

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

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

To: The Commission

**REPLY COMMENTS OF CBS CORPORATION, THE WALT DISNEY COMPANY,
TIME WARNER INC., 21ST CENTURY FOX, INC., AND VIACOM, INC.**

CBS Corporation, The Walt Disney Company, Time Warner Inc., 21st Century Fox, Inc., and Viacom, Inc. (the “Content Companies”) respectfully submit these reply comments in the captioned proceeding.¹ In particular, the Content Companies write to address certain contentions — which repeatedly have been shown to be without merit — that bundling, tiering and penetration arrangements diminish diversity and harm consumers.

Several commenters — including the American Cable Association (“ACA”), AT&T/DirecTV, ITTA and Verizon — contend that bundling, tiering, and penetration thresholds requested by programmers in distribution negotiations diminish diversity and harm consumers. In particular, they contend, these practices force MVPDs to purchase undesirable programming, raise consumer prices and limit channel capacity.²

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

² See Comments of the American Cable Association at 13-33, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016); Comments of AT&T at 14-15, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016); Comments of Free Press at 9-15, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016); Comments of ITTA — The Voice of Mid-Size Communications Companies at 3-7, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016) (“ITTA Comments”); Comments of Verizon at 3-6, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016) (“Verizon Comments”).

If these alleged ills sound familiar, it is because they are a rehash of arguments that have been repeatedly raised, and just as repeatedly refuted, in multiple previous proceedings.³ So perhaps it should not be surprising that certain distributors would bootstrap their anticompetitive wish list into yet another proceeding — in a cynical misuse of the Commission’s processes and resources. Nevertheless, in the interest of clearing the air and ensuring a comprehensive record, the Content Companies are obliged, once again, to address these spurious assertions.

Claims that bundling, tiering, and penetration arrangements give programmers outsize leverage vis-à-vis MVPDs are baseless. Because the video programming marketplace is highly competitive, content owners do not have market power to compel MVPDs to accept

³ See, e.g., Reply Comments of Viacom Inc. at 4-8, *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198 (filed Feb. 12, 2008) (relying on rigorous empirical data provided in an economic study conducted by Dr. Bruce Owen to explain why programmers lack the market power to coerce MVPDs to purchase unwanted programming); Reply Comments of The Walt Disney Company at 12-27, *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198 (filed Feb. 12, 2008) (“Disney 2007 Reply Comments”) (explaining how bundling practices benefit consumers and how policy proposals advanced by small and rural cable operators — including prohibitions on minimum tiering and penetration provisions in distribution contracts — would harm both competition and consumers); Reply Comments of The Walt Disney Company, Viacom, Inc., News Corporation, Time Warner Inc., and CBS Corporation at 5, *Revision of the Commission’s Program Access Rules*, MB Docket No. 12-68 (filed July 23, 2012) (noting, in response to comments submitted by Mediacom Communications Corporation (“Mediacom”) in a proceeding concerning proposed revisions to the program access rules, that “[t]o the extent that Mediacom makes vague allegations about the alleged bundling practices of programmers, the Joint Commenters have responded to and refuted these specious allegations numerous times”); Comments of 21st Century Fox, Inc. and Fox Television Stations, LLC at 11-12, *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, MB Docket No. 15-216 (filed Dec. 1, 2015) (explaining that bundling “foster[s] competition,” “generate[s] consumer benefits,” and is “critical to programmers’ ability to develop and offer to consumers a diverse set of innovative channels”); Opposition of the National Association of Broadcasters to Petition for Rulemaking at 14-18, *Petition for Rulemaking to Amend the Commission’s Rules Governing Practices of Video Programming Vendors*, RM-11728 (filed Sept. 29, 2014) (observing that Mediacom’s proposal to mandate the “unbundling” of video programming would “involve[] a level of government interference in retransmission consent negotiations entirely inconsistent with the statutory regime established by Congress” and would “foreclose negotiations for carriage of new nonbroadcast programming”); Joint Opposition of CBS Corporation, The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., and Viacom, Inc. at 1-2, *Petition for Rulemaking to Amend the Commission’s Rules Governing Practices of Video Programming Vendors*, RM-11728 (filed Sept. 29, 2014) (arguing, in response to Mediacom’s petition for the Commission to adopt rules restricting bundling (among other commercial practices), that “by its own admission, Mediacom’s Petition is a transparent ploy to get still another bite at an apple that it already has gnawed to the core”).

bundled programming or abide by exploitative tiering or penetration obligations.⁴ In a study submitted in a previous proceeding examining programming tying arrangements, Dr. Bruce Owen determined that the low Herfindahl-Hirshman Index (“HHI”)⁵ figures associated with top programmers’ market shares across various metrics⁶ demonstrated that “[n]one [of these programmers] has a share that is *even close* to the levels that are commonly associated with market power,” a condition that must be present in order for consumer welfare even potentially to be harmed.⁷ The force of this conclusion is likely even greater today, given the variety of original content being produced and distributed by over-the-top providers such as Netflix, Amazon and Hulu.⁸ Further, arguments that MVPDs are capacity constrained have been debunked by recent evidence indicating that, due to technological advances, “the vast majority of pay television services will encounter few technical obstacles to increasing their program-carrying capacity for the foreseeable future.”⁹

⁴ See Comments of the National Association of Broadcasters at 4-5, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016) (“NAB Comments”); Comments of Univision Communications Inc. at 11, *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, MB Docket No. 15-216 (filed Dec. 1, 2015).

⁵ The HHI is a widely used measure of market concentration.

⁶ Dr. Owen assessed the market shares of eight large programmers with respect to network ownership, subscribers, full-day and prime time viewing, and revenue. See Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., App. B, Bruce M. Owen, Economists Inc., *Wholesale Packaging of Video Programming* 26 (Jan. 4, 2008), *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198 (filed Jan. 4, 2008). He found that “concentration in video programming networks measured with the number of networks or with subscribers would be considered to be unconcentrated” under the HHI, and that “[i]f measured using revenue or viewers, the sale of video programming networks would be in the middle to low end of the moderately concentrated range.” *Id.* at 27. Dr. Owen noted, however, that “[t]hese measures probably exaggerate the degree of concentration because they exclude video content not currently purchased by MVPDs — such as the growing body of broadband video content on platforms such as YouTube and other Internet providers of video.” *Id.*

⁷ *Id.* at 25-28 (emphasis added).

⁸ See *supra* note 6.

⁹ Steven J. Crowley, *Capacity Trends in Direct Broadcast Satellite and Cable Television Services* (Oct. 8, 2013), http://www.nab.org/documents/newsRoom/pdfs/100813_Capacity_Trends_in_DBS_and_Cable_TV_Services.pdf.

Similarly, arguments in favor of banning bundling arrangements outright should be viewed skeptically. In the same proceeding in which Dr. Owen submitted his findings, Dr. Jeffrey Eisenach offered his own study, in which he concluded that prohibitions on bundling and distribution requirements often require onerous price controls to be implemented.¹⁰ And in the absence of clearly defined standards concerning the lawfulness of bundling, arbitrary, broad prohibitions on such practices “may discourage conduct that is procompetitive or competitively neutral and thus may actually harm welfare.”¹¹

Indeed, the pro-competitive and diversity effects of bundling arrangements are well-accepted. The packaging of affiliated networks helps independent programmers¹² secure the distribution they need to survive and thrive. Bundling can be instrumental in ensuring that niche, minority, or otherwise underserved audiences receive the programming they want and need.¹³ In addition to enhancing diversity, bundling generates economic benefits, including

¹⁰ Reply Comments of The Walt Disney Company, Ex. A, Jeffrey A. Eisenach, Criterion Economics, L.L.C., *Why the FCC Should Not Increase Regulation of Wholesale TV Programming: Reply to Comments in MB Docket No. 07-198*, at 13-15 (Feb 12, 2008), *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198 (filed Feb. 12, 2008).

¹¹ Antitrust Modernization Comm’n, *Report and Recommendations* 94 (Apr. 2007).

¹² An “independent programmer” is any programmer that is not vertically integrated with an MVPD. NOI at 1 n.4. Although certain commenters argue to the contrary, see ITTA Comments at 3; Comments of Writers Guild of America, West, Inc. at 4-7, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016), the proposed definition is appropriate both in scope and in substance. Indeed, any other definition would require the Commission to engage in a line-drawing exercise that necessarily would be arbitrary and likely to have harmful unintended consequences.

¹³ See Comments of Univision Communications Inc. at 6, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016) (noting that “it is critically important for independent programmers, especially those that cater to historically underserved communities across cultural and ethnic groups, to be able to achieve distribution to allow them to continue to reach viewers today and in the future”); NAB Comments at 2 (“Without the ability to negotiate for program bundles and tier placement, many content providers would face increased challenges in expanding their offerings for consumers, leading to a reduction in high-quality and diverse content including programming targeted to minority or niche audiences.”).

“[i]ncreased efficiencies of scale and scope, reduced transaction costs, and reduced information costs, all of which benefit consumers through lower prices.”¹⁴

In addition, favorable tier placement and penetration thresholds help make program channels more attractive to advertisers, which in turn gives programmers access to revenue while they build out their audience base.¹⁵ Minimum penetration and tier placement guarantees also comprise part of the consideration programmers exchange when negotiating license fees.¹⁶ The absence of such commitments effectively gives MVPDs the discretion to relocate an independent network to a less penetrated tier or drop the network altogether,¹⁷ which deprives the independent programmer of the benefit of its bargain.

Hackneyed attacks on bargained for, pro-competitive bundling, tiering and penetration arrangements are, as before, bereft of any basis in fact or law. The Commission therefore should — as before — decline the invitation by several commenters to remedy a “problem” that simply does not exist.¹⁸

¹⁴ Disney 2007 Reply Comments at 15-16.

¹⁵ *See id.* at 14 n.48.

¹⁶ *See* Comments of Comcast Corporation and NBCUniversal Media, LLC at 34, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016).

¹⁷ *See* Comments of Altitude Sports & Entertainment, Outdoor Channel, Sportsman Channel and World Fishing Network at 7, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016).

¹⁸ The Content Companies also note that neither Section 257 nor Section 616(a) of the Communications Act provides a statutory basis of authority for the promulgation of new rules addressing market obstacles faced by independent programmers. NOI at 11 (¶ 23). Section 257(a) sets out a Congressional directive for the Commission to identify and eliminate “market entry barriers for entrepreneurs and other 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*.” 47 U.S.C. § 257(a) (emphases added). Thus, by its terms, Section 257 applies only to telecommunications services and information services regulated under Title II of the Act. Section 616(a) fares no better. The Commission previously has concluded that its authority under Section 616(a) is narrowly directed toward specific acts of bad behavior by vertically integrated distributors and that Congress did not grant the Commission plenary authority to intervene in the conduct of carriage negotiations between independent programmers and MVPDs. *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video* (continued...)

Respectfully submitted,

**CBS CORPORATION
THE WALT DISNEY COMPANY
TIME WARNER INC.
21ST CENTURY FOX, INC.
VIACOM, INC.**

By: _____/s/

Mace Rosenstein
Brandon H. Johnson

CBS CORPORATION

By: _____/s/

Anne Lucey
Senior Vice President for Regulatory
Policy
601 Pennsylvania Avenue NW
Suite 540
Washington, DC 20004
(202) 457-4618

COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000
mrosenstein@cov.com
bjohnson@cov.com

Their Counsel

THE WALT DISNEY COMPANY

By: _____/s/

Susan L. Fox
Vice President
425 Third Street SW
Suite 1100
Washington, DC 20024
(202) 222-4780

TIME WARNER INC.

By: _____/s/

Kyle Dixon
Vice President, Public Policy
800 Connecticut Avenue NW
Suite 1200
Washington, DC 20006
(202) 530-5460

Programming Distribution and Carriage, Second Report and Order, 9 FCC Rcd. 2642, 2648 (¶¶ 14-15) (rel. Oct. 22, 1993).

Some commenters have proposed Sections 325, 628, and 706 as additional bases of authority. See ITTA Comments at 8-10; Comments of TheBlaze Inc. at 11, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (filed Mar. 30, 2016); Verizon Comments at 7. However, Section 325 pertains to the retransmission of television station signals, Section 628 pertains to program access rules designed to promote competition among cable operators and satellite carriers, and Section 706 pertains generally to the promotion of the Internet. Clearly none of these provisions provides a basis for the Commission to regulate the terms and conditions of carriage of independent programming networks.

