networks. As cable television and the multichannel marketplace evolved, that same creator had the chance to sell her idea to one of a handful of broadcast networks or a dozen, then a few dozen, and now hundreds of cable networks. Today, 99 percent of consumers can choose from three or more MVPDs, and some consumers have access to as many as five MVPDs, each offering access to hundreds of networks and tens of thousands of programs.[5] With the flourishing of the Internet as a means to consume video programming, a content creator can reach viewers directly and need not even deal with a network. Netflix has vastly more paying customers (over 43 million domestically) than the largest MVPD (AT&T/DirecTV, with 25 million); Google's YouTube has four billion views per day. According to SNL Kagan, an estimated 9.2 million households rely on over-the-top delivery to view TV shows and movies in lieu of an MVPD service, and that number is expected to grow to as many as 12.9 million (10.3 percent of households) by 2019.[6] There simply are no distribution gatekeepers, or any distribution bottlenecks, preventing creators from reaching consumers.

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5 *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd. 3253, ¶ 31 & n.71 (2015) ("*Sixteenth Video Competition Report*").

6 *See* Ian Olgeirson, *Online Substitution Pressures Multichannel, Mitigated by Influence of VSP Skinny Packages*, SNL Kagan (Nov. 20, 2015), https://www.snl.com/InteractiveX/article.aspx?ID=34481378. In SNL Kagan's analysis, the number of households relying solely on over-the-top subscriptions does not include subscribers to "virtual [multichannel] providers," such as Sling TV and PlayStation Vue. *Id.*

The cable industry, which created and sustained the market for niche content, continues to offer consumers incredibly robust programming options and the best showcase for diverse and independent content via cable bundles. While that model is healthy today, it is also evolving as technology and competition evolve. Meanwhile, online video distributors ("OVDs") like Netflix, Amazon, Hulu, Sling TV, and Google provide a vast and growing array of programming choices – and opportunities for content creators to distribute their programming to tens of millions of customers. And MVPDs have continued to reimagine their offerings, building their own vast video-on-demand libraries, bringing TV Everywhere to their customers, and offering additional packaging choices.[7] There is widespread consensus that television continues to enjoy a "Golden Age."[8]

There is no lack of opportunity for independent and diverse programmers[9] on traditional multichannel outlets. Over the past 24 years, while the channel capacity for MVPDs has increased tenfold from approximately 30 channels[10] to 300 or more channels,[11] vertical

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7 *See Sixteenth Video Competition Report* ¶¶ 71-88.

8 *See* Tom Wheeler, Chairman, FCC, Workshop on the State of the Video Marketplace at 01:20 (Mar. 21, 2016), https://www fcc.gov/news-events/events/2016/03/workshop-state-video-marketplace ("I am old enough to have been around for both golden ages of television. . . . But having now lived through both golden ages, there is no doubt in my mind that this golden age is better."); David Carr, *Barely Keeping Up in TV's New Golden Age*, N.Y. Times (Mar. 9, 2014), http://www nytimes.com/2014/03/10/business/media/fenced-in-by-televisions-excess-of-excellence.html?_r=0; *see also* Christine Persaud, *The Golden Age of Television Reigns on with These 10 Highly Anticipated New TV* Series, Digital Trends (Feb. 27, 2016), http://www.digitaltrends.com/movies/the-10-most-anticipated-new-tv-shows-in-2016/; Julie Liesse, *How Cable's New Golden Age of Content is Changing the Game*, Advert. Age (May 1, 2015), http://adage.com/lookbook/article/cable-broadcast/cable-s-golden-age-content-changing-game/298363/; Marcus Wohlsen, *When TV Is Obsolete, TV Shows Will Enter Their Real Golden Era*, Wired.com (May 15, 2014), http://www.wired.com/2014/05/real-golden-age-television/.

9 The NOI defines independent programmer as "one that is not vertically integrated with a[n] MVPD" for purposes of the inquiry. NOI at n.4. Unless otherwise stated (*see*, *e.g.*, *infra*, Section II.B.1), that is how these comments use the term.

10 *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd. 7442, ¶ 20 (1994) ("*First Video Competition Report*") (noting that nearly 97 percent of cable operators had the capacity to provide 30 or more channels).

11 "DirecTV offers over 2,000 digital video and audio channels including approximately 200 basic entertainment channels, approximately 50 premium movie channels, over 60 regional and specialty sports networks,

integration has plummeted and independent and diverse programming has exploded.[12] From 1994 to 2014, the number of national programming networks increased from just over 120 to more than 900,[13] and the overwhelming majority of these networks are not affiliated with cable operators. At the time the Cable Act was passed in 1992, 57 percent of national cable networks – 39 of only 68 – were affiliated with a cable operator.[14] Today, only about 11 percent of national cable networks – 98 out of 900 – are affiliated with a cable operator.[15] Moreover, of the top 20 national cable networks by average 24-hour ratings, only two are affiliated with a top-five cable operator.[16]

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over 120 Spanish-language and other foreign language special interest channels, and over 195 HD channels." *Sixteenth Video Competition Report* ¶ 112. "Dish Network offers 3,100 standard definition and HD channels including more than 280 basic video channels (which include 25 regional sports channels and 70 channels of pay-per-view content), 70 Sirius Satellite Radio music channels, 30 premium movie channels, 10 specialty sports channels, and 300 Latino and international channels." *Id.* ¶ 113. "Verizon FiOS TV offers five television plans ranging from FiOS TV Local with local channels, to Ultimate HD with 385 all-digital channels. AT&T U-verse TV also offers five television plans ranging from U-basic with local channels, to U450 with 470 channels. Both Verizon FiOS and AT&T U-verse offer additional premium movie, sports, and international channel packages." *Id.* ¶ 122.

12 *See First Video Competition Report* ¶¶ 161-162 (finding 53 percent of programming services integrated with a cable operator, with 12 of the top 15 most-watched services according to prime-time rankings vertically integrated). In contrast, the *Sixteenth Video Competition Report* found 98 national programming networks affiliated with a cable operator – or 11 percent – and noted "only one of the top 20 most viewed cable networks are owned by cable operators." *See Sixteenth Video Competition Report* ¶ 34; *infra* note 16.

13 *See* NCTA, Industry Data, https://www ncta.com/industry-data (last visited Mar. 23, 2016) (citing FCC Video Competition and industry data); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd. 2060, ¶ 150 (1995).

14 *See* H.R. Rep. No. 102-628, at 41 (1992).

15 At last count, there were 98 national programming networks affiliated with a cable operator (down from 127 networks in 2012). *Sixteenth Video Competition Report* ¶¶ 34, 39; *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd. 10496, ¶ 39 (2013). This number will drop further if the proposed acquisition of Cablevision by Altice is approved.

16 USA Network (affiliated with Comcast) and AMC (affiliated with Cablevision) are the two national programming networks in the top 20 by average 24-hour ratings affiliated with a top-five cable operator. *See* SNL Kagan, *Economics of Basic Cable Networks*, 61-64 (Dec. 2014) https://www.snl.com/interactivex/NewslettersDetails.aspx?ID=30186803&FID=26559744&RID=&PRName=&KeyDocID=1&KeyOnlineService=129; *see also Sixteenth Video Competition Report*, App. B, tbl. B-1 (listing national video programming services affiliated with one or more MPVDs). By average prime-time rating, three of the top 20 national programming networks are affiliated with a top-five cable operator (USA Network and SyFy with Comcast, and AMC with Cablevision). *See* SNL Kagan, *Cable Network Ratings & TVHH Delivery, Total Day & Prime Time*, (Oct. 2014), https://www.snl.com/Interactivex/doc.aspx?id=29584873&IOP=1. AMC will no longer be affiliated with a cable operator if the proposed acquisition of Cablevision by Altice is approved.

And while vertical integration has plummeted, robust competition among MVPDs has skyrocketed, further benefitting independent and diverse programmers. There are more opportunities than ever before for independent and diverse programmers to obtain carriage on MVPD systems, though the competition for carriage has increased as well in light of the explosion of independent programmers. The largest MVPD (AT&T/DirecTV) now serves over 25 million customers,[17] leaving a programmer the opportunity to be carried by MVPDs serving 75 million pay TV households even if the largest chooses not to carry the programmer. In fact, numerous programmers have launched their networks and continue to be viable solely based on carriage by one or two MVPDs.

These competitive dynamics have driven significant increases in the quality and diversity of programming. More than ever, broadcast and cable networks are investing substantially in highly praised original programming, which provides a "cinematic experience in terms of the sheer quality of the content."[18] AMC, for example, once carried classic movies, but now delivers award-winning original shows like "Better Call Saul" and "The Walking Dead." Starz invested almost $250 million in original programming last year, and plans to increase annual production of original shows to 80 to 90 episodes, up from about 75 last year.[19] Viacom has announced that it has added an entirely new night of original programming on VH1, doubled its capacity for

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[17] *See* AT&T Inc., Annual Report (Form 10-K), at 6 (Feb. 18, 2016), http://www.sec.gov/Archives/edgar/data/732717/000073271716000147/ye15_10k.htm.

[18] *See* Mark Hughes, *How Cable's Emmy Wins Signal the Future of Television Programming*, Forbes (Sept. 23, 2013), http://www forbes.com/sites/markhughes/2013/09/23/how-cables-emmy-wins-signal-the-future-of-television-programming/; *see also* Julie Liesse, *How Cable's New Golden Age of Content is Changing the Game*, Advert. Age (May 1, 2015), http://adage.com/lookbook/article/cable-broadcast/cable-s-golden-age-content-changing-game/298363/.

[19] *See* Lucas Shaw & Michaela Ross, *Netflix's $5 Billion Budget Sets Off an Arms Race in Cable*, MSN (Mar. 2, 2016), http://www msn.com/en-us/money/technologyinvesting/netflix%E2%80%99s-dollar5-billion-budget-sets-off-an-arms-race-in-cable/ar-BBqfzaT?li=BBnbfcN.

animation at Nickelodeon, and will air more events on networks like BET.[20] Cable programmers offered nearly *five times* more original series in 2015 than in 2002.[21] And broadcast networks, "once relied on repeats and reality shows to get through the summer, but are now moving toward year-round original scripted programming."[22] There were a record 409 scripted series across broadcast networks, cable networks, and OVD services in 2015, a *94 percent increase* from the 211 such series just six years earlier.[23]

At the same time, more than 115 over-the-top video services exist in the United States.[24] Online video accounted for 41.5 percent of consumer Internet traffic in North America in 2009[25] – a large number even then – but it accounted for a staggering 73.3 percent of such traffic in 2014.[26] By 2019, online video is expected to account for 83 percent of all U.S. Internet traffic.[27] An estimated 61 million households regularly watch television or movies online today,

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20 *See id.*

21 *See* Jethro Nededog, *This Chart Shows the Number of TV Shows Hit a 'Staggering' New High in* 2015, Bus. Insider (Dec. 16, 2015), http://www.businessinsider.com/number-of-scripted-tv-shows-2015-12.

22 *See* Sarah Barry James, *Choosing Between Netflix Dollars and Ratings Declines*, SNL Kagan (Dec. 11, 2014), https://www.snl.com/interactivex/article.aspx?id=30134019&KPLT=6.

23 *See* Lisa de Moraes, *FX Study: Record 409 Scripted Series on TV in 2015*, Deadline (Dec. 16, 2015), http://deadline.com/2015/12/tv-study-record-number-scripted-series-fx-1201668200/.

24 SNL Kagan, U.S. OTT Entities (Nov. 19, 2015), https://www.snl.com/interactivex/doc.aspx?id=34583376&IOP=1.

25 *See* Cisco, Visual Networking Index 10-14 (2010), http://large.stanford.edu/courses/2010/ph240/abdul-kafi1/docs/white_paper_c11-481360.pdf (946 PB/month Internet video traffic (video to TV and video to PC) out of a total 2,279 PB/month Internet traffic).

26 *See* Cisco, Visual Networking Index 9-11 (2015), http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.pdf (6,535 PB/month Internet video out of a total 8,911 PB/month Internet traffic).

27 *See* Cisco, VNI Forecast Highlights, http://www.cisco.com/c/en/us/solutions/service-provider/visual-networking-index-vni/vni-forecast html (last visited Mar. 23, 2016).

accounting for 50 percent of all U.S. households,[28] and 84 percent of millennials engage in at least some online video consumption.[29]

With this growth trajectory, OVDs are emerging as a potential source of new distribution opportunities, for established programmers and new ones alike. Today, OVDs offer content to customers on both a live and an on-demand basis,[30] including programming traditionally only available from an MVPD. For example, in March 2015 Sony launched PlayStation Vue, a live streaming service that allows consumers to stream over 85 channels, including NBC, CBS, Fox, and Discovery.[31] Sony recently announced a nationwide rollout of new packages.[32] Dish launched Sling TV in February 2015.[33] Priced at $20 per month, its core package includes more than sixty-five live channels, including ESPN, plus optional extra packages.[34] Sling TV is projected to have two million subscribers by year-end 2016.[35] While the offerings on these distribution outlets are not nearly as robust as those offered by traditional MVPDs, they are a potential source of distribution for diverse and independent programmers.

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28 *See* Ian Olgeirson, *Online Substitution Pressures Multichannel, Mitigated by Influence of VSP Skinny Packages*, SNL Kagan (Nov. 20, 2015), https://www.snl.com/InteractiveX/article.aspx?ID=34481378.

29 Horowitz, State of Cable & Digital Media 2015 3.

30 *See, e.g.*, *Sixteenth Video Competition Report* ¶¶ 213-241.

31 *See Economics of Mobile Programming*, SNL Kagan (June 1, 2015), https://www.snl.com/interactivex/article.aspx?id=32824505; Iyel Rakel Cabanilla, *Sony Expands PlayStation Vue to Los Angeles, San Francisco*, SNL Kagan (June 16, 2015), https://www.snl.com/interactivex/article.aspx?id=32985491.

32 *See* Eric Lempel, *PlayStation Vue Goes Nationwide, Starting at $29.99 in New Markets*, PlayStation.Blog (Mar. 14, 2016), http://blog.us.playstation.com/2016/03/14/playstation-vue-goes-nationwide-starting-at-29-99-in-new-markets/.

33 *See* Todd Spangler, *Dish's Sling TV to Add AMC to $20 Monthly Internet Package, Launches Nationwide*, Variety (Feb. 9, 2015), http://variety.com/2015/digital/news/dishs-sling-tv-to-add-amc-to-20-monthly-internet-package-launches-nationwide-1201428588/.

34 *See id.*; Sling Television, https://www.sling.com/ (last visited Mar. 24, 2016).

35 *See* Kristofer Wouk, *Sling TV May Hit 2 Million Subscribers By Year's End*, Digital Trends (Jan. 15, 2016), http://www.digitaltrends.com/home-theater/sling-tv-2-million-subscribers-by-years-end/.

A large and growing number of studios, broadcast networks, sports leagues, and programming networks now are also offering their own standalone online video services. CBS All Access, launched in October 2014, allows subscribers, for $5.99 per month, to stream more than 7,500 episodes of CBS shows and provides certain live programming in markets served by CBS owned-and-operated stations.[36] Showtime likewise recently launched a standalone service.[37] CBS projects 4 million subscribers for Showtime and CBS All Access by 2020.[38] And HBO's standalone service, HBO Now, is nearing one million subscribers.[39] Other recently-launched services include Viacom's Noggin, a channel aimed at preschoolers,[40] Univision NOW, which provides live broadcasts of the Univision and UniMas networks and offers on-demand access to primetime shows,[41] and NBCUniversal's SeeSo, a new streaming comedy channel offering original and library TV and film content for $3.99 per month.[42] As Amazon recently put it, "competition and innovation in all sectors of the video content and distribution industry, including 'over the top' ('OTT') services, today is vibrant and growing, with many companies

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[36] *See* Lauren Moraski, *CBS Launches Expansive Digital Subscription Service*, CBS News (Oct. 16, 2014), http://www.cbsnews.com/news/cbs-launches-digital-subscription-service-cbs-all-access; Peter Leitzinger & Robin Flynn, *CBS' OTT Service, Possible Aereo Reclassification and the Live Streaming of TV Stations*, SNL Kagan (Oct. 30, 2014), https://www.snl.com/interactivex/article.aspx?id=29619858; CBS All Access, http://www.cbs.com/all-access (last visited Mar. 23, 2016).

[37] *See* Mikolo Ilas, *Showtime OTT Service Goes Live*, SNL Kagan (July 7, 2015), https://www.snl.com/interactivex/article.aspx?id=33173947.

[38] *See id.*; Cynthia Littleton, *CBS Predicts 8 Million Subscribers for CBS All Access and Showtime Streaming Services by 2020*, Variety (Mar. 15, 2016), http://variety.com/2016/tv/news/cbs-all-access-showtime-8-million-subscribers-1201730792/.

[39] *See* Christopher Palmeri, *Time Warner Says HBO Now Service Nears 1 Million Subscribers*, Bloomberg Bus. (Mar. 8, 2016), http://www.bloomberg.com/news/articles/2016-03-08/time-warner-says-hbo-now-service-nearing-1-million-subscribers.

[40] *See* Deborah Yao, *Examining the Multitude of OTT Services*, SNL Kagan (Mar. 19, 2015), https://www.snl.com/interactivex/article.aspx?id=31775211.

[41] *See* Todd Spangler, *Univision Launches Live Subscription-Video Service, Univision Now*, Variety (Nov. 18, 2015), http://variety.com/2015/digital/news/univision-now-live-streaming-subscription-1201643429/.

[42] *See* SeeSo, https://www.seeso.com/ (last visited Mar. 23, 2016).

offering content through multiple devices and delivery technologies and investing in high-quality programming, all to the benefit of consumers."[43]

As Media Bureau Chief Lake has observed,[44] OVDs are also increasingly competing with traditional networks by investing billions of dollars annually to develop popular, critically-acclaimed original content – creating even more opportunities for independent producers of programming. Netflix announced a budget of $5 billion to add to an original programming slate that currently includes hits such as "House of Cards," "Orange is the New Black," "Master of None," and "Unbreakable Kimmy Schmidt" (the latter two produced and licensed by NBCUniversal).[45] Amazon's original series have won "Best TV Comedy" at the Golden Globes

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43 *See* Letter from Gerard J. Waldron, Covington & Burling LLP, Counsel for Amazon.com Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-261, at 1 (Nov. 5, 2015); *see also* Comments of Walt Disney Company et al., MB Docket No. 14-261, at ii, 17 (Mar. 3, 2015) ("Market forces have successfully driven the creation of new digital business models in response to consumer demand. . . . [I]mposition of additional regulation may limit, rather than increase, the opportunity for consumers to obtain their desired video programming in a myriad of new ways"); Comments of Discovery Communications, LLC, MB Docket No. 14-261, at 5, 15-16 (Mar. 3, 2015) ("In the absence of regulation, options for watching video content online are emerging rapidly. Consumer choice in video sources is at an all-time high; viewers have at their disposal a wide variety of programming, including exclusive programming that is unavailable on MVPDs"; "Unaffiliated programmers will have full leeway to decide based upon their business judgment whether to distribute their linear channel over the Internet, and also have discretion to reject or embrace any particular OVD as a content licensee").

44 *See* William Lake, Media Bureau Chief, FCC, Workshop on the State of the Video Marketplace (Mar. 21, 2016), https://www fcc.gov/news-events/events/2016/03/workshop-state-video-marketplace ("Online video providers discovered that their direct relationships with their subscribers gave them a way to distribute original programming, bypassing the traditional distribution channels. And some OVDs are putting together linear programming bundles which position them to be substitutes, not merely complements, to traditional pay TV services. Emmy nominations, once the exclusive territory of broadcast networks, were invaded first by cable channels such as HBO and now by the online providers, with Netflix and Amazon receiving a total of 46 nominations in 2015."); *see also* Mark Fratrik, Senior Vice President, BIA/Kelsey, Workshop on the State of the Video Marketplace at 248:23 (Mar. 21, 2016), https://www.fcc.gov/news-events/events/2016/03/workshop-state-video-marketplace ("This original programming is meeting consumers' demands that may not be available on the other programming networks. So it seems to me that the investment in original content and its success is a strong indicator of a future success as well as an increase in program diversity. . . . It's very encouraging . . .).

45 *See* Lucas Shaw & Michaela Ross, *Netflix's $5 Billion Budget Sets Off an Arms Race in Cable*, MSN (Mar. 2, 2016), http://www msn.com/en-us/money/technologyinvesting/netflix%E2%80%99s-dollar5-billion-budget-sets-off-an-arms-race-in-cable/ar-BBqfzaT?li=BBnbfcN.

two years in a row.[46] Netflix and Amazon earned a combined 46 Primetime Emmy nominations and five wins in 2015,[47] and at the 2016 Golden Globes, Netflix had eight nominations.[48]

Many of these series have been so successful that MVPDs have licensed them for on-demand viewing by MVPD customers after they have premiered online.[49] But the reverse is also true. Programming that already aired on cable networks has become some of the most popular content on Netflix, Hulu, and Amazon due in part to carriage and promotion of the original airing of that programming on MVPD platforms. And creators such as Aziz Ansari, Chelsea Handler, Adam Sandler, and Mindy Kaling, after first building an audience through exposure on network programming, have developed their own content for Netflix and Hulu. As *Fortune* explained, in this new world "ruled by personalization and convenience, there's more room for once-niche offerings."[50]

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[46] "Mozart in the Jungle" took home the award in 2016, and "Transparent," a series about a transgender woman, won in 2015. *See* Hayley Cuccinello, *At 2016 Golden Globes, Amazon Wins Best TV Comedy, But Netflix Goes Home Empty-Handed*, Forbes (Jan. 10, 2016), http://www.forbes.com/sites/hayleycuccinello/2016/01/10/at-2016-golden-globes-amazon-wins-best-tv-comedy-but-netflix-goes-home-empty-handed/#14fe1e14368a; *see also* Yvonne Villarreal, *Once an Underdog, Hulu is Becoming a Player in the Streaming World*, L.A. Times (Dec. 23, 2015), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-hulu-lookback-20151223-story html; Troy Dreier, *Amazon Increasing Original Program Budget to Compete with Netflix*, Streaming Media (June 18, 2015), http://www.streamingmedia.com/Articles/News/Online-Video-News/Amazon-Increasing-Original-Program-Budget-to-Compete-With-Netflix-104718.aspx.

[47] *See* Rae Votta, *Streaming Titans Amazon and Netflix Win Big at 2015 Emmys*, The Daily Dot (Sept. 20, 2015), http://www.dailydot.com/entertainment/emmys-2015-winners-amazon-netflix/.

[48] *See* Hayley Cuccinello, *At 2016 Golden Globes, Amazon Wins Best TV Comedy, But Netflix Goes Home Empty-Handed*, Forbes (Jan. 10, 2016), http://www forbes.com/sites/hayleycuccinello/2016/01/10/at-2016-golden-globes-amazon-wins-best-tv-comedy-but-netflix-goes-home-empty-handed/#14fe1e14368a.

[49] *See* Liam Boluk, *The State and Future of Netflix v. HBO in 2015*, Redef (Mar. 5, 2015), http://redef.com/original/the-state-and-future-of-netflix-v-hbo-in-2015; Matt Wilstein, *You Can Now Watch House of Cards without Netflix Subscription*, Mediaite (Mar. 10, 2014), http://www.mediaite.com/tv/you-can-now-watch-house-of-cards-without-netflix-subscription/; Brian Stelter, *34 Emmy Nominations for Netflix, 12 Nominations for Amazon*, CNN Money (July 16, 2015), http://money.cnn.com/2015/07/16/media/emmys-amazon-netflix-streaming-nominations/.

[50] Jon Erlichman, *The 'Golden Age' of TV Has A lot of People Worried – Here's Why*, Fortune (Jan. 18, 2016), http://fortune.com/2016/01/18/golden-age-tv-peak/.

In today's marketplace, of course, content creators need not go through a broadcast or cable network, much less an MVPD, to reach an audience. For example, Google sites, primarily driven by YouTube, have the highest number of viewers of any online video content property, with over 174 million unique desktop viewers in the United States in January 2016 alone.[51] In addition to professional channels such as "The Late Show with Stephen Colbert" and "The Ellen Show," YouTube (with combined subscribers across the top 100 channels surpassing one billion[52]) hosts an ever-increasing number of successful channels created by artists who amassed large audiences through exposure on the platform.[53] YouTube launched its first exclusive programming in February 2016, featuring stars of its most popular channels.[54] Funny or Die, created in 2007 by comedy star Will Ferrell, writer Adam McKay, and producer Chris Henchy, creates and hosts both amateur and professional videos and received 5.3 million unique visitors in January 2015 and secured two Emmy nominations in 2015.[55] Vice Media, which grew from a small print magazine to a digital video powerhouse, launched a cable network called Viceland in

[51] *See* Press Release, comScore Releases January 2016 U.S. Desktop Online Video Rankings, (Feb. 24, 2016), https://www.comscore.com/Insights/Rankings/comScore-Releases-January-2016-US-Desktop-Online-Video-Rankings.

[52] *See* Seth Shafer, *30% Annual Growth Sees Top YouTube Channels Eclipse 1 Billion Subs*, SNL Kagan (Feb. 1, 2016), https://www.snl.com/interactivex/article.aspx?id=35213269&KPLT=6.

[53] These include PewDiePie, a gamer whose channel has nearly 40 million subscribers and is estimated to earn $12 million per year, Smosh, a pair of friends who run five YouTube channels (including ElSmosh in Spanish), and Michelle Phan, a makeup artist with over 8 million subscribers. *See The World's Top-Earning YouTube Stars 2015*, Forbes, http://www forbes.com/sites/maddieberg/2015/10/14/the-worlds-highest-paid-youtube-stars-2015/#186a20aa542c (last visited Mar. 23, 2016); *These 15 YouTube Stars Make More Than Most People on TV*, TV Guide, http://www.tvguide.com/galleries/youtube-stars-make-more-1089689/photo/c2d69c70-68c1-4ad1-9702-0cc1e709b313/ (last visited Mar. 23, 2016); Nicole LaPorte, *How Ipsy Founder Michelle Phan Is Using Influencers to Reinvent the Cosmetics Industry*, Fast Co. (Jan. 11, 2016), http://www fastcompany.com/3054926/behind-the-brand/how-ipsy-founder-michelle-phan-is-using-influencers-to-reinvent-the-cosmeti.

[54] *See Get Your Popcorn Ready! Our First YouTube Red Originals Are Now Available*, YouTube (Feb. 10, 2016), https://youtube.googleblog.com/2016/02/youtube-red-originals-available-today html.

[55] *See* Michael Sebastian, *Ex-BuzzFeed Revenue Chief Lands at Will Ferrell's Funny or Die*, Advert. Age (Feb. 27, 2015), http://adage.com/article/digital/buzzfeed-revenue-chief-lands-funny-die/297342/; Mike Reynolds, *Netflix, Amazon Stream Up 46 Emmy Nominations*, SNL Kagan (July 16, 2015), https://www.snl.com/interactivex/article.aspx?id=33258663&KPLT=6.

February 2016 that features original programming developed and produced by Vice entirely in-house;[56] Vice Media is now valued at over $4 billion.[57] These "exploding viewing options are creating opportunities for [programmers] . . . to sell shows to streaming video-on-demand services like Netflix and Amazon, to go directly to consumers with their own online services, and to market programs internationally."[58]

This evolution continues to be driven by robust, multi-platform competition to give consumers ever more choices, including from many independent and diverse programmers. These marketplace dynamics should be celebrated, not downplayed or doubted. It is worth noting that Chairman Wheeler's statement accompanying the NOI relies on a GAO study from *2010* to suggest that "the range of diverse voices on TV is narrowing." The GAO study did not support that conclusion even then (based on even older data), but the subsequent six years have fully disproved it. Diverse voices can be heard resoundingly everywhere – on broadcast television, on cable television, on MVPD VOD platforms, and also increasingly on Netflix and on YouTube (to name just a few). The Commission's own *Sixteenth Video Competition Report* dedicated *108* paragraphs just to OVDs – more than ever before – to highlight services launched by these providers.[59] The same report noted that "OVDs continue to expand the amount of video content available to consumers through original programming" and "only one of the top 20 most

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56 *See* Todd Spangler, *Vice Names Spike Jonze, Eddy Moretti to Lead Viceland Cable Channel*, Variety (Feb. 3, 2016), http://variety.com/2016/tv/news/viceland-spike-jonze-eddy-moretti-cable-ae-1201695758/; Mike Farrell, *Viceland Makes Its Cable Debut*, Multichannel News (Feb. 29, 2016), http://www multichannel.com/news/content/viceland-makes-it-cable-debut/402903.

57 *See* Jeremy Barr, *Vice Magazine, "The Heart of Vice," Will Relaunch in March*, Advert. Age (Dec. 16, 2015), http://adage.com/article/media/vice-magazine-heart-vice-launch-march/301821/.

58 *See* Lucas Shaw & Michaela Ross, *Netflix's $5 Billion Budget Sets Off an Arms Race in Cable*, MSN (Mar. 2, 2016), http://www msn.com/en-us/money/technologyinvesting/netflix%E2%80%99s-dollar5-billion-budget-sets-off-an-arms-race-in-cable/ar-BBqfzaT?li=BBnbfcN.

59 *See Sixteenth Video Competition Report* ¶¶ 213-320.

viewed cable networks are owned by cable operators."[60] Each day brings fresh stories of new innovations, new forms of competition, and new programming ideas flourishing, all of which should give the Commission pause about any expansion of regulation in this area.[61]

B. Comcast and NBCUniversal Have Fostered Independent and Diverse Programming.

Comcast/NBCUniversal is just one player in an increasingly crowded and highly competitive marketplace. Yet Comcast and NBCUniversal certainly more than do their part to provide a robust platform for diverse and independent programming. To be sure, some of Comcast's and NBCUniversal's efforts to promote independent and diverse programming were amplified by Comcast's commitments in the NBCUniversal transaction proceeding. But those efforts have long been and continue to be part of the company's DNA. That is why Comcast was able to agree to those commitments as part of the NBCUniversal transaction; they reflected the company's longstanding business priorities (as evidenced, for example, by Comcast being the first MVPD to launch TV One in 2004). In any event, Comcast has fully embraced these commitments and has surpassed them in multiple ways.

1. Comcast is committed to offering independent and diverse programming.

Independent programmers bring a unique and valuable voice to a diverse range of communities. Comcast is committed to continuing to foster a positive environment for independent programmers and ensuring that independent voices are able to reach new audiences

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60 *See id.* ¶¶ 9, 34.

61 As analyst Mark Fratrik aptly observed at the Workshop on the State of the Video Marketplace, "We have been in the workshop for about four hours. Those of you who are active [on social media], have there been any new OTT or OVD entrants during this time? . . . Certainly no day goes by without some company in this arena not announcing something or . . . some competitive company such as a cable MSO or satellite distribution system responding to some action by an OTT or OVD service." Mark Fratrik, Senior Vice President, BIA/Kelsey, Workshop on the State of the Video Marketplace at 210:48 (Mar. 21, 2016), https://www fcc.gov/news-events/events/2016/03/workshop-state-video-marketplace.

across the country. As part of this commitment, Comcast has consistently expanded independent programming, increasing the amount, quality, and diversity of national and local programming for its customers across its platforms, including its VOD and online platforms.

Comcast carries over 160 independent networks,[62] including many small, diverse, and international ones, and six of every seven networks carried by Comcast are unaffiliated with the company. One hundred of the independent networks carried by Comcast are focused on diverse programming, including 54 cable networks geared toward Hispanics, seven cable networks geared toward the African-American community, and 22 cable networks geared toward the Asian-American audience. Since the closing of the NBCUniversal transaction in January 2011, Comcast has added more than 20 independent networks, a majority of which are tailored to diverse audiences.[63] Notably, pursuant to its commitments in the NBCUniversal transaction, Comcast launched four new independent and diverse networks – two with majority African American ownership (REVOLT and ASPiRE), and two owned and operated by American Latino programmers (BabyFirst Americas and El Rey) – that also have gained wider marketplace carriage. Comcast is currently reviewing proposals for two substantially Hispanic American-owned, independent English-language networks that it will launch in select Comcast markets by January 28, 2017, and two additional independent, majority African American owned networks will be launching within the next four years.

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[62] Independent network as used in this section means a network that is not an affiliate of Comcast or of another top-15 programming network owner, as measured by annual revenues. *See Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, App. A, § III.3 ("*Comcast-NBCUniversal Order*").

[63] These networks include Cinema Dinamita USA (Hispanic), Impact Network (African-American), Pasiones (Hispanic), Univision Deportes (Hispanic), V-Me Kids (Hispanic), plus four networks that have been launched thus far to satisfy the Company's independent programming commitments in connection with the Comcast-NBCUniversal transaction.

Further, Comcast has substantially expanded carriage of over 141 independent networks by more than 217 million subscribers since 2011, including expanded carriage of networks tailored to diverse audiences such as The Africa Channel (by more than two million), Crossings TV, a channel focused on Asian American programming (by more than three million), Mnet, a South Korean-based music television channel (by more than four million), TV One (more than 600,000), and African-American religious programmers UP (f/k/a Gospel Music Channel) and Word Network (by six million and three million, respectively).[64] Comcast extended distribution of seven independent Hispanic programming services (Azteca America, Galavisión, HITN, LATV, nuvoTV (formerly SíTV), Telefutura, and Univision) by more than 14 million subscribers (thereby exceeding by 40 percent its commitment to expand carriage of three Hispanic networks by 10 million subscribers); and Comcast launched a package of 40 to 60 Spanish-language channels in major Hispanic markets.

As the volume of high-quality programming continues to grow, Comcast is looking for innovative ways to work with independent programmers to feature content on platforms across multiple screens. Today, Xfinity VOD and online platforms feature on-demand choices from over 65 independent networks, including content from non-linear independent programmers such as Gaiam TV, Havoc, Hip Hop On Demand, Kabillion, and Kid Genius. As of year-end 2015, Comcast's central VOD storage facilities hosted more than 6,000 titles or 2,100 hours' worth of VOD content from 69 independent networks. Online, Comcast customers enjoyed access to over 9,200 titles or 3,300 hours of programming from 54 independent programmers. In addition to its centralized VOD content, Comcast cable systems across its 39 state and District of Columbia

[64] Collectively, Comcast expanded carriage of seven African-American independent networks by 36.5 million subscribers; 51 Hispanic networks by over 65 million; and 13 Asian-American networks by over 8.7 million, with the balance of the increases going to general market or international independent networks. Comcast has plans to expand TV One's distribution to millions of additional homes by the end of this year.

footprint host considerable amounts of local VOD content that is, by its nature, independent.[65] For example, in the fourth quarter of 2015, Comcast hosted close to 7,000 local, independent VOD titles totaling close to 1,800 hours of content.[66]

In the last five years, Comcast has expanded the quality and quantity of diverse programming available through its VOD and online platforms to nearly 12,000 combined hours by year-end 2015, an increase of 70 percent over 2014 and more than 1,100 percent over year-end 2010. These increases were driven by content from independent content providers, including African-American programmers Black Cinema On Demand, Hip Hop On Demand, and TV One; Asian-American programmers Cinema Asia America, Fumination, and KPOP; and Hispanic programmers Canal Sur, Cine Latino, and Nuestra Tele, among others.

Beyond providing and expanding carriage of independent and diverse networks, Comcast promotes and helps drive viewer interest in such programming through a variety of innovative measures that many of these networks, particularly smaller ones, could not implement on their own. For instance, Comcast creates Xfinity "microsites," first-of-their-kind, one-stop Internet destinations for entertainment features and news tailored for African-American, Asian-American, Hispanic-American, and LGBT audiences (Celebrate Black TV, Xfinity Latino, Xfinity Asia, Xfinity.com/LGBT), and in support of events like Disability Awareness Month, Veterans Day, and Native American Heritage Month. Each special collection supplements

[65] Local VOD choices often consist of high school sports, local events, and other public interest programming. For instance, in 2015, Comcast's regional cable network covering Northern and Central California televised and streamed 23 high school football games live, and made all games available on Comcast's local VOD platform at no additional charge. Local Comcast teams are able to leverage the power of the Xfinity VOD platform (and, in some instances, regionally-focused websites) to promote localism and independent programmers.

[66] An additional 22,000 independent programming choices from 10 independent networks are available on XfinityTV.com through Comcast's content partnership with Hulu.

Comcast's permanent VOD and online offerings, providing customers with access to hundreds of additional diverse content hours and choices throughout the year.

Independent programming also features prominently in Comcast's annual celebration of ethnic heritage months. For instance, independent black filmmakers were the focus of Comcast's celebration of 2016 Black History Month; Comcast launched a new destination on Xfinity VOD which featured a special curated collection of films from the American Black Film Festival (ABFF). In celebration of 2015's Asian-Pacific American Heritage Month, Comcast featured a selection of programming across Xfinity VOD and online platforms through a partnership with independent producers Well Go Entertainment, Tribeca Film, and the Center for Asian-American Media (CAAM). And in 2013, Comcast launched its annual Xfinity Freeview Latino, giving customers a two-week all-access pass to discover and view Hispanic content. In 2015, Freeview Latino featured more than 3,500 hours and more than 5,000 VOD choices in English and Spanish, including content from independent networks such as El Rey and Pasiones, plus more than 300 movies from Cine Latino, Viendomovies, and other diverse independent networks and producers.

Comcast has also undertaken many initiatives to promote independent film. With over 22 million video subscribers in 39 states plus Washington, D.C., Comcast is bringing Xfinity TV customers a unique opportunity to view films that might not be available outside of New York and Los Angeles. Since pioneering its same-day-as theatrical releases offering with IFC Films in 2006, Comcast's partnerships with indie film houses have grown – now featuring content from 65 independent studios, including Phase4/E1, Tribeca Film, IFC Films, Concert TV, and Havoc – to feature and launch independent films on VOD. In 2015, Comcast showcased over 3,700 independent films on VOD, with approximately 200 films available on VOD on the same day as they are exhibited in theatres. And Comcast created a permanent VOD destination for all indie film called "Indie Cinema," to showcase over 3,000 films, the vast majority of which come from independent providers.

Comcast also recently launched Watchable, a new, cross-platform video service that curates a selection of the best content from popular online video networks and shows in an easy-to-use experience. Videos from over 30 independent digital partners are available for viewing on iOS devices, watchable.com, and Comcast's own X1 platform.[67] Many Watchable partners have not traditionally had distribution on linear TV, so the platform provides them with a path to reach new audiences and further monetize their content.

2. NBCUniversal is committed to featuring diverse and independent voices in film and on television, in front of and behind the camera.

One of the most important ways Comcast/NBCUniversal supports the creative community is by investing in the infrastructure that allows it to do its best work. Universal Studios is a major hub for the entire industry and is home to not only Universal Studios, but also more than 20 other production companies. NBCUniversal also owns Focus Features, which makes, acquires, and releases a diverse slate of films, including specialty films. Universal Pictures has more than 25 production deals at the studio, which include partnerships with Judd Apatow, Jason Blum, Will Packer, Imagine Entertainment, Working Title, and Legendary Pictures, among others. NBCUniversal has partnered with independent production companies,

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[67] Over 70 percent of the videos on Watchable are produced by independent programmers. These partners currently include: attn:, AwesomenessTV, College Humor, Defy Media, Discovery Digital Networks, Fast Company, Flama, Fullscreen, Future Today, GarageMonkey, GoPro, Hip Hop on Demand, Jukin Media, Kin Community, Machinima, Mashable, Mic Media, mitú, Network A, Newsy, The Onion, PlanesTrains+Automobiles, POPSUGAR, Quartz, Red Bull, Refinery29, Studio71 (formerly Collective Digital Studio), Tastemade, TEN, TYT Network, Video Detective, Vin Di Bona Productions, What's Trending, and Woven Digital. On television, that means popular digital shows from these partners will be available via the Internet on the same video platform as live news and sports.

such as Illumination Entertainment, the creators of the highly successful "Minions" franchise, and Mark Burnett Productions, which has brought hits like "The Voice" to viewers.

The popular networks of NBCUniversal Cable Entertainment – which include USA, Bravo, Syfy, E!, Oxygen, Esquire, and Sprout – aired more than 140 original series in 2015. The majority of primetime programming on the combined NBC Networks (NBC Network and Cable Entertainment networks) is produced by third-party studios (i.e., independent of Comcast or NBCUniversal).[68] The vast majority of the primetime programming on the Cable Entertainment networks (Bravo, E!, Oxygen, Syfy, USA) is produced by independent producers (i.e., not affiliated with major studios or broadcast or cable networks).[69] More than 30 outside production companies are producing original series slated to air across NBCUniversal's Cable Entertainment portfolio throughout the year.

With its Telemundo and NBC Universo networks, NBCUniversal has invested deeply in diverse programming. Telemundo is the largest producer of Spanish language prime-time television programming in the nation. NBC Universo has expanded its sports programming to feature Spanish-language broadcasts of the Barclays Premier League and Super Bowl XLIX. Going forward, Telemundo and NBC Universo will be the official broadcasters for Spanish-language coverage of the FIFA World Cup events in the U.S. through 2022.

Universal Pictures and Focus Features strive to attract a diverse range of talent and filmmakers who reflect the broad spectrum of today's movie-going audiences. As *Variety* noted,

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[68] The *Comcast-NBCUniversal Order*, App. A, § X.5 defines "independent programming" as, inter alia, "produced by an entity unaffiliated with Comcast and/or NBCU." The combined NBC Networks' 2015 share by primetime hours consisted of 72 percent unaffiliated content (55 percent independent; 17 percent content produced by major studios) and 28 percent affiliated content.

[69] NBC Network's 2015 share by primetime hours consisted of 44.6 percent unaffiliated content (24.2 percent independent; 20.4 percent major studios) and 55.4 percent affiliated content; NBCUniversal Cable Entertainment networks' primetime share was 83.6 percent unaffiliated (67.6 percent independent; 16 percent major studios) and 16.4 percent affiliated.

"[d]iversity not only characterizes Universal's hit pics. It also reflects the cast and crew of many of its latest and greatest [productions]."[70] The studio is the proud creator of the film industry's most prominent multicultural franchise, "Fast & Furious," which features a heavily diverse leading cast, including Vin Diesel and Michelle Rodriguez, and has a history of utilizing diverse directors and producers.[71] Other notable diverse films from Universal and Focus include the highest-grossing musical biopic of all time, "Straight Outta Compton," directed by F. Gary Gray; the critically acclaimed James Brown biopic "Get On Up," starring Chadwick Boseman; and the Jesse Owens biopic "RACE" starring Stephan James. Universal Pictures and Focus Features also celebrate female-driven films and filmmakers, recently seen with the "Pitch Perfect" franchise, starring an ensemble cast of mostly women and co-produced by independent production company Brownstone Productions, which is co-owned by co-star Elizabeth Banks.

NBCUniversal has long been a leader in offering programs that aim to develop diverse talent both on camera and behind the scenes, and under Comcast's leadership, the company has added even more signature programs. NBCUniversal's highly-successful talent pipeline programs are detailed in the Company's annual Diversity and Inclusion reports.[72]

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[70] Lisa Klug, *For Universal, Diversity is Key to Box Office Success*, Variety (Nov. 17, 2015), http://variety.com/2015/film/spotlight/universal-diversity-straight-outta-compton-1201641856/.

[71] Looking forward, former "Fast & Furious" director Justin Lin will direct the latest installment in the Bourne film franchise and F. Gary Gray is slated to direct "Fast & Furious 8."

[72] *See Seeing the Bigger Picture*, at 41-44 (June 2, 2014), http://corporate.comcast.com/images/Comcast_Diversity_Report_060214.pdf; (the 2013 Comcast-NBCUniversal Diversity and Inclusion Report); *Our Principles in Practice*, at 26 (June 15, 2015) http://corporate.comcast.com/images/2014-Diversity-and-Inclusion-Report.pdf. (the 2014 Comcast-NBCUniversal Diversity and Inclusion Report).

III. COMMONPLACE CONTRACTUAL PROVISIONS, SUCH AS MFNS AND ADMS, ARE PRO-COMPETITIVE OR BENIGN AND DO NOT HARM INDEPENDENT OR DIVERSE PROGRAMMING.

A significant portion of the NOI focuses on "most favored nation" provisions ("MFNs") and "alternative distribution method" clauses ("ADMs") in carriage agreements, seeking comment on what impact such provisions have on independent programmers' ability to distribute their programming.[73] The level of attention focused on these contractual terms is unjustified. These commonplace contractual provisions exist in a marketplace marked by robust competition and thousands upon thousands of successful private negotiations. Rather than limiting distribution, these types of provisions may assist independent networks in obtaining and expanding their carriage opportunities. There is no credible sense in which MFN or ADM provisions have stood in the way of independent programmers obtaining carriage and growing and succeeding.

MFNs are provisions that guarantee a distributor will be offered certain no less favorable terms than those which a programmer makes available to certain other distributors. Programmers may also have MFN-type provisions that provide certain guarantees with respect to a distributor's dealings with other programmers. ADMs are provisions that prohibit networks that have sold distribution rights to MVPDs from exhibiting the network programming on certain alternative platforms (and typically limited to specific types of exhibition) within a time-specified "holdback" period or window. These provisions – which can vary in the particulars as a result of negotiations – must be understood within the context of the wide range of consideration exchanged in such negotiations. MFNs can act as a form of insurance policy for distributors – and their customers – against the risk of being shut out of certain benefits

[73] NOI ¶¶ 5-14.

(including lower pricing) that programmers may subsequently extend to other distributors. ADMs, which reflect the longstanding practice of licensing content to various distribution platforms in different windows, help ensure that the programming for which a distributor is providing valuable consideration in order to benefit its customers is not immediately available for free online or otherwise in a window that encroaches on the initial exhibition window, which would undermine the value of what a distributor purchased. The fact is that MVPDs assume significant economic risk in committing to carry cable networks and often pay considerable license fees to do so. Contractual provisions like MFNs and ADMs reduce transaction costs, risks, and uncertainties and foster workable agreements for programmers and MVPDs, particularly with respect to new networks for which these risks and uncertainties may be greater.

Different programming networks have different goals and priorities that impact the negotiation of a carriage agreement, and the MFN and ADM provisions to which a programmer is willing to agree will depend on that network's content, business model, rights profile, existing licensing and distribution agreements, and other factors. For example, a new programmer that is seeking initial carriage may be willing to make broader assurances on issues such as content guarantees or pricing in exchange for such carriage than would a well-established programmer. Programmers – including independent programmers – are sophisticated parties, and generally will not agree to terms that they perceive to be insufficiently flexible for their business purposes. In short, contrary to the NOI's assumption, these terms are usually the product of significant give-and-take, not "insistence" or "demands" by one party.

This is not to claim that, as a theoretical matter, all MFNs and ADM-like provisions are perfect. There may be contexts when certain arrangements *could* have the purpose or effect of raising prices to consumers or inhibiting competition – when they are used as a sword rather than a shield.[74] But that is *not* generally the case in the programming industry. Comcast and NBCUniversal are party to many agreements, and are unaware of current MFN or ADM provisions that would fit this description, notwithstanding the occasional criticism of particular terms in particular programming agreements (and Comcast remains subject to specific limitations on ADMs with third-party programmers under the NBCUniversal merger conditions). The key questions for policy-makers, however, are (1) is there evidence of any material marketplace problem attributable specifically to these contractual provisions, and (2) do any issues presented by these provisions outweigh the legitimate pro-competitive and pro-consumer "shield" role they play in this highly competitive marketplace? As discussed below, the answer to each of these questions is squarely *no*.

MFNs

MFNs about pricing can clearly serve a pro-competitive and pro-consumer function – to lower prices. For example, Network X thinks it is worth $0.15 per subscriber per month. MVPD A has its doubts but is willing to take a chance at that price, provided it has the assurance that it will share in a price reduction if Network X subsequently reduces the price to $0.10 per subscriber per month. The Commission has previously recognized this dynamic in approving terms: "[T]he existence of [MFN] clauses . . . in many programming contracts . . . eliminates cable operators' ability to free ride on other MVPDs' paying for the fixed costs of creating the

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[74] Recent cases that have challenged MFNs have found them to be problematic with aggravating circumstances that are not present in program carriage agreements. In the *Apple e-Books* case, for example, the district court characterized the MFNs at issue as "unique," and, indeed, they were held to have functioned not as standard MFNs but as mechanisms to enforce a horizontal price-fixing conspiracy among e-book suppliers. *See United States v. Apple Inc.*, 952 F. Supp. 2d 637, 662-63 (S.D.N.Y. 2013), *aff'd*, 787 F.3d 131 (2d. Cir. 2015). In *Blue Cross Blue Shield of Michigan*, the DOJ brought suit against a defendant insurer that had MFN provisions with demonstrable anticompetitive effects; the MFN provisions had caused hospitals to raise rival insurers' rates. Blue Cross also had "MFN plus" provisions that required the hospitals to charge *more* than the price charged Blue Cross. *See* Compl. ¶¶ 6, 18, 33, *United States v. Blue Cross Blue Shield of Mich.*, No. 2:10-cv-14155-DPH-MKM (E.D. Mich. Oct. 18, 2010).

programming."[75] That is, "the ubiquity of so-called most-favored-nation clauses in programming contracts resolves this free-rider problem and protects the cable operator who initially purchases the programming from opportunism on the part of the programmer and other operators."[76] Courts and agencies similarly have recognized that MFNs can be pro-competitive and pro-consumer in this and other ways.[77]

As the above example illustrates, MFNs also can make it more likely that MVPDs are willing to carry a network, including an independent or diverse network, that may be relatively new or not carried very broadly by other distributors. The fact that a particular MVPD is willing to take a chance by being the first to carry a new network may help that network gain additional carriage from other MVPDs. But there is nothing problematic about parties agreeing as part of an exchange of valuable consideration that the first MVPD may benefit from any price reduction that the new network subsequently offers due to broader distribution or otherwise.

When they consider entering into long-term contracts with programmers, MVPDs are also concerned about not having access to rights that may be offered subsequently to other distributors. The ability to provide programming (whether as a live linear stream or on an on-demand basis) on convenient additional platforms is an increasingly important competitive factor

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75 *Commission's Cable Horizontal and Vertical Ownership Limits*, Fourth Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 2134, ¶ 33 (2008) (subsequent history omitted).

76 *Commission's Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd. 9374, ¶ 97 n.342 (2005).

77 *See Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, J.) (MFNs are "standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. . . . [T]hat is the sort of conduct that the antitrust laws seek to encourage."); Comments of David Gelfand, DOJ/FTC Workshop on MFN Clauses, at 20 (Sept. 10, 2012), https://www.healthlawyers.org/Members/PracticeGroups/Documents/Benefits/PGs_ExSumm_MFN_Clauses.pdf (MFNs "are simply an efficient way to get the best deal possible without spending time on the contract and moving on to deals that may be more important to the company."); Outline of Remarks by Andrew I. Gavil, Director, Office of Policy Planning, Federal Trade Commission, at 6 (Sept. 2012), https://www.justice.gov/sites/default/files/atr/legacy/2012/09/11/286852.pdf (discussing the procompetitive benefits of MFNs, including as a means to avoid becoming "a disfavored purchaser" on price).

for MVPDs because it is increasingly valued by consumers. Thus, when bargaining for carriage terms, MVPDs also typically bargain for ancillary rights, such as rights to exhibit programs on their VOD platforms, and a network may agree, via MFN provisions, to ensure the MVPD has the opportunity to obtain such ancillary offerings when and if they are made available to other distributors. Rather than restrict the supply and availability of programming, such provisions can expand it.

The NOI appears to credit the mistaken view that MFNs *prevent* licensing to OVDs in particular – implying that programmers would strike more deals with OVDs but for the need to share the benefit of those deals with MVPDs (which, of course, also benefits the MVPDs' customers). As a general rule, MFNs pertaining to additional rights (sometimes referred to as "content MFNs") do *not* prevent a network from offering its programming to another distributor. Instead, such terms simply ensure that, if the network is prepared to share additional content with other distributors (e.g., broader VOD rights to current-season programs), then the MVPD will have an opportunity to obtain the same rights for its customers on the same terms and conditions.[78] As such, these commonplace MFNs are *pro-consumer*, because they ensure that MVPD customers can enjoy the full value of the subscriptions for which they are already paying rather than having to pay more to purchase content elsewhere. In this respect, an MFN *may* limit a programmer from providing certain limited *exclusive* rights to another distributor, but it is hard to see how the Commission could view the expansion of or support for exclusivity as an affirmative public interest mandate. It is true that OVDs often seek (and are willing to pay for)

[78] An MFN typically only covers programming whose rights are controlled by the network – that is, airing during the network (i.e., current season) window, which is precisely what MVPDs provide to their customers. Thus, MFNs are not typically implicated in licensing arrangements between studios and OVDs for prior-season content.

exclusivity that may impact existing or potential MFN guarantees, but this is just one of many possible business models they can pursue.[79]

In any event, as the OVD marketplace continues to evolve, programmers are in the best position to judge whether they need to adjust their licensing approach to maximize their returns. Given OVDs' increasing bargaining power, programmers are not likely to forsake lucrative licensing opportunities by agreeing to inflexible MFN provisions with MVPDs. MFNs, in this respect, promote candor in the parties' bargaining; if it is important to a programmer to retain the opportunity to market certain exclusive rights to network content to another distributor, that is something the purchasing MVPD may legitimately feel it needs to know, and the negotiation over the scope of an MFN will assist both parties in drafting better contracts based on mutually well-informed positions.

It is worth noting that programmers also negotiate for beneficial MFN-type provisions on non-price issues, such as guarantees of equal treatment with respect to content security, technical specifications, and access to usage data. For programmers as well, these types of provisions are a form of insurance policy that can guarantee equal opportunity, especially during the course of a long-term contract.

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[79] In fact, it is OVDs (not MVPDs) that are imposing some of the most restrictive terms in the marketplace today. To be clear, Comcast does not point to these practices because they are inherently a problem in need of a government solution; rather, they show that OVDs exert significant leverage of their own that shapes how programmers negotiate with MVPDs. As noted, OVDs often license content on an exclusive basis. As Comcast has explained elsewhere, some OVDs also have insisted that they will not license a series, or will impose a financial penalty on the programmer, if the series' current season is made available on MVPD on-demand platforms on a season-long basis (i.e., each episode remains available for the entire season, rather than only the five most-recent episodes). *See* Reply Comments of Comcast Corporation, MB Docket No. 15-158, at 17-18 (Sept. 21, 2015) (discussing these practices). In practice, this means that MVPD customers often cannot "catch-up" on a current season of programming even while that programming still has episodes left in a season, and the programming is not otherwise available on *any* platform.

ADMs

ADMs are merely another form of the type of contractual provisions that reflect the program windowing practices content producers have utilized for decades to pay for high-quality programming. For nearly a century now, content producers have distributed their content in distinct exhibition windows. For example, a movie studio typically would first distribute a new movie to theaters for a certain period of time before making that movie available at discount theaters, through MVPDs' pay-per-view offerings, on DVDs, through premium networks, on broadcast or cable networks through syndication, and then finally online through SVOD OVDs. TV programming has followed a similar pattern. Although the number of exhibition windows has expanded with the diversification of platforms, and the time frames have narrowed in response to consumer demand, windowing remains essential to allow content creators to be fully compensated for their efforts and is critical to the business economics of the content production industry.

ADM provisions reflect the importance of windowing, which has widely been acknowledged to have led to the success of the American movie and television industry. In an age when content prices were skyrocketing and alternative (and possibly free) distribution of the same content could seriously undermine the value of the content for which MVPDs were paying, ADM clauses were one way of ensuring an appropriate exhibition window for Pay TV – and also ensuring that consumers are getting valuable access to content for the price they pay, rather than paying for content that is available for free elsewhere. When the Internet was in its relative infancy, some ADM provisions may have been broader than necessary, but they have evolved as the marketplace has evolved – and, in particular, as programmers are increasingly factoring OVD revenues into their revenue models.

As a result, there is simply no evidence that ADMs present significant issues in the MVPD marketplace today. Comcast and NBCUniversal believe that overly restrictive ADMs – the kind that prevented any Internet exhibition – are largely a thing of the past. Comcast has not been party to these types of provisions in some time; other MVPDs may have had them more recently but are likely to have abandoned them as well. Notably, Sony PlayStation Vue and Sling TV have both launched in the past couple of years, and between the two of them exhibit a wide array of linear networks via the Internet. In addition, many networks offer their content online on an a la carte basis, and several premium networks do so in conjunction with Amazon Prime or Hulu. Surely more of this is yet to come. Meanwhile, Comcast has lived comfortably for years within the reasonable ADM limitations in the NBCUniversal merger conditions. For example, it is perfectly reasonable for an MVPD that pays for (and charges customers for) content to seek a guarantee that the same content not be available for free elsewhere for a period of 30 days.

* * *

Finally, there is no marketplace evidence that MFNs or ADMs in programming agreements with MVPDs are preventing content from being licensed to OVDs or somehow preventing independent programmers from reaching audiences. As discussed above, it is hard to find content that is *not* available in some form on OVDs. Furthermore, it is difficult to square the NOI's apparent concerns about contractual provisions with the Commission's approach to these issues in approving the AT&T/DirecTV merger last year. The Commission stated that it could not find that DirecTV on its own "has been able to limit consumers' access to distribution of video programming online" and concluded that claims that the merged entity would have "an increased incentive and ability to force third-party programmers into withholding online video rights from rival MVPDs and OVDs [were] unsupported by the record."[80] The Commission's conclusions – after months of analysis – provide compelling evidence that (1) MFNs and ADMs do not present a competitive issue, because there is no reason to think that AT&T's or DirecTV's contracts did not have the same type of provisions as other marketplace participants, and (2) MVPD size is not determinative of whether a contractual term is problematic, since the Commission approved the creation of the largest MVPD in the country without seeing any need to take prophylactic action about MFNs and ADMs.

IV. THE CONCERNS RAISED ABOUT BUNDLING, MINIMUM PENETRATION ARRANGEMENTS, AND PEG ARE WITHOUT MERIT.

The NOI also raises questions about bundling from the standpoint of independent programmers.[81] The widespread industry practice of offering programming in bundles has helped foster the enormous range of diversity, high-quality content currently available, and certainly does not justify any sort of regulatory intervention for the sake of programming diversity. The bundling of programming networks is so pervasive because it has affirmative benefits, including efficiency of contracting and greater overall output that enhances consumer welfare.[82] Wholesale bundling of programming networks can create opportunities for valuable content – including diverse content that may not otherwise have an opportunity to fully flourish – to be carried. Including new, untested programming with special appeal to diverse audiences in

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80 *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd. 9131, ¶ 187 (2015). Moreover, the Commission declined to impose any protective program carriage- or program access-related requirements on the transaction, or any affirmative obligations regarding independent or diverse programming.

81 NOI ¶¶ 15-18.

82 *See* Tasneem Chipty, Managing Principal, Analysis Group, Workshop on the State of the Video Marketplace at 125:20 (Mar. 21, 2016), https://www.fcc.gov/news-events/events/2016/03/workshop-state-video-marketplace ("Carriage agreements in the industry are heavily negotiated. . . . Bundling can be efficient for the firm. Bundling can be convenient for consumers. . . . There are lots of pro-competitive reasons for why you might see wholesale bundling and if you are going to take this seriously and regulate or perhaps run an inquiry, you should take each of these [into account].").

programming bundles may encourage viewers to sample that programming, which in turn can help to grow the audience for such programming.[83] Notably, independent programmers that are not part of the largest media companies also offer bundles of content. For example, Scripps Network offers bundles of programming including Food Network, DIY Network, Travel Channel, and the Cooking Channel. IFC and Sundance are now part of the programming bundle with AMC.

Distributors negotiating for content must take into account the full range of content a programmer is offering and any enticements a programmer may offer to carry more than its most popular networks. As for smaller MVPDs with technological capacity constraints (increasingly less of an issue as smaller cable operators switch to IPTV), programmers can and should be flexible to address such constraints in appropriate circumstances.[84]

The NOI also asks about minimum penetration guarantees.[85] Most "basic cable" networks with sufficient value try to obtain some guarantee of penetration and/or tier placement (as part of a larger exchange of value). From the programmer's standpoint, the minimum

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[83] As explained by various civil rights organizations when the Commission was last considering so-called "wholesale unbundling":

> Video channels catering to minorities serve a critical role in our communities: they provide us with news and entertainment that speaks to and from our ethnic and cultural perspectives. Given the smaller size of their target audiences, these channels face an uphill battle in earning and expanding carriage on cable and satellite systems. Nevertheless some have succeeded in growing penetration by taking advantage of the economic efficiencies created when they are bundled with other channels. The overwhelming body of analysis has found that bundled discounts benefit consumers. It is certainly true with respect to increasing the availability of programming targeting minority communities. Increased distribution leads to increased investment in programming which yields a higher quality product.

Letter from Dr. E. Faye Williams, Esq., National Chair, National Congress of Black Women, et al., to Kevin Martin, Chairman, FCC, et al., MB Docket No. 07-42, at 1 (May 29, 2008).

[84] For example, it was reported that, "[a]ccording to . . . sources, AMC has recognized that a large number of NCTC members have system capacity constraints, and the new deal does not require that all members carry all six channels on their most popular tier." Mike Farrell, *AMC, NCTC Reach Agreement*, Multichannel News (Jan. 4, 2016), http://www multichannel.com/news/networks/amc-nctc-reach-agreement/396228.

[85] NOI ¶ 20.

penetration guarantee is a key part of the consideration it negotiates in coming to terms on the license fees. In setting its license fees, the programmer assumes a certain level of advertising revenues, and it naturally seeks some assurance as to the number of subscribers on the basis of whom it can recoup both license fee and advertising revenues – revenues that subsidize the significant cost of creating the content. Precluding a programmer from contractually establishing the carriage levels it can expect would produce a different deal, with different revenues, and would impede rather than assist a meeting of the minds. If the Commission were to limit programmers' rights to seek minimum penetration guarantees, that would distort the whole bargaining process, and make negotiations over rates and other related terms more challenging than they need be.

In short, these relationships are complex and dynamic. Programmers and distributors both need to find ways to structure mutually beneficial relationships, each taking account of the growing alternatives available to the other, and they succeed in doing so to a remarkable degree. To the extent there are any issues, the marketplace is sorting them out and is more than capable of resolving them, without the need for any regulatory finger on the scale (and without the attendant risk of running roughshod over the First Amendment).

As for the questions raised by the NOI about PEG and program guides,[86] Comcast notes that the data in cable operator program guides is controlled and provided by third-party vendors, not the operator itself. Programmers contract directly with the program guide companies to provide their detailed listing for inclusion on the guide service. If there is an issue here, PEG programmers need to deal directly with the third-party vendors who provide the metadata for distributors' program guides. Comcast certainly has no objection to PEG programmers having

86 *Id.* ¶ 21.

their detailed program listings included in the guide service by working directly with the vendor where it is otherwise technically feasible to do so.[87]

As a general matter, Comcast is the largest distributor of PEG programming in the country, with PEG fee expenses exceeding $72 million in 2015. PEG channels have benefited from Comcast's digital transition and are part of Comcast's IP transition as well. Where Comcast offers IP-based linear cable service, Comcast includes each and every local PEG channel in the customer's channel lineup encoded in IP. Notably, none of Comcast's largest competitors are required to match cable's PEG obligations.

V. THE FCC LACKS BOTH ANY COMPELLING POLICY REASON AND PLAUSIBLE LEGAL AUTHORITY TO BECOME MORE INVOLVED IN PROGRAMMING CARRIAGE NEGOTIATIONS.

The single most important principle of law relevant to this inquiry is the First Amendment. MVPDs and OVDs (in deciding which networks to carry) and networks (in deciding which shows to carry) are both First Amendment speakers. As the Supreme Court enunciated more than twenty years ago: "There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[88] Accordingly, the Commission should tread lightly in determining whether the video programming marketplace is sufficiently "independent" or "diverse" as a basis to contemplate any additional government

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[87] There are certain situations where it is not technically feasible for Comcast to add PEG programming details to the guide. For example, there are some places in Comcast's footprint where PEG channels are "narrowcasted" on a more local basis than the guide can be split, in which case the programming guide capability is not available. For instance, if Smithville and Jonesville are served by the same headend and each has its own government channel shown on channel 15 (so people in Smithville only see the Smithville programming), there is not a different guide for the two communities and therefore Comcast cannot support a localized guide for this channel. *See generally* Reply Comments of NCTA, MB Docket Nos. 12-107 & 12-108, Tech. App. (filed Mar. 20, 2014).

[88] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636-37 (1994).

involvement in First Amendment speakers' decision-making as to what programming they carry and how they carry it.

Programming diversity of course is of immense societal value. But any additional governmental regulation aimed at promoting even more diversity than now exists in the video programming space would almost certainly encroach upon First Amendment protections. As the D.C. Circuit has recognized, "at some point, surely, the marginal value of such an increment in 'diversity' would not qualify as an 'important' governmental interest."[89] Notably, in the seminal *Miami Herald v. Tornillo* case, the Supreme Court rejected the argument that governmental interference with newspaper editorial decision-making was justified by "a homogeneity of editorial opinion, commentary, and interpretive analysis" resulting from what the proponents of government intervention viewed as excessive concentration in media ownership, ruling that such a perceived lack of diversity could not justify mandatory rights of response.[90] As detailed above, in a marketplace that has experienced dizzying growth in the more than two decades since *Turner* and that is clearly competitive and diverse at all levels – production, aggregation, and distribution – there is unlikely to be any constitutionally sound justification for additional intrusive government regulation.

The NOI seeks comment on whether Section 257 of the Communications Act provides it the authority to impose regulations aimed at improving programming diversity.[91] Section 257 required that, "[w]ithin 15 months after February 8, 1996, the Commission . . . complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (*other than this section*), market entry barriers for entrepreneurs and other

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89 *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1135 (D.C. Cir. 2001).

90 *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 250, 254-55 (1974).

91 *See* NOI ¶ 23.

small businesses in the provision and ownership of *telecommunications services and information services*, or in the provision of parts or services *to providers of telecommunications services and information services*."[92] This section clearly does not grant the Commission any authority to impose regulations related to improving diversity in video programming.

The plain language of Section 257 – "other than this section" – clearly indicates that it is *not* a standalone source of authority to promulgate regulations and that any source of authority for imposing new regulations must derive from a separate section of the Communications Act. Nor does subsection 257(b) confer a separate source of authority on the Commission, as it merely states that the Commission should consider diverse media voices and other goals "[i]n carrying out subsection (a)."[93] Rather, as the Court of Appeals for the D.C. Circuit has made clear, the only affirmative authority that the Commission has under Section 257 is to prepare a

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[92] *See* 47 U.S.C. § 257(a) (emphasis added). In its first Section 257 report, the Commission recognized that its focus should lie with only those problems that significantly distort the operation of the market and harm consumer welfare. *See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd. 16802, ¶ 19 (1997) ("the term 'market entry barrier' as used in Section 257(a) is primarily intended to encompass those impediments to entry within the Commission's jurisdiction that so significantly distort the operation of the market and harm consumer welfare that they justify regulatory intervention").

[93] *See* 47 U.S.C. § 257(b).

triennial report to Congress.[94] In all events, Section 257 is directed to "telecommunications services and information services," *not* Title VI services (much less *cable* services).[95]

The NOI also seeks comment on whether Section 616 of the Communications Act can be expanded to cover issues of independent programming diversity.[96] It is notable that, in a marketplace that was not nearly as competitive as it is today, the Commission in 1993 wisely decided to limit its role in program carriage negotiations to the specific problematic conduct identified by Congress, i.e., unaffiliated programmers facing demands for equity or exclusivity and affiliation-based discrimination from MVPDs at a time when cable was dominant and 57 percent of programming networks were affiliated with cable operators.[97] Over the more than two

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[94] When the Commission attempted to rely on Section 257 as a source of even ancillary authority to regulate Comcast's network management practices, the D.C. Circuit forcefully rejected the effort: "The Commission next cites section 257. Enacted as part of the Telecommunications Act of 1996, that provision gave the Commission fifteen months to 'complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.' Although the section 257 proceeding is now complete, that provision also directs the Commission to report to Congress every three years on any remaining barriers. We readily accept that certain assertions of Commission authority could be 'reasonably ancillary' to the Commission's statutory responsibility to issue a report to Congress. For example, the Commission might impose disclosure requirements on regulated entities in order to gather data needed for such a report. But the Commission's attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to issue a report defies any plausible notion of 'ancillariness.'" *Comcast Corp. v. FCC*, 600 F.3d 642, 659-60 (D.C. Cir. 2010) (internal citations omitted).

[95] Based on Commission precedent, it is far from clear that "information service" as used in Section 257 would include Title VI services, particularly cable services. *See Appropriate Framework for Broadband Access to Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019, ¶ 7 n.10 (2002) (stating that a "functional regulatory approach is embodied in the Act's classification of distinct service categories, such as 'information services,' 'cable service,' and 'telecommunications services'"); *Microscope Associates, Inc.; Petition for Declaratory Ruling Concerning Resale of Internet Access Services*, Order, 19 FCC Rcd. 10451, ¶¶ 6-8 & n.22 (WCB 2004) (treating "cable service," "information service," and "telecommunications service" as separate categories). Moreover, any attempt to regulate the content or provision of cable services must be expressly stated, and Section 257 does not meet this standard. *See* 47 U.S.C. § 544(f) ("Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter," i.e., Title VI).

[96] *See* NOI ¶ 23.

[97] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition & Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd. 2642, ¶¶ 14-15 (1993) ("In implementing the provisions of Section 616, we believe that our regulations must strike a balance that not only prescribes behavior prohibited by the specific language of the statute, but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations…. Accordingly, we adopt general rules that are consistent with the statute's specific prohibitions regarding actions

decades that those rules have been in place, there have been only a handful of complaints, and those in which Comcast has been named as a defendant have been non-meritorious.

Given the competitiveness of the marketplace, and the ever-present dangers of encroaching on First Amendment rights that comes with any government oversight of program carriage decision-making, there are serious questions as to whether the Commission has a legitimate role to play in policing program carriage negotiations even under its existing rules. As Judge Kavanaugh observed three years ago, "In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market."[98] Expanding Commission oversight of private negotiations in order to promote additional carriage of what the Commission defines as "independent" and "diverse" programming would be arbitrary and capricious and contrary to law, especially in light of the above-described marketplace evidence.

VI. CONCLUSION

For the foregoing reasons, the Commission should recognize that the video marketplace is competitive and diverse at all levels, more hospitable than ever to independent and diverse programmers, and in no need of government intervention.

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between distributors and program vendors in forming program carriage agreements. . . . We believe that [a case-by-case] approach complies with the expressed congressional intent of the program access and carriage agreement provisions of the 1992 Cable Act, by preserving the legitimate aspects of negotiations for multichannel video programming that result in greater availability of programming to the multichannel video marketplace.").

98 *See Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (internal citations omitted) *see also Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("[T]he record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992."); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 165 (2d Cir. 2013) ("The program carriage regime requires an unaffiliated-network complainant to make a case-specific showing that an MVPD 'unreasonably restrain[ed]' its ability to 'compete fairly,' and market power is generally a 'significant consideration' under such a requirement. In light of this fact, even if the regime does not explicitly require proof of market power, we expect that the FCC will consider market power in evaluating the vast majority of future § 616(a)(3) complaints.") (internal citations omitted).

Respectfully submitted,

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