The Walt Disney Company

Susan L. Fox
Vice President
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June 16, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Notice of Ex Parte Communication
MB Docket No. 15-216
Implementation of Section 103 of the STELA Reauthorization Act of 2014 -- Totality of the Circumstances Test

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

Dear Ms. Dortch:

On June 14, 2016, Ken Newman (Associate General Counsel, Antitrust, The Walt Disney Company), Thomas Barnett (Partner, Covington & Burling LLP), and Susan Fox (Vice President, Government Relations, The Walt Disney Company) participated in a series of meetings with the Commission personnel listed below as additional recipients of this letter.

During the meetings, we addressed allegations by certain distributors regarding the inclusion of television stations and affiliated non-broadcast programming in retransmission consent negotiations. As a general matter, we argued that, as a matter of competition policy, antitrust law and marketplace reality, there is no basis for the Commission to alter its current presumption that bundling is consistent with the FCC's good faith negotiating standard.

Mr. Newman and Mr. Barnett focused on antitrust law and competition policy to explain that -- as the Commission historically has recognized -- bundling is consistent with competitive marketplace considerations. Indeed, both competition policy and antitrust law regard bundling as generally a pro-competitive and pro-consumer practice because it can reduce transaction costs and promote economies of scale and scope and because it typically does not harm competition. For that reason, the antitrust laws do not prohibit bundling in the vast majority of situations. The Commission's current presumption with respect to bundling is consistent with this treatment under the antitrust laws and should be retained.

With respect to the bundling of linear video channels, Mr. Newman made reference to the Brantley litigation. *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192 (2012). Specifically, Mr. Newman made reference to the fact that the plaintiffs in that litigation had asserted that bundling foreclosed competitive entry. However, after

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discovery of both the programmers and distributors focused the question as to whether independent programmers had been excluded from the market, the plaintiffs decided to abandon that allegation, and amended their complaint to delete "all allegations to the Programmers and Distributors' contractual practices foreclosed independent Programmers from participating in the upstream market," 675 F.3d at 1196.

With respect to the Riordan study that has been submitted in the record, Mr. Barnett noted a few reasons why that study is not probative to the FCC's good faith negotiation standard: (1) the conclusions drawn from that study depend on the assumed valuations and the conclusions change with plausible changes in those valuations; (2) the study seeks to predict the outcome of programming negotiations using a model in which a seller sets a single price for multiple buyers, which does not reflect the actual marketplace at issue here in which content licensors and distributors engage in separate bilateral negotiations, often years apart, with prices determined separately for each buyer at different times and often under different market conditions; and (3) the study depends on the assertion that programmers are monopolists or have market power, an assertion that is unsupported and inconsistent with the expanding sources of programming and increasing fragmentation of viewership in the marketplace today.

Indeed, with respect to the programming marketplace, we observed that the marketplace for programming has only become *more* (and not less) competitive since the FCC's presumption with respect to bundling was adopted. The record is replete with evidence of myriad and continually increasing sources of content vying for the attention of distributors, advertisers and viewers. Particularly given the growth of competition in the programming market, there is no basis in law or competition policy to change the FCC's long-standing presumption on this issue.

This letter is being submitted electronically pursuant to Section 1.1206(b) of the Commission's Rules. Please contact the undersigned if you have any questions about this submission.

Respectfully submitted,

Susan L. Fox

cc: Commissioner Ajit Pai
Commissioner Jessica Rosenworcel
Marc Paul
Matthew Berry
Bill Lake
Mary Beth Murphy
Martha Heller
Susan Aaron
Steven Broeckaert
Nancy Murphy
Susan Singer
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