

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Expanding Consumers' Video Navigation Choices	)	MB Docket No. 16-42
	)	
Commercial Availability of Navigation Devices	)	CS Docket No. 97-80
	)	

**COMMENTS OF TV ONE, LLC**

Tara M. Corvo  
Alyssia J. Bryant  
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY  
AND POPEO, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

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TV One, LLC (“TV One”)<sup>1/</sup> submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) *Notice of Proposed Rulemaking and Memorandum Opinion and Order* (“NPRM”) in the above captioned proceedings.<sup>2/</sup>

**INTRODUCTION AND SUMMARY**

The United States population is becoming steadily more diverse. While in 1990, non-Hispanic whites made up 74.5 percent of the population, that percentage had dropped to 63.75 percent by 2010, and is expected to decrease further to 60.9 percent by 2017.<sup>3/</sup> By approximately 2020, “more than half of the nation’s children are expected to be part of a minority race or ethnic group.”<sup>4/</sup> As a result, there is a sharp increase in the demand for and availability of content

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<sup>1/</sup> TV One has been 100% owned by Radio One, Inc., an African American-owned media company, since April 2015.

<sup>2/</sup> *Expanding Consumers’ Video Navigation Choices*, MB Docket No. 16-42, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Rcd. 1544 (2016) [hereinafter *NPRM*].

<sup>3/</sup> *Minority Population Growth— The New Boom An Analysis of America’s Changing Demographics*, ESRI (2012), available at <http://www.esri.com/library/brochures/pdfs/minority-population-growth.pdf>.

<sup>4/</sup> Bill Chappell, *For U.S. Children, Minorities Will Be The Majority By 2020, Census Says*, NPR (Mar. 4, 2015, 8:05 AM), <http://www.npr.org/sections/thetwo-way/2015/03/04/390672196/for-u-s-children-minorities-will-be-the-majority-by-2020-census-says>.

targeted at and of interest to diverse viewers. The quantity and quality of minority-owned and minority-targeted programming has increased dramatically in recent years, and the percentage of the population interested in diverse programming continues to increase. The programming market today is working for content providers seeking to reach consumers, including minority content providers. However, the path to success for minority programmers has not been easy, and its future is not guaranteed. Many minority programmers are not affiliated with large parent corporations that own multiple programming networks, and thus remain economically fragile.

It is critical to TV One's continued ability to provide innovative content specifically targeted to the Black audience that the Commission support the health of minority programmers instead of proposing rules that threaten to undermine the progress that minority programmers have worked so hard to attain. While today's offerings are a substantial improvement from ten years ago, when there were only two channels – BET and TV One – in the entire channel line-up focused on Black viewers, the number of channels focusing specifically on African-American or other diverse content is still dwarfed by the number of channels available.

Although the proposal to grant third party set-top box manufacturers access to the video content offered by MVPDs so that they can create their own competitive user interface (the "Proposal") may have initially been well-intended, its consequences would be dire for minority programmers, such as TV One.

*First*, the Proposal hands third parties control over TV One's brand – and thus the ability to dilute and undermine it. TV One has spent more than a decade establishing itself as a network to which African Americans can turn at any time, assured that they will find programming created with their needs and interests in mind. By allowing third parties to characterize, associate, and promote TV One's content in any manner they determine useful to their own

business, and even disassociate TV One content from the network, Black viewers will lose this strong cultural connection, and TV One will suffer a loss in identity and viewers.

*Second*, because the Proposal allows third parties to disregard many of the provisions TV One fought hard to secure in agreements with MVPDs, TV One will lose the value of those contracts. Companies like Google and TiVo will benefit from being able to bury diverse content (or extract compensation from programmers seeking to avoid that result), to devalue the advertising that TV One has sold by increasing the overall amount of advertising and even to replace TV One ads with those of their own choosing, and from unfairly monetizing TV One's content without providing anything to TV One in return – all at TV One's expense. For small minority programmers with no leverage, who rely heavily on their contracts with distributors to enforce their rights, the loss of contract privity is a devastating loss of control.

*Finally*, contrary to the Commission's belief, the proposed rules are not needed to provide opportunities for minority, niche, or special-interest programming to gain exposure. Opportunities to reach viewers abound in today's marketplace, and those content providers that offer programming valued by the community can succeed. If the Commission truly seeks to help diverse programmers, it should abandon its plan to transfer wealth from small, independent minority programmers to large high tech companies with substantial assets and poor diversity track records. The proposed rules should not be adopted.

**I. THE PROPOSED RULES WILL UNDERMINE TV ONE'S ABILITY TO PROVIDE DIVERSE PROGRAMMING BY GIVING THIRD PARTIES THE ABILITY TO DILUTE THE TV ONE BRAND**

TV One, a minority-owned programming network, has spent many years building its brand identity as a network to which Black viewers can turn to find programming that focuses on their heritage, culture, and experiences. Through a mix of acquired and original programming,

TV One works diligently to resonate with its target audience by improving the visibility of independent, minority-created content, and by showcasing content starring and featuring Black actors. Over the years, TV One has grown not only into a national network, but also into a national brand that its viewers find relatable, and that advertisers targeting the Black community find attracts the consumer demographics they seek. By allowing third parties to dilute TV One's brand among its well-earned viewers and hamper TV One's ability to engage advertisers hoping to market to African Americans, the Proposal threatens diversity in programming.

**A. TV ONE Invests Significant Time And Resources To Create Its Brand Identity To Attract And Retain Viewers And Advertisers.**

TV One's audience turns to the network because they feel certain that the network will be airing culturally relevant programming of interest to them. Everything TV One does is designed to attract, serve, and retain its target audience.

TV One chooses programming that includes particular actors, themes, and topics of interest to the African-American community. For example, the network provides original and acquired programming such as:

- *NewsOne Now*<sup>5/</sup> hosted by Roland Martin, the *only* daily news show that targets a Black audience;
- *Unsung*,<sup>6/</sup> a music documentary series featuring stories of certain R&B and soul music artists;
- *Hollywood Divas*,<sup>7/</sup> an unscripted series following the lives of Black actresses in Hollywood;
- *Empire*, a multi-award-nominated drama series about a hip-hop mogul, his family, and the future of his music empire. TV One recently acquired the cable rights to

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<sup>5/</sup> *NewsOne Now With Roland Martin is On TV One*, NEWSONE, <http://newsone.com/2749799/newsone-now-with-roland-martin-debuts-on-tv-one-monday/> (last visited Apr. 4, 2016).

<sup>6/</sup> *About Unsung*, TV ONE, <http://tvone.tv/28723/about-unsung-2/> (last visited Apr. 13, 2016).

<sup>7/</sup> *About Hollywood Divas*, TV ONE, <http://tvone.tv/30514/about-hollywood-divas/> (last visited Apr. 13, 2016).

the program, which will debut on TV One in a marathon leading up to the second season finale;<sup>8/</sup>

- Award shows and festivals, such as the *NAACP Image Awards*, an awards show celebrating outstanding achievements and performances “of people of color in the arts, as well as those individuals or groups who promote social justice through their creative endeavors;”<sup>9/</sup> the *Triumph Awards*, an awards show that honors individuals that have made a positive impact nationally and globally, which TV One broadcast for the first time in 2015, reaching nearly 2 million viewers;<sup>10/</sup> and during the *American Black Film Festival* (“ABFF”) – a festival dedicated to “bringing awareness of entertainment content made by and about people of African descent”<sup>11/</sup> – TV One airs the film it developed and produced from the script of the winner of the TV One Screenplay Competition;<sup>12/</sup>
- Original movies, such as *White Water*, a TV One original movie depicting the story of a seven year old in Alabama in the 1960s who desires to taste water from the “Whites Only” drinking fountain;<sup>13/</sup> and
- Numerous syndicated programs featuring Black actors, such as *Good Times*, *Sanford & Son*, *The Jeffersons*, *A Different World*, *Living Single*, and *Martin*.

This year, TV One honored Black History Month by selecting four standout Black filmmakers to each create a series of short films that spotlighted current diverse achievers and change agents – from college campuses, the community, corporate America, government, technology, medicine,

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<sup>8/</sup> *TV One Acquires 20<sup>th</sup> Century Fox Television and Imagine Television Series on the Eve of Its Annual Upfront Presentation*, BUSINESS WIRE (Apr. 14, 2016, 9:49 AM), <http://www.businesswire.com/news/home/20160414005980/en/TV-Announces-Blockbuster-Drama-%E2%80%9CEMPIRE%E2%80%9D-Coming-Programming>.

<sup>9/</sup> *NAACP Image Awards*, TV ONE, <http://tvone.tv/imageawards/> (last visited Apr. 13, 2016); *47<sup>th</sup> NAACP Image Awards*, [http://www.naacpimageawards.net/main\\_awards.html](http://www.naacpimageawards.net/main_awards.html) (last visited Apr. 13, 2016).

<sup>10/</sup> *TV One’s Inaugural Broadcast of the 2015 Triumph Awards Reached 1.7 Million Viewers P2+*, NATIONAL ACTION NETWORK, <http://nationalactionnetwork.net/press/tv-ones-inaugural-broadcast-of-the-2015-triumph-awards-reached-1-7-million-viewers-p2/> (last visited Apr. 15, 2016).

<sup>11/</sup> *About ABFF*, ABFF, <http://www.abff.com/about-abff/> (last visited Apr. 15, 2015).

<sup>12/</sup> TV One hosts a screenplay competition, which honors filmmakers offering a different perspective on the American Black cultural experience or providing content that appeals to Black audiences. The winning screenplay is developed and produced to premiere at the following ABFF festival. *See TV One Screenplay Competition*, ABFF, <http://www.abff.com/tv-one-screenplay-competition/> (last visited Apr. 15, 2015).

<sup>13/</sup> *See About The Movie – White Water*, TV ONE, <http://tvone.tv/16234/about-the-movie-white-water/> (last visited Apr. 22, 2016).

and beyond – who are making changes in the African-American community and making history in their daily lives.<sup>14/</sup> In other words, in all it does, TV One’s programming lineup includes Black-cultural nuances, content of interest to TV One’s audience, and Black celebrities, actors and on-air talent.

In seeking to attract advertisers, too, TV One markets itself to those companies offering products and services of interest to its viewers. Unlike other programmers that serve a general audience, TV One works directly with its advertisers to create content that is appealing to and directly targets its viewers through sensitivity to cultural nuances. For example, TV One worked recently with the University of Phoenix to create an advertisement specifically for TV One viewers that features diverse actors and speaks to the value of having the full support of family and the community behind you in seeking to achieve your goals.<sup>15/</sup>

TV One’s success in attracting the Black community is due to its calculated efforts to build viewer affinity with the *network*, in addition to particular programs. By including highly targeted themes, actors, topics and advertising in its programming, TV One has established a viewing audience that turns to TV One, not necessarily for specific programming (*i.e.*, to watch *NewsOne Now*), but because the viewer anticipates that at any time of the day, she will find programming and advertising of interest to her. TV One augments and reinforces this relationship through its affiliates, such as Radio One’s radio broadcasting franchise, the largest

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<sup>14/</sup> TV One, *TV One Kicks-Off February With Its First-Ever Change Agents: History in the Making Short Films*, YAHOO FINANCE (Jan. 28, 2016), <http://finance.yahoo.com/news/tv-one-kicks-off-february-231700879.html>.

<sup>15/</sup> See, e.g., *How to Prepare Students to Compete in a Global Economy*, TV ONE, <http://tvone.tv/18955/how-to-prepare-students-to-compete-in-a-global-economy-video/> (last visited Apr. 13, 2016) (showing original advertising content that the University of Phoenix and TV One worked together to create). These companies recognize that “in order to win among consumers, they must understand who the consumers are and make products that meet their needs and have a lasting impact.” NNPA, *THE AFRICAN-AMERICAN CONSUMER 2013 REPORT 5* (2013), <http://nnpa.org/wp-content/uploads/2013/06/African-American-Consumer-Report-2013.pdf>.

radio broadcasting operation that primarily targets African-American and urban listeners; Interactive One, LLC, an online platform serving the African-American community through social content, news, information, and entertainment; and BlackPlanet, the largest Black community online.<sup>16/</sup>

By consistently serving as a provider of minority and special-interest programming, as well as a source for content geared towards her specific lifestyle and experience, whether cultural, educational, or inspirational, TV One has built a *relationship* with its Black audience. This relationship is symbiotic. By providing quality minority programming targeting African-American women, TV One has established a large audience that consistently tunes in to the network. This large audience enables TV One to continue to create diverse content because it attracts subscription fees (MVPDs are willing to carry TV One because it consistently delivers viewers) and advertising revenues (large national advertisers are interested in purchasing time on TV One's network to air advertisements marketed to African-American female consumers, knowing TV One can deliver that demographic). But as discussed below, the Commission's proposal threatens to interfere with this relationship.

**B. The Proposal Threatens TV One's Brand Identity, Hindering The Success Of The Network.**

TV One's success depends on its ability to have complete control over its brand, which attracts and retains its audience and in turn, enables the network's ability to sell to advertisers. Just this year, TV One spent a significant sum and expended substantial time and resources to refresh and relaunch its brand. TV One's content is branded consistently with colors that reinforce the connection the viewer has to the network, and TV One's new tagline – "Represent"

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<sup>16/</sup> Interactive One, LLC is a subsidiary of Radio One. Interactive One's brands include BlackPlanet. See *Interactive One*, Radio One, <http://home.radio-one.com/our-properties/interactive-one/> (last visited Apr. 22, 2016).

– reflects its commitment to represent the best of black culture, past, present and future, and deliver perspectives and elevate voices as unique and diverse as the black landscape. It is imperative to the TV One business model that the network be able to establish, control and maintain its relationship with the viewer. The Proposal, however, gives third parties all the tools to dilute TV One’s brand identity, threatening TV One’s success and its ability to enhance diversity on the programming lineup.

By allowing third parties to create “competitive” user interfaces for accessing programming, the Proposal requires TV One to yield full control of its brand identity to third parties, which will have the potential to completely alter TV One’s brand that it has worked so hard to build.<sup>17/</sup> Once they have access to the TV One video stream, those third parties will not be restricted in their ability to characterize the network any way they want, or include it with programming that is completely unrelated – in TV One’s view – to the message that TV One wishes to convey to its audience, in a way that dilutes the TV One message. The TV One network could appear in categories unrelated to its target viewers such as “Top Channels for Men” or “Teen Favorites,” categories contradicting its programming themes such as “Pop Music Favorites” or “Low Budget Channels” – or conversely, might not appear in categories where it should appear, such as groups of minority-targeted channels.<sup>18/</sup>

Even more concerning, a third party box manufacturer could group selected content from the TV One network with other, unrelated content, such that viewers no longer have a clear

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<sup>17/</sup> See Felix Sanchez, *How the FCC Is Actually Undermining Media Diversity*, FOX NEWS LATINO (Mar. 9, 2016), <http://latino.foxnews.com/latino/opinion/2016/03/09/felix-sanchez-how-fcc-is-actually-undermining-media-diversity/> (“[T]he FCC’s proposal directly undermines the growth of quality entertainment, particularly emerging channels serving minority and ‘niche’ communities, being made available to more consumers in more areas of the country. This approach takes away the basic rights of independent creators to control and monetize the content they create.”).

<sup>18/</sup> Equally concerning, the third party box might treat TV One’s competitors more favorably, by placing them in more prominent or appropriate categories.

association of programming with TV One, and no longer feel an affinity to the TV One network. TV One viewers would not see the “look and feel” colors of the TV One brand consistently, and TV One’s efforts to convey the message that it “Represents” its viewers could be completely lost as content is rearranged and regrouped. Under either scenario, the result would be diminished viewership, leading to diminished subscriber revenues, lower advertising revenues, and a resulting loss in ability to procure and produce quality minority programming.

This brand dilution and resulting harm to programmers could happen simply because that entity does not have the benefit of a relationship with TV One or a clear understanding of the TV One brand. While TV One is constantly in touch with its MVPD partners to explain and reinforce the TV One brand and message, box manufacturers would have no such information available to them. Further, while TV One, given its contractual relationships, could address any concerns with its MVPD partners directly, it would have absolutely no recourse under the Commission’s proposal, since the third party box manufacturer would have no relationship with TV One or any incentive to resolve TV One’s concerns.

While the *NPRM* rejects programmer concerns based on the notion that it has “not seen evidence of any such problems in the CableCARD regime,”<sup>19/</sup> that argument cannot hold water. The Proposal is specifically designed, in the Chairman’s own words, to allow those third parties to develop “new ways for consumers to access and enjoy their favorite shows and movies on their terms” and create new menus for accessing that programming.<sup>20/</sup> It is naive to argue that third parties will not do precisely what the Proposal envisions, given this explicit invitation.

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<sup>19/</sup> *NPRM* ¶ 80.

<sup>20/</sup> *Statement of Chairman Tom Wheeler*, MB Docket No. 16-42, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Rcd. 1544 (2016) [hereinafter *Chairman Statement*].

There is no reason that a goal of enhancing competition in the set-top box market needs to be accompanied by programmers losing complete control of their brand and message, and thus their means of generating revenue and creating diverse programming options. The Commission should not move forward with any rules that allow this result.

## **II. THE PROPOSED RULES WILL INTERFERE WITH THE VALUE OF TV ONE'S NEGOTIATED CONTRACTS WITH MVPDS AND PUT TV ONE AT RISK OF LOSING VIEWERS**

TV One's diverse content is widely recognized as among the highest quality content serving the African-American audience. Over the years, TV One has won numerous awards for its programming, including multiple NAACP Image Awards,<sup>21/</sup> multiple NAMIC Vision Awards,<sup>22/</sup> CableFax Trailer Awards,<sup>23/</sup> Promax BDA Award,<sup>24/</sup> and a GLAAD Media Award.<sup>25/</sup> Creating innovative, diverse content requires substantial resources, and TV One depends on revenues from MVPD affiliate fees and from advertising to ensure that the network succeeds.<sup>26/</sup> The Proposal puts TV One at risk of losing the full value of both of these revenue streams, and creates the risk that it will be buried on competitive user interfaces.

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<sup>21/</sup> *Unsung* won a NAACP Image Award for "Best Outstanding News/Information Series" in 2012, 2013, and 2014.

<sup>22/</sup> *The Rickey Smiley Show* won a 2013 NAMIC Vision Award for "Best Comedy," and *Save My Son* also won a 2013 NAMIC Vision Award for "Best Reality Series/Social Issues."

<sup>23/</sup> *Fatal Attraction* won a 2015 Cablefax Trailer Award in the "Returning Show/Series" category.

<sup>24/</sup> TV One won a PromaxBDA Award for its Black History Month programming in 2015.

<sup>25/</sup> *R&B Divas: ATL* won a GLAAD Media Award in 2015.

<sup>26/</sup> See Henry Waxman, *FCC Cable Box Proposal Affects More Than Just Cable Boxes*, THE HILL (Mar. 21, 2016, 8:00 AM), <http://thehill.com/blogs/congress-blog/technology/273590-fcc-cable-box-proposal-affects-more-than-just-cable-boxes> ("Today, emerging producers can invest in new content knowing they are likely to receive a reasonable return through agreements with distributors covering advertising, channel placement, on-demand rights, and anti-piracy protections. . . . It's the contracts these companies negotiate that supports the creation of quality original content and the addition of innovative new features that are rapidly emerging in today's 'app-based' world."); see also Frank Washington, *A New Threat to Diversity on TV*, SEATTLE TIMES (Mar. 8, 2016), <http://www.seattletimes.com/opinion/a-new-threat-to-diversity-on-tv/> (in which the CEO of minority-owned Crossings TV notes that it is the MVPD license terms that "help fund our networks and ensure they get enough exposure to thrive").

**A. TV One Will Be Less Able To Offer High Quality Diverse Content When It Loses Part Of The Value Of Its MVPD Carriage Agreements.**

In its affiliation agreements with MVPDs, TV One goes to great lengths to negotiate certain carriage protections to ensure diverse content is available to MVPD viewers, that the network can attract those viewers, and that MVPDs are not inappropriately monetizing TV One content without providing value to TV One. Without the safety net of a large parent company negotiating for multiple programming networks, these protections are hard to obtain, and TV One often gives up other things of value to secure them. While the terms of each deal differ, they often address:

- Channel position and/or neighborhood, so that TV One can be available to as many viewers as possible and grouped with like channels targeting similar viewers;
- Advertising terms, including how many total minutes of advertising an MVPD may insert and what types of advertising may be included;
- Video degradation conditions, which ensure that programs and other content cannot be overly compressed, sped-up or down, or otherwise lowered in quality;
- On-demand restrictions, governing how the MVPD may use TV One’s content outside of showing the linear channel;
- Promotional terms, requiring the MVPD to highlight and feature TV One on channel guides or other MVPD-controlled media; and
- Security and privacy terms, ensuring that TV One’s content is protected against illegal distribution.

Each of these terms provides value to TV One.<sup>27/</sup> But the proposed rules fail to include any provisions that entitle TV One to retain much of this value when MVPD subscribers receive

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<sup>27/</sup> The Commission’s repeated suggestion that the proposal allows customers to “get what they have paid for” using the box of their choice, *see, e.g.*, NPRM ¶ 11, is therefore wrong. If TV One had allowed MVPDs to have the vast rights that the Proposal grants third party manufacturers, it would have charged a substantially different – and higher – price, which would be reflected in the prices MVPDs charge subscribers. Customers have *not* paid for the right to receive programming free of all these contractual restraints.

programming through a third party box. To the contrary; the Commission specifically rejects the argument that third parties should be held to those terms.<sup>28/</sup>

Under the Proposal, TV One would simply lose the value of those provisions when subscribers watch MVPD programming using a third party box. On a third party box, any TV One promotion an MVPD aired could be simply omitted; TV One's content could be degraded; TV One's advertisements could be exchanged for others sold by the third party, or the amount of advertising could be expanded substantially through wrap-around advertising, shrinking programming to part-screen, or inserting additional ads during commercial breaks;<sup>29/</sup> or the third party might disaggregate and put all of TV One's programming on a video-on-demand channel.<sup>30/</sup>

The Commission's repeated statements in response to these concerns that the Proposal does not disrupt the contract between the programmer and MVPD<sup>31/</sup> offers no comfort. The programmer's issue will not be with the MVPD, and since the Proposal explicitly declines to bind third party manufacturers to the terms of those contracts, programmers will have absolutely

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<sup>28/</sup> *NPRM* ¶¶ 2, 80 (“We do not currently have evidence that regulations are needed to address concerns raised by MVPDs and content providers that competitive navigation solutions will disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods), replace or alter advertising or improperly manipulate conduct.”).

<sup>29/</sup> In addition to diluting the value of advertisements on TV One, there is no assurance any replacement ads will cater to and be of interest to TV One's Black audience, harming the TV One brand and diluting its message. As noted above, TV One often works with advertisers so that commercials resonate with its audience. *See* Section I.A, *supra*.

<sup>30/</sup> *See* Letter from Members of the Congressional Black Caucus to FCC Chairman Tom Wheeler (Dec. 1, 2015) (arguing that the proposed rules “will cause irreparable harm to independent and minority programmers by allowing third parties to strip programming from visible channel placements and relegate it to the bottom of the pile” and that “these merchants would also be allowed to sell intrusive advertising without sharing any of the revenue with programmers, cutting off the needed revenue to continue to produce quality content”).

<sup>31/</sup> *See, e.g., Chairman Statement supra* note 20. (“This proposal will *not* interfere with the business relationships or content agreements between MVPDs and their content providers or between MVPDs and their customers.”).

no recourse when their networks are presented by third parties in a manner that negatively portrays or devalues them. At its core, the Proposal simply transfers part of the value that TV One negotiated for in the MVPD contract from TV One to Google, TiVo, or other third party box manufacturers, leaving TV One less than whole, and less able to serve the Black audience.<sup>32/</sup>

**B. Minority Programmers Are Particularly At Risk Of Losing Viewers Under The Proposal.**

Niche networks offering diverse content are at special risk of losing viewers under the Proposal. The loss of the negotiated right to particular placement – a very difficult right to secure for a diverse programmer – would cause particular harm to TV One and other minority programmers.

Under the Proposal, a third party box manufacturer could place TV One anywhere on its interface, despite the fact that TV One’s agreements with MVPDs often provide for specific tier or channel placement and result in TV One being grouped in a neighborhood with other channels serving the Black audience. These provisions are important to TV One’s success because when the network is placed near other channels offering diverse content, it strengthens the likelihood that TV One will attract new viewers from a consumer that comes across TV One’s programming via channel surfing. Without this ability – and combined with a potential loss of

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<sup>32/</sup> See Nomi M. Bergman & Alfred C. Liggins, *Fighting AllVid Mischief for the Future of TV*, Cleveland.Com (Feb. 14, 2016, 9:50 AM), [http://www.cleveland.com/opinion/index.ssf/2016/02/fighting\\_against\\_allvid\\_mischi.html](http://www.cleveland.com/opinion/index.ssf/2016/02/fighting_against_allvid_mischi.html) (“AllVid advocates want to ‘free ride’ on license deals... but they refuse to respect the license terms that say where and how our brands appear and that fund the production of great content” and noting that the proposal allows high tech companies to “strip-min[e] the value from our work for their profit.”); see also Waxman, *supra* note 26 (observing that “[m]inority content providers in particular lack the scale and resources to absorb the revenue losses, channel dislocation, and other harms that would result.”).

promotional opportunities – TV One’s viewership, and thus its revenues, will shrink – threatening the continued vibrancy of diverse content.<sup>33/</sup>

The Commission states that it expects that such provisions will be less important – and that the Proposal actually will benefit minority programming – because competitive interfaces, menus, and search functions will make it easier for consumers to find minority and special interest programming (including programming not carried by MVPDs),<sup>34/</sup> but this is simply not the case. First, niche and minority programming already have a difficult time securing a position that will result in higher exposure, and there is no reason to believe that, unbound by contractual requirements, a competitive interface will choose to make minority-owned and minority-targeted programming more prominent in guides or search results. Indeed, there is no reason to believe that these box manufacturers will even select any additional minority-themed programming for inclusion in their interface at all.

Second, the third party box’s search algorithm is likely to prioritize content that viewers most often request—meaning that niche diverse content is likely to be buried, making it even harder for a viewer to come across and be exposed to TV One’s programming or any other minority content, even if it is technically available on that platform.<sup>35/</sup> African-American

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<sup>33/</sup> The programming that we produce and our audiences enjoy does not come free. Passion and creativity alone won’t keep the lights on; if the revenue we generate from our work isn’t sufficient to cover the cost of producing it, our businesses won’t survive very long and our audiences’ viewing options will shrink. That’s why true media diversity requires a level playing field where independent voices like ours can negotiate with distributors and advertisers to build lasting, sustainable businesses.

*18 Independent Content Creators Join Chorus of Programmers in Opposing AllVid*, FUTURE OF TV (Feb. 18, 2016), <http://futureoftv.com/news-item/17-independent-content-creators-join-chorus-of-programmers-in-opposing-allvid/>.

<sup>34/</sup> NPRM ¶17.

<sup>35/</sup> Washington, *supra* note 26 (“[T]he cross-search function leaves our channels all at the mercy of the new box’s often mysterious algorithms – notorious for burying disfavored and smaller companies in

generated content is already difficult to find on the Internet through Google due to its search algorithm, which some have found appears to place African-American generated content towards the very end of search results.<sup>36/</sup> Under the proposed rules, which do not offer content providers any protection from such discretionary algorithms, minority content is likely to be buried on the “lowest rung” of interface search results as well.

Further, while proponents of the proposed rules argue that a viewer will be able to search for minority and special interest programming, including TV One’s programming, this ability is not at all certain. Without a relationship with the set-top box manufacturer, TV One will have no insight into the terms that trigger a search result, and will not be able to suggest using key words increasing the likelihood of exposure. One of TV One’s important offerings, for example, is Roland Martin’s news show – the only daily news show targeting African Americans. But the title of the program is “NewsOne Now” – with no mention of Roland Martin. TV One will have no way of knowing whether a viewer searching for “Roland Martin” will find *NewsOne Now* or not. And given Google’s well-known history of prioritizing search results based on who pays for

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its ash heap. The dedicated viewers who value [minority and special interest content] have no currency with Google, its fellow Silicon Valley technology inhabitants or profit-maximizing, cross-platform search algorithms.”).

<sup>36/</sup> See Washington, *supra* note 26 (noting that while working to create an African-American-focused search engine, Frank Washington, CEO of Crossings TV, witnessed the Google search algorithm consistently burying “African-American generated content on the lowest rung of search results” and under the proposed rules, minority content will suffer the same fate). Notably, Google – a huge company with reported revenues for fiscal year 2015 of \$74 billion and cash reserves for that same period of \$73 billion – is frequently criticized for its lack of commitment to diversity. See Murrey Jacobson, *Google Finally Discloses Its Diversity Record, and It’s Not Good*, PBS (May 28, 2014, 6:00 PM), <http://www.pbs.org/newshour/updates/google-discloses-workforce-diversity-data-good/> (noting that Google’s employee base is only 2% African American); Kali Wilder, *Board Diversity: Top Tech Companies Without Black Corporate Directors*, Black Enterprise (Aug. 19, 2014), <http://www.blackenterprise.com/technology/tech-companies-without-black-directors-diversity/> (listing Google as such a company).

them,<sup>37/</sup> a programmer could be required to pay for additional search terms to “hit” – a requirement that would be particularly difficult for minority programmers such as TV One who have limited budgets. At best, TV One’s limited resources would be shifted away from procuring and producing the best diverse content available, and more to paying large companies large sums simply to assure that TV One is not buried in search results.

Finally, the Commission’s belief that none of these harms have occurred even though third party boxes exist today is erroneous. TV One’s agreements with MVPDs generally allow only a certain amount and type of advertising, and explicitly prohibit MVPDs from displaying commercial materials other than in the manner specified in their affiliation agreements. But on closer examination, it appears that TiVo has nonetheless been flooding cable viewers with additional advertising.

Certain TiVo Digital Video Recorder (“DVR”) equipment, for example, can insert commercials into a program (in the form of pop-up advertisements) while a consumer pauses or fast-forwards the program.<sup>38/</sup> Ironically, Joseph Weber, TiVo’s Chief Technology Officer, recently commented that the industry “shouldn’t be scared” of any third party advertising because the presence of too many ads is intrusive and consumers are likely to reject products that

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<sup>37/</sup> Mike Epstein, *Google’s New Search Layout Melds Paid Ads with Real Search Results*, Digital Trends (Mar. 13, 2014), <http://www.digitaltrends.com/computing/google-testing-new-layout-help-paid-ads-blend-organic-search/>; *see also* Tom Fairless, *Study Suggest Google Harms Consumers by Skewing Search Results*, WALL STREET J. (June 29, 2015), <http://www.wsj.com/articles/SB11064341213388534269604581077241146083956>.

<sup>38/</sup> TiVo actively markets these features to advertisers. *See TiVo Advertising*, TiVo <https://www.tivo.com/tivoadvertising/programplacement.html> (last visited Apr. 4, 2016) (“Want to target a specific TV series, episode, or genre? Program Placement buys allow premium placement in TiVo® viewers’ beloved Now Playing List, both in the Program Folder and on the Delete Screen of the recorded show. Program Placement ads include long-form video, campaign messaging, and promotional options. Now advertisers can reach elusive DVR time-shifters—when primetime can be any time.”); *see also* Sean Byrne, *TiVo Begins Testing Pop-Up Ads While Skipping Commercials*, MYCE (Apr. 1, 2005), <http://www.myce.com/news/TiVo-begins-testing-pop-up-ads-while-skipping-the-commercials-10072/>.

include too many ads over programming.<sup>39/</sup> But it is *programmers* who should be making the determination of which advertisements to add, how much advertising turns off viewers, and which ads its viewers do and do not like; TiVo and other third parties do not have the expertise to make these decisions, nor do they face the consequences of those decisions if they err. They should not be allowed this control over programming.

Moreover, allowing manufacturers of set top boxes to sell advertising within and adjacent to TV One’s content without consent or compensation represents an unauthorized use of TV One content for profit and interferes with the business model on which both TV One and the MVPD rely. Yet under the Commission’s proposal – which not only allows but appears to endorse this behavior – third parties would feel no constraints against implementing and even augmenting this behavior.<sup>40/</sup> And even though it is the programming drawing the viewers, minority programmers would receive no compensation from these extra ads; rather, third parties will gain the revenue while giving nothing. By allowing third parties to drain viewers from networks, the Proposal harms niche and minority-focused programming.<sup>41/</sup>

### **C. Small, Minority-Owned Programming Networks Are Particularly Dependent on Contracts To Protect Against Mistreatment.**

As a small, minority-owned programmer that is not a part of a large, multi-network

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<sup>39/</sup> See Monty Tayloe, *Third-Party Set-Tops That Change or Remove Ads Not a Concern, TiVo CTO Says*, COMM. DAILY (Apr. 20, 2016), <http://www.communicationsdaily.com/article/view?s=88127&id=492450>.

<sup>40/</sup> Washington, *supra* note 26 (“[B]ig technology companies like Google would be given the right to poach the program-license deals [minority content developers] negotiate with pay-TV providers, such as DirecTV or Time Warner Cable, without being bound to the underlying licensing terms that help fund our networks and ensure they get enough exposure to thrive.”).

<sup>41/</sup> See Alfred Liggins, *Protecting Consumer Choice, Not Special Interests in Video*, TENNESSEAN (Dec. 3, 2015, 4:31 PM), <http://www.tennessean.com/story/opinion/contributors/2015/12/03/protecting-consumer-choice-not-special-interests-video/76744898/> (“[A] government mandate that enables . . . special interests to pick and choose which of these terms to follow would do severe damage to the programming ecosystem, and in particular, niche and minority-focused networks.”).

conglomerate, TV One has limited leverage with distributors. While distributors may hesitate to mistreat programmers affiliated with broadcasters or multiple cable networks or production studios, because of potential repercussions in other areas of their business, TV One knows that the only rights it will be able to assert successfully are those that it secures through negotiations, embodied in its written distribution contracts. TV One relies very heavily on those contracts to ensure that it is carried in the agreed-upon manner, that distributors do not degrade or alter its programming stream, and that it receives value for the content it offers.

By allowing TV One content to be distributed without privity of contract between TV One and the third party manufacturer, TV One would have little or no recourse to address any concerns that arise over distribution of its content over the new platform.<sup>42/</sup> The Commission should not deprive the most vulnerable programmers of the only real protection they have.

### **III. THE PROPOSED RULES ARE UNNECESSARY TO ADVANCE MINORITY AND SPECIAL INTEREST PROGRAMMING**

Proponents of the proposed rules state that the proposed rules will give minority-controlled programming a better chance at exposure.<sup>43/</sup> As discussed above, diverse content is far more likely to be relegated to the bottom of any new user platform. But regardless, there is

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<sup>42/</sup> While the Commission has voiced its opinion that programmers can seek to remedy these issues through the copyright law, many of these results, such as loss of neighborhood or failure to run a promotional spot, might not be protected by copyright law, and bringing a copyright infringement case would be far too expensive and take far too long to resolve to be an effective means of relief for a small programmer like TV One.

<sup>43/</sup> See, e.g., Daniel Frankel, *Google-Backed Third-Party Set-Top Coalition Launches 'Unlock The Box' Website*, FIERCE CABLE (Mar. 22, 2016), <http://www.fiercecable.com/story/google-backed-third-party-set-top-coalition-launches-unlock-box-website/2016-03-22> (quoting Chris Lewis of Public Knowledge as claiming that “Giving consumers the power to choose their own devices will save money and create new opportunities for minority programmers who have been shut out by big cable companies.”).

no need for rules that harm diverse programming networks like TV One when opportunities for content providers to reach viewers abound in today's marketplace.

The explosion of technological advances has created a competitive and diverse market in which niche and special interest programmers are finally finding footing and beginning to thrive. Consumers have a wealth of options in ways and devices to watch video programming – through apps, over devices manufactured by Roku and Apple, over Internet connections accessed through computers, tablets or their smart phones, or myriad other means. Content providers are keeping pace with the changing times by providing their own apps (*e.g.*, *HBO Now*, *Discovery Go*, *WatchESPN*) and negotiating with numerous distributors to distribute their content.<sup>44/</sup>

In this environment, different business models can and should coexist, and each of them offers an opportunity for minority creators and communities. There is no need for rules governing set-top boxes; if anything, American households are moving away from set-top boxes<sup>45/</sup> and many are abandoning traditional MVPD services.<sup>46/</sup>

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<sup>44/</sup> Dr. E. Faye Williams, *FCC Rules Imperil Diversity Programming*, COURIER J. (Feb. 17, 2016, 6:10 PM), <http://www.courier-journal.com/story/opinion/2016/02/17/comment-fcc-rules-imperil-diversity-programming/80523378/?from=global&sessionKey=&autologin> (“And the idea that AllVid is needed to facilitate video competition is ridiculous in the age of cord-cutting, where an apps revolution has already made virtually every kind of television you can imagine available on a multitude of devices from phone and tablets to smart TVs and games consoles, as well as dedicated streaming devices like Roku, Apple TV, Google Chromecast, and Amazon Fire.”); Nomi M. Bergman & Alfred C. Liggins, *Fighting AllVid Mischief for the Future of TV*, CLEVELAND.COM (Feb. 14, 2016, 9:50 AM), [http://www.cleveland.com/opinion/index.ssf/2016/02/fighting\\_against\\_allvid\\_mischi.html](http://www.cleveland.com/opinion/index.ssf/2016/02/fighting_against_allvid_mischi.html) (“From online streamers like Netflix and Amazon, to new boxes from Roku and Apple TV, to new apps from networks like HBO, Showtime and major leagues sports, and cable companies streaming their lineups by app to smartphones, tablets, game consoles and smart TVs – the *American viewer has never had so much choice.*”) (emphasis added).

<sup>45/</sup> See, *e.g.*, *Pay TV Set-Top Box Market Contracts, IHS Says*, IHS Electronics 360 (June 30, 2015) <http://electronics360.globalspec.com/article/5442/pay-tv-set-top-box-market-contracts-ihs-says>.

<sup>46/</sup> For example, 300,000 Americans dropped cable service in the third quarter of 2015. Patrick Coffee, *With So Many American Dropping Cable, Will Cord Cutting Doom TV as We Know It*, ADWEEK (Oct. 27, 2015, 7:47 PM), <http://www.adweek.com/news/television/so-many-americans-dropping-cable-will-cord-cutting-doom-tv-we-know-it-167749> (“Cord cutting is happening; that much is not up for

Moreover, evidence suggests that niche and special-interest programmers, including those programmers that are not carried by MVPDs, are already using these means to find their audience absent the proposed rules – a result consistent with Black Entertainment Television founder, Robert L. Johnson’s statement that “with a good program idea, some financing and access to the Internet,” a programmer today can find an audience.<sup>47/</sup> Minority-owned special-interest programmer AcornTV, for example, was reportedly the first niche-programmer to receive an Emmy Award nomination<sup>48/</sup> and has successfully obtained carriage across numerous platforms without the benefit of “competitive” set-top box rules.<sup>49/</sup> Viewers seeking diverse content outside an MVPD offering can turn to *BoxTV*,<sup>50/</sup> a video service that focuses on Indian content (e.g., Bollywood and Hollywood); *Africafilms.tv*, a video-on-demand platform that offers “the best of African cinema and video to a wider audience;”<sup>51/</sup> *KweliTV*,<sup>52/</sup> a streaming service

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debate”). Although majority of Americans still have cable subscriptions, the television landscape is changing. *Id.*

<sup>47/</sup> Robert L. Johnson, *Consumers Deserve Choice and Minority Programs Deserve Opportunity*, THE HILL (Jan. 22, 2016, 4:00 PM), <http://thehill.com/blogs/congress-blog/technology/266653-consumers-deserve-choice-and-minority-programmers-deserve>.

<sup>48/</sup> See *Acorn TV Receives First Emmy® Award Nomination*, PR NEWswire (July 16, 2015), <http://www.prnewswire.com/news-releases/acorn-tv-receives-first-emmy-award-nomination-300114615.html>.

<sup>49/</sup> Acorn TV, owned by Robert L. Johnson (founder of Black Entertainment Television), is a subscription-based steaming service that provides British programming. See *Frequently Asked Questions*, ACORN TV, <https://acorn.tv/help/faq> (last visited Apr. 6, 2016). Acorn TV’s content can be found online and is available on YouTube, Roku, Apple TV, iTunes, smartphones, tablets, and computers. *Id.* Roku categorizes Acorn TV’s programming as “Most Watched” and it has been featured in several articles including those published by *USA Today* and the *Los Angeles Times*. See *Acorn TV*, Roku, <https://channelstore.roku.com/details/14295/acorn-tv> (last visited Apr. 6, 2016); Mike Snider, *Cutting the Cord: Acorn TV Cracks Apple TV*, USA Today (Feb. 15, 2016), <http://www.usatoday.com/story/tech/columnist/2016/02/15/cutting-cord-acorn-tv-cracks-apple-tv/80034312/>; Robert Lloyd, *British ‘Detectorists’ on Acorn TV Uncovers A Comedy Treasure*, L.A. TIMES (Aug. 25, 2015, 3:30 AM), <http://www.latimes.com/entertainment/tv/la-et-st-detectorists-interview-20150824-column.html>.

<sup>50/</sup> *BoxTV*, <http://www.boxtv.com/> (last visited Apr. 13, 2016).

<sup>51/</sup> *Africafilms.tv: The New Online Platform For Quality African Movies*, IFAS, <http://www.ifas.org.za/index.php/cinema-media/cinema/211-africafilmstv-the-new-online-platform-for>

offering documentaries, indie films, and shows targeted at the global Black community; or Mitú,<sup>53/</sup> the largest Latino online media startup offering Latino content. All of these offerings contribute content that is different from what is available on the MVPD platform, offering content producers multiple means of achieving success. Today's video marketplace is functioning successfully, and the Commission should continue to allow it to thrive.

## CONCLUSION

For the reasons stated above, the Commission should not move forward with the proposed rules due to the substantial risk of harm to the availability and strength of diverse content.

Respectfully submitted,

/s/ Tara M. Corvo

Tara M. Corvo

Alyssia J. Bryant

MINTZ, LEVIN, COHN, FERRIS, GLOVSKY  
AND POPEO, P.C.

701 Pennsylvania Avenue, N.W.

Suite 900

Washington, D.C. 20004

(202) 434-7300

*Counsel for TV One, LLC*

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quality-african-movies (last visited Apr. 13, 2016); *see also AfricaFilms.TV*, <http://www.africafilms.tv/en> (last visited Apr. 20, 2016).

<sup>52/</sup> *KweliTV*, <https://kweli.tv/#/join> (last visited Apr. 13, 2016).

<sup>53/</sup> *We are Mitú*, MITÚ, <https://www.wearemitu.com/> (last visited Apr. 13, 2016); *see also* Todd Spangler, *Discovery U.S. Hispanic Unit, Mitú Digital Network Pact on Original Programming*, *Variety* (June 23, 2015, 6:11 AM), <http://variety.com/2015/digital/news/discovery-hispanic-mitu-1201525916/> (discussing the deal between Discovery Communications' U.S. Hispanic Division and Mitú to produce original programming that will premiere on Discovery en Español and Discovery Familia).