Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF FREE PRESS

Free Press respectfully submits this reply to initial comments on the Notice of Inquiry (the "NOI") in the above-captioned proceeding. That NOI sought comment on the state of the marketplace for independent video programming and the principle obstacles that independent and diverse programmers face to carriage by multichannel video programming distributors ("MVPDs") and over-the-top ("OTT") distributors.[1]

Based on the initial submissions in the docket, it is clear that independent and diverse programmers continue to face barriers to carriage not only via traditional MVPD channels but via online distribution platforms as well. Other public interest organizations and social justice advocacy groups, as well as industry participants echoed the same critiques of the existing video marketplace that Free Press noted in our initial comments.[2] Namely, today's traditional video market replicates the faults of earlier iterations by offering limited access to diverse voices despite the Commission's statutory obligation to promote such content, while the promise of OTT remains subject to MVPD influence.

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[1] *In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Inquiry, 31 FCC Rcd 1610 (2016) ("NOI").

[2] *See* Comments of Free Press, MB Docket No. 16-41, at 4-9 (filed Mar. 30, 2016) ("Free Press NOI Comments").

I. Independent Producers Face Structural Barriers Both on Pay-TV Platforms and Online, Preserving Incumbents' Advantages Over Diverse Content.

As the Leadership Conference on Civil and Human Rights explained in its comments, "Our nation's current media landscape is significantly lacking in programming that features women and people of color as actors, directors, and producers in popular entertainment and news."[3] This is not surprising, since a variety of studies suggest that diverse content is more likely to be produced by diverse owners,[4] and the existing video market lacks sufficient diversity of ownership.

For example, when Free Press last reviewed the Commission's broadcast ownership data in depth in 2012, Latinos owned approximately 1.6 percent of all full-power commercial broadcast TV stations and African Americans owned only 0.4 percent.[5] Broadcast transactions since then have not materially improved these abysmal numbers. As we explained in our initial NOI comments, the video market does not provide equal opportunities and outcomes for independent programmers. Broadcast and pay-TV platforms lack racial and gender diversity reflective of our nation's make-up. MVPDs also create barriers (such as arbitrary data caps) to prevent robust adoption of online video that competes with their legacy pay-TV platforms, meaning MVPDs benefit from increased broadband usage while controlling the growth of online video options.[6]

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[3] *See* Comments of Leadership Conference on Civil and Human Rights, MB Docket No. 16-41, at 1 (filed April 6, 2016) ("Leadership Conference Comments").

[4] *See id.* at 3-4 (citing Dam Hee Kim, *The Triangle of Minority Ownership, Employment and Content: A Review of Studies of Minority Ownership and Diversity* (2011)).

[5] *See* Comments of Free Press, MB Dockets Nos. 09-182, 07-294, at 16-17 (filed Dec. 21, 2012).

[6] *See* Free Press NOI Comments at 16-18.

Public Knowledge suggested in a similar vein that the initial structures of the broadcast and cable industries remain "locked in place" despite technological and economic shifts in our digitally capable world, where channel scarcity is no longer such a stark concern.[7] Despite these fundamental changes in the landscape for video distribution platforms, incumbent providers such as MVPDs (with or without their own vertically integrated programming) still benefit from the preservation of this closed system.[8] Independent programmers typically obtain cable carriage if at all on a limited number of systems; or they must rely solely on OTT alternative distribution platforms while facing a variety of anti-competitive behaviors by MVPDs that are not only their video competitors, but the providers of the broadband service viewers must have to access OTT content.[9] Public Knowledge concluded – due to these structural and competitive barriers – that despite its huge potential to offer diverse and independent content, today's video market "has not lived up to that potential."[10]

Writers Guild of America West ("WGAW") used its comments to dig deeper into the data showing that the pay-TV system still skews heavily towards MVPDs and other incumbents despite the growth in OTT. In analyzing the number of cable networks affiliated with MVPDs or with other media and broadcasting conglomerates, WGAW

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[7] *See* Comments of Public Knowledge, MB Docket No. 16-41, at 3-6 (filed Mar. 30, 2016) ("Public Knowledge Comments").

[8] *See* Free Press NOI Comments at 8-10 (citing S. Derek Turner, Free Press, "Combating the Cable Cabal: How to Fix America's Broken Video Market," May 2013).

[9] *See* Public Knowledge Comments at 3-6; *see also id.* at 12 ("Pay TV incumbents . . . generally face even less competition in the broadband market. 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, [adopting] anticompetitive interconnection practices, [ ] manipulating the pricing of broadband/TV bundles to disadvantage new entry, [ ] data caps and anticompetitive zero-rating[.]").

[10] *Id.* at 6.

found that of 80 percent of the 99 widely distributed networks it identified are affiliated with such incumbent MVPDs or conglomerates. Among the top 20 most widely distributed cable networks, that number rose to 85 percent affiliated with either an MVPD or another large media conglomerate.[11] The existing pay-TV market clearly continues to provide opportunities for such affiliated programmers while restricting opportunities for independent voices.

This may be due to several factors. In particular though, Free Press pointed in our initial comments to the industry-wide practice of forced bundling by MVPDs and large, vertically integrated programmers as a significant barrier for programmers seeking carriage on an increasingly bloated cable dial.[12] We also discussed potential abuses of contractual clauses such as most favored nation agreements ("MFNs") and alternative distribution method ("ADM") restrictions. Independent programmers commenting on the NOI, including even large and well-established players such as Univision,[13] agreed with this assessment in their initial filings. Univision explained that the scope of MFNs has expanded significantly as the cable industry has consolidated, allowing MVPDs to stymie growing OTT competition and "reinforce their market position artificially by, for example, effectively prohibiting a programmer from granting advantageous conditions to a new OTT entrant."[14]

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[11] *See* Comments of the Writers Guild of America, West, Inc., MB Docket No. 16-41, at 9 (filed Mar. 30, 2016) ("WGAW Comments").

[12] Free Press NOI Comments at 11.

[13] *See* Comments of Univision Communications Inc., MB Docket No. 16-41, at 7 (filed Mar. 30, 2016) ("Univision Comments").

[14] *Id*. at 9.

The Hispanic Information and Telecommunications Network ("HITN") filed similar comments detailing its own experiences in seeking carriage by MVPDs and online. Despite offering Spanish language educational programming aimed at a growing national demographic, HITN has faced difficulty securing contracts with satellite carriers because "larger programmers, vertically integrated programmers and those with bundling arrangements have soaked up available channel capacity. HITN has been told repeatedly that there is simply no available bandwidth for negotiated placement of small independent programmers within the Spanish Language Tier."[15]

Trade associations representing smaller, non-traditional MVPDs also echoed these concerns. ITTA represents small and mid-sized legacy telephone companies that have more recently entered the MVPD space. It noted the desire of many such smaller MVPDs to offer diverse and independent content that will appeal to their subscribers, in an attempt to gain an edge over traditional pay-TV providers.[16] However, large programmers insist that operators purchase not only highly demanded content but bundles that also include unpopular channels. That forces small MVPDs to spend money and channel placements on this less valuable content in order to secure the "must-have" channels they need. As a result, ITTA suggested that its members have fewer resources and channel slots to offer independent and diverse programmers, arguing that forced bundling is in fact "directly responsible for displacing independent programming."[17]

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[15] *See* Comments of Hispanic Information and Telecommunications Network, Inc., MB Docket No. 16-41, at 4 (filed Mar. 30, 2016).

[16] *See* Comments of ITTA, MB Docket No. 16-41, at 2 (filed Mar. 30, 2016) ("ITTA Comments").

[17] *Id*.

The American Cable Association likewise contended that for its member companies to serve their small subscriber bases, small cable operators have a vested interest in carrying programming uniquely tailored to their subscribers' needs. Yet they are often hindered by "increasingly stringent" forced bundling and other requirements that drain their limited resources.[18] Even Verizon argued that the incumbent programmers that offer almost all of the nation's most popular programming routinely use their market power to "divert money and resources away from independent programming or otherwise impose restrictions that interfere with consumer choice," making it more challenging even for well resourced ventures like FiOS-TV to support independent content.[19]

Many commenters prescribed policies that would ensure wholesale unbundling or the promotion of "skinny" bundles to free up more MVPD channel space for independent and diverse content.[20] Several also noted the importance of policy solutions that preserve the potential of OTT distribution as an alternative outlet for diverse content, which Free Press has described as promoting "Big Open Pipes." This means preserving Net Neutrality to prevent discrimination against independent video, and also examining arbitrary data caps to determine their dampening effect on Internet users' ability and willingness to watch OTT video at all. Thus as WGAW recognized, with many diverse voices relying on OTT video distribution platforms, "the Commission's Open Internet rules are necessary to protect the[ ] ability to reach viewers."[21] Yet because entrenched

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[18] *See* Comments of American Cable Association, MB Docket No. 16-41, at 6-14 (filed Mar. 30, 2016) ("ACA Comments").

[19] *See* Comments of Verizon, MB Docket No. 16-41, at 3 (filed Mar. 30, 2016).

[20] *See, e.g.*, Comments of RFD-TV, MB Docket No. 16-41, at 30 (filed Mar. 30, 2016) ("RFD Comments"); ACA Comments at 37; ITTA Comments at 6.

[21] WGAW Comments at 17.

MVPDs have both the incentive and ability to hinder OTT platforms in other ways besides blocking, Smithwick & Belendiuk, P.C. also asked the Commission to investigate MVPDs' use of data caps to make online streaming seem less appealing than the MVPDs' own uncapped cable TV service or the MVPDs' own proprietary OTT platforms.[22]

II. Incumbent MVPDs' and Media Conglomerates' Self-Serving Claims Regarding Diversity Have No Merit.

Despite overwhelming record evidence of the impact of these barriers, some commenters continued to deny that they exist. The National Cable & Telecommunications Association ("NCTA") said that diverse and independent programming is "thriving" in the video market. "The economics of existing MVPD models have always encouraged and facilitated the growth and development of high value, diverse programming," it insisted.[23] This displays both a profound misreading of our nation's media legacy as well as a willful ignorance of the state of programming today. To support its case, NCTA points to a number of cable channel offerings and names a handful of networks among them that target Latino and African-American viewers,[24] unintentionally proving the opposite point: if there are few enough diverse and independent networks for NCTA to name them in a few one-line footnotes, even when MVPDs have expanded their total number of channels, diversity is clearly lacking.

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[22] *See* Comments of Smithwick & Belendiuk, P.C., MB Docket No. 16-41, at 14 (filed Mar. 16, 2016).

[23] *See* Comments of National Cable & Telecommunications Association, MB Docket No. 16-41, at 1 (filed Mar. 30, 2016).

[24] *Id.* at 2-3.

Comcast made the same empty claims, going so far as to argue that the "video programming marketplace is coming close to embodying the mythological horn of plenty."[25] Tooting their own horn will only get these cable giants so far. Just like NCTA, Comcast could muster no support for its fanciful claims. It boasted about a bloated bundle that includes a smattering of channels like Aspire, a majority African-American owned cable network launched by Comcast/NBCUniversal pursuant to its merger commitments.[26] Yet even its own anecdotes and supposed success stories do not support Comcast's flimsy arguments.

That's because Aspire filed its own comments in response to the NOI, detailing the "serious impediments to distributing independent programming services."[27] Just like other programmers, Aspire asserted that it has been informed by MVPDs that carriage opportunities were limited by forced bundling practices. In particular, "Cablevision specifically confirmed in the Viacom litigation that it would have launched Aspire and UP 'sooner if Viacom did not force Cablevision to distribute Viacom's Suite Networks.'"[28] Comcast may claim that Aspire and other channels like it are evidence of a competitive video market with no need for further action by the Commission; but when these networks speak for themselves they tell a very different story.

Whether we look in front of the camera, behind the scenes, or at the programmers who produce the content, the numbers show that our current video market fails to achieve

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[25] *See* Comments of Comcast Corporation and NBCUniversal Media, LLC, MB Docket No. 16-41, at 4 (filed Mar. 30, 2016) ("Comcast/NBCU Comments").

[26] *Id.* at 17.

[27] *See* Comments of Aspire Channel, LLC and UP Entertainment, LLC, MB Docket No. 16-41, at 1 (filed March 30, 2016).

[28] *Id.* at 4.

true diversity.[29] As relatively successful rural programmer RFD-TV said regarding its own struggles to achieve and maintain carriage, "If well-established, successful independent channels such as these are being dropped by distributors, it is obvious that any new independent channel has little or no chance of launching and being carried in today's environment."[30] And even a programmer such as TheBlaze, which professes that regulation should only be employed in cases of demonstrated market failure, requested that the Commission intervene to remedy harmful bundling and contractual practices.[31]

Comcast and the National Association of Broadcasters ("NAB") give undue credit to the very same bundling arrangements diverse and independent programmers bemoan, claiming that these bundles are "pro-consumer" and critical for protecting diversity.[32] Specifically, NAB lauds bundles for incentivizing diverse content by giving programmers bargaining power to encourage carriage of "less attractive" networks serving "niche audiences."[33] Comcast says that "untested" diverse content must rely on bundling to "encourage viewers to sample that programming" and achieve basic audience growth.[34] As explained in our initial comments, this paternalistic argument ignores the fact that diverse content is not a niche product, but an extremely valuable commodity that speaks to an ever-growing (and often ignored) segment of the population. As Univision noted, demographic changes including significant growth in populations of color in the United

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[29] *See, e.g.,* Leadership Conference Comments at 2-3.

[30] RFD Comments at 12-13.

[31] *See* Comments of TheBlaze Inc., MB Docket No. 16-41, at 10 (filed Mar. 30, 2016).

[32] *See* Comments of the National Association of Broadcasters, MB Docket No. 16-41, at 2 (filed Mar. 30, 2016) ("NAB Comments"); Comcast/NBCU Comments at 1.

[33] NAB Comments at 2, 6.

[34] Comcast Corporation/NBCU Comments at 32-33.

States "make it imperative from both a business and a social perspective for independent programmers to gain distribution for programming that serves a racially and ethnically diverse audience."[35] Diverse programming could certainly withstand the trials of the free market – and thrive – without this supposed assistance from forced bundles that limit viewers' choice and drive up the prices they pay.

CONCLUSION

Barring the unsupported arguments of a few incumbent industry representatives with a financial interest in maintaining their existing market power, the record contains nearly universal concern about the state of the current video market, particularly with regard to barriers faced by diverse and independent programmers. The Commission has clear statutory authority to pursue policies aimed at remedying these market failures and promoting diverse viewpoints. Targeting forced bundling practices, as well as MVPD efforts to stifle OTT video competition by encroaching on the openness and affordability of Internet alternatives, should be the central focus of the Commission's efforts.

Respectfully Submitted,

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[35] Univision Comments at 6.