

May 23, 2016

Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Rielly
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42

Dear Chairman Wheeler and Commissioners,

As independent and diverse content creators and programmers, we are strong advocates for greater innovation and competition in the marketplace for video distribution. Our businesses benefit significantly from the emergence of new pathways to reach an audience – presuming, of course, that those pathways include the right to negotiate with distributors to obtain fair terms and fair compensation for our works.

We strongly oppose federal mandates that would allow an entire class of potential customers for our creative works to instead repackage and profit from our content for free. And we strongly object to the arguments advanced in comments submitted by Google – and by Google-funded lobbying groups– that the set-top box mandate under consideration would somehow benefit diverse and independent content.

This proposal, while espousing a laudable goal to increase competition in the set-top box market, increasingly appears to be a thinly veiled handout to wealthy technology companies interested in harvesting consumer data. It could limit the choices available to American viewers and ultimately undermine the market for quality TV programming. Whatever the Commission's intentions, this proposal will undermine – not enhance – competition, innovation, and diversity on TV.

“Competition” means a level playing field – not a thumb on the scale

Advocates for the proposed mandate cloak their self-serving agenda in platitudes about “competition.” But nothing prevents Google or any other technology company from licensing content and launching their own video service to compete with traditional providers in the market today. Numerous over-the-top (OTT) services – from streaming libraries like Netflix to linear skinny bundles like Sony VUE – have already done so. And innovative devices like Smart TVs, Roku boxes, and Apple TV are recreating the experience of finding and watching television, giving consumers more options than ever for watching their favorite shows – increasingly, without needing any leased set-top box at all.

Even Google is reportedly considering launching its own competing OTT service, YouTube Unplugged, which we would welcome as a new potential customer for our content. But notably, public reports indicate Google has struggled to secure any program licensing rights for this proposed service, because it has been unwilling to agree to pay fair market prices to creators and programmers.^[1]

The FCC's proposed mandate would give Google a shortcut around their stalled content negotiations by granting free access to programming negotiated and paid for by others and allowing them to generate advertising revenue without dealing directly with us, the content creators. Viacom and other content creators have endured multi-year litigation against Google for copyright violations. By allowing Google access to our content in the guise of an open standard, the proposed mandate would set the stage for widespread copyright violation, but small programmers like us cannot afford to fund massive intellectual property litigation and stand to lose revenue even if we win a judgment in our favor. The proposed mandate therefore denies content creators and programmers a major potential customer, drives down the value of our content to our other customers, and gives free-riding competitors a federal blessing to poach our advertising revenues. That's not enhancing competition – it's asking a federal regulator to pick winners and losers in the marketplace.

The pay-TV market is not perfect. There still are far too few independent, minority-oriented networks and even fewer minority-owned programming services. We support efforts to enhance diversity in the video marketplace. We do not believe, however, that the proposed mandate is the panacea its supporters claim it to be.

Tearing down imaginary barriers to online video

Comments submitted by the supporters of the proposed mandate repeat the claim that “unlocking the box” will make online video content more “accessible” to consumers. Google's “Consumer Video Choice Coalition” suggests that *“offerings that have never before graced television screens [would] suddenly become accessible through competitive navigation devices,”*^[2] and cited an op-ed by Eric Easter that argued, *“As long as the streaming world is locked out from the mainstream, many audiences will never find them and they will not succeed.”*^[3]

These arguments might have made sense ten years ago; today, they're simply bizarre. 60% of American households have already connected their TV to the Internet^[4], and devices ranging from cutting-edge smart TVs to \$35 Chromecast plug-in dongles have made online video as easily accessible on TV screens as on any other screen in the home. Surely, Netflix's 45 million U.S. subscribers would be surprised to hear that “the streaming world is locked out from the mainstream.”

We applaud creators and entrepreneurs who are innovating and experimenting with a growing universe of online distribution platforms. But to suggest that American television viewers need

the FCC's help to figure out how to watch online video content simply doesn't reflect reality. It's a smokescreen to distract the Commission from Google's desire for free access to our content – and one the Commission should easily see through.

OTT distribution channels are great for creators – if they generate revenue

Supporters of the mandate portray OTT streaming channels as a panacea that could free diverse and independent programmers from “gatekeepers” and allow them to “reach viewers directly”.^[5] Public Knowledge and the CVCC both suggested that diverse programmers would find “online distribution a more friendly habitat than the traditional media ecosystem.”^[6]

These are arguments that might make sense to lobbyists and PR firms who know nothing about the actual business and economics of programming, but they simply don't hold up under the slightest real world scrutiny. It's telling that these talking points fail to include any concrete analysis of different business models – or any discussion of revenue at all. The abstract right to reach an audience won't keep a programmer in business if this reach doesn't generate a meaningful and sustainable revenue stream.

While obtaining carriage with cable, satellite, and telco TV distributors can be an arduous process, the rewards of carriage – dual revenue streams from licensing fees and advertising revenues – are the economic foundation on which numerous minority-owned media companies have been built and thousands of good media jobs in front of and behind the camera have been created.^[7] Instead of lifting up diverse and independent sources of programming, this proposal undercuts those that have worked hard and achieved broad distribution – knocking the legs out from under the sources of some of the most ambitious diverse programming available.

Limiting minority content creators to web-only streaming channels simply will not advance or expand opportunities for diverse programming or for minority media ownership in the same way. Google claims that YouTube “gets high marks for inclusiveness”,^[8] but it certainly cannot claim that YouTube offers diverse creators economic terms comparable to licensing deals with major TV distributors. Even Robert Johnson, with whom we respectfully disagree on this issue, would have to acknowledge from his own experience building BET into a \$3 billion business that carriage agreements are an engine for business growth and minority wealth creation unmatched by online distribution alternatives. As the League of United Latin American Citizens stated:

“[C]ontrary to the Commission's statements, over-the-top programming is not especially diverse, few if any minority channels have developed a sustaining revenue stream from over-the-top programming, and the edge providers themselves are some of the least diverse businesses operating in the United States. It is hard to understand why the Commission is under the impression that blending over-the-top programming with paid-TV channels in a 3rd party interface will lead to more revenue for diverse programmers.”^[9]

There's a Better Path Forward

As independent content creators and programmers, we have no stake in set-top box revenues. We are receptive to the Commission's stated goals of encouraging additional retail alternatives to these boxes beyond the ones that already exist and to expanding alternatives and apps that allow consumers to ditch the box altogether.

But from our perspective, we already see these goals being addressed through rapid developments in the marketplace. And critically, these market-driven innovations don't undermine our licensing agreements, weaken copyright protections, or drive down the value of our content. That's why we view these new apps and devices as clearly superior alternatives to the Commission's proposed mandate.

We encourage the Commission to fully consider the overwhelming volume of concerns that have been voiced about this proposal by diverse content creators, independent programmers, and advocates for communities of color. The Commission has heard from civil society groups like the National Urban League, the League of United Latin American Citizens, and the Multicultural Media, Telecom, and Internet Council; from programmers including as Revolt, TV One, FUSE Media, Vme TV, and Crossings TV; and from more than 150 Members of Congress, including more than 50 Members of the Congressional Tri-Caucus of African American, Latino, and Asian Pacific American lawmakers. The overwhelming message has been clear: This proposal has significant flaws that the Commission has failed to acknowledge, study, or correct.

Moving forward with the proposed mandate would devastate diverse and independent programmers, turning back the clock on our hard-fought progress. We urge you to reconsider reject the current proposal.

Sincerely,

Victor Cerda, Senior Vice President
VMe Media Inc.

Sang H. Cho, President
MNET America

Jorge Fiterre, President & CEO
Condista Networks

Feliciano Garcia, President & CEO
Manteca Media

Timothy Greenfield Sanders, President
Perfect Day Media

Bel Hernandez, Creator/Executive Producer
Hola! LA, Latin Heat Media

Michael Schwimmer, CEO
Fuse Media

Melissa Narvaez, Vice President of Productions
Stateless Media

Catherine Pino, Founder
Freemind Beauty

Marisa Rivera, President
MPowerment Works

Mario Solis-Marich, President & CEO
Feel Good TV

Tommy Walker, Producer and Partner
Freemind Ventures

Tirrell D. Whittley, CEO & Principal
LIQUID SOUL

Frank Washington, CEO
Crossings TV

[1] *Bloomberg News*, "YouTube Said to Plan 'Unplugged' Online TV Service for 2017," May 4 2016 (<http://www.bloomberg.com/news/articles/2016-05-04/youtube-said-to-plan-unplugged-online-tv-service-for-2017>)

[2] Consumer Video Choice Coalition comments, MB Docket No. 16-42, April 22 2016, p.9

[3] *Ibid*, p.51

[4] Infinite Dial survey by Edison Research and Triton Digital, conducted January-February 2016, as reported by *Twice*, "Internet-connected TVs reach age of majority", April 4 2016 (<http://www.twice.com/internet-connected-tvs-reach-age-majority/61004>)

[5] Public Knowledge comments, MB Docket No. 16-42, April 22 2016, p.40

[6] Consumer Video Choice Coalition comments, MB Docket No. 16-42, April 22 2016, p.49

[7] See the remarks by Calisha Meyers, Honors Attorney with the FCC Media Bureau's Policy Division, at the February 18, 2016 open meeting: "*Consumers today can access video programming over multiple competing platforms, and the dominance of cable operators and other incumbent pay-TV distributors has eroded. However, incumbent operators maintain a very important position in the video programming marketplace, and **obtaining carriage from traditional MVPDs is still vital for the growth of many emerging programmers.***" [Emphasis added.]

[8] Google comments, MB Docket No. 16-42, April 22 2016, p.3

[9] LULAC comments, MB Docket No. 15-64, February 17 2016, p.4