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

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198

REPLY COMMENTS OF THE WALT DISNEY COMPANY

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Executive Summary

Commenters supporting government intervention on behalf of MVPDs in this proceeding primarily consist of small/ rural cable operators ("Regulation Advocates"). These Regulation Advocates, relying upon self-serving, unattributed statements, allege that programmers engage in harmful "tying" or "bundling" practices. In reality, as some Regulation Advocates acknowledge, programmers do not tie programming and bundling often is in the interests of distributors and consumers alike. Nonetheless, the Regulation Advocates continue to urge the Commission to further regulate the market for cable and broadcast programming through a variety of proposals. Ultimately, however, their proposals boil down to a single request—the adoption of *wholesale price controls*, a suggestion that is as startling and unjustified as it is impractical and illegal.

As shown herein and in the attached economic study of Jeffrey A. Eisenach, the Commission should reject the Regulation Advocates' proposals because:

- **The Regulation Advocates' proposals call for rate regulation that is unworkable, unnecessary and beyond the Commission's authority.**

The American Cable Association, a leading Regulation Advocate, urges the Commission to establish "reasonable rates, terms and conditions" for its members' wholesale purchases of broadcast and cable programming. Other Regulation Advocates want the impossible—they want to pay a price per channel that is made possible only by bundling it with other channels and simultaneously restrict the very bundling practices that make that price possible. The Commission should reject these calls for rate regulation because they are unworkable, unnecessary and beyond the Commission's authority. The Eisenach study shows, *inter alia*, that rate regulation also cannot be justified based on the comparative marketplace position of smaller operators because they possess significant advantages in negotiating leverage relative to larger operators.

- **The government intervention that the Regulation Advocates promote would hurt consumers and competition in a futile attempt to make business easier for the Regulation Advocates.**

The Regulation Advocates' proposals also should be rejected because they are unnecessary given the state of the marketplace and would not benefit consumers. As shown by several commenters, the current marketplace works. Thanks in part to negotiated bundling practices, consumers may choose from dozens or hundreds of channels of video programming. Competition among these many channels for consumers' attention drives them to develop more programming and improve the quality of existing programming, all of which benefits consumers. The fact that the marketplace works is further evidenced by the many *a la carte*-like (and often free) online programming options that evolved without any government intervention, which let consumers choose to watch an individual program or other content when and where they want it. Without challenging these benefits, the Regulation Advocates nevertheless insist that the government must step into the marketplace on their behalf. However, the Regulation Advocates do not show how this government intervention would benefit consumers. They cannot make such a showing because their proposals, if adopted, actually would hurt consumers and competition in a vain effort to make business easier only for themselves, primarily small/ rural operators, who do not suffer any competitive disadvantage in their markets. This type of "benefit"—even if it came about—cannot support government intervention into an already thriving marketplace.

- **The Regulation Advocates have not shown how programmers' contracting practices harm competition given well-established economic principles.**

The Regulation Advocates also have not shown how programmers' practices harm competition. All programmers who commented stated that they do not tie their most popular programming—they always provide stand-alone offers in addition to their packaged offers. As shown by several commenters, these package selling practices can be anti-competitive only if a programmer has sufficient market power and excludes rivals. The Regulation Advocates have not shown how package sales satisfy either of these conditions. Rather, as Disney showed in its initial comments, programmers lack the market power necessary to impose an anticompetitive tie and their package sales have served to promote, rather than foreclose, competition. Nothing submitted by the Regulation Advocates shows otherwise.

- **The FCC has no authority to adopt the Regulation Advocates' proposals.**

Aside from the merits, the Regulation Advocates also have not shown that the Commission has the authority to adopt their proposals. The express provisions of the Act that they cite do not provide jurisdiction; nor do they adequately explain how the Commission could assert ancillary jurisdiction given recent court decisions. Finally, the Regulation Advocates have not shown how their proposals are consistent with the First Amendment.

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Everyone wants to pay less for what they buy but government-imposed price control is an outdated regulatory tool from a bygone era that is justified, if at all, in very limited circumstances, which are not present here. Accordingly, the Commission should reject the Regulation Advocates' request for price controls and other interference in this vibrant and thriving marketplace.

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REPLY COMMENTS OF THE WALT DISNEY COMPANY

The Walt Disney Company ("Disney")[1] hereby submits reply comments ("Comments") in the above-captioned proceeding of the Federal Communications Commission ("FCC" or "Commission") regarding negotiations between programmers and multichannel video programming distributors ("MVPDs") for carriage of broadcast and non-broadcast programming and whether the Commission should prohibit certain alleged practices with respect to such negotiations.[2]

[1] Disney files these reply comments on behalf of itself, as well as the following Disney-owned entities: ESPN (80% owned by Disney), Disney ABC Cable Networks Group (including Disney Channel, ABC Family, Toon Disney, and SOAPnet), the ABC Television Network, and the ABC Owned Television Station Group.

[2] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007) ("*Notice*").

The comments in this proceeding reveal a rare consensus in opposition to regulation. Programmers and the MVPDs that serve the clear majority of the American public—whose interests lie in maximizing the diversity and quality of programming delivered to as wide an audience as possible—agree that the Commission should not interfere in the highly competitive video programming marketplace. By contrast, the parties promoting additional government regulation—including price controls—generally are self-labeled small/ rural operators ("SROs") who seek to increase their own business prospects at the expense of both programmers and consumers, and who already exercise considerable market power in their negotiations with programmers and subscribers (the "Regulation Advocates").

It is well-established that "the Commission should not intervene in the market except where" two conditions are satisfied: (i) "there is evidence of a market failure;" and (ii) "a regulatory solution is available that is likely to improve the net welfare of the consuming public."[3] Ultimately, the Commission must ensure that the regulation "does not impose greater costs than the evil it is intended to remedy."[4] Applying this principle to the present proceeding, the Commission cannot adopt the Regulation Advocates proposals because there is no "evil" to remedy and the proposed "solution" would harm consumers.

First, Section I below shows that the Regulation Advocates' proposals would require rate regulation that is unworkable, unnecessary and beyond the Commission's authority. Section II further shows that the Regulation Advocates' proposals would not benefit consumers. Next, as shown in Section III, there is no evidence of market failure or other competitive harm that needs remedying. Finally, Section IV demonstrates that the Commission has no authority to adopt the

[3] *See Amendment of 47 C.F.R. § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, 94 FCC 2d 1019, ¶ 107 (1983).

Regulation Advocates' proposals. For all of these reasons, the Commission should reject the Regulatory Advocates' demands for additional regulation, as set forth below.

I. THE REGULATION ADVOCATES EXPRESSLY CALL FOR RATE REGULATION THAT IS UNWORKABLE, UNNECESSARY AND BEYOND THE COMMISSION'S AUTHORITY

Many Regulation Advocates acknowledge that bundling can be pro-competitive and "efficient," and thus urge the Commission not to adopt an "overbroad" prohibition on bundling.[5] Incredibly, these Regulation Advocates instead ask the Commission to adopt price controls![6] Some Regulation Advocates expressly request that the FCC set "reasonable" wholesale prices for programming.[7] Other Regulation Advocates' proposals would require wholesale and retail rate regulation in their implementation, as shown in the attached report of Dr. Jeffrey Eisenach.[8] Overall, Regulation Advocates no longer just want the Commission to preclude tying or bundling—they "merely" want the Commission to require programmers to sell them bundles "under reasonable prices, terms or conditions."[9] The price regulation the Regulation Advocates seek is untenable and should be rejected by the FCC.

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[4] *Id*.

[5] *See* Comments of the American Cable Association ("ACA Comments") at 13.

[6] *See*, *e.g.*, ACA Comments at 22-25.

[7] *Id*.

[8] *See* Jeffrey A. Eisenach, *Why the FCC Should Not Increase Regulation of Wholesale TV Programming: Reply to Comments in MB Docket No. 07-198* (Feb. 12, 2008) (attached as Exhibit A) ("Eisenach Reply Report"), at 13-14 (showing that bundling prohibitions would require price controls); Eisenach Reply Report at 14-15 (showing that prohibiting distribution or tiering requirements would require price controls); Eisenach Reply Report at 15 (showing how non-discrimination rules would require price controls).

[9] Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies *et al*. ("OPASTCO Comments") at 10.

As shown below, the Commission should reject rate regulation proposals because they would be unworkable. Rate regulation proposals also are unnecessary because current programming rates already are market-driven and reasonable given retail rates. Further, nothing about the comparative marketplace position of SROs justifies any special relief for a certain subset of MVPDs. Finally, the Commission cannot impose rate regulation because it lacks jurisdiction to do so.

A. Rate Regulation Proposals are Unworkable

Wholesale rate regulation, especially if enacted only on behalf of SROs, would be unworkable. As the Commission previously has found in other contexts, regulating rates requires constant micromanagement, is practically difficult, if not impossible, to accomplish, and takes significant Commission resources away from other tasks. Moreover, imposing rate regulation in this circumstance would require the Commission to address a long list of issues, as discussed by Dr. Eisenach.[10] Chief among these issues is how the Commission would calculate "reasonable" rates, terms and conditions.

Would the Commission, as the Regulation Advocates suggest, use a cost-based formula?[11] If so, use of such a formula would raise another set of sub-issues. As Dr. Eisenach asks, how would the Commission account for programmers' cost of capital and required revenues, in order to assess whether their rates are "cost-based" (including a reasonable return on capital)?[12] Would a network that generates multiple "hit" shows in a given year be permitted to

[10] *See* Eisenach Reply Report at 12-17.

[11] *See* ACA Comments at 23 ("[T]he Commission should prohibit volume-based price differences, unless those differences are genuinely cost-based.").

[12] Eisenach Reply Report at 15-16.

benefit from its success in the ensuing round of retransmission consent negotiations? Would the answer turn on the programmers' costs, *i.e.*, would high-cost situation comedy "hits" be valued more heavily than relatively cheap to produce reality show "hits"? Or, would content be considered such that "family" or "educational" hits were granted a higher rate of return than programming the Commission may deem less meritorious? If the Commission-established rates would not be cost-based, what would they be based on? Content? Ratings? These and other questions make clear that any Commission attempt at regulating wholesale programming rates would be entirely unworkable.

Further, even if the Commission adopted a vague "reasonableness" guideline in lieu of specific price controls, it eventually would have to determine whether individual contractual terms satisfied that standard. How would it do so? In determining whether a programmer's rate is reasonable, would the Commission account for each operator's subjective desires? In their comments, the Regulation Advocates describe various program packages or tiers that they would like to establish. In doing so, the Regulation Advocates clearly do not agree on which channels are "desired" versus "undesired." For example, some ACA members identify ESPN2 as a "desirable" channel while other members label it as an "undesirable" channel that they reluctantly agree to carry.[13] If the Commission takes on the responsibility for determining whether a rate is reasonable, is the Commission supposed to set a different "reasonable" rate for an operator that "really wants" ESPN2 than for an operator that "reluctantly is willing to" carry it?

The Commission would find it impossible to resolve even this single valuation issue, let alone the dozens of other valuation issues (such as local ad sales time, marketing support,

[13] *See* ACA Comments at 6, Table I.

channel placement, digital rights management, length of term, VOD rights, interactive television capacity, most favored nation clauses, payment terms, and technical/ quality specifications) that comprise a modern-day distribution agreement. Valuation and other issues would grow even more complex if the Commission imposed asymmetric regulations, *i.e.*, if it imposed one set of regulations on "small" cable operators and a different one on "large" ones.[14] Simply put, nothing about the Regulation Advocates' rate regulation proposals is workable.

B. Rate Regulation Proposals Are Unnecessary

Further, the Regulation Advocates have not shown that government intervention is necessary. Specifically, the Regulation Advocates have not shown that programmers' market-driven prices are unreasonable using any metric other than their own opinions. Several commenters *allege* that broadcasters' and programmers' stand-alone offers are "false alternatives" due to their purportedly high price; however, they provide no economic analysis to support their claims.[15] In contrast, Disney previously submitted a thorough economic study demonstrating that the wholesale stand-alone price offered for its ABC Owned TV stations was reasonable when compared to the retail price for that programming.[16]

[14] Eisenach Reply Report at 16.

[15] *See, e.g.*, Comments of Small Cable System Operators for Change ("SCSOC Comments") at 3-4 (alleging that "[programmers'] 'stand alone' prices are typically set at unreasonably high levels"); Comments of the National Telecommunications Cooperative Association ("NTCA Comments") at 13 (alleging that stand-alone programming offers are a "'false alternative'"). None of these commenters provides any factual support regarding prices or a showing of how the price is unreasonable. Instead, commenters quote unsubstantiated statements from anonymous cable operators giving their personal opinion that the prices are high. These empty statements do not permit any useful conclusion regarding a price's reasonableness. *See* Eisenach Reply Report at 3-4 (showing how survey quotes relied upon by Regulation Advocates are "nothing more than hearsay, and should be disregarded by the Commission").

[16] *See generally* Michael G. Bauman & Kent W. Mikkelsen, *The Fair Market Value of Local Cable Retransmission Rights for Selected ABC Owned Stations* (July 15, 2004) (filed in MB

Similarly, the Regulation Advocates again provide no evidence of the correlation between wholesale programming costs and retail rates (*i.e.*, that lowering prices at the wholesale level would lower retail prices). The only evidence they provide consists of unsupported statements from cable operators claiming that such a connection exists.[17] Statements from self-interested operators claiming a correlation do not constitute evidence of an actual connection.[18] Ultimately, an evidentiary record this scant cannot support a remedy as drastic and potentially damaging as price regulation.[19]

Docket No. 04-207) (demonstrating that the retail price of the ABC Owned Stations exceeded the wholesale price requested from MVPDs using three different methodologies). NTCA's statement that "no company that claims to offer 'stand alone' programming also claims to offer it according to reasonable terms and conditions" is just plain wrong. NTCA Comments at n.34. Disney consistently has claimed—and has supported its claim with economic studies—that its stand-alone offer for each of the ABC Owned Stations is reasonable and fair. *See e.g.,* Bauman & Mikkelsen, *supra*.

[17] *See, e.g.*, ACA Comments at 19 (quoting member surveys).

[18] *See* Eisenach Reply Report at 3-4 (showing that evidence "fails to meet even the most *de minimis* standards of survey research"). Available evidence shows that no such correlation between programming costs and retail costs exists. *See* Comments of The Walt Disney Company ("Disney Comments") at 59-61; Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming* (Jan. 4, 2008) ("Eisenach Bundling Report"), at ¶¶ 92-95 (finding that, although the FCC's December 2006 cable report states that MVPDs' programming costs have increased by $1.12 per subscriber, the report does not conclude that there is any causal link between these increases in programming costs and rising cable rates); *see also* Reply Comments of The Walt Disney Company, MB Docket 05-28, Mar. 31, 2005, Exhibit B, Jeffrey A. Eisenach & Douglas A. Trueheart, *Retransmission Consent and Cable Television Prices* ("Pricing Study"), at 5-6. Further evidence shows that cable rates are not rising more rapidly than inflation. *See* Eisenach Bundling Report at ¶ 90, Figure 6 (explaining that in the first ten months of 2007 cable rates increased only 2.6%, whereas the consumer price index for all goods increased by 3.2%).

[19] *See* Eisenach Reply Report at 16-17 (showing how rate regulation proposals would result in high costs and economic distortions). Further, as shown in Section III, rate regulation also is unnecessary because programmers lack market power. *See infra* at 28-30.

C. Rate Regulation Cannot Be Justified Based on SROs' Bargaining Power

Rate regulation also cannot be justified by limiting its applicability to programming purchases by SROs because programmers possess no special or increased level of power with respect to SROs. One study submitted by the Regulation Advocates (the "Ball State Study") purports to show that programmers have "disproportionate bargaining power" when negotiating with SROs for carriage of their programming.[20] Another study (the "CRS Report") similarly claims that SROs are at a disadvantage in acquiring programming.[21] SROs allegedly are subject to this "uneven playing field" because of their smaller subscriber bases and because of increased competition from other MVPDs, such as direct broadcast satellite ("DBS") companies, overbuilders, telephone companies and online sources.[22]

Neither report cited by the Regulation Advocates supports these assertions of competitive disadvantage.[23] As an initial matter, much of the "evidence" cited in the supporting reports is irrelevant because it consists of anecdotes regarding large MVPDs, not SROs. For example, in support of its conclusion regarding SROs' disadvantages in retransmission consent negotiations, the CRS Report cites six retransmission consent disputes between broadcasters and MVPDs, but

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[20] *See generally Retransmission Consent, Must Carry and the Public: Current Economic and Regulatory Realities of Multichannel Video Providers: A White Paper by the Ball State University Digital Policy Institute* (Commissioned by the National Telecommunications Cooperative Association) (October 3, 2007) ("Ball State Study").

[21] *See generally* Charles B. Goldfarb, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, Congressional Research Service (July 9, 2007) ("CRS Report").

[22] Ball State Study at 48.

[23] Eisenach Reply Report at 3-7 (reviewing how the survey-based and anecdotal evidence relied upon in the CRS Report and Ball State Study does not support the Regulation Advocates' proposals).

only one of these disputes even potentially involved an SRO.[24] It is difficult to understand how alleged instances of tough negotiations between *large MVPDs* and programmers support the notion that *SROs* are disadvantaged in carriage negotiations.[25]

Further, as shown in the attached report of Jeffrey A. Eisenach, SROs often possess significant advantages (relative to larger MVPDs) in programming negotiations—especially in retransmission consent negotiations—and thus need no special government intervention on their behalf.[26] For example, SROs face less downstream competition (*i.e.,* competition from DBS, telephone companies and overbuilders) than large MVPDs face, and their markets often have other characteristics that tend to advantage SROs.[27] Specifically, Dr. Eisenach shows that:

(i) SROs are disproportionately located in markets where DBS providers do not carry local television signals;[28]

(ii) SROs are disproportionately likely to serve areas outside the broadcast coverage areas of local television stations (and thus represent the only means for local broadcasters to reach potential viewers);[29] and

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[24] CRS Report at 31-55; Eisenach Reply Report at 4-5 (defining SROs as systems with 400,000 or fewer subscribers, consistent with FCC rules and SRO comments).

[25] The Ball State Study relied upon by the National Telecommunications Cooperative Association suffers from a similar lack of evidence. *See* Eisenach Reply Report at 6-8 (noting speculative statements and self-contradictory conclusions).

[26] Eisenach Reply Report at 3. Dr. Eisenach analyzed market conditions in markets where SROs typically operate. *Id.*

[27] Eisenach Reply Report at 7-11.

[28] *See* Eisenach Reply Report at 9 (showing that a greater percentage of SROs than larger MVPDs operate in areas where one or no DBS operator carries local broadcast programming).

[29] *See* Eisenach Reply Report at 9-10 (showing that SROs tend to face less competition than large MVPDs from over-the-air broadcasters because they operate in areas where many households live outside the broadcast stations' Grade B contours).

(iii) SROs are far less likely than large operators to face competition from overbuilders, especially from telephone companies.[30]

All of these factors place SROs in strong bargaining positions relative to broadcasters in retransmission consent negotiations.

Regulation Advocates assertions regarding "must have" programming also do not support their calls for government intervention on behalf of SROs.[31] Mere recitation by the Regulation Advocates (and the Commission) of this poorly defined "must have programming" concept does not support their proposals because it is not demonstrative of the kind of market power that justifies government regulation.[32] As the Commission recently stated:

> All differentiated products, such as video programming, possess some degree of market power in the sense that there are no perfect substitutes. The critical question in any analysis involving differentiated products is *whether the existing*

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[30] *See* Eisenach Reply Report at 10-11 (demonstrating that SROs face less competition from overbuilders and telephone companies than larger MVPDs because such potential competitors generally are deploying their systems in urban areas). Absent competition, SROs often are the only means by which broadcasters and other programmers may reach customers, which gives them a negotiating advantage. Eisenach Reply Report at 8.

[31] *See, e.g.*, OPASTCO Comments at 8.

[32] Eisenach Reply Report at 11-12. Further, as shown by other commenters, the term "must have programming" is a misnomer because the lack of a single programming service in an MVPD's lineup would not make an MVPD completely undesirable to a large number of consumers. *See* Bruce W. Owen, *Wholesale Packaging of Video Programming* (attached to NBC Comments as Exhibit B) (January 4, 2008) at 2, 29-32. The fact that one group of consumers may prefer a single channel over potential "substitutes" may make that channel more desirable for an MVPD seeking to entice as many consumers as possible, but it does not make that channel a "must have" in order for the MVPD to compete, especially with respect to the many consumers who do not similarly value that single channel. Even the show mentioned in the FCC's *Notice*—the finale of HBO's *The Sopranos*—was watched by only ten percent of U.S. television households. Thus, even assuming that all who watched the show would choose their MVPD based solely on whether it carried *The Sopranos*, nothing would prevent an MVPD from targeting the other ninety percent of households who did not similarly value the show. In sum, the lack of a single channel does not prevent an MVPD from being able to compete for subscribers. *Id*.

> *degree of market power is sufficient to allow the firm to profitably engage in the hypothesized anticompetitive activity….*[33]

In this case, programmers' market power does not approach an anti-competitive level, as shown in Section III, *infra*. Absent some showing of anti-competitive market power, the Commission cannot justify government regulation on behalf of MVPDs in general or SROs in particular.

D. The FCC Has No Authority to Regulate Rates

The Commission also may not adopt the Regulation Advocates' proposals because they would require rate regulation, over which the Commission has no authority. Proposals such as the setting of "reasonable" rates and prohibiting price differences expressly beg for rate regulation. Others would require retail rate regulation in order to have their supposed "benefits" passed on to consumers.[34] The Commission never has had authority to regulate wholesale rates, *i.e.*, the rates programmers charge to MVPDs. Thus, Regulation Advocates' assertion of Commission authority to set rates in that context has no support whatsoever. Their proposals requiring retail rate regulation suffer from a similar flaw because Congress expressly repealed the Commission's jurisdiction to regulate retail cable rates other than in very limited circumstances.[35] Further, the FCC has no residual authority because Congress explicitly provided a sunset for rate regulation.[36]

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[33] Federal Communications Commission, Media Bureau, *Report on the Packaging and Sale of Video Programming Services to the Public* (rel. Nov. 18, 2004) ("*2004 Packaging Report*"), at 70 (citing *General Motors corporation and Hughes Electronics Corporation—News Corporation Limited*, 19 FCC Rcd 473 (2004)).

[34] Restrictions on tiering and bundling also would require rate regulation because, as the Regulation Advocates acknowledge, the Commission would have to decide whether a discount offered in exchange for carriage on a certain tier was "reasonable." ACA Comments at 22; *see also* Eisenach Reply Report at 12-15 (showing how proposals would require rate regulation).

[35] 47 U.S.C. § 532(c)(1); 47 U.S.C. § 543.

[36] 47 U.S.C. § 543(c)(4).

Finally, rate regulation was not mentioned or even hinted at in the *Notice*. Because rate regulation would not be a "logical outgrowth" of the proposals mentioned in the *Notice*, the Administrative Procedure Act requires the Commission to release another notice and solicit comments on rate regulation before even considering the Regulation Advocates' proposals.[37] Accordingly, the Commission lacks authority to adopt the Regulation Advocates' rate regulation proposals.

II. THE GOVERNMENT INTERVENTION THAT THE REGULATION ADVOCATES PROMOTE WOULD HARM CONSUMERS, COMPETITION AND THE MARKETPLACE

Even if some of the Regulation Advocates proposals could be accomplished without government imposed price controls, they should be rejected because they are unnecessary given the state of the marketplace and would not benefit consumers. As noted above, Commission intervention in the marketplace is justified only if the regulation sought "is likely to improve the net welfare of the consuming public, *i.e.,* [it] does not impose greater costs than the evil it is intended to remedy."[38] The comments do not support such a finding in this proceeding. As Disney and other parties showed in their initial comments, they do not tie their programming and the package sales they do offer benefit consumers (and MVPDs).[39] The Regulation Advocates have not rebutted this showing. Nor have they shown how any of the other drastic measures they seek would benefit consumers or competition. Instead, many of these suggested measures would

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[37] *See* 5 U.S.C. § 553; *United Mine Workers of Am. v. MSHA*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005).

[38] *Id*.

[39] *See, e.g.,* Disney Comments at 27-42; Comments of the National Association of Broadcasters ("NAB Comments") at 27-30; Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. ("Fox Comments") at 10-16; Comments of NBC Universal, Inc. and NBC Telemundo License, Inc. ("NBC Comments") at 50-57.

harm consumers through reduced choice, lower quality programming and higher prices. The only "benefit" of the proposed government intervention, if any, would be to increase the bargaining power of the Regulation Advocates themselves, at the expense of consumers.

A. Bundling Practices Benefit Consumers

To justify government intervention, the Regulation Advocates must show that there is some harm to consumer welfare that needs remedying. They cannot do so because the current marketplace, largely a result of the bundling practices they seek to restrict, provides several tangible and important consumer benefits.[40]

The primary consumer benefit of the current video marketplace was described succinctly by one commenter as follows: It "*provides American television viewers with a collection of programming choices that is the envy of the world*."[41] The facts set forth in the Commission's most recent video competition report and multiple parties' comments support this statement on every level.[42] As described therein, the currently vibrant marketplace is home to more than 500 national cable programming networks, almost half of which are not affiliated with any cable operator or other media entity.[43] The current lack of government intervention has invited more

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[40] The term "bundling practices" encompasses practices such as offering packages of programming for sale and negotiating for tiering and distribution minimums.

[41] Fox Comments at 2 (emphasis added).

[42] *See generally Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503 (2006) ("*Twelfth Video Competition Report*"); Comments of the National Cable & Telecommunications Association ("NCTA Comments") at 5-6; Comments of Viacom, Inc. ("Viacom Comments") at 4-8.

[43] *Twelfth Video Competition Report* at ¶ 21. The total number of networks likely will increase upon release of the Commission's next video competition report, the release of which apparently has been delayed indefinitely.

and more program networks into the marketplace each year.[44] Bundling practices, in particular, have helped more of these new entrants reach consumers and thrive.[45]

Of equal or more benefit to consumers than the sheer number of programming options is the diversity of this programming and its ability to serve niche or underserved audiences. The various programming options need not be repeated here.[46] It is sufficient to note that whatever her interest, the American consumer can find a cable service, if not multiple services, that speak(s) to that interest.[47] Bundling practices help to ensure that these diverse networks have an opportunity to be carried and reach their intended audience.[48]

The competitive pressures of the current marketplace, in which so many networks compete for carriage, viewers and advertisers, also drive programmers to improve the quality of

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[44] *Twelfth Video Competition Report* at ¶ 21 (noting 143 more networks in 2005 versus 2004, a 36 percent increase).

[45] For example, a programmer may offer a discount on one of its already popular programming services to entice an MVPD to carry a new service it would not carry on its own, perhaps because demand for the new service has not been established. *See* Viacom Comments at 14.

[46] Specific communities or niche audiences to which these networks appeal include, without limitation, African Americans, Hispanic Americans, pre-school children, and more. *See* Viacom Comments at 5.

[47] According to commenters, the interests addressed include, without limitation, news, adventure, country music, travel, extreme sports, cooking and animals, all in addition to the more generally appealing entertainment networks featuring various drama and comedy series. *See* Fox Comments at 21.

[48] Placing a new channel on a certain tier makes it more attractive to advertisers and, thus, offers the channel the opportunity for initial revenue while it builds its audience. In addition, bundling is particularly important for the introduction of commercial-free services "because a programmer needs to generate adequate license fees to offset the lack of advertising revenue." *See* Viacom Comments at 15 (discussing launch of commercial-free children's programming service). Further, restricting bundling practices such as tiering could hurt small services the most, as noted by the Government Accounting Office. *See* U.S. General Accounting Office, Report to the Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (Oct. 2003) ("GAO Report"), at 36 ("[S]ome cable networks, especially small and independent networks, would not be able to gain enough subscribers to support the network.").

their programming. The absence of unnecessary restrictions on carriage negotiations—and bundling practices in particular—plays at least two important roles in promoting this programming quality. First, package selling and tiering result in the delivery of multiple networks to as many viewers as possible.[49] The Commission long has recognized the launch and development of new, more diverse networks as a consumer benefit.[50] Second, the opportunity to obtain compensation for their programming (whether broadcast or cable), without undue restriction by the government, encourages programmers to develop and purchase attractive programming.[51] The more appealing its programming, the more the programmer may expect in return.[52] As a result of this basic principle, programmers increase expenditures on programming in order to make it as appealing as possible versus the competition.[53] This increased quality of programming directly benefits consumers.

Other important benefits of bundling practices are the less obvious but no less important economic benefits described by experts. These benefits include increased efficiencies of scale and scope, reduced transaction costs, and reduced information costs, all of which benefit

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[49] Even the Regulation Advocates implicitly acknowledge that if an MVPD negotiates for a packaged sale with tiering requirements instead of a stand-alone offer, the MVPD typically will deliver more channels of programming to more of its subscribers. *See* ACA Comments at 5-8 (describing alleged bundling and tiering practices which result in the distribution of dozens of channels); NTCA Comments at 17. What some commenters mischaracterize as a "bloated" tier is, in reality, a tier that provides multiple and diverse choices to a large number of consumers.

[50] *See 2004 Packaging Report* at 53 ("The Congress, the Commission and the Courts have all stated that diversity is one of the paramount goals in Federal communications policy.").

[51] Michael G. Baumann & Kent W. Mikkelsen, *Response to Comments Regarding Economic Consequences of Retransmission Consent*, Mar. 31, 2005 (cited in Fox Comments at 14).

[52] *Id*.

[53] *Id*.; Disney Comments at 35-36 (noting that programmers' spending on original programming for cable increased 66 percent to a record-setting $5 billion in 2006) (citation omitted).

consumers through lower prices.[54] Economists also agree that program carriage negotiations under the current system increase consumer welfare by encouraging both sides to reach mutually beneficial agreements that ensure delivery of more programming consumers want.[55]

The Commission itself has agreed that package sales resulting from negotiated retransmission consent arrangements are beneficial to all parties involved:

- "[T]he station benefits from carriage because its programming and advertising will be carried as part of the MVPD's service…."
- "[T]he MVPD benefits because the station's programming makes the MVPD's offerings more appealing to consumers…[and]"
- "[M]ost importantly, consumers benefit by having access to such programming via an MVPD."[56]

And, as set forth above, the Commission, programmers, and many MVPDs agree that bundling practices benefit consumers in a myriad of ways. The Regulation Advocates have not challenged these many benefits.

B. The Regulation Advocates' Proposals Would Hurt Consumers and Competition

At stake in this proceeding is the vibrant marketplace described above, with all of its associated consumer benefits. Having not challenged these benefits, the Regulatory Advocates must show that the benefits of their government intervention proposals somehow outweigh the

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[54] *See, e.g.*, Disney Comments at 29-31 (citing dozens of economic works); Eisenach Bundling Report at 23-47.

[55] Fox Comments at 12 (citing economic reports).

[56] *See Retransmission Consent and Exclusivity Rules*, Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (rel. Sept. 8, 2005) ("*SHVERA Report*"), ¶ 44. Additionally, as the Commission has stated, the current competitive marketplace "has provided consumers with increased choices, better picture quality and greater technological innovation." *Twelfth Video Competition Report* at ¶ 5.

consumer benefits of the current marketplace.[57] The Regulation Advocates cannot satisfy this burden because each of their proposals actually would hurt consumers and competition, as demonstrated below.

1. Prohibit distribution provisions

Several Regulation Advocates urge the Commission to prohibit programmers from bargaining for a distribution provision in their carriage agreements.[58] Distribution provisions, which appear in some carriage agreements, typically involve the MVPD committing to carry programming on a certain tier (such as the expanded basic tier) or to distribute programming to a certain percentage of the MVPD's subscribers. Regulation Advocates claim that the FCC should prohibit distribution provisions because they expand the number of channels in, and the price of, certain tiers, and also limit "choice."[59]

As an initial matter, it is unclear how an agreement provision resulting in *more programming choices distributed to more consumers* somehow gives consumers less choice.[60] In any event, prohibiting distribution provisions is not a pro-consumer measure. Although a ban on distribution provisions may give the MVPD more flexibility when crafting tiers of programming to sell to its subscribers, such a ban would not give consumers more choices; nor

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[57] As noted above, the Regulation Advocates must show that that their proposals will improve the net welfare of the consuming public. *See supra* at 2, 12.

[58] *See, e.g.*, Comments of DISH Network ("DISH Comments") at 18; ACA Comments at 20-25.

[59] ACA Comments at 18; SCSOC Comments at 4-5.

[60] For example, one commenter objects that "small rural MVPDs must contract for, pay for and distribute 120 to 125 video channels" and that "the channel lineup is growing ever larger" but is silent as to how this plethora of channels somehow gives consumers less choice. NTCA Comments at 16.

would it give them more choices for the same price.[61] Instead, consumers would pay more to get less.[62] Consumers who chose not to pay for special programming tiers would have fewer choices on the tiers they select because MVPDs would have moved channels they previously enjoyed to a special tier available only for an additional price.[63] Further, some programming services would disappear altogether because they could not obtain critical advertising dollars necessary to their survival without being carried on a tier with wide penetration.[64]

Prohibiting distribution provisions also is not in the public interest because it could result in more "deadlocked" negotiations between programmers and MVPDs and, thus, fewer programming options for consumers. As recognized in the CRS Report often quoted by the Regulation Advocates, removing options from a negotiation (in this case, by prohibiting distribution provisions) makes an agreement less likely because "the fewer the number of parameters involved in a retransmission consent negotiation, the fewer the areas where compromise can be reached, and the higher the likelihood of unresolved conflict."[65] The Commission also has recognized that entering negotiations with as many agreement options as

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[61] *See* ACA Comments at 22 ("[Prohibiting tiering or distribution obligations] would enable MVPDs to offer a much wider variety of program packages at retail."). Even if an MVPD decides to offer certain channels *a la carte* instead of on smaller tiers, consumers still would pay more to get less, as demonstrated in previous comments and proceedings. *See* Disney Comments at 62-72 (citing comments in previous proceedings, GAO Report, *2004 Packaging Report* and expert economic studies).

[62] *Id.* at 71.

[63] *See, e.g.*, ACA Comments at 28-42 (proposing multiple channel lineups in which some of the most popular channels, typically carried on expanded basic, are moved to separate tiers available only for an additional fee).

[64] *See* Disney Comments at 67-68; *2004 Packaging Report* at 43-46 (reviewing level of subscriber penetration necessary to attract advertisers); *see also* GAO Report at 36 (concluding that in *a la carte* regime, "some cable networks, especially small and independent networks, would not be able to gain enough subscribers to support the network").

[65] CRS Report at 67.

possible is in the best interest of the parties and consumers alike.[66] In contrast, removing possible agreement terms, *e.g.*, by prohibiting distribution provisions, is contrary to the public interest because it could result in more deadlocks and, thus, less programming for consumers.[67] The Commission should not adopt any regulation that limits the number and type of proposals that the parties may bring to the bargaining table and certainly should not prohibit any provisions that result in delivering more programming to more people.[68]

In sum, negotiated distribution minimums have facilitated expanded basic programming tiers, featuring multiple services offering high-quality and diverse programming. This result is good for consumers, not bad. Further, giving MVPDs the sole discretion to chop and package

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[66] *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity,* First Report and Order, 15 FCC Rcd 5445, ¶ 56 (2000) ("*2000 Good Faith Order*") ("We also believe that to arbitrarily limit the range or type of proposals that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and MVPDs to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent.").

[67] One study provided by the Regulation Advocates inaccurately suggests that deadlocks have occurred in smaller rather than larger markets because broadcasters have more market power over small operators than large ones. *See generally* Ball State Study. This is not the case, as shown in Section I, *supra*. *See also* Eisenach Reply Report at 6-8 (demonstrating that anecdotal evidence cited in Ball State Study did not support allegations regarding SROs "disadvantaged" status because it involved large MVPD and not SROs). The more likely causes for deadlocks with small operators are that: (i) small cable operators have fewer "degrees of freedom" in bargaining (*e.g.*, less ability to combine negotiations over multiple systems/stations/networks), and (ii) fewer bargaining parameters makes it more difficult to reach an agreement. Thus, the fact that deadlocks may occur mainly in rural areas says nothing about relative bargaining power, but it does *support permitting* bundling to increase the number of bargaining parameters and thus decrease deadlocks everywhere.

[68] Promoting the delivery of more programming to more people is consistent with the Commission's ultimate purpose, which is to regulate "so as to make [communications] available, so far as possible, to all the people of the United States." *See* 47 U.S.C. § 151; *see also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663-64 (1994) ("It has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.") (citations omitted).

programming in whatever way they see fit (presumably the way that would maximize revenue from subscriber fees) would reduce consumer choice, not improve it.

2. Rate regulation

As described in Section I, Regulation Advocates ask the FCC to establish "reasonable" rates, terms and conditions for programmers' package sales and stand-alone offers.[69] In their own words, the primary alleged benefit of this rate regulation proposal is that it "would create a realistic option for MVPDs to purchase channels other than in bundles [allegedly] mandated by programmers."[70] At no point, however, do the Regulation Advocates show how providing more "options" for MVPDs to mix and match bundles to suit their business interests would be beneficial to consumers. Absent any showing of consumer benefit, the Commission should not accept the Regulation Advocates' invitation to regulate rates. Further, as shown in Section I, rate regulation is unworkable, unnecessary and beyond the Commission's authority.

3. Prohibit differential pricing

There also is no evidence that the Regulation Advocates' other rate-related proposals would benefit consumers. For example, some Regulation Advocates ask the FCC to prohibit volume-based discounts to some MVPDs based on the MVPD's size.[71] Left unexplained is how eliminating discounts for MVPDs with the most subscribers serves the public interest. The Regulation Advocates likely offer no consumer-based justification because "[t]he economic

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[69] *See, e.g.*, ACA Comments at 22, 25. *See also* Eisenach Reply Report at 13-15 (showing how other commenters' proposals regarding distribution requirements and non-discrimination also amount to calls for rate regulation).

[70] ACA Comments at 22.

reality is that price differences and price discrimination typically benefit, not harm, consumers."[72]

Further, it is not clear that differential pricing is harmful or widespread. Disney and other programmers offer volume discounts to smaller MVPDs through the National Cable Television Cooperative ("NCTC"), whose members include small and mid-sized cable operators.[73] NCTC collectively negotiates terms and conditions for programming carriage, which then are made available to its individual member operators.[74] As a result, many smaller operators may take advantage of lower prices offered to larger MVPDs and the number of small operators faced with higher prices is diminished.

Finally, differential pricing is justified because agreements with large operators provide valued certainty and revenue to the programmer that agreements with smaller operators cannot provide. Specifically, a carriage agreement with an operator serving millions of subscribers gives the programmer certainty that its programming will reach a large number of subscribers for a specified period of time. This certainty then benefits consumers because it encourages the programmer to purchase and invest in high-quality programming.[75]

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[71] ACA Comments, at 22, 25 ("To address the harm of price discrimination against smaller MVPDs, the Commission should prohibit volume-based price differences, unless those differences are genuinely cost based.").

[72] Antitrust Modernization Commission, *Report and Recommendations* (Apr. 2007), at 318, *available at* http://www.amc.gov/report_recommendation/amc_final_report.pdf ("AMC Report").

[73] Disney Comments at 53; Fox Comments at 23-24.

[74] Disney Comments at 53.

[75] *See* Disney Comments at 67-68; *2004 Packaging Report* at 43-46 (reviewing level of subscriber penetration necessary to attract advertisers).

4. *Market shopping for broadcast stations*

Some Regulation Advocates also seek a special exception to the current retransmission consent framework so that they may carry network broadcast stations from distant or adjacent markets if they are unwilling to compensate their in-market station for carriage of its signal.[76] The problems associated with broadcast station "market shopping" have been addressed convincingly in previous proceedings.[77] For present purposes, it is sufficient to note that market shopping would not benefit consumers. Replacing local broadcast stations with distant market stations would deprive many consumers of access to their local market stations, many of which provide local news and other public interest programming. The Emergency Alert System also depends in part on local cable systems' pass-through of local broadcast stations. Giving an MVPD more ability and incentive to deny its subscribers this valuable programming cannot be in the public interest.

Further, the consumer interest in the ongoing viability of local broadcast stations was what motivated Congress to enact the current retransmission consent framework.[78] The Regulation Advocates should not use the instant proceeding, with its pro-consumer focus, as an end-run around Congress's important objectives. Finally, restricting market shopping to only small or rural operators, as some Regulatory Advocates have suggested, is not an acceptable

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[76] *See, e.g.*, NTCA Comments at 23-26.

[77] *See e.g.*, Reply Comments of National Association of Broadcasters, ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, CBS Television, The Walt Disney Company and NBC Telemundo License Co., *Petition for Rulemaking to Amend 47 C.F.R. § 76.64, 76.93 and 76.103, Retransmission Consent, Non-Duplication and Syndicated Exclusivity*, RM-11203 (2005).

[78] *See* S. Rep. No. 102-92, at 35 (1991), accompanying S.12, 102nd Cong. (1991) ("*1992 Cable Act Committee Report*") (concluding that lack of retransmission consent rights "has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting").

approach because all of the above harms of market shopping to consumers remain valid regardless of an MVPD's subscriber base size or location.

5. *Prohibiting packaging of broadband content*

Regulation Advocates also urge the Commission to prohibit programmers from negotiating for delivery of broadband content as part of their programming carriage agreements.[79] Yet again, however, these commenters fail to show how such a prohibition would benefit consumers. This failure likely is because expanding the availability and amount of quality broadband content is good for consumers. A program carriage agreement provision involving carriage of, or access to, broadband content increases the amount of quality broadband content. Further, as noted in Disney's comments, providing content online permits consumers to access unique content unavailable anywhere else and to access content re-purposed from broadcast and cable services at a time that is most convenient for them.[80] Providing high-quality broadband content, in turn, will drive broadband penetration—one of the FCC's primary goals.[81]

6. *Mandate program delivery to shared headends and IPTV providers*

Regulatory Advocates' proposals for government intervention include forcing programmers to sell their products to MVPDs that use shared headends or rely on Internet protocol technology ("IPTV").[82] As noted by other commenters, programmers often choose not to deliver their programming to shared headends or IPTVs because of legitimate security

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[79] *See, e.g.*, NTCA Comments at 19-20.

[80] Disney Comments at 52-54.

[81] 47 U.S.C. § 157.

[82] *See, e.g.*, OPASTCO Comments at 13-14.

concerns.[83] Without the ability to protect their product, programmers may limit their programming investments. In this respect, limiting access benefits consumers because it ensures adequate compensation which, in turn, incentivizes creation and improvement of high-quality programming. Further, the ability to secure programming lowers the overall cost charged to MVPDs because the cost does not need to account for losses due to theft. These costs savings also benefit consumers provided that they can be passed on to consumers by MVPDs.

C. Any "Benefits" from Government Intervention on Behalf of MVPDs, if They Occurred, Would Go to the MVPDs Instead of to Consumers

As shown above, bundling and other carriage agreement terms benefit consumers and enhance competition. Nothing in the history of the business, the economic literature or any third party analysis suggests that any public interest (such as preserving competition or improving consumer welfare) is in jeopardy under the current regulatory environment. Further, the Regulation Advocates have not shown how their proposals—many of which would threaten the benefits of the present marketplace—are pro-consumer. As shown below, the two alleged consumer benefits identified by the Regulation Advocates, to the extent they exist, would accrue to the MVPD, not the consumer.[84]

Regulation Advocates first claim that their proposals would provide flexibility to MVPDs and, thus, more choice for consumers. There are two primary reasons why this alleged benefit cannot support government intervention. First, the Regulation Advocates fail to show how restricting *programmers* in their negotiations with MVPDs ultimately benefits *consumers*. This is because the same parties that attack programmers' bundling practices in the interest of

[83] *See, e.g.*, Fox Comments at 39-40.

[84] *See infra* Section II.C.

consumer choice want the Commission to control the terms and conditions under which they acquire programming but want no similar regulation of the way in which they package that very same programming for sale to consumers.[85] Under these commenters' ideal scenario, consumers still would have no choice other than the grouping of channels selected by the cable operator based on its economic preference.[86]

Second, government intervention to provide MVPDs with more flexibility is unnecessary given the variety of choices already available to consumers. A single MVPD's programming options provide choices through the many channels of high-quality programming made available.[87] Choice also exists *between* MVPDs, who often carry different programming services and, at the very least, different tiers or packages of the same programming services.[88] Further, the marketplace—without government intervention of any kind—already has begun providing more individualized programming options directly to consumers primarily through online sources such as Apple's iTunes, Amazon's Unbox, ABC.com and YouTube.[89] Through these and other sources, consumers already are choosing to watch individual episodes of cable or

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[85] *See, e.g.*, SCSOC Comments at 2-6 (describing alleged market problems such as "unreasonable terms and conditions" while simultaneously asserting that retail *a la carte* is not a "panacea or remedy").

[86] Further, as noted in previous comments, retail *a la carte* also would not benefit consumers. *See* Reply Comments of The Walt Disney Company, MB Docket 05-28, Mar. 31, 2005, at 4-37.

[87] *See supra* at 13-16 (describing variety of programming choices and options).

[88] *See, e.g.* DISH Comments at 16 (describing how DBS operators offer "different programming package options than available from cable companies" including placement of previously premium channels on basic cable tiers); *see also* Fox Comments at 24-26 (noting that 4,200 systems with fewer than 400,000 subscribers carried Fox's networks in 113 unique packages and finding similar patterns for carriage of NBC Universal and Viacom networks).

[89] Disney Comments at 54-55 (describing content delivered directly to consumers through online and wireless platforms, including full episodes of certain ABC shows on ABC.com).

broadcast programming or other video content when and where they want it, without any interference from an MVPD.[90]

Regulation Advocates also claim that bundling practices increase rates for consumers and that prohibiting such practices would lower prices. However, they carefully sidestep whether regulating the prices charged by programmers to MVPDs actually would result in lower prices for consumers. Like their requests for packaging flexibility, their request for price controls on programmers would come with no corresponding obligation to pass these supposed savings on to consumers. Instead, the only price-related "benefit" would be giving MVPDs' the unilateral power to decide how to package and sell programming and disregard the interests of consumers and programmers alike.

Indeed, the relief sought by Regulation Advocates seems highly unlikely to benefit anyone—even those who argue for it. The price controls, regulatory impediments and administrative burdens the Regulation Advocates seek to impose on programming suppliers would prohibit efficiency enhancing business practices, and thus are more likely to result in *higher* cost (and prices) than lower ones, and to *reduce* the quality and quantity of available content—and, therefore, the breadth of choice for MVPDs and consumers alike—than increase it. This is simple Economics 101: the more difficult or more expensive it is to supply a product, the less of that product may be supplied.

In, sum, the two primary consumer benefits suggested by the Regulation Advocates are "more choice" and "lower prices." However, if bundling practices were restricted, "lower

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[90] In 2006, the Commission estimated that fourteen percent of Americans had accessed online video programming in the preceding month. *See Twelfth Video Competition Report* at ¶ 18. With the development of even more programming sources, and the availability of more programming content, this number likely will have increased significantly when the Commission releases its next video competition report.

prices" no longer would exist because the per-channel rate the Regulation Advocates ultimately seek is the very rate made possible only by the bundling practices that the Regulation Advocates attack. In any event, it is more than clear that the Regulation Advocates' proposals would not afford more choices or lower prices *for the consumer*. At best, their proposals could result in more choices *for themselves*, with no corresponding obligation to pass these choices or any actual cost savings on to consumers. Ultimately, absent any demonstration of market power, the only principle supporting intervention is the Regulation Advocates' self-interest—to make their business prospects better by tilting the balance of power in carriage negotiations even further. This self-interest cannot serve as the foundation for government intervention.

III. THE REGULATION ADVOCATES HAVE NOT SHOWN THAT PROGRAMMERS' CONTRACTING PRACTICES HARM COMPETITION

As shown above, there are two prerequisites for government intervention—market failure that harms consumers and a regulatory solution that would improve such welfare. As demonstrated in Section II, the Regulatory Advocates proposals would harm rather than improve consumer welfare. As set forth below in Section III, the Regulation Advocates also have not shown that programmers' practices harm competition or result in market failure.

Package sales cannot harm competition unless a seller has market power and its packaged sales foreclose competition (*i.e.*, exclude rival sellers).[91] The Regulation Advocates have not shown any package sales that meet either of these conditions. Rather, as Disney showed in its initial comments, the evidence is compelling that programmers do not have the market power that would be necessary to impose an anticompetitive tie and that their package sales have served

[91] *See* Disney Comments at 24, 36-40.

to promote, rather than foreclose, competition. Nothing in the studies submitted by the Regulation Advocates shows otherwise.

A. Programmers Lack Market Power

As shown in multiple comments and supporting economic analyses, programmers do not possess the market power necessary to impose anti-competitive conditions on the carriage of their programming. The Regulation Advocates argue that they need government intervention to balance the purported power of programmers. To support this assertion, however, they provide nothing more than isolated anecdotes untethered analytically from any meaningful definition of market power and without any methodology to establish that their examples are representative of the industry.

For example, one comment asserts that "81% of respondents to the OPASTCO/Viodi survey reported being presented with 'take it or leave it' offers that may technically permit them to obtain programming, but not under reasonable prices, terms or conditions."[92] No details about the survey methodology (*e.g.*, number and type of entities surveyed, response rate, question wording) are offered. Putting that difficulty aside, at most, the survey data could be inferred to show that some MVPDs subjectively believe that some programmer offers are unreasonable. Such self-serving perceptions of the offers made by a counter-party in the course of arms-length bargaining should be afforded no weight whatsoever.

Another commenter lists the top 15 cable networks by primetime ratings in order to show, purportedly, that each network is affiliated with "the handful of major media companies."[93] This table itself should dispel any concern about any of these companies having

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[92] OPASTCO Comments at 10.

[93] DISH Comments at 9.

the degree of market power that would be necessary for an unlawful tie. It shows that the top 15 networks are owned by six different companies, with no one company owning more than five of those networks. Even if this were a meaningful way to compute market share, it would show that no single owner has a market share large enough to give it the market power necessary for an unlawful tie under the Supreme Court's decision in *Jefferson Parish.*[94] But, more importantly, there is no principled reason to look only at the top 15 networks when the average MVPD carries approximately 55 networks. As Disney showed in its initial comments, when one looks not just at the top 15 networks, but rather at all networks available over cable, the networks owned by these six "major media companies" account for only 71 percent of the prime time audience, with no one company accounting for more than 16 percent.[95] As stated in the expert report of Dr. Eisenach, which Disney submitted with its initial comments, this yields an HHI for cable programming, as measured by primetime audience share, well under the 1,000 threshold, below which the antitrust agencies classify a market as "unconcentrated."[96] As Dr. Eisenach also shows, the level of concentration has declined significantly over the last six years.[97] MVPDs' proven ability to drop programming and continue to retain customers provides further evidence that programmers do not possess significant market power.[98] Ultimately, what the

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[94] *Jefferson Parish Hosp., Dist. No. 1 v. Hyde*, 466 U.S. 2, 13-14 (1984).

[95] Eisenach Bundling Report at 27.

[96] *Id*.

[97] *Id*.

[98] For example, at year end 2005, DISH Network dropped Lifetime and Lifetime Movie Network, despite the fact that these networks were popular with consumers (especially with women, who publicly protested the move). *See* Linda Moss, *DISH Unbroken*, Multichannel News, Jan. 16, 2006 (noting that DISH Network also had dropped, or threatened to drop, several other programming networks).

evidence shows is not "market failure," but, rather, a market that is functioning very well to give consumers more and more quality programming at increasingly competitive prices.[99]

B. Programmers' Practices Do Not Foreclose Other Programmers

For bundling or other practices of some programmers to be anticompetitive, they also must foreclose competition from other programmers. The Regulation Advocates have not provided even a scintilla of evidence regarding foreclosure—the *sine qua non* of establishing an anticompetitive effect. The Regulation Advocates' failure to make any substantiated contention that competition for programming has been foreclosed speaks volumes as to the merits of their argument. Absent evidence of substantial foreclosure, the Commission should not adopt the drastic intervention requested by the Regulation Advocates. As Disney showed in its initial comments, the market evidence compellingly contradicts any claim of foreclosure.[100] Almost 100 major new cable channels have launched over the past decade, two-thirds of which are now profitable, and concentration, as measured by prime-time audience share, continues to decline.[101] Again, this shows a market that is functioning well to give consumers more quality programming at a competitive price.

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[99] The American Cable Association's list of the "Top 50 Channels" likewise contradicts its claim that programmers possess market power. It lists Viacom as the largest single owner of cable channels, with eight of the top 50 channels. *See* ACA Comments at Table 6. This gives Viacom only a sixteen percent share of those channels, well below any recognized threshold for market power.

[100] Disney Comments at 39-40.

[101] Eisenach Bundling Report at 27, 36.

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Because the Regulation Advocates have not provided any evidence of anti-competitive behavior or results under the applicable analytical framework, the Commission has no factual basis on which to support government intervention in the programming marketplace.

IV. THE FCC HAS NO AUTHORITY TO ESTABLISH THE SUBSTANTIVE TERMS OF CARRIAGE AGREEMENTS

As demonstrated in Sections II and III, the Regulation Advocates have failed to show any relevant failure in the current programming market necessitating government intervention or any valid consumer benefits that would result from that government intervention. Aside from the merits, they also have not shown that the Commission has the authority to adopt their proposals. The lack of jurisdiction for their rate regulation proposals was addressed in Section I. More generally, the express provisions of the Act that they cite do not provide jurisdiction; nor do they adequately explain how the Commission's could assert ancillary jurisdiction given recent court decisions. Finally, the Commission lacks jurisdiction because the Regulatory Advocates' proposals would violate the First Amendment.

A. The FCC Has No Jurisdiction under the Communications Act

In its initial comments, Disney showed that the FCC lacks the necessary express or ancillary jurisdiction to preclude tying or otherwise restrict programmers in their carriage negotiations.[102] That analysis of the various statutory texts, legislative history, and judicial decisions revealed three key principles:

- For non-vertically-integrated, non-broadcast programming, the Commission has no authority whatsoever to interfere with carriage negotiations;

[102] Disney Comments at 4-17.

- For broadcast retransmission consent, the Commission's authority, at most, extends to the process of—and not the substance of or end result of—the negotiations; and

- The Commission cannot rely upon the 1992 Cable Act to restrict the bargaining ability of programmers vis a vis cable operators because the primary purpose of that legislation was just the opposite—to increase competition and benefit consumers by constraining the undue power of cable operators.

These principles bar all of the above-listed proposals requested by the Regulation Advocates in their comments. For example, the Regulation Advocates' ask the Commission to establish or restrict agreement terms regarding consideration, confidentiality and distribution. However, none of the statutory provisions cited by the Regulation Advocates expressly delegates authority over these matters to the Commission.[103] This is because, as noted in Disney's comments, Congress clearly excluded from its jurisdiction the ability to write the substantive terms of carriage agreements.[104]

The Regulation Advocates also have not demonstrated that the Commission could exercise ancillary jurisdiction to establish such agreement terms. Indeed, the only commenter who addressed ancillary jurisdiction in any detail neglected to mention the primary restriction on

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[103] *See, e.g.*, NTCA Comments at 19 (listing twelve sections of the Communications Act with no showing of how these sections authorize the Commission to establish substantive terms of carriage agreements pursuant to express or ancillary jurisdiction). DISH Network and ACA point to Section 628(b) and the good faith retransmission consent provision as potential sources of jurisdiction. DISH Comments at 18-20; ACA Comments at Appendix 2, 47, 52. However, Disney showed in its comments that neither provision provides jurisdiction, either express or ancillary. Disney Comments at 4-9. Similarly, both OPASTCO and ACA point to various "statutory purposes" that they believe provide the Commission with jurisdiction. OPASTCO Comments at 5-7, n. 38; ACA Comments at 48-52. Being consistent with a statutory purpose is, by itself, an insufficient basis for jurisdiction. As shown in Disney's comments, ancillary jurisdiction requires consistency with a statutory purpose and communication by wire or radio at the time the regulation applies, an element not present here. Disney Comments at 14-17.

[104] Disney Comments at 6-9. The Commission's potential authority over procedural matters would not extend to these proposals either because such authority only applies to broadcast

the Commission's ancillary jurisdiction set forth by the D.C. Circuit.[105] Commenters' suggestion that the Commission has authority to write substantive agreement terms because it has imposed similar restrictions as merger conditions similarly is without merit.[106] The Commission cannot extend conditions imposed on merger parties to parties like Disney because Disney is not vertically-integrated and has no power to engage in the potential anti-competitive behavior that motivated the merger conditions. Finally, as noted in Section I above, the Commission also may not adopt the Regulation Advocates proposals because they are or would require rate regulation, over which the Commission has no authority.

B. The First Amendment Bars the Government Intervention Sought by the Regulation Advocates

In the *Notice*, the Commission specifically asked commenters to address "whether Commission action to preclude tying arrangements is consistent with the First Amendment."[107] None of the parties submitting comments favoring additional regulation of programming agreements even responded to the Commission's question about its constitutional authority to regulate the manner in which speakers package and distribute content. On the other hand, programmers in addition to Disney pointed out that the Commission would face stiff constitutional barriers to any regulation of programming agreements.[108] The failure of parties

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programming and measures intended to ensure that both sides (broadcasters and MVPDs) show up at the bargaining table. *Id*.

[105] ACA Comments at 48-52 (suggesting ancillary jurisdiction was present without showing that parties are engaged in communication by wire or radio at the time the regulation would apply, as required by *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005)).

[106] DISH Comments at 4-7; NTCA Comments at 32-35.

[107] *Notice* at ¶ 128.

[108] *See, e.g.*, NBC Comments at 30-32; Comments of Time Warner Inc. at 9-12. Time Warner suggests (*id.* at 9 n. 26), consistent with Disney's arguments (Disney Comments at 75-78), that

favoring new regulation to even address the Commission's constitutional concerns is an implicit concession that, as Disney argued, regulation of programming agreements by the Commission would be a violation of the First Amendment.

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the Commission's proposed regulations would trigger strict First Amendment scrutiny as content-based restrictions.

V. CONCLUSION

The Commission should not interfere in the highly competitive video programming marketplace by adopting any of the Regulation Advocates' proposals. The proposals generally amount to calls for rate regulation, which is unworkable and unnecessary. Government intervention of this kind also would not benefit consumers, who already enjoy diverse and substantial programming choices from multiple MVPDs and online sources. Further, there is no evidence of market failure or other competitive harm that needs remedying with respect to MVPDs generally or SROs in particular. Finally, the Commission lacks jurisdiction to adopt any of the Regulation Advocates' proposals.

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_/s/_Susan L. Fox_____________________________

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