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

In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))))))	MB Docket No. 06-189

REPLY COMMENTS OF VIACOM INC., MTV NETWORKS AND BLACK ENTERTAINMENT TELEVISION LLC

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December 29, 2006

SUMMARY

Viacom Inc., MTV Networks ("MTVN") and Black Entertainment Television LLC ("BET Networks") (collectively, "Viacom") submit these reply comments to urge the Commission to report to Congress that competition in the video programming market is flourishing, and that consumers would benefit most from continued government restraint when it comes to oversight of the distribution of programming networks. Consumers today have access to an unprecedented number of video programming choices, and the competitive free market has fostered the creation of an enormous array of diverse program networks. Thus, the Commission should reaffirm that diversity is "best achieved by reliance on competition among delivery systems rather than by government regulation."

Indeed, as opening comments in this proceeding demonstrate, competition is now the hallmark of the marketplace for the delivery of video programming. Despite this intense competition, however, some commenters continue to suggest that the government should force programmers and multichannel video program distributors ("MVPDs") to offer networks on an a la carte or themed tier basis. As Viacom and others have convincingly demonstrated over the past three years, government-mandated a la carte would only serve to limit consumer choice while increasing consumers' costs. Moreover, programming networks devoted to serving niche or minority audiences would suffer the most, undermining one of the FCC's touchstone goals – the promotion of program diversity.

In particular, Viacom previously commissioned Economists Incorporated ("EI") to provide economic analysis of the market for the delivery of video programming.

EI has explained in detail that most MVPD networks (including those owned by Viacom) rely upon two interconnected sources of revenue to produce the high-quality programming necessary to attract a discerning audience – advertising revenues and subscriber fees. Any type of a la carte regime would destroy this economic model and result in consumers having to pay more for lower-quality programming. For that very reason, EI also explained, programmers and MVPDs have chosen to offer most networks to consumers via packages, or "bundles," of channels. Bundling is a ubiquitous practice throughout the U.S. economy, enabling consumers to obtain products or services at lower prices while allowing sellers to efficiently package and distribute a wide array of components designed to appeal to the demands of various consumers.

Mandatory a la carte or themed tiering would have a particularly detrimental impact on programming networks that seek to attract minority or niche audiences, such as Viacom's BET (the preeminent programming service for African Americans) and Noggin (which provides 12 hours each day of award-winning, commercial-free educational programming that appeals to families with young children). By participating in programming bundles and obtaining carriage on widely-available programming tiers, minority-targeted and niche networks gain access to a guaranteed base of subscribers and to a revenue stream that enables them to develop high-quality program offerings that appeal to specific audiences. If networks such as BET and Noggin are precluded from inclusion in programming bundles, they would have difficulty attracting a sufficient number of subscribers to survive. Similarly, new minority and niche networks would find it nearly impossible to launch.

In addition, Viacom's experience reveals that very few other countries mandate that programming be offered to consumers on an a la carte or themed tier basis. But even this limited experience confirms that when governments do attempt to impose a la carte schemes, consumers fare worse than their American counterparts, particularly with respect to diversity of programming choices.

Thus, the Commission should disregard requests made in this proceeding for further exploration of government-mandated la carte or themed tier programming regimes. Instead, the FCC should confirm to Congress that the video programming market is working well to provide consumers with a tremendous array of diverse programming choices.

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Viacom Inc., MTV Networks ("MTVN") and Black Entertainment Television LLC ("BET Networks") (collectively, "Viacom") hereby submit these reply comments in response to the Commission's *Notice of Inquiry,* released October 20, 2006, seeking information about the status of competition in the market for the delivery of video programming.[1] The video programming market today is extraordinarily competitive and vibrant, and consumers have access to an assortment of video programming choices unimaginable a generation ago. As the Commission has made clear, program diversity – the availability of a wide variety of programming formats and contents – has long been one of its central policy goals.[2] Given that the dynamic free market is working well to create diverse choices for consumers, Viacom urges the Commission to use this proceeding to confirm to Congress that "program diversity is best

1 *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, FCC 06-154, released October 20, 2006 (the "*Notice of Inquiry*").

2 *See, e.g., In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13631-32 (2003).

achieved by reliance on competition among delivery systems rather than by government regulation," and that governmental interference would in fact produce a net loss in terms of diversity of program offerings available to consumers.[3]

I. THE PRO-COMPETITIVE VIDEO PROGRAMMING MARKETPLACE IS THRIVING, DELIVERING UNPRECEDENTED CHOICE AND VARIETY TO AMERICAN TELEVISION VIEWERS

MTVN programs channels that appeal to the entire range of consumers' tastes and interests. From the award-winning children's educational programming of Nickelodeon and Noggin to the music-lovers' networks MTV, MTV2, VH1, VH1 Classic, VH1 Soul, CMT (County Music Television) and CMT Pure Country to the classic programming offered by TV Land and Nick at Night to the comic relief provided by Comedy Central and to Spike, the first network created especially for men, MTVN offers something for everyone. MTVN also programs a number of channels specifically targeting minority and underserved audiences, such as MTV Tr3s (for Hispanic Americans) and MTV Chi (for Chinese Americans). BET Networks offers a variety of programming services to its viewers including BET, BET J, BET Gospel, and BET Hip Hop. BET was the nation's first, and it remains the preeminent, programming service specifically targeted to African Americans. Viacom strongly believes that this diverse range of channels is the product of a competitive free market that encourages content-producers to take financial and artistic risks to create innovative and compelling programming, including the risks necessary to provide programming for under-served (often minority) audiences.

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3 *Id.*

Indeed, as several parties pointed out in their opening comments, robust competition is now the hallmark of the marketplace for the delivery of video programming.[4] Not only do consumers have an increasing number of options when it comes to the source of their video programming (be it cable, satellite or now telephone companies), they also have an ever-burgeoning number of video programming networks from which to choose. By 2005, there were more than 530 national programming networks available via multichannel video programming distributors ("MVPDs") (an increase of more than 30 percent from the year before), plus an additional 96 regional or local channels.[5] And that does not even include the video content available from broadcast networks (both analog and digital multicast), DVDs and the Internet and mobile devices, which are flourishing as never before. With so many choices competing for viewers' attention, Viacom is well aware that its future as an independent video programming company is directly tied to its ability to continue to provide consumers with unique, high-quality content.

II. GOVERNMENT-IMPOSED 'CHOICE,' WHETHER IN THE FORM OF MANDATORY A LA CARTE OR THEMED TIERING, WOULD LIKELY REDUCE CONSUMERS' VIDEO PROGRAMMING OPTIONS

Despite the intense competition that characterizes the video programming market, two parties nonetheless have suggested again in this proceeding that MVPDs and

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4 *See, e.g.*, Comments of the National & Telecommunications Association, at 8-27; Comments of Comcast Corp., at 2-7; Comments of the Consumer Electronics Association, at 5-6.

5 *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, FCC 06-11 (released March 3, 2006), at ¶¶ 21-22.

programmers should be forced to offer networks on an a la carte or themed tier basis.[6] As Viacom and others have convincingly demonstrated over the past three years, any type of government-mandated a la carte regime would only serve to *limit* consumer choice while increasing consumers' costs.[7] Moreover, the record is replete with evidence that programming networks dedicated to serving niche or minority audiences, such as BET, Noggin, CMT, MTV Tr3s or MTV Chi, would suffer the most under an a la carte regime.[8] In fact, many minority-targeted networks would not likely survive the imposition of an a la carte scheme.

Unlike a number of its competitors, Viacom is an independent producer of video programming and does not own a multichannel video distribution platform. Thus, as noted above, Viacom's success is predicated on producing high quality programming that warrants carriage on MVPDs because of its attractiveness to consumers. Viacom is therefore especially attuned to the potentially devastating impact that government-imposed a la carte would have on the market for the delivery of video programming.

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6 *See* Comments of Broadband Service Providers, at 20-22; Comments of EchoStar Satellite L.L.C., at 6-7, 12 ("EchoStar Comments").

7 *See, e.g., In re A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite*, MB Docket No. 04-207, Comments of Viacom (filed July 15, 2004) (the "Viacom A La Carte Comments"); Reply Comments of Viacom (filed August 13, 2004) (the "Viacom A La Carte Reply Comments"); *see also* Comments of the National Cable & Telecommunications Association (filed July 15, 2004); Comments of Discovery Communications, Inc. (filed July 15, 2004).

8 *See id.*, at 25-28. *See also In re A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite*, MB Docket No. 04-207, Comments of MBC Gospel Network, LLC (filed July 15, 2004); Comments of GoodLife TV Network (filed July 15, 2004); Comments of Oxygen Media Corp. (filed July 15, 2004); *Ex Parte Letter* from the NAACP to the FCC, August 13, 2004 (noting that a la carte proposals would be a "wrecking ball for media diversity").

Because any regulation of a la carte intrudes on multifaceted business dealings involving, among other things, pricing, promotion, channel positioning, quality and other technical considerations, any government mandate for a la carte necessarily would create a vast and complex regulatory intrusion into the market – a market that, by all accounts, is competitive and working. Together with the incredible complexities that a government-mandated a la carte regulation would introduce, any effort to foster so-called "choice" by government fiat would in fact result in consumers paying more money for fewer choices.[9] And program diversity, long one of the touchstone FCC policy goals, would likely suffer most.

A. Economic Analysis Demonstrates That Government Regulation of the Program Delivery Market Would Harm Consumers

Viacom has previously commissioned Economists Incorporated ("EI") to provide economic analysis of the market for the delivery of video programming, and to explain the ways that the bundling of video programming networks has benefited consumers.[10] Viacom hereby incorporates the EI Studies by reference into this proceeding. As EI has explained, most MVPD networks (including MTVN and BET

[9] To the degree that the FCC is concerned about allegedly indecent programming on broadcast and MVPD networks, it should focus not on the imposition of an a la carte regime but rather on empowering parents to take control over their children's television viewing experience through technologies such as the V-Chip.

[10] *See Cable Networks: Bundling, Unbundling, and the Costs of Intervention*, by Bruce M. Owen and John M. Gale, Economists Inc., submitted with the Viacom A La Carte Comments (July 15, 2004); *Why a Box of Crayons Has Many Colors, and the 'Cable Tax' is Not a Tax*, by Bruce M. Owen and John M. Gale, Economists, Inc., submitted with the Viacom Reply Comments (August 13, 2004); *Ex Parte Letter* from DeDe Lea, Executive Vice President, Viacom, to Marlene H. Dortch, April 13, 2006, transmitting *The FCC 'Further Report' on the Retail Marketing of Video Programming Services: An Economic Review*, by Bruce M. Owen (collectively, the "EI Studies").

Networks) rely upon two interconnected sources of revenue in order to produce the high-quality programming necessary to attract a discerning audience – advertising revenues and subscriber fees.[11] Any type of a la carte regime would be reasonably likely to result in reduced subscribership for the vast majority of networks.[12] And since channels that reach at least 50 million viewers are eligible to participate in the national ad market, a reduction in subscribership below that threshold would cause a dramatic decrease in advertising revenues.[13] Assuming that consumers today channel surf and at least occasionally view networks that they would not subscribe to in an a la carte environment, then advertising revenue stemming from that viewership would drop for all networks (even those that manage not to drop below that threshold) if a la carte is imposed by the government. At the same time, programmers would incur increased transactional and marketing costs, as each network would have to persuade viewers to select it on a stand-alone basis.[14]

Facing a dramatic reduction in revenue plus increased costs, programming networks would confront a devastating cycle: any attempt to increase subscriber fees to maintain the revenue necessary to produce high-quality programming would almost certainly drive away subscribers. A loss of subscribers, in turn, would reduce available resources (both subscriber fees and advertising revenue) and force the network to spend

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11 *See Cable Networks: Bundling, Unbundling, and the Costs of Intervention*, at 7.

12 *See id.*

13 *See id.*

14 *See id.* Based on the estimated expenses currently incurred by premium networks (such as HBO and Showtime), EI calculated that existing widely-distributed networks would face approximately $300 million in annual marketing and related transaction costs under an a la carte regime. *See id.* at 39-40.

less on the production of programming, which would only make the network less attractive to consumers. Whereas the current free market model works to consumers' benefit by encouraging and enabling networks to rely upon advertising revenue in order to charge lower subscriber fees, a la carte – by impairing both sources of revenue – would result in consumers having to pay *more* for lower-quality programming. Inevitably, numerous programming networks would be forced out of business under an a la carte system, while launching new networks would become extraordinarily difficult.

For all of these reasons and many more, programmers and MVPDs have chosen to offer most networks to consumers via packages, or "bundles," of channels. As EI also has explained, "[a]lmost every product and service purchased by consumers is 'bundled,' by sellers, from various components that could each, at least in principle, be sold or priced separately."[15] Bundling enables consumers to obtain products or services at lower prices, while sellers obtain competitive advantages from efficiently packaging and distributing bundles of components designed to appeal to the demands of various consumers.[16] Thus, not only is "bundling . . . a pervasive practice throughout the economy," it is also especially well-suited to the video programming marketplace.[17]

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15 *The FCC 'Further Report' on the Retail Marketing of Video Programming Services: An Economic Review*, at 6.

16 *See id.* at 7.

17 *Id.* Bundling, for example, permits newspaper and magazine publishers to efficiently produce and distribute a variety of content that is packaged together for sale to consumers. Thus, *The Washington Post* and *Newsweek* sell publications containing international news, sports news, local news and feature material all in a single package, while consumers benefit from the ability to receive a diverse array of content for a modest price. Like in the video competition market, a government mandate that consumers be permitted to purchase the sports section or a specific political cartoon on a stand-alone basis would only increase costs while likely reducing the availability of diverse content. As EI explained,

Moreover, the U.S. Supreme Court recently confirmed that product bundling is often pro-competitive.[18] Adopting a modern analysis rooted in rigorous economic theory, the Court also found that many bundling arrangements are "fully consistent with a free, competitive market."[19] Accordingly, the Commission should disregard requests made in this proceeding for further government exploration of a la carte or themed tier programming regimes.

EchoStar states in its opening comments that some programmers' decision to bundle networks requires EchoStar to "carry unwanted programming as a condition of access to must-have programming."[20] EchoStar, however, has more than 13 million subscribers to its DISH Network satellite platform, which has been growing at a rate of more than a million subscribers a year for the past six years.[21] As one of the largest MVPDs nationwide, EchoStar has significant market power when it negotiates with

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"[c]ustomers get a bundled product for a lower price, which they prefer to a self-assembled product, even though the self-assembled or tailor-made product might more closely match their own special tastes. Sellers obtain competitive advantage from offering bundles of components that are cheaper and/or better suited to the demands of various consumers, and the competitive market process tends to ensure that the driving force behind the assembly of bundles is consumer satisfaction." *Cable Networks: Bundling, Unbundling, and the Costs of Intervention*, at 12-13.

18 *See Illinois Tool Works, Inc., et al. v. Independent Ink, Inc.*, 126 S. Ct. 1281, 1292 (2006).

19 *Id.*

20 EchoStar Comments, at 10-11.

21 *See EchoStar Tops 13 Million Subs*, Broadcasting & Cable TV Fax, December 26, 2006.

programmers regarding the channels that EchoStar is willing to carry and the prices it is willing to pay for those channels.[22]

B. A La Carte Schemes Would Have a Detrimental Effect on Program Diversity

Mandatory a la carte or themed tiering would have a particularly damaging impact on programming networks that seek to attract minority or niche audiences. Indeed, as EI also has pointed out, a loss of programming diversity is likely to be one of the most harmful consequences, even if unintended, wrought by mandated a la carte.[23] If minority-targeted networks are precluded from participating in programming bundles, they likely would have an especially difficult time attracting a sufficient number of subscribers to survive. Many existing diverse networks would struggle to generate enough revenue to continue to offer high-quality programming, while new networks with no brand recognition would find it nearly impossible to launch.

That bleak prospect stands in stark contrast to the way that the free market fostered the creation of BET and enabled it to make an enormous contribution to the American programming landscape. BET Networks today comprises BET, BET J, BET

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22 Moreover, the Commission has noted that when MVPDs negotiate with broadcasters for carriage of over-the-air television stations, a "balance of terror" – the threat to both sides that failure to reach a carriage deal would be devastating to their businesses – ensures that the parties have relatively equal bargaining power. *See In re General Motors Corp. and Hughes Electronics Corp., et al.,* 19 FCC Rcd 473, 556-57 (2003). Since Viacom does not own any broadcast stations, there is no comparable balance of terror tempering EchoStar's demands in negotiations for carriage of Viacom's programming networks. Instead, those networks achieve carriage through complex business negotiations that succeed only when the result provides value to both Viacom and EchoStar, generally on the basis of the networks' ability to convince EchoStar that they offer high-quality programming that is attractive to a discerning audience.

23 *See The FCC 'Further Report' on the Retail Marketing of Video Programming Services: An Economic Review,* at 14-15.

Gospel and BET Hip Hop – all of which seek to reflect the authentic and diverse experiences of the African American community. But when BET first launched in 1980, it was a trailblazer, helping to introduce diverse content to MVPD audiences. It is unlikely that BET ever could have gotten off the ground in an a la carte environment. With the benefit of carriage on widely-available programming tiers, BET used the revenue provided by subscriber fees to invest in programming capable of attracting more viewers. As its viewership increased (today BET is in more than 80 million homes), BET also was able to take advantage of increased advertising revenues to further improve and expand the breadth of its programming. BET Networks followed a similar model to launch BET J, BET Gospel and BET Hip Hop. Indeed, it is the growth engendered by carriage on widely-available tiers that has enabled BET Networks to increase its programming from a single channel providing two hours of African American-targeted content per day to four distinct channels offering diverse programming on a daily basis.

Minority audiences likely would suffer the most collateral damage under an a la carte regime, since it is uncertain what type of programming services and quality of programming BET Networks could offer its audiences under a government-mandated a la carte regime. Without the economic base provided by wide carriage, it is unlikely that even established programmers could continue to develop and expand the quality and diversity of their program offerings. Viewers of niche programming services also would be left behind. Noggin, for instance, offers 12 hours daily of commercial-free educational programming designed to appeal to families with young children. Noggin never could have become a programming staple for many pre-school children if it had not been able to obtain MVPD carriage on widely-available programming tiers (which provided a guaranteed base of subscribers) at the time of its launch.

C. The Limited Experience With A La Carte in Foreign Countries Only Confirms That A Free Market Approach is Better-Suited to Delivering Consumer Benefits

In the *Notice of Inquiry,* the Commission also asks for comment on the degree to which a la carte programming options are available and successful in other countries.[24] Since Viacom distributes a great deal of programming to foreign markets, it believes that it is especially well qualified to report to the Commission on the limited availability of la carte offerings in other countries. First and foremost, Viacom's research has revealed that very few countries actually mandate that programming be offered to consumers on an a la carte or themed tier basis. Even in those few countries that have experimented with a la carte, Viacom has found that consumers fare worse since they have far fewer content choices than their American counterparts.

In Canada, for example, government-mandated a la carte offerings do not include the most popular programming networks. And in order to get the channels that are available on a stand-alone basis, consumers first must subscribe to a basic tier of cable networks. So even in Canada, consumers cannot simply select any programming service they want at any time. More importantly, according to the then-President of the Canadian Cable Television Association, most Canadians would gladly give up the highly-regulated Canadian system in exchange for the incredible array of content choices that have developed under the pro-competitive American model.[25] "[I]t's somewhat ironic

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[24] *See Notice of Inquiry*, at ¶ 90.

[25] *See* Remarks by Michael Hennessy, then-President and CEO, Canadian Cable Television Association, Washington Metropolitan Cable Club, June 29, 2004.

that America has become engaged in a spirited debate about regulated choice – or mandated a la carte – when our industry looks enviously to your country because of the choice you have in terms of diversity."[26]

In Hong Kong, meanwhile, a la carte offerings are available only from one MVPD – the incumbent telephone company – which has chosen to offer the service as a loss leader to attract customers as it tries to break into the video programming business. In other words, the new entrant is willing to sell video programming at an artificially depressed price (and to lose money doing so) in the hope that it can lure customers away from the entrenched cable provider.[27] This is not a model designed for any long-term viability. Other nations, such as India and the United Kingdom, operate essentially the same way that the United States does – certain channels, usually premium or movie channels, are available on an a la carte basis, and then only after consumers buy a certain minimum level of bundled service (*i.e.*, a basic programming tier).

In short, the few foreign markets where limited a la carte offerings are available do not provide any basis for concluding that an a la carte mandate would benefit American consumers. To the contrary, the experiences in markets such as Canada and Hong Kong confirm what Viacom and others have argued to the Commission: that mandated a la carte would eradicate the pro-competitive business model that has

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[26] *Id.*

[27] *Cf. In re Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* FCC 06-179 (released December 27, 2006), at ¶ 15 & n.14 (attributing moderation in the increase in costs for Hong Kong cable to "aggressive pricing" from the competitive entrant).

delivered enormous programming choices to American viewers, harming diversity and driving up costs.

III. CONCLUSION

In conclusion, the market for the delivery of video programming is incredibly competitive – offering consumers access to an extraordinary array of video programming options. Viacom urges the Commission to use this proceeding to report to Congress that the marketplace is working well, and that consumers would benefit most from continued government restraint when it comes to oversight of the distribution of video programming networks.

Respectfully submitted,

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