

**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
)	

REPLY COMMENTS OF TV ONE, LLC

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May 23, 2016

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
I. COMMENTERS’ ARGUMENTS WOEFULLY FAIL TO PROVIDE ANY EVIDENCE THAT THE PROPOSED RULES WILL BENEFIT MINORITY PROGRAMMERS	2
A. The Purported Benefits Of The Proposal For Diverse Programmers Are Unclear Or Exaggerated.....	4
B. Manufacturers Make No Guarantees – Or Even Suggestions – Of Improved Access To Minority Content.	7
II. THE PROPOSAL CAUSES SERIOUS HARMS TO PROGRAMMERS	9
CONCLUSION.....	13

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TV One, LLC (“TV One”) submits these reply comments in response to the Federal Communications Commission (“FCC” or “Commission”)’s *Notice of Proposed Rulemaking* (“*NPRM*”) in the above captioned proceedings, seeking comment on the Commission’s 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”).^{1/} The initial comments, evidencing widespread concerns about the impact of the Proposal on programmers, copyright holders, and others, confirm that the Commission should not move forward.

INTRODUCTION AND SUMMARY

The record in this proceeding demonstrates atypical widespread agreement among many consumer groups, academics, programmers, content interest groups, MVPDs, union members, and many different advocates for diverse interests – including Members of Congress – that the Proposal is not needed. As TV One explained in its initial comments,^{2/} the video programming

^{1/} *Expanding Consumers’ Video Navigation Choices*, MB Docket No. 16-42, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Rcd. 1544 (2016).

^{2/} Comments of TV One, LLC, MB Docket No. 16-42, CS Docket No, 97-80 (filed Apr. 22, 2016) (“TV One Comments”).

market is evolving rapidly without government intervention, and content providers today – including independent, niche, and minority programmers – have many different innovative ways of reaching consumers. Contrary to the Commission’s goal, the Proposal will actually hinder this innovation and competition and threaten the success of independent and minority programmers.

While proponents of the Proposal claim that the proposed rules will benefit programmers, particularly minority programmers, their comments reveal that these benefits are either unclear or exaggerated. None of the commenters supporting the Proposal provides **any** evidence or example to support the claims that competitive user interfaces will offer consumers more diverse content. Nor could they, as none of the third party set-top box manufacturers that support the Proposal provides any assurance whatsoever that they will improve access to minority content, offer more diverse content offerings, or even that they will refrain from the discrimination and deprioritization that occurs today.

While the Proposal may initially have been well intended, TV One and others demonstrated in their initial comments that the Proposal threatens the vitality of independent and minority programmers by transferring much of the value they derive from their creations – value that they need to continue to create compelling diverse content – to third party manufacturers.

For all these reasons, the Proposal should be abandoned.

I. COMMENTERS’ ARGUMENTS WOEFULLY FAIL TO PROVIDE ANY EVIDENCE THAT THE PROPOSED RULES WILL BENEFIT MINORITY PROGRAMMERS

While some commenters – the majority of which are not diverse programmers

themselves^{3/} – boldly assert that a benefit of the Proposal is its value to minority-owned and diverse programming, there is absolutely no evidence in the record nor any reason to think that diverse content will be treated well on the “competitive” set-box envisioned by the Commission.

TV One established in its initial Comments the many ways the Proposal would harm minority programmers – from reassigning part of the value of their MVPD agreements to third party manufacturers, like Google, a company well known for its lack of diversity,^{4/} to diluting their brand,^{5/} to diluting their potential viewership because Internet search algorithms tend to bury minority content in favor of more popular content.^{6/} None of the commenters asserting that the Proposal could benefit diverse programming even attempts to address these real-world business issues. Instead, ignoring these harsh business realities, supporters of the Proposal simply assert generically and without support that the Proposal could benefit minority-owned content because some minority-owned content not carried by MVPDs *might* be available on a competitive set-top box. But while those supporting the Proposal may *hope* that the Proposal will benefit minority programmers, and argue that the Proposal *could* benefit minority programmers, a hope or theoretical possibility, alone, is a wholly insufficient and legally indefensible basis to support a rule change. Notably, those manufacturers that have the power to

^{3/} TV One believes that the comments made concerning its equity holders are irrelevant, but notes that they are also wrong. Contrary to the suggestion by the Consumer Video Choice Coalition (CVCC) that TV One had to “sacrifice equity in exchange for carriage” and “give away a reported 47.9 percent equity stake to Comcast,” Comments of the Consumer Video Choice Coalition, MB Docket No. 16-42, CS Docket No. 97-80, at 49-50 (filed Apr. 22, 2016), the very article CVCC cites makes clear that TV One *bought out* Comcast’s share of TV One. As of April 2015, TV One has been 100% owned by Radio One, the largest African American-owned media company. Likewise, Public Knowledge’s similar claim that there are no 100% African-American owned media companies, Public Knowledge Comments at 40, is without merit.

^{4/} See TV One Comments at 15 n.36.

^{5/} See *id.* at 3-4, 8.

^{6/} See *id.* at 14 n.35.

provide assurances of expanded protections for minority and diverse content have declined to do so, either as part of the public debate or as a part of the voluminous record in this proceeding.

A. The Purported Benefits Of The Proposal For Diverse Programmers Are Unclear Or Exaggerated.

Several commenters wrongly extol the virtues of the Proposal for minority content providers as a reason the Commission should adopt it, but their arguments are based on speculative dreams about how diverse content might be treated on competitive platforms. As TV One explained in its initial comments, there is no reason to think niche and minority content will have greater opportunities if the Proposal is adopted, and instead, there will be numerous ways providers of such content will be adversely affected.

The Consumer Federation of America (“CFA”) argues that the Proposal could assist diverse content creators because “consumers will likely be able to program their set-top boxes to recognize what programs they like and generate additional programs they might like based on those preferences.”^{7/} But it is unclear what competitive navigation devices will even look like, let alone their capabilities, and given past experience with search algorithms, CFA is naïve to believe that independent, minority, and niche programming will suddenly appear on the competitive device interface. Similarly, some programmers complain that new video programming entrants are already denied carriage on large MVPD systems,^{8/} but fail to offer any

^{7/} Comments of the Consumer Federation of America, MB Docket No. 16-42, CS Docket No, 97-80, at 12 (filed Apr. 22, 2016).

^{8/} See, e.g., Comments of UBCTV, MB Docket No. 16-42, CS Docket No, 97-80 (filed Apr. 22, 2016) (claiming that “large cable companies have not even historically wanted to entertain a conversation about diverse programming.”); Comments of UNIFYMe.tv MB Docket No. 16-42, CS Docket No, 97-80 (filed Apr. 22, 2016) (claiming that “Unlock the Box gives audiences easy access to diverse programming from streaming services like UNIFY and other content providers who have been shutout from cable outlets”); Comments of GFNTV.com, MB Docket No. 16-42, CS Docket No, 97-80 (filed Apr. 22, 2016) (“GFNTV Comments”) (stating that under the current system, minority programmers are unable to survive); Comments of New England Broadband, MB Docket No. 16-42, CS Docket No, 97-80 (filed

explanation or concrete data for why they believe they will be treated differently on user interfaces developed by third party manufacturers who will not be regulated by the FCC.

Public Knowledge argues that minority creators have found a better footing through the online video marketplace and that the Proposal will make online video including diverse content more accessible to viewers.^{9/} But Public Knowledge fails to show how the Proposal will lead to minority content being offered on a particular device – the Proposal does not require such carriage, or provide any benefits or incentives to manufacturers that offer more diverse content. If anything, given Public Knowledge’s recognition that the current online video market has provided the opportunity for diverse content creators to flourish^{10/} – a view shared by TV One^{11/} – Public Knowledge’s comments actually support the fact that the proposed rules are unnecessary.

BLQBOX claims the Proposal will provide a “more even playing field” for independent and minority programmers,^{12/} but offers no answer regarding *how* the Proposal will achieve this. BLQBOX further makes the entirely false and unsupported accusation that TV One has no real concerns and is just siding against the Proposal in an attempt to gain “sympathy” for those opposing the Proposal.^{13/} But BLQBOX ignores the fact that TV One is an independent network not owned by an MVPD, and fails to offer any reason why TV One should not be concerned

Apr. 22, 2016) (explaining how cable operators refused to carry Black Education Network because those operators were already carrying BET, which at the time focused primarily on music and comedy).

^{9/} Comments of Public Knowledge, MB Docket No. 16-42, CS Docket No, 97-80 at 40 (filed Apr. 22, 2016) (“Public Knowledge Comments”).

^{10/} Public Knowledge Comments at 40.

^{11/} See TV One Comments at 18-21.

^{12/} Comments of BLQBOX, MB Docket No. 16-42, CS Docket No, 97-80, at 2 (filed Apr. 22, 2016) (“BLQBOX Comments”).

^{13/} *Id.* at 1.

about its continued ability and resources to offer diverse content to African-American viewers – an ability the Proposal directly threatens – or why its desire to continue to receive a return on its investments, free from any predatory encroachment by third parties, is not a valid concern.

Other commenters go even farther to inflate the perceived benefits of the Proposal. Greenlining Institute, for example, asserts that the Proposal will create “enormous benefits” to communities of color by suggesting a number of things that third party device manufacturers *could* do under the proposed rules, such as develop a device in which a consumer may purchase content language rights directly from the content creator, or develop a device that allows consumers to install apps for a channel or program that is not available on an MVPD system.^{14/} But there is nothing preventing device manufacturers from having developed these capabilities already – but they haven’t done so – and there is absolutely nothing in the Proposal that would make it more likely.

GFNTV.com argues that the television programming business needs to be disrupted, not only to ensure competition, but also to advance positive images of African Americans on television.^{15/} TV One agrees with GFNTV in this regard – but the Proposal is not the answer to this problem, and GFNTV offers no explanation why it would be. While there are indeed few African-American networks carried by MVPDs, the Proposal is not a Patron Saint coming to protect minority programmers and ensure competition in the video programming marketplace or diversity in Hollywood or television. Those seeking to rationalize adoption of the Proposal simply cannot point to any certain and concrete benefits to diverse content as support for their position.

^{14/} See, e.g., Opening Comments of the Greenlining Institute, MB Docket No. 16-42, CS Docket No, 97-80, at 4-5 (filed Apr. 22, 2016).

^{15/} GFNTV Comments at 1.

B. Manufacturers Make No Guarantees – Or Even Suggestions – Of Improved Access To Minority Content.

What commenters supporting the Proposal ignore is that no third party manufacturer has actually expressed a willingness to do *anything* to improve access to minority content. To the contrary, notably absent is any commitment from the third party manufacturers who would benefit from the Proposal to make more diverse content available to subscribers, despite having the prime opportunity to do so.

Google, for example, argues only that the Proposal will increase “opportunities for exposure” for minority programmers,^{16/} because current online platforms, such as Google’s YouTube, have enabled content creators to connect directly with a larger audience.^{17/} Google does not commit – or even suggest an intent – to integrate *any* additional diverse content into its user interface, it simply believes that diverse content will benefit because that content may be found using the Google search tool – a search tool that, as TV One noted, has a history of burying minority content.^{18/}

Similarly, TiVo claims that the Proposal will “benefit minority, independent, and other non-mainstream programmers” because consumers will be able to find their programming more easily.^{19/} Like Google, however, TiVo makes no commitment to offer diverse content or ensure it can be found easily. While claiming that under the proposed rules, diverse programmers will be afforded the ability to work-around the “MVPD bottleneck” and reach a larger audience

^{16/} Comments of Google Inc., MB Docket No. 16-42, CS Docket No, 97-80 at 3 (filed Apr. 22, 2016) (“Google Comments”).

^{17/} *Id.*

^{18/} *See* TV One Comments at 15 n.36.

^{19/} Comments of TiVo Inc., MB Docket No. 16-42, CS Docket No, 97-80, at i (filed Apr. 22, 2016) (“TiVo Comments”).

through the competitive navigation device's "universal search function,"^{20/} TiVo fails to explain how *it* intends to give minority programmers enhanced exposure or any increased ability to reach audiences on its devices.

Nor do the third party manufacturer commenters offer any assurance that they will not engage in any of the damaging practices TV One raised that actually harm minority programmers, such as altering advertising, charging for preferential search results, or grouping the network in a manner contrary to its branding. To the contrary, the initial comments from them and other supporters of the Proposal confirm these fears and suggest that monetization and manipulation of content is the prime intent:

- Rather than reassuring content providers that it did not intend to try to profit from the content they created or detract from the value of the carriage agreements they had negotiated – despite the prominence of this issue before the initial comments were submitted – Google's comments focused nearly entirely on its refusal to abide by any FCC privacy requirements. Its silence on content issues speaks volumes.
- TiVo who already manufactures equipment that can insert advertisements^{21/} was silent on the advertisement manipulation issue. With respect to targeted advertisements, TiVo suggested that since distributors were already selling their set-top box data, it planned to do the same.^{22/}
- "Unlock the Box" supporter UnifyMe.TV not only does not deny but *touts as one of the advantages* of the Proposal as giving third party box manufacturers the ability to "organize[] programming around themes that give viewers a simple list of programming options . . . Sports themes, nature, romance, culture, etc."^{23/} But as discussed in TV One's initial comments, this approach carries utter disregard for programmers' substantial investment of time, resources and expertise in how to best position their channel with viewers and advertisers.
- Public Knowledge states that programmers can simply enter into agreements directly with device manufacturers over rights and access that the Proposal does not

^{20/} TiVo Comments at 6.

^{21/} See TV One Comments at 16-17.

^{22/} TiVo Comments at 30.

^{23/} UnifyMe.TV Comments at 4.

address^{24/} – but offers no reason that manufacturers would have any incentive to do so, leaving the clear opening for manufacturers to require payments for respecting each of the rights a programmer already has negotiated—and for which a subscriber is paying.

At base, the Proposal leaves more questions, uncertainties and opportunities for harm than answers and solutions for creators of diverse content. There is no guarantee that the Proposal will provide the benefits it touts. As currently proposed, the Proposal will only *harm* programmers, especially independent, niche, and minority creators.

II. THE PROPOSAL CAUSES SERIOUS HARMS TO PROGRAMMERS

Having reviewed the initial comments, TV One is even more firm in its opinion that the Proposal is unnecessary. The video programming market is competitive and many programmers, including independent and minority content creators, are finding footing in a number of ways, including by negotiating with MVPDs, whose subscribers are demanding diverse programming, or by using online platforms to reach consumers through a number of devices, which will only continue to grow as technology continues to progress.

The record confirms that the Proposal would impose numerous harms on programmers, especially independent, niche, and minority programmers that are already vulnerable:

- ***The Proposal harms programmers by diluting or otherwise trading on the goodwill of programmers' brands.*** TV One explained the importance of a programmer's brand in its initial comments, and how the Proposal threatens to dilute programmers' branding because it gives control over the brand to third parties.^{25/} Other commenters similarly express concern that third party manufacturers will have control over the presentation of content, such as the ability to group programming into presentations

^{24/} Public Knowledge Comments at 45-46.

^{25/} TV One Comments at 3-9. TV One's brand attracts its audience, which in turn, attracts advertisers. By consistently providing quality programming that targets African-American viewers, TV One has built a relationship with its audience and the Proposal threatens that relationship. *See id.*

of the third party manufacturer's own choosing, even if it means networks are grouped with unrelated content.^{26/}

- ***The Proposal harms programmers by failing to ban third party manufacturers from altering or omitting advertising.*** Many commenters agree with TV One that by allowing third party manufacturers to alter or delete advertising, the Proposal decreases the value of advertising sold by programmers, directly impacting programmers' ability to provide quality content.^{27/}
- ***The Proposal harms programmers because third party manufacturers are free to disrupt the viewing experience with additional advertising.*** As the Content Companies and others explained, programmers carefully evaluate how much advertising to include in programming. If third parties are permitted to add more ads to programming, it will detract "from the uniform viewing experience across MVPD platforms that viewers expect."^{28/} Third parties will be able to surround programming with advertising or place ads next to or below programming, disrupting the consumer's viewing experience and devaluing the programmer's content.^{29/}
- ***The Proposal harms programmers because third party manufacturers may carry content in a manner that interferes with Nielsen viewer measurements.*** Several commenters note the importance of ensuring that programming is carried only in a manner that allows Nielsen to capture viewer ratings.^{30/} They explain that TiVo today offers the capability to speed up content, and that such degradation strips out

^{26/} See, e.g., Content Companies Comments at 11 ("The proposals impede the Content Companies' ability to . . . carefully manage branding, presentation, and other aspects of how their content will be distributed and discovered.").

^{27/} See, e.g., *id.* at 12 ("The proposals would allow third parties to alter . . . the advertising that helps support investment in high-quality content.").

^{28/} Content Companies Comments at 38 ("Permitting device manufacturers to surround programming with advertising . . . would degrade the integrity of the content, risk exposing viewers to excessive and inappropriate advertising, and detract from the uniform viewing experience across MVPD platforms that viewers expect. Derogation of content owners' copyrights produces bad results for content owners and for consumers."); Comments of VMe Media Inc. et al., MB Docket No. 16-42, CS Docket No, 97-80, at 2 (filed Apr. 22, 2016) ("VMe Comments") (third-party device manufacturers and app developers will have the ability under the proposed rules "to insert new pop-up, banner, wraparound, search, and pre-roll advertising").

^{29/} See IFTA Comments at 11-12 (stating that the Commission needs to address a number of issues including "the negative impact of advertising overlays or pop-ups added by unaffiliated manufacturers" before proceeding with the Proposal). Even the Writers Guild of America, West, Inc., who supports the Proposal, urges the Commission to "take steps to protect the integrity of network programming . . . [and] clearly address the issue of advertising manipulation or insertion on third-part set-top devices." Comments of Writers Guild of America, West, Inc., MB Docket No. 16-42, CS Docket No, 97-80, at 12 (filed Apr. 22, 2016).

^{30/} See, e.g., Content Companies Comments at 8-9.

Nielsen's ability to capture viewing measurements.^{31/} Nielsen ratings can have broad implications for programmers – from affiliate fees to advertising revenues to securing new carriage. They also help programmers evaluate what content is successful in the market, and with what audience. If third party manufacturers interfere with Nielsen's ability to conduct measurements, they could impact programmers' ability to continue creating high quality content.

- ***The Proposal gives third parties the ability to monetize programmer content for their own benefit.*** Many commenters express grave concerns about third parties gaining the ability to monetize programmer content, such as by collecting and selling viewing data about the programming network, without any involvement of or value to the programmer.^{32/}
- ***The Proposal harms programmers because pirated or illegal content could be listed next to legitimate content in searches.*** As IFTA describes, the proposed rules “dangerously encourage” third parties to manufacture devices in which a consumer could access illegally-offered programs “side-by-side with legitimate broadcast, cable and online platform programming.”^{33/}
- ***The Proposal does not protect programmers from discriminatory search algorithms.*** As TV One described in its initial comments, discretionary search algorithms put TV One's programming at risk of being deprioritized, because minority content is often buried in search results.^{34/}
- ***The Proposal does not preclude third party manufacturers from charging programmers for inclusion or prioritization in search results.*** The Proposal does not preclude a third party manufacturer from charging programmers for additional search terms or prioritization.^{35/} Without protections (*e.g.*, subjecting third parties to transparency requirements about the search algorithms that they create, or barring third parties from charging or accepting any form of compensation for priority in

^{31/} See, *e.g.*, *id.*; see also NCTA Comments at 52-53 (explaining that competitive third party devices will affect Nielsen's audio watermarking and that the Proposal does not prohibit such alterations).

^{32/} See, *e.g.*, Content Companies Comments at 39 (Explaining how the proposed rules “would allow third parties to appropriate, monetize, and distribute content without undertaking any of the risks or expenses associated with the creation of that content and without being bound by any of the duties or obligations that distributors agree to in order to obtain distribution rights.”); NCTA Comments at 6, 49 (expressing that the Proposal allows third parties to “monetize consumers' privacy viewing information.”).

^{33/} Comments of the Independent Film & Television Alliance, MB Docket No. 16-42, CS Docket No, 97-80, at 9 (filed Apr. 22, 2016) (“IFTA Comments”).

^{34/} TV One Comments at 14-16.

^{35/} See *id.* at 15.

search results) minority content – including TV One’s programming – could be buried and difficult to find.^{36/}

- ***The Proposal leaves programmers without recourse or means of resolving any of the above issues, because they have neither privity of contract nor any business relationship to assist in resolving concerns.*** As TV One explained in its initial comments, being forced to distribute its content through parties with whom they have no contractual or business relationship leaves programmers without recourse when issues of concern arise.^{37/} Commenters agree that privity of contract is important to ensure that programmers have a form of recourse if their content is being treated inappropriately,^{38/} and “that each party in the chain has both the incentive and the means to honor licensing terms.”^{39/} The lack of contract privity with the third party manufacturer also means that programmers have no business partner to whom they can reach out and discuss and resolve concerns informally; third party manufacturers will have no obligation and no incentive to talk to programmers that do not like how their content is presented or used.^{40/}

As TV One noted in its initial comments, there is nothing about expanding competition in the set-top box market that necessitates imposing these harms and risks on programmers. The harms caused by the Proposal far outweigh its purported benefits. The Commission should decline to adopt its proposed rules.

^{36/} Such transparency must allow programmers to ascertain the terms that trigger particular search results. To the extent that a manufacturer claims that its search algorithm is proprietary information, the third party device manufacturer must work with the programmer to suggest key words that will increase the likelihood that the programmer’s content will reach viewers.

^{37/} TV One Comments at 12-13.

^{38/} *See id.* at 6, 10-12, 17-18 (explaining that “the only rights it will be able to assert successfully are those that it secures through negotiations, embodied in its written distribution contracts.”).

^{39/} Comments of the Recording Industry Association of America, the National Music Publishers Association, America Association of Independent Music, American Federation of Musicians, Screen Actors Guild – American Federation of Television and Radio Artists, and SoundExchange, Inc., MB Docket No. 16-42, CS Docket No, 97-80, at 7 (filed Apr. 22, 2016).

^{40/} TV One Comments at 9 (“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.”).

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/

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