Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF PUBLIC KNOWLEDGE

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I. Introduction

This is a paradoxical time in the video marketplace. Programming is better than it has ever been, and even in the broadband and social media age, television remains a key part of the cultural conversation. At the same time, consumers are consistently dissatisfied with the way they access television content and how much they pay for it, while many creators feel like they still have to struggle and fight to even be given the opportunity to earn an audience.

For decades, there simply weren't that many ways for creators and programmers to reach viewers. Broadcast licenses and cable franchises were limited by legal, technological, and economic barriers. As a result, public policy regarding video typically focused on the margins—ensuring that viewers have access to diverse and local content, promoting competition, and prohibiting certain egregious practices. But the overall structure of the market was locked in place, and year after year, prices went inexorably upward, and the market became ever-more concentrated. People have access to the world's literature and music at a few taps of a smartphone's screen. Why must so much video remain tied up in the legacy pay TV model?

One reason is that the companies who benefit most from the current state of the marketplace—dominant pay TV distributors like cable companies—control both the route to the viewer's home (through broadband and the set-top box) that new video services need to access, and much of the content those services would need to offer if they were to become true competitors to cable. It has become increasingly obvious that one way today's incumbents can hold back tomorrow's competition is through economic coercion, forcing programmers to agree to limit who they sell to and how they sell it, in an effort to limit new services' ability to compete with traditional pay TV head on.

The effects of this are reflected in every customer's bill. As the GAO has found, "despite the myriad of technological and other changes, the rates paid by consumers for subscription video services continue to increase at a faster pace than the general rate of inflation."[1] People pay for content they don't want, in packages that don't make any sense, that they have to watch using devices they don't like but nevertheless have to pay for.[2]

Meanwhile, every viewer is denied access to the range of programming that might be available in a more open marketplace. Furthermore, these systemic problems disproportionately affect diverse, independent, and niche programmers who have seen benefits from the open accessibility innovative technologies provide. A more open and vibrant video marketplace would most clearly benefit those voices which are underrepresented in traditional access outlets, and the people who want to hear those voices. As Robert Johnson, founder of Black Entertainment Television, explains:

> It is hypocritical that one of the arguments used by the video network operators to fight the new program access technologies is that they would disadvantage minority programmers or raise their cost of cable to consumers. On the contrary, the frontier of new media and innovative access to programming through streaming and OTT content, allows newcomers, particularly minority programmers, to have a voice in the age of digital content.[3]

Changes to the system would help content creators get a foot in the door and alleviate the strong-arm incumbents wield over up-and-comers. The immediate benefit to

[1] GAO Report, VIDEO MARKETPLACE, Competition Is Evolving, and Government Reporting Should Be Reevaluated, June 2013. page 1; *See also* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2756175.
[2] https://www.publicknowledge.org/press-release/a-competitive-video-set-top-box-market-could-save-consumers-billions.

them is passed on to minority communities who want to see their story told from their point of view, but have so far been relegated to stereotypes in mainstream media. It passes, too, to multicultural actors and actresses who right now find less opportunity in Hollywood than their Caucasian counterparts:

> As a battle wages on #OscarsSoWhite, there are hundreds of thousands of hours of quality programming —documentaries, shorts, lifestyle, indie movies, global movies—that don't fit well within the traditional ad-based TV model and will never make it onto broadcast, cable or even Netflix and Amazon. And for those content creators and the entrepreneurs who want to distribute that work, the only viable market is direct to consumers in the streaming world. But as long as the streaming world is locked out from the mainstream, many audiences will never find them and they will not succeed. Set-top box innovation would open that system.[4]

So, too, do the benefits pass on to innovators who, spurred on by the ability to branch out, are increasingly experimenting with yet-unimagined new avenues to content and technology experiences. It passes to communities – kids growing up who want to see themselves represented on screen but right now find very few choices on current cable line-ups. And when the nascent technologies and content take root and can really bloom, it may also awaken more traditional outlets to the fact that there is, indeed, an appetite for that kind of diversity and niche programming, and disrupt the status quo of relative homogeneity.

We no longer have to settle for the status quo. The solutions to this frustrating situation are clearer than ever. Broadband distribution of content, new devices and apps, and new platforms and services have shown that a new, more fundamentally competitive

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[3] http://thehill.com/blogs/congress-blog/technology/266653-consumers-deserve-choice-and-minority-programmers-deserve.

[4] Eric Easter, Chairman of the National Black Programming Consortium and CEO of BLQBOX streaming video service, FCC's set-top box proposal is really about a level playing field, The Hill (Feb. 17, 2016), *available at* http://thehill.com/blogs/congress-blog/technology/269588-fccs-set-top-box-proposal-is-really-about-a-level-playing.

and fair model is possible, if only a few obstacles are cleared away. To get there, however, policymakers need to make an inventory of what these obstacles are. In this proceeding, the FCC has the opportunity to get a better understanding of the full range of methods, including coercive and limiting contracts, that pay TV incumbents use to can hold back the development of new services and business models that better serve creators and viewers.

II. **The Current Video Marketplace Fails to Meet the Needs of Viewers and Independent and Diverse Programmers.**

Today’s world has the potential to far surpass previous eras in terms of diverse and niche content proliferation. Yet it has not lived up to that potential. From programmer and content creator perspective, the problem is twofold. Those who yearn for their content to reach consumer eyeballs generally fall into two buckets: those who receive carriage on the limited cable channel line-up but at great expense because of their lack of leverage; and those who, having been rejected by traditional carriage, have relied on over-the-top as an alternative to get their product out there.

Many of the incumbent companies in the traditional marketplace have extraordinary leverage over the smaller players they negotiate with. In many cases, denial of carriage by a single company was a career-ender. The result was that even the programmers who make the short list are strong-armed into deals that undermine both their bottom-line and their autonomy, because the alternative is nothing at all. A case study: Robert L. Johnson, one of the relatively few who has been allowed at the table, summarized well the difficulties that diverse and independent programmers face in the current marketplace:

> In 1980, I started the nation's first and only African-American owned cable channel. As founder of Black Entertainment Television (BET), I know first-hand the barriers minority-owned programmers must face when trying to get carriage on cable. I vividly recall going from cable operator to cable operator to convince them that there was an underserved African-American consumer base who wanted to see quality entertainment and programming that was created especially for them and, more importantly, not available anywhere else.[5]

Mr. Johnson fortunately had a relationship with with the cable companies that allowed him a foot in the door.[6] Those who aren't blessed with even that modicum of clout end up left out in the cold on traditional cable. For years, content creators have been jostling with each other on the precious few spots on the cable line-up. We are all familiar with the fact that companies seem to give us an infinite number of channels. But at the end of the day, traditional packages are finite – and a disproportionately low number of those are diverse or niche programming. Even for broad "diverse" programming, programmers find themselves fighting each other for the precious few slots cable companies make available to them:

> Over 35 years later, there are still only a handful of African-American-led cable channels, most of which are not available in every market, serving over 12 million African-American cable households who pay billions of dollars in cable subscriber fees.[7]

An apt parallel to the success of Mr. Johnson is Mr. Stephen Davis's experience. When he approached the same cable companies with his own idea for programming designed to speak to diverse voices, he was told that the box had already been checked:

> The responses we received from large cable systems were extremely disturbing.

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[5] Robert L. Johnson, Chairman of RLJ Entertainment and Founder of Black Entertainment Television, Consumers Deserve Choice and Minority Programmers Deserve Opportunity, The Hill, Jan. 22, 2016. Available at http://thehill.com/blogs/congress-blog/technology/266653-consumers-deserve-choice-and-minority-programmers-deserve.

[6] *Id*. ("Let me be clear, I am proud of the relationship I had with the cable industry when I founded BET, and today, as chairman of RLJ Entertainment. Therefore, I hope my friends in the cable industry will support minority interests in the digital age as they did with BET in the analog era by endorsing the new consumer empowering program set-top box technology available today.")

[7] *Id.*

> We were told that since many systems carried the Black Entertainment Network (BET), then a primarily music and comedy channel, there was no need for additional diverse programming. We were repeatedly told that there was no market for positive, uplifting programming targeting the African American community. There is something terribly wrong with a media system where one or two companies have the power to deny the African American community access to programming about education, healthcare, and public policy.[8]

Fortunately, the internet has in recent years changed the game some. Over-the-top video options now give creators alternatives to the “cable deal or no deal” marketplace structure. Many programmers and writers who recall their initial failure due to rejection by cable companies in the early 1990s-2000s now find the proliferation of over-the-top gives them a mainline to previously unimagined success. Mr. Davis’ experience exemplifies this evolution to a more optimal environment:

> Things are very different today. Technology is accessible and easy to share. High quality video can be produced and edited with smartphones! This technological evolution has occurred in ways most could have never imagined in 2001. Most importantly, the Federal Communications Commission is set to provide our country’s diverse and independent video programmers and technology entrepreneurs an open media platform that will free us from our big cable past.[9]

Ruth Livier is another creator who found that doors once closed to her on traditional cable were opened by the surge of independent programming and innovative outlets the Internet enabled:

> At a conference designed to nurture Latino talent, I approached a traditional media executive for advice on how to get my show produced who said “who are you for anyone to produce your show?” Others asked “who’s going to watch this?” Their comments were not based on my writing. They had not read a single word. Their immediate objections were based entirely on the concept of a Latina-drive show.
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> Then a few years later, everything changed. Technology advanced... The Internet suddenly put worldwide distribution at our fingertips... We independent artists suddenly had unprecedented access to create, produce, and distribute our content.

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[8] Stephen Davis, Founder of Black Education Network, FCC and The Set-Top Box, The Hill, Feb. 18 2016, available at http://thehill.com/blogs/congress-blog/technology/269778-fcc-and-the-set-top-box.
[9] *Id.*

> In this exciting new frontier of an open internet, anyone, regardless of ethnicity or socioeconomic standing, could finally tell their stories... without getting derailed by corporate gatekeepers.[10]

Moreover, the open nature of the Internet has given rise to original new stars with complete autonomy over their creations. Sites like YouTube and Funny Or Die, and even Vine have inspired up-and-comers to bypass cable completely and broadcast their ideas directly to hungry viewers online. We have also seen a surge in original programming by over-the-top services.[11] In some cases, the online success of over-the-top original shows has led to solicitation and subsequent deals inked with the incumbents.[12]

It's worth noting that the stories above were generated from a range of other groundbreaking proceedings coming out of this Commission, including the historic 2015 Open Internet Order and the more recent "unlock the box" proceeding.[13] That underscores that this Notice of Inquiry is another critical element in working towards a set of fundamental goals for the digital age: encouraging competition and openness; elevating the plethora of new voices and ideas waiting to spring forth; and, critically to all of that, breaking up the current monopolies to which the incumbent giants currently cling.

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[10] Why Net Neutrality Matters: Protecting Consumers and Competition through Meaningful Open Internet Rules Before S,. Comm. on the Judiciary, 113 Cong. (2014) (Testimony of Ruth Livier, Writers Guild of America-West), *available at* https://www.judiciary.senate.gov/imo/media/doc/09-17-14LivierTestimony.pdf.

[11] Just this year, Netflix has doubled its original programming, See http://screenrant.com/netflix-original-shows-2016/.

[12] Notable examples include, but are not limited to, Issa Rae and Todrick Hall, both of whom earned notability through niche careers on over-the-top outlets and now perform on traditional carriage. See, e.g., Jenna Wortham, The Misadventures of Issa Rae, N. Y . Times, Aug 4, 2015, *available at* http://www.nytimes.com/2015/08/09/magazine/the-misadventures-of-issa-rae.html?_r=0; *See also* Matthew Scott Donnelly, "Todrick Hall is Headed to MTV! See The YouTube Star's Greatest Hits," MTV.com, Oct. 22, 2014, *available at* http://www.mtv.com/news/1971879/todrick-hall-web-parodies/.

[13] *See* In the Matter of Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, MB Docket No. 16-42, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, (rel. Feb. 16, 2016).

III. Incumbents Can Stymie the Development of Competition.

As described above, the video marketplace shows promising signs of improving in ways that can benefit consumers. New online video services provide a way for programmers and creators of all kinds to reach viewers while giving consumers more options. New devices allow people to watch video in new ways, and not just tied to a rented cable set-top box. However, the vibrant online video marketplace is still just a fraction of what it could be. Most online video services complement, rather than directly compete with, traditional pay TV packages, and most innovative new apps and devices can only access online video, not pay TV programming. While broadband distribution and new business models and services have revolutionized the way people access and pay for music, news, books, and media of all kinds, the video marketplace remains relatively stable. For all the talk of cord cutting, there are still nearly a hundred million pay TV subscribers, and approximately $19 Billion in revenue for the four largest cable providers.[14] Much must-see content is only available, or only available affordably, with a traditional pay TV subscription.

A. As Broadband Providers, Incumbent Pay TV Providers Can Disadvantage Competing Video Services and So Reduce Options for Programmers.

Some of the largest technology companies—for example, Apple, Intel, and Amazon—have been trying to launch online video services that more directly compete with cable for some time but have hit insurmountable obstacles.[15] These new business

[14] http://www.businessinsider.com/cord-cutting-doesnt-spell-doom-for-cable-companies-2015-7.
[15] *See e.g.*, Amol Sharma, Shalini Ramachandran & Don Clark, Amazon Considering Online Pay-TV Service, Wall Street Journal, Jan. 21 2014, http://online.wsj.com/news/articles/SB10001424052702304757004579334981130200324 ("Those companies seeking to launch new services have struggled to negotiate licensing terms that would allow them to price their services competitively."); Ina Fried, Brian Krzanich on Why He Pulled the Plug on Intel's TV Dreams, re/code, Jan. 2 2014, http://recode.net/2014/01/02/brian-krzanich-on-why-he-pulled-

models are visions of what could be—but so far, they are unrealized promises. No matter how much money, technology, and talent a company has, it can't sell a video product if programmers won't sell to them, and programmers won't sell to them if their current largest customers won't let them.[16] MVPDs use their power over content, over the broadband pipe, and over the viewer's TV screen to limit the availability of any new services in the market. Even popular online services like Netflix face a cloudy future where, in order to reach viewers, they first have to pay off cable companies with local monopolies and nationwide monopsonist power.[17]

It is not surprising that pay TV companies will do what it takes to fend off and limit competition. What is unique about the video industry, however, is the various methods the pay TV incumbents have at hand to achieve their goals. Most fundamentally, unlike other media marketplaces, video incumbents control both the pipes their competitors need to access, and the content they need to offer a service.

Comcast's StreamTV is an example of the anticompetitive behavior that can emerge as a result of the unique position in which video incumbents find themselves in. Comcast is taking advantage of its position as an infrastructure provider to ensure that the dominance it enjoyed in traditional cable services extends online. The very promise of online video is that it can finally bring viewers the choice that has been lacking for so many years in the pay TV marketplace, allowing customers to choose services, packages,

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the-plug-on-intels-tv-dreams; Peter Kafka, Apple's iTunes Pitch: TV for $30 a Month, All Things D, Nov. 2, 2009, http://allthingsd.com/20091102/apples-itunes-pitch-tv-for-30-a-month. John Paul Titlow, Big Cable Stalls Apple's TV Plans, READWRITEWEB, http://www.readwriteweb.com/archives/big-cable-stalls-apples-tv- plans; John Bergmayer, Rumors of Apple Set-Top Box a Reminder of Thwarted Innovation, Public Knowledge, Aug. 17, 2012, *available at* http://www.publicknowledge.org/blog/rumors-apple-set-top-box-reminder- thwarted-in

[16] That's not to say that a few of the largest programmers don't see benefits from the current constrained distribution model, which raises prices by inhibiting supply.

bundles, and content that better meets their needs. But Comcast's actions could drive other online video providers out of the market or make it more difficult for independent programmers to reach viewers. This reduced competition could drive up prices for video services nationwide while making it less likely that viewers would have access to new services offered in new ways.[18]

Pay TV incumbents who are have traditionally faced little competition in the video marketplace generally face even less competition in the broadband market.[19] They are thus able to leverage their control over the broadband pipe in various ways that can disadvantage online video competitors—through throttling or blocking them, through anticompetitive interconnection practices, through manipulating the pricing of broadband/TV bundles to disadvantage new entry, through data caps and anticompetitive zero-rating, and so on. As Assistant Attorney General Bill Baer recently put it,

> So many consumers' only option for high-speed internet service is the cable company – the same cable company that also derives significant revenues from its cable television business. This means that as online video distribution increases the cable companies have both the incentives and means to use their gatekeeper power to slow innovation to protect their video profits. In this way, the high-speed Internet market and the video distribution market are inextricably intertwined.[20]

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[17] See http://arstechnica.com/business/2015/02/netflix-call-your-lawyers-fcc-is-ready-for-interconnection-complaints/

[18] See Public Knowledge, Petition for the Federal Communications Commission to Enforce Merger Conditions and its Policies, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses and Protecting and Promoting the Open Internet,* MB Docket No. 10-56; GN Docket No. 14-28 (March 2, 2016).

[19] Prepared Remarks of FCC Chairman Tom Wheeler at 1776, "The Facts and Future of Broadband Competition" (September 4, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf ("At the low end of throughput, 4 Mbps and 10 Mbps, the majority of Americans have a choice of only two providers. That is what economists call a "duopoly", a marketplace that is typically characterized by less than vibrant competition.").

[20] Remarks of Assistant Attorney General Bill Baer at the Future of Video Competition and Regulation Conference, Video Competition: Opportunities and Challenges (Oct. 9, 2015), *available at* http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-keynote-address-future-video-competition.

The FCC has started to address some of these issues in its Open Internet proceeding, but efforts to constrain the anticompetitive actions of large broadband providers are ongoing, as well as efforts to ensure that broadband is available to and affordable by those communities that need it most.

B. As Dominant Video Platforms, Incumbent Pay TV Providers Can Harm Smaller, Diverse, and Independent Programmers.

Incumbent distributors can harm programmers in a number of ways. As discussed below, some of these ways relate to restrictions on programmers that prevent them from experimenting with business models, selling to new distributors, and otherwise inhibiting competition. However, small programmers can be disadvantaged by large pay TV distributors in other ways, as well.

For example, vertically integrated cable companies that produce their own programming have an incentive to favor that programming over similar programming from independent programmers. Many programmers have alleged that they have faced discrimination in this regard.

Additionally, some MVPDs will not carry a programmer unless it is already carried by a particular other MVPD, or unless it has already reached a certain level of distribution. It is not difficult to see how this can create “chicken or the egg” kinds of problems for smaller programmers, who might find themselves with no path to nationwide carriage.

The harms to programmers can be more straightforwardly economic, as well. Large cable distributors typically enjoy “volume discounts” on the programming they carry. While in an electronic age it is not necessarily cheaper for a programmer to supply a larger cable company with programmer instead of a number of smaller cable companies (apart from transaction costs), larger distributors are able to use their bargaining power (and frequently, their status as must-have distribution platforms) to pay lower rates than other distributors.

The Department of Justice has noted that volume discounts can be anticompetitive on the part of the seller[21], or on the part of the buyer, depending on the circumstances.[22] Additionally, there is no reason to assume that when a television distributor extracts a better rate from programmers, that this results in any savings to subscribers, because a monopsonist has no incentive to share any of those gains with downstream customers unless, ... downstream buyer power drives the upstream market exploitation.[23]

There is reason to suspect that large cable companies already such economies of scale that their "volume discounts" are not related to real efficiencies, but to leverage. As Justice Department official Nancy Rose put it (when reflecting on the failed Comcast/Time Warner Cable deal):

> What we found was there was very strong evidence of substantial bargaining leverage in this industry by larger cable firms. Not only did the larger firms get better deals in both of these distribution channels, but the implication of putting together these two was that they'd have more bargaining leverage and be able to raise prices significantly as a result of that.[24]

The harmful effects of anticompetitive volume discounts that result from this kind of leverage are at least threefold. First, a programmer that must grant such discounts may

[21] Competitive Impact Statement at 18, *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (Nos. 95-5037, 95-5039), http://www.usdoj.gov/atr/cases/f0000/0045.pdf
[22] See Business Review Letter from Joel I. Klein, Assistant Attorney General, to Counsel for Containers America LLC (Mar. 8, 2000), http://www.justice.gov/sites/default/files/atr/legacy/2006/09/20/4287.pdf (recognizing possibility of "oligopsonistic" buying power); *see also* Statement of Peter C. Carstensen, *Buyer Power and Merger Analysis – The Need for Different Metrics* at 1 (Feb. 17, 2004), http://www.justice.gov/sites/default/files/atr/legacy/2007/08/30/202606.pdf ("the structure of buying markets plays a very significant role in both creating incentives for and the opportunity to exploit buyer power. Mergers that increase such power... present significant threats to both the short run and long run efficiency of those markets in static as well as dynamic terms.")
[23] *See Carstensen*, *id.* at 19 (discussing this issue in an agricultural context).

have to reduce the quality of its programming. Second, a programmer that must grant such discounts may be forced to charge more to smaller video distributors, raising costs to consumers, and harming MVPD and online video competition.

Third, and most broadly: Independent programmers, particularly those catering to diverse or niche interests, may struggle to come to terms with the merged entity. This may undermine their business or keep them off the cable dial entirely. Other independent programmers may be tempted to sell to larger conglomerates in a tit-for-tat of consolidation. Such an outcome would be contrary to the Commission's established goal of ensuring that "no single operator can, by simply refusing to carry a programming network, cause it to fail."[25] Fostering diverse ownership and content is an important public interest goal, and because the public relies on multiple, conflicting accounts to cast informed ballots, ensuring independent and diverse voices can get carriage on reasonable terms has civic benefits.

C. As Dominant Video Platforms, Incumbent Pay TV Providers Can Harm Online Video Competition and Thus Programmers.

Pay TV incumbents can also restrain new video competition in their capacity as TV providers by restraining emerging competitive platforms. They control the set-top box that most viewers use to watch video programming, and can keep it locked down, not open to new video competitors. They can tie online video to pay TV subscriptions through "TV Everywhere"-style authentication systems—and then further restrain competition by selectively authenticating some apps on some devices and not other apps on other devices. Perhaps most central to this proceeding, the largest pay TV providers

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[24] Spoken comments of Nancy Rose at ABA Event, Bargaining Leverage and Competitive Effects, Jun. 25, 2015.

are able to do this because effectively monopsonists, or nearly so. They are "must have" platforms for programmers, which grants them significant bargaining power and the ability to impose terms and conditions on programmers that might work against the programmers' own long-term interests.

A monopoly exists when a single seller of a good or services has market power, which means it can raise prices at will without being afraid of losing business to competitors. A monopsony, on the other hand, exists when a single buyer has the ability to demand that it pays less for goods or services, or is able to extract other kinds of onerous terms, leaving sellers with nowhere else to go, or to face financial ruin if they walk away. Monopsonies, like monopolies, can violate antitrust law. "The antitrust laws apply to the exercise of market power over sellers (monopsony power), just as they do to the exercise of market power over buyers (monopoly power),"[26] and "the economic approach to analyzing seller or buyer market power is the same."[27]

In a business negotiation between two companies, contract terms will tend to be mutually beneficial. But when one side has significant leverage as a monopsonist, it can force the other side to "agree" to terms that are, in the medium- or long-term, disadvantageous. In its internal analysis of the proposed Comcast/Time Warner Cable merger, the Commission took a hard look at the ways that large cable companies can use their market power as television distributors to harm competition. For example, larger

[25] See, e.g., Cable Horizontal and Vertical Ownership Limits, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 2134, ¶ 40 (2008).
[26] United States Response to Public Comments, US v. Cargill, Civil Action No. 99-1875 (GK) (United States District Court for the District of Columbia) (citing Mandeville Island Farms v. American Crystal Sugar Co. 334 U.S. 219, 235-44 (1948), https://www.justice.gov/atr/case-document/file/490656/download.
[27] Comments of Marius Schwartz, Should Antitrust Assess Buyer Market Power Differently than Seller Market Power?, Feb. 17, 2004, https://www.justice.gov/atr/should-antitrust-assess-buyer-market-power-differently-seller-market-power.

video distributors are better positioned to extract contractual terms that restrict the delivery of programming online, and their carriage decisions are more likely to harm the nationwide programming marketplace.

This is exacerbated by a few features of the traditional pay TV market that the FCC must consider. First, while all cable companies act as distributors for video programming, they do not generally compete with each other. Programmers prefer to be carried not just by most cable companies (as they serve distinct geographic markets), but by all MVPDs, even when they do overlap. Although, during carriage disputes, a high-value programmer may pull its content from a distributor as a temporary negotiating tactic, in general, a programmer would prefer to be carried by a cable company, as well as DISH, DirecTV, and any telecommunication video provider, instead of being carried by just one. Because programmers do not choose between competing distributors but instead typically do business with many of them at once, large distributors do not compete with each other for access to programming. This increases the incentive for large distributors to behave in parallel ways—for example, by offering similarly unfavorable terms.

This is true in part because of a regulatory structure which prohibited or discouraged many kinds of exclusive contracts. Section 628 of the Communications Act[28] is at the core of this. Passed as part of the Cable Television Consumer Protection and Competition Act of 1992,[29] this section states that an MVPD may not "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming

[28] Codified at 47 U.S.C. § 548.
[29] PL 102-385, 106 Stat. 1460.

distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." This statute (and the FCC's implementation of it via the "program access" rules) allowed the development of MVPD competition in the United States. Without these protections, DBS providers, telco MVPDs (like FiOS TV and U-Verse), and other new entrants would not have been able to access the programming they needed to start competing with incumbent cable providers.

Thus even where MVPDs do compete head-to-head (such as overbuilt areas, or with respect to DBS) they usually carry roughly similar programming lineups.[30] But this marketplace and legal framework only applies to the world of traditional MVPDs, who *do* compete with online video providers for programming, and use their current status in the marketplace as a means of accomplishing this.

Although program carriage contracts are generally confidential, there is enough in the public record to demonstrate that MVPDs are free to, and do, either require that programmers not distribute their programming online (or distribute it online only subject to restrictive conditions), or refuse to carry programming networks that do distribute their programming online.[31]

The use of "alternative distribution method" (ADM) provisions with respect to online video is an area of obvious concern—it is unclear why, if certain behaviors are unlawful with respect to MVPD carriage, they are not unlawful with respect to online carriage.[32] Yet MVPDs are free to prohibit programmers from distributing programming

[30] While DBS competition for video customers is real, DBS is generally at a disadvantage because it does not offer broadband.
[31] *See* Letter from TheBlaze, Inc., Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign or Transfer Control of License and Authorizations, MB Docket No. 14-57 (Feb. 13, 2015).
[32] See Comments of Public Knowledge, Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261, at 19 (Mar. 3, 2015).

online at all, or only subject to significant windows. The use of "most favored nation" (MFN) clauses in programming contracts can also harm consumers and programmers. These clauses state that an MVPD who is able to demand such a provision automatically benefits from terms another distributor is able to secure—terms that might not only relate to programming costs, but business models. MFNs can be used to simply assure that a particular MVPD gets the best possible deal in terms of the price paid for programming on a per-subscriber basis. This could create competitive harms, of course, but a provisions such as these are not necessarily the most concerning kinds of MFNs. More troubling are MFNs that keep the marketplace from evolving, by preventing programmers from offering video in new ways and through new services, or that have the same practical effect as ADMs and keep programming off of online platforms entirely.

Because of these kinds of terms, a programmer might not be able to give a special break to a new entrant in order to promote competition, or to grant an online provider on-demand access to programs, without also granting these rights to an incumbent cable company. Thus, MFNs can restrict competition and prevent the market from evolving toward new methods of video distribution and new business models. The Department of Justice has noted the anticompetitive problems that MFNs can cause. For example, then-Deputy Assistant Attorney General, Antitrust Division Fiona Scott-Morton noted that when an "MFN is in place, the incumbent is contractually entitled to the low price of the entrant. Thus the entrant can never create an advantage vis-a-vis the incumbent, and entry is blocked."[33] Additionally, as the Second Circuit recently explained, "though surely

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[33] Presentation by Fiona Scott-Morton, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Contracts that Reference Rivals, at 13 (Apr. 5, 2012),

proper in many contexts, [MFNs] can be 'misused to anticompetitive ends in some cases.'"[34]

IV. Factors to Consider When Determining Whether Particular Kinds of Contractual Restrictions are Anticompetitive.

Given the complexities of the marketplace it is difficult to conclude that any particular kind of contractual provision is *per se* unreasonable. It may be the case that particular kinds of provisions are so likely to be anticompetitive that they should be prohibited outright, since the costs of prohibiting the beneficial ones are outweighed by the costs of monitoring and enforcement. It may also be the case that some kinds of contractual provisions are so likely to harm smaller creators or consumers in the short term that they should be prohibited even if some of them may carry some theoretical, longer-term benefit. But the Commission's first task should be to outline a framework listing factors to consider when determining whether particular contractual limitations are likely to be anticompetitive. A list of such factors may include:

- **Disparate bargaining power.** In determining whether disparate bargaining power exists between an MVPD and programmer, the Commission should examine the concentration of the marketplace and each party's position within the market. When a large pay TV provider inserts contractual provisions like MFNs and ADMs, they are especially anticompetitive when the programmer is not in a position to bargain. A large gap in bargaining power results in coercion and can be an indicator of anticompetitive behavior.

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http://www.justice.gov/atr/file/518971/download. Additionally, the presentation argues that in some market conditions, smaller buyers who obtain MFNs can actually be harmed by the practice. *Id*. at 11-12.

[34] United States v. Apple, 791 F.3d 290, 319 (2nd Cir. 2015) (citing Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir.1995)).

- **The parties' market power.** As noted by Fiona Scott-Morton, former Deputy Assistant Attorney General of the D.O.J. Antitrust Division, contracts that reference rivals (CRRs),which include MFNs, "have the potential to harm consumers and competition, particularly — but not always — when they involve firms with market power." Contracts between parties with large market power have a significant impact on prices and consumers because they make it difficult if not impossible for competitor to participate in the market. Therefore, the Commission should examine market power as a factor in determining what contractual limitations are anticompetitive.[35]
- **Disparate information.** When the distributor has more information about demand (in the video context, ratings may be such information) than the seller, it may be more likely to have the ability to impose unfavorable contractual requirements.
- **The effect on competition.** This factor is directly related to those above, but is focused on actual or likely marketplace outcome rather than relative negotiation power. If a contractual limitation is likely to or actual does negatively affect competition, the Commission should be more likely to determine that the provision is anticompetitive. Insufficient competition in the video marketplace is a major contributor to the lack of diversity in programming.
- **Nature of the companies in question.** The Commission should consider the structure and business models of the parties involved. This includes whether parties offer multiple related products (*e.g.*, a bundle of video and broadband) or

[35] Presentation by Fiona Scott-Morton, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Contracts that Reference Rivals*, at 13 (Apr. 5, 2012),

if they are vertically integrated. These business arrangements can enhance bargaining power, leading to the anticompetitive effects described previously.

- **Is the contractual limitation about getting the same price for programming or restricting ability of new entrants to access programming at all?** MFNs and ADMs can be harmful when they prevent new companies from entering the market—for example, by making it impossible or excessively costly to access content or reach consumers.[36] Provisions of this kind may be express (for example, a flat prohibition on a programmer selling to a new competitor) or simply the expected result of particular terms. The Commission should examine the intent of these provisions when analyzing whether they are anticompetitive.
- **Who do the restrictions effect?** If the restrictions fall more heavily on new entrants or parties who are less likely to be able to push back on their own, contractual limitations are more likely to be anticompetitive. When these provisions impact new entrants and those with little bargaining power, the result is less competition, which can harm viewers and diverse and independent programmers. Restrictions that expressly refer to particular delivery methods or business models (for example, online delivery, or on-demand access) are more likely to have an anticompetitive effect or intent.
- **The availability of new business models.** The Commission should assess whether contractual provisions prevent new business models from emerging, or impede experimentation in the marketplace. For example, there is increasing

http://www.justice.gov/atr/file/518971/download.

[36] Presentation by Fiona Scott-Morton, former Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Contracts that Reference Rivals, at 13 (Apr. 5, 2012), http://www.justice.gov/atr/file/518971/download.

consumer demand for on-demand, subscription streaming, and "skinny bundles," and provisions that prevent these sorts of business models from emerging may be harmful to consumers and the marketplace.

- **Unbargained-for Benefits.** A contractual provision that goes beyond merely tweaking the terms of an existing deal, or the price that is paid for content, may be anticompetitive in some circumstances. However, some MFNs are more "open-ended" in that they require that a programmer turn over new rights or grant new concessions to distributors on matters that were never even part of the initial bargain. An MFN of this kind is more likely to be anticompetitive , in that it grants a distributor with market power more than it bargained for.

This non-exhaustive list of factors is merely a starting point for the Commission to consider when evaluating contractual limitations that may restrict the ability of programmers to experiment with new platforms. Congress charged the Commission "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, ... and to spur the development of communications technologies."[37] To carry this out, the FCC should use its authority over the video programming distribution market to protect independent programmers from anticompetitive actions.

V. Conclusion

To benefit viewers, the Commission should consider prohibiting the anticompetitive methods some large incumbent pay TV distributors use to limit emerging competition,

[37] 47 U.S.C. § 548(a).

restrict the options of programmers, and take away consumer choice. The Commission should give particular weight to the experience of small, independent, and diverse programmers, while acknowledging the why distributors with market power may, at times, use their position to limit competition and fend off new entry, and what may be done to prevent such actions. With such an approach, the Commission can best achieve its pro-competitive goals while promoting diversity and viewer choice.

Respectfully Submitted,

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