

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Review of the Commission's Program ) MB Docket No. 07-198  
Access Rules and Examination of )  
Programming Tying Arrangements )

**REPLY COMMENTS OF VIACOM INC.**

February 12, 2008

## SUMMARY

The opening comments in this proceeding overwhelmingly confirm that video programmers do not engage in “tying” practices that result in harm either to cable systems or consumers. Contrary to the unsubstantiated allegations of certain small cable operators, Viacom and other programmers offer to sell their networks on a stand-alone basis at rates, terms and conditions established in an open and competitive free market. Accordingly, the Commission should find that there is absolutely no need for the government to intercede, and should promptly conclude this proceeding without taking further action.

First and foremost, numerous commenters reinforced what Viacom’s opening comments in this proceeding made clear: the video programming market is highly competitive. As Dr. Bruce Owen of Stanford University and Economists Incorporated explained in his report accompanying Viacom’s comments, no video programmer has market power and therefore none can coerce MVPDs to purchase unwanted programming. Notwithstanding the rigorous analysis provided by Dr. Owen’s report, the American Cable Association (“ACA”) and DISH Network allege – without support – that the market is highly concentrated. Dr. Owen analyzes their claims in his supplemental report attached to these reply comments, and finds that they are simply wrong. Even relying upon the restrictive market definitions utilized in ACA’s and DISH Network’s comments, Dr. Owen finds that the market is not highly concentrated, and thus he concludes that neither of them “provides data upon which the Commission can rely for the purpose of imposing regulation” on the wholesale programming market.

ACA and other small cable interests also assert that video programmers compel MVPDs to purchase unwanted channels in order to obtain the right to carry highly desired programming. Viacom, however, explained in its comments that all of its channels are available for cable

systems to purchase on a stand-alone basis at competitive rates. Dr. Owen's report provided compelling – and unrefuted – data confirming that MVPDs can and do purchase individual channels. In particular, fully 30 percent of small cable systems that contract for carriage directly with Viacom carry only one or two of Viacom's networks and 68 percent purchase 4 or fewer networks. ACA nonetheless posits that MVPDs are required to carry specific bundles of Viacom networks in order to get the highly popular Nickelodeon and MTV channels. Dr. Owen's supplemental report proves that ACA's allegation cannot withstand scrutiny. In direct and irrefutable contradiction of ACA's claims, 98 percent of small cable systems that carry Nickelodeon *do not* purchase the bundle of networks allegedly tied to it, while 97 percent of systems that carry MTV *do not* purchase the group of channels allegedly tied to it.

Given that MVPDs indisputably can purchase programmers' networks on a stand-alone basis, small cable operators are forced to fall back on the unsupported allegation that prices for channels sold in packages "coerce" cable operators to purchase packages that include unwanted networks. Since neither Viacom nor any other programmer has market power, content owners cannot coerce MVPDs to do anything. Equally significant, the fact that two-thirds of small cable systems carry four or fewer Viacom networks and more than 95 percent of these systems carry less than half of Viacom's networks severely undermines any suggestion that the pricing of stand-alone channels is coercive.

Small operators' allegations simply cannot be squared with these facts and the well-understood economic benefits that stem from the sale of products in packages. As Dr. Owen explained in his initial report, distribution of programming in packages is highly economically efficient, and results in numerous benefits for MVPDs, programmers and most of all, consumers. Indeed, the price for a channel purchased in a package often includes discounts and other incentives offered by video programmers to encourage wide distribution of their networks. The

higher a channel's audience penetration the more advertising revenue it can generate. The ability to negotiate more favorable rates based on aggregated viewership is, of course, why collective bargaining groups like the National Cable Television Cooperative ("NCTC") exist. By purchasing and negotiating for all of its members, NCTC matches the size and scope of a large multiple system operator, and therefore has substantial bargaining leverage. The small cable operators' comments fail even to mention that they can and many do negotiate collectively through NCTC.

Ultimately, small cable operators are not really asking the Commission to ban a practice ("bundling") that does not exist, but instead are asking the Commission to tip the bargaining scale in their favor so that they can obtain all of the benefits of discount pricing without having to provide fair value in return. The Commission should recognize these complainants' motives for what they really are: an ill-advised invitation for the government to engage in wholesale price regulation of every cable carriage contract. Price regulation, however, would cause vast unintended consequences, especially for diverse programming networks, and prove nearly impossible to implement.

In any event, in a competitive market in which no party has market power, there is no justification for the Commission to interfere with privately-negotiated carriage agreements. Indeed, these agreements result from free market bargaining, and no cable system is compelled to accept any particular term. Regardless, the Commission lacks authority under the Communications Act to regulate independent video programmers, such as Viacom, or the wholesale video programming market. Viacom and other parties described in their opening comments how the Commission can promulgate rules only pursuant to an express grant of authority from Congress. Congress has given the Commission no jurisdiction to intervene in the video programming market, and no commenter has presented any evidence to the contrary.

## TABLE OF CONTENTS

SUMMARY .....	i
I. THE RECORD IN THIS PROCEEDING CONFIRMS THAT THE VIDEO PROGRAMMING MARKET IS ROBUSTLY COMPETITIVE AND THAT ANY COMMISSION INTERVENTION WOULD BE CONTRARY TO THE PUBLIC INTEREST .....	4
A. No Video Programmer, Including Viacom, Has Market Power; Therefore, No Video Programmer Can Coerce MVPDs to Purchase Unwanted Programming .....	4
B. Viacom Offers All of Its Programming Networks on a Stand-Alone Basis as Well as in Packages that Are Tailored to Meet the Needs of Individual MVPDs.....	8
C. Prices for Stand-Alone Networks Are Not Coercive, as Some Small Operators Allege, but Are Determined by the Marketplace .....	12
II. THE TERMS AND CONDITIONS OF VIACOM’S CARRIAGE AGREEMENTS ARE ALWAYS NEGOTIATED IN GOOD FAITH AND REFLECT BARGAINED-FOR CONCESSIONS .....	18
III. THE COMMISSION HAS NO AUTHORITY TO REGULATE INDEPENDENT PROGRAMMERS OR THE WHOLESALE VIDEO PROGRAMMING MARKET .....	21
IV. CONCLUSION.....	23
Appendix 1 -- Wholesale Packaging of Video Programming: Reply to ACA and Dish Network, Dr. Bruce M. Owen, Economists Incorporated	

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Commission’s Program	)	MB Docket No. 07-198
Access Rules and Examination of	)	
Programming Tying Arrangements	)	

**REPLY COMMENTS OF VIACOM INC.**

Viacom Inc. (“Viacom”) hereby respectfully submits its reply comments in the above-captioned proceeding.<sup>1</sup> A review of the opening comments confirms that the answer to the central question posed in the *Notice* – whether video programmers engage in “tying practices” that result in harm to cable operators and consumers<sup>2</sup> – has and can only have one answer: no. Numerous commenting parties affirm that video programmers offer their networks on a stand-alone basis, at prices, terms and conditions that are determined by a vibrant and competitive free market. The record contains no credible evidence that programmers make “take-it-or-leave-it” offers, or compel multichannel video programming distributors (“MVPDs”) to purchase undesired programming. Allegations to the contrary are wholly unsupported. Accordingly, the Commission should conclude that the video programming market is vibrant and highly competitive and that no action is necessary in response to the unsubstantiated allegations raised by some small and rural cable operators.

---

<sup>1</sup> See *In re Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, Notice of Proposed Rulemaking, MB Docket No. 07-198 (rel. Oct. 1, 2007) (“*Notice*”).

<sup>2</sup> See *id.* ¶ 132.

The American Cable Association (“ACA”), the National Telecommunications Cooperative Association (“NTCA”), and others claim that programmers intentionally charge more for stand-alone channels in order to compel the purchase of packages of networks.<sup>3</sup> These allegations, however, cannot withstand scrutiny. That a substantial number of small and rural cable operators purchase only one or two of Viacom’s programming networks undermines any claim that stand-alone prices are coercive. Indeed, as the expert report prepared by Dr. Bruce M. Owen (attached to Viacom’s opening comments) established, about half of the small cable operators with whom Viacom negotiates directly purchase three or fewer Viacom networks.<sup>4</sup> In any case, Dr. Owen explained that the video programming market is highly competitive, and therefore, no programmer can coerce an MVPD to purchase programming that the MVPD does not want to carry.<sup>5</sup>

Some commenters, moreover, contend that cable systems are compelled to accept carriage agreements with onerous terms and conditions relating to Internet Protocol Television (IPTV), video on demand (VOD) programming, website promotion, shared headends and

---

<sup>3</sup> See, e.g., *In re Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of American Cable Association, at 13-14 (filed Jan. 3, 2008) (“*ACA Comments*”); National Telecommunications Cooperative Association Initial Comments, at 18-19 (filed Jan. 4, 2008) (“*NTCA Comments*”); Comments of The Organization for the Promotion and Advancement of Small Telecommunications Companies, *et al.*, at 10 (filed Jan. 4, 2008) (“*OPASTCO Comments*”); Comments of The Small Cable System Operators for Change, at 3-4 (filed Jan. 4, 2008) (“*Small System Operators Comments*”).

<sup>4</sup> See *In re Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of Viacom Inc. (filed Jan. 4, 2008) (“*Viacom Comments*”), Appendix 2, Dr. Bruce M. Owen, Economists Incorporated, *Wholesale Packaging of Video Programming*, at 12, Figure 1 (Jan. 4, 2008) (“*Owen Report*”).

<sup>5</sup> See *Owen Report*, at 25-27.

nondisclosure agreements.<sup>6</sup> Viacom, however, does not demand or require any specific provisions in its programming contracts with regard to any of these matters, nor does Viacom engage in take-it-or-leave-it bargaining. Rather, both Viacom and small cable operators bargain for concessions, terms and conditions that they deem important. Viacom does not and could not force any MVPD to accept unreasonable terms and conditions because it, like every other video programmer, lacks market power. Certainly, no term or condition can be included in a carriage contract unless both parties, in an arm's-length negotiation, come to an agreement. Quite simply, programming contracts reached in private negotiations in the absence of market failures or market power should not be subject to second-guessing by the Commission.

The Commission also should not ignore the overwhelming evidence, including its own reports, that the video programming market is highly competitive and efficient.<sup>7</sup> There is no doubt that government regulation of this well-functioning market would increase the cost of programming to consumers while at the same time reducing program quality, diversity and innovation. As Commissioner Robert McDowell recently observed, the video programming market is “a fragile economic ecosystem.”<sup>8</sup> The government, indeed, should not “put its heavy thumb on the scale”<sup>9</sup> in favor of certain MVPDs to the detriment of programmers and consumers with unpredictable results. In any event, as Viacom's opening comments make clear, the

---

<sup>6</sup> See, e.g., *In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of the Rural Iowa Independent Telephone Association, at 2-4 (filed Jan. 4, 2008) (“*RIITA Comments*”); *ACA Comments*, at 11-12; *NTCA Comments*, at 19-39; *OPASTCO Comments*, at 12-17; *Small Operators Comments*, at 2-4.

<sup>7</sup> See, e.g., *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MB Docket No. 05-255 (rel. Mar. 3, 2006) (“*2005 Video Competition Report*”).

<sup>8</sup> Ted Hearn, *McDowell Concerned About Wholesale A La Carte: FCC Commissioner Question Chairman Martin's Unbundling Plan*, Multichannel News, Jan. 31, 2008, available at <http://www.multichannel.com/article/CA6527396.html&>.

<sup>9</sup> *Id.* (quoting Commissioner McDowell).

Commission lacks authority to regulate independent video programmers or, for that matter, the wholesale video programming market.

**I. THE RECORD IN THIS PROCEEDING CONFIRMS THAT THE VIDEO PROGRAMMING MARKET IS ROBUSTLY COMPETITIVE AND THAT ANY COMMISSION INTERVENTION WOULD BE CONTRARY TO THE PUBLIC INTEREST**

**A. No Video Programmer, Including Viacom, Has Market Power; Therefore, No Video Programmer Can Coerce MVPDs to Purchase Unwanted Programming**

The weight of the comments filed in this proceeding confirms that the wholesale video programming market is highly competitive and efficient.<sup>10</sup> This competition has been a boon to consumers, fostering the creation of an enormous array of diverse programming networks and providing Americans access to a wealth of video programming choices. Myriad MVPDs carried 531 national programming networks and 96 regional or local channels in 2005.<sup>11</sup> Consumers also have the ability, often at low cost or for free, to access video content from broadcast networks, DVDs, internet-based video services and mobile video services.

Dr. Owen made clear in his report, moreover, that no video programmer has market power.<sup>12</sup> Indeed, no programmer “has as much as 25 percent of the [wholesale video

---

<sup>10</sup> See, e.g., *In re Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of Comcast Corporation, at 2 (filed Jan. 4, 2008); Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., at 18-31 (filed Jan. 4, 2008); Comments of NBC Universal, Inc. and NBC Telemundo License Co., at 42-45 (filed Jan. 4, 2008) (“*NBC Universal Comments*”); Comments of The National Cable & Telecommunications Association, at 3-9 (filed Jan. 4, 2008) (“*NCTA Comments*”); Comments of Time Warner Inc., at 1 (filed Jan. 4, 2008) (“*Time Warner Comments*”); Comments of The Walt Disney Company, at 35-36 (filed Jan. 4, 2008) (“*Disney Comments*”); *Viacom Comments*, at 3-23 (filed Jan. 4, 2008).

<sup>11</sup> See *2005 Video Competition Report*, ¶¶ 21-22.

<sup>12</sup> See *Owen Report*, at 25.

programming] business.”<sup>13</sup> While Viacom, with 24 networks, is the largest independent (i.e. non MVPD-affiliated) video programmer, it controls only about 8 percent of the total 301 basic national programming networks.<sup>14</sup> With so many contenders vying for the attention of the “voracious consumers of media services,”<sup>15</sup> Dr. Owen’s conclusion that no party dominates the market for the sale of video programming should come as no surprise.<sup>16</sup>

Notwithstanding Dr. Owen’s rigorous market analysis, ACA’s comments posit that the video programming market is highly concentrated.<sup>17</sup> ACA’s own figures, however, disprove this premise. Dr. Owen analyzed ACA’s assertion that “five conglomerates control at least 75% of the news and entertainment channels in the Top 50 [channels]”<sup>18</sup> and, even restricting his analysis to ACA’s limited universe of 50 networks, found that the video programming market is not concentrated.<sup>19</sup> In particular, the Hirschman-Herfindahl Index (HHI) “associated with the network ownership is only 920, putting it in the unconcentrated range.”<sup>20</sup> Even the low HHI of 920 overstates concentration in the video programming market for it fails to take into account

---

<sup>13</sup> *Id.*

<sup>14</sup> *See id.* at 26.

<sup>15</sup> *2005 Video Competition Report*, ¶ 4.

<sup>16</sup> Disney also submitted an expert economic report confirming cable programmers do not have market power. *See Disney Comments*, at Exhibit A, Economic Implications of Bundling in the Market for Network Programming, Jeffrey A. Eisenach (Jan. 4, 2008).

<sup>17</sup> *See ACA Comments*, at 15-16.

<sup>18</sup> *Id.* (ranking networks by audience size).

<sup>19</sup> *See Bruce M. Owen, Wholesale Packaging of Video Programming: Reply to ACA and Dish Network*, at 5 (Feb. 12, 2008) (Appendix 1) (“*Owen Rebuttal Report*”). “HHI is often used as a summary measure of the degree of concentration among sellers.” *Owen Report*, at 27. It “is calculated by squaring the share of each firm and then summing the squared shares.” *Id.* at n.18. According to the Department of Justice, industries with HHIs below 1,000 are considered unconcentrated. *See id.*

<sup>20</sup> *Owen Rebuttal Report*, at 5.

networks outside of the top 50 channels.<sup>21</sup> As Dr. Owen explains, “the HHI indicating concentration of ownership measured by the number of networks, the measure ACA uses, is only 235.”<sup>22</sup> These findings, Dr. Owen concludes, prove that “ACA’s contention [that the video programming market is highly concentrated] is factually incorrect . . . .”<sup>23</sup> In fact, Dr. Owen finds the video programming market to be, “at most, in the middle to low end of the moderately concentrated range.”<sup>24</sup> Thus, ACA’s own “data” only serve to reinforce Dr. Owen’s finding that no supplier of wholesale video programming “has a share that is even close to the levels that are commonly associated with market power.”<sup>25</sup>

Likewise, DISH Network asserts, without evidence or support, that “a small handful of media conglomerates” dominate the wholesale programming market.<sup>26</sup> This claim, too, cannot withstand scrutiny. In an attempt to highlight the supposedly “top-heavy nature of the programming market,” DISH Network provides a list of the top fifteen programming networks (ranked by audience size) and the corresponding “affiliated media conglomerate.”<sup>27</sup> Not only does Dr. Owen find DISH Network’s attribution of channel ownership to be “incorrect on several points,”<sup>28</sup> but he also rebuts DISH Network’s contention that a “handful of media

---

<sup>21</sup> *See id.* at 6.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 4-5.

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *Owen Report*, at 27.

<sup>26</sup> *In re Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of DISH Network, at 8 (filed Jan. 4, 2008) (“*DISH Network Comments*”). DISH Network also argues that unnamed programmers prohibit the inclusion of their networks on family tiers. *See id.* at 16. Viacom, however, has never rejected an MVPD’s proposal to place its content on family tiers.

<sup>27</sup> *Id.* at 9.

<sup>28</sup> *Owen Rebuttal Report*, at 7 n.14.

companies” control the top 15 networks.<sup>29</sup> In fact, “this ‘handful’ includes seven different owners, each with (on average) about two of the top 15 networks.”<sup>30</sup> Dr. Owen concludes that, contrary to DISH Network’s characterization, “[t]his ownership pattern is not highly concentrated . . . .”<sup>31</sup> In addition, “an analysis of audience shares taking into account networks outside the top 15 confirms this finding.”<sup>32</sup> DISH Network’s conclusory assertions merely highlight a dearth of supporting facts and data.

The same is true of DISH Network’s unsuccessful attempt to demonstrate the alleged “dominance by the same handful of large cable companies and broadcasters” of Time Warner Cable’s Beverly Hills, California standard cable line-up.<sup>33</sup> Dr. Owen’s analysis of DISH Network’s claim, however, reveals that the 42 cable networks identified “are owned by 13 different entities.”<sup>34</sup> Dr. Owen found that concentration, measured using the number of networks, as DISH Network’s comments suggests, yields an HHI of 1,111, “which indicates relatively low concentration.”<sup>35</sup>

In short, Dr. Owen concludes that “[n]either ACA nor DISH Network provides data upon which the Commission can rely for the purpose of imposing regulation of wholesale bundling of

---

<sup>29</sup> *See id.* at 7.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *DISH Network Comments*, at 9-10.

<sup>34</sup> *Owen Rebuttal Report*, at 7.

<sup>35</sup> *Id.*

programming sold to MVPDs. . . . Contrary to ACA’s and DISH Network’s claims, the sale of cable networks to MVPDs is not highly concentrated.”<sup>36</sup>

**B. Viacom Offers All of Its Programming Networks on a Stand-Alone Basis as Well as in Packages that Are Tailored to Meet the Needs of Individual MVPDs**

In its opening comments in this proceeding, Viacom stressed that it offers all of its video services on a stand-alone basis at rates, terms and conditions determined by the competitive market. Viacom also explained that it does not require any MVPD to purchase any channel that the MVPD does not want to carry. Any MVPD can negotiate for the carriage of individual Viacom networks. In fact, 30 percent of small cable systems that contract for carriage directly with Viacom carry only one or two of Viacom’s networks.<sup>37</sup> Moreover, 68 percent of these systems purchase just 4 or fewer networks.<sup>38</sup>

---

<sup>36</sup> *Id.* at 8. Relatedly, the Community Broadcasters Association, without even acknowledging very recent Supreme Court precedent that is directly on point, argues mistakenly that program packaging is no “different from the motion picture ‘block-booking’ practice that was soundly struck down by the Supreme Court as a Sherman Act antitrust violation in *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).” *In re Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of The Community Broadcasters Association, at 3 (filed Jan. 4, 2008). In passages that have since been discredited and overruled, *Paramount Pictures* and more specifically *United States v. Loew’s, Inc.*, 371 U.S. 38 (1962), suggested that requiring movie theatres and television stations to license an entire “block” of films in order to get the more desirable ones, or “block booking,” constituted a *per se* unlawful tying arrangement under the antitrust laws. More than a year ago, however, in a unanimous decision, the Supreme Court, noting that the antitrust enforcement agencies, economists and many lower courts had all squarely rejected the “block booking” theories underlying *Paramount* and *Loew’s*, overruled those outdated analyses and held that “tying arrangements involving patented products should be evaluated under the standards applied in cases like . . . *Jefferson Parish* rather than under the *per se* rule applied in . . . *Loew’s*.” *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 42 (2006). The Court further found that “a patent [or other intellectual property] does not necessarily confer market power upon the patentee,” and that “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.” *Id.* at 45-46. Any suggestion today, therefore, that the bundling of copyrighted materials in the absence of market power gives rise to a Sherman Act violation would blatantly ignore clear antitrust precedent and, just as importantly, consensus economic thinking and express antitrust enforcement policy recognized by the Supreme Court in its *Independent Ink* decision. See also *Disney Comments*, at 24-26.

<sup>37</sup> See *Owen Report*, at 12, Figure 1.

<sup>38</sup> See *id.*

Contrary to ACA's allegations, when Viacom negotiates with operators who desire multiple channels, it does not mandate that they purchase any particular pre-determined package of networks. ACA asserts, without any evidence or support, that "the rights to distribute 13 of the most powerful channels or their HD counterparts, are tied to or bundled with obligations to distribute 60 other channels."<sup>39</sup> According to ACA, Viacom conditions carriage of MTV and Nickelodeon on an MVPD's obligation to carry a host of other networks.<sup>40</sup> Dr. Owen examined ACA's claim, however, and determined that it cannot be squared with the facts.<sup>41</sup> In particular, ACA contends that in order to obtain the right to carry Nickelodeon, an MVPD also has to agree to carry a bundle consisting of 11 networks: TV Land, Country Music Television, MTV, VH1, Spike, Noggin, GAS, NickToons TV, MTV2, MTV Hits and VH1 Classic.<sup>42</sup> Dr. Owen's analysis reveals that 68 percent of small cable systems that contract for carriage directly with Viacom carry Nickelodeon.<sup>43</sup> However, contrary to ACA's claim, "98 percent of [those operators] do not take the bundle that was allegedly tied to it."<sup>44</sup> Dr. Owen concludes that "[i]t is clearly not the case that Viacom requires cable systems to carry this bundle as a condition of carrying Nickelodeon."<sup>45</sup> Indeed, "there is no evidence that any individual network in ACA's

---

<sup>39</sup> *ACA Comments*, at 7. *See also NTCA Comments*, at 16 (asserting without any semblance of support that "[i]n order to obtain carriage rights for the primary channels of the 10 most widely distributed basic programmers, small rural MVPDs must contract for, pay for and distribute 120 to 125 video channels offered by those programmers").

<sup>40</sup> *See ACA Comments*, at 6.

<sup>41</sup> *See Owen Rebuttal Report*, at 2.

<sup>42</sup> *See ACA Comments*, at 6.

<sup>43</sup> *See Owen Rebuttal Report*, at 2.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

bundle is required as a condition for carrying Nickelodeon.”<sup>46</sup> In fact, “[n]one of the individual networks in ACA’s purported tied bundle is carried by all the systems carrying Nickelodeon.”<sup>47</sup> Furthermore, systems are not even required to take a substantial number of networks in ACA’s bundle: for example, “only 13 percent of the systems take five or more of the eight networks in the bundle.”<sup>48</sup>

Dr. Owen’s analysis similarly contradicts ACA’s contention that MTV is tied to an 8-channel package consisting of TV Land, Country Music Television, VH1, Nickelodeon, Noggin, VH1 Soul, CMT Pure Country and MTV Jams.<sup>49</sup> Dr. Owen found that 97 percent of small cable systems carrying MTV do not “carry the bundle of networks to which MTV is allegedly tied.”<sup>50</sup> Thus, concludes Dr. Owen, “Viacom does not condition the carriage of MTV on the carriage of this bundle. Nor are the individual networks in ACA’s bundle tied to MTV. None of the individual networks in ACA’s purported tied bundle is carried by all the systems carrying MTV.”<sup>51</sup> Moreover, “[o]nly 28 percent of the systems take five or more of the 11 networks in ACA’s bundle.”<sup>52</sup> Dr. Owen found similar results with respect to ACA’s assertions about News Corp.’s Fox regional sports networks and NBC Universal’s USA Network.<sup>53</sup> Although Dr.

---

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *See ACA Comments*, at 6.

<sup>50</sup> *Owen Rebuttal Report*, at 2.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See id.* at 2-5. Indeed, Dr. Owen observed at the outset that ACA’s inclusion of Comedy Central, a network owned by Viacom, in the bundle allegedly tied to NBC Universal’s USA network “throws further doubt on ACA’s claims, since it is not plausible that NBCU required systems to carry a non-NBCU network . . . .” *Id.* at 4.

Owen’s analysis was limited to Viacom, Fox and NBC Universal, Dr. Owen “strongly suspect[s] that a study of ACA’s other alleged bundles would similarly conclude that network bundles are not tied to the ‘desired’ networks.”<sup>54</sup>

Not only does Viacom not mandate that MVPDs purchase a particular package of networks, it also does not require that an MVPD purchase a specific minimum number of services. Rather, Viacom negotiates in good faith with MVPDs to reach mutually beneficial agreements that allow each individual MVPD to carry a mix of Viacom programming networks that suits its needs. Moreover, due to the highly competitive nature of the video programming market, packages of networks vary widely from one MVPD to another. Dr. Owen’s analysis confirmed as much: for example, small cable systems that carried just 2 of Viacom’s networks carried them in 11 unique combinations; systems that carried 4 Viacom networks carried them in 12 different combinations; and systems that carried 5 Viacom networks carried them in 10 different combinations.<sup>55</sup> Dr. Owen found similar results for Fox and NBC Universal. For instance, small cable systems that carried 3 of Fox’s channels carried them in 23 different combinations and those that carried 3 of NBC Universal’s networks carried them in 7 unique combinations.<sup>56</sup>

In sum, Dr. Owen’s analysis of actual market data confirms that MVPDs are not required to “carry a particular set of networks as a condition for carrying another ‘desired’ network,

---

<sup>54</sup> *Id.* at 4.

<sup>55</sup> *See Owen Report*, at 49, Appendix 2. The sample is comprised of the 205 small cable systems with fewer than 10,000 subscribers that contract for carriage directly with Viacom. *See id.*

<sup>56</sup> *See id.* at 50.

because most systems (or operators) carrying the ‘desired’ network do not carry the allegedly tied bundle ACA describes.”<sup>57</sup> Nor are MVPDs required to carry a minimum number of services.

**C. Prices for Stand-Alone Networks Are Not Coercive, as Some Small Operators Allege, but Are Determined by the Marketplace**

There is no question that video programmers offer their programming networks on a stand-alone basis; ACA, NTCA, and the Small System Operators begrudgingly acknowledge as much.<sup>58</sup> These small MVPDs argue, however, that the stand-alone price for a desired channel is sometimes higher than that of a package of networks. Because of a perceived per-network price differential, they allege, without any support, that video programmers inflate the price of stand-alone channels in order to “coerce” MVPDs into purchasing a larger package of channels.<sup>59</sup> However, as Dr. Owen explained in his initial report, “[i]n a business where market power is absent, customers cannot be ‘coerced’ or ‘forced’ by a supplier to purchase anything, or things in any form. The transactions that do take place are voluntary, not coercive.”<sup>60</sup> Given that neither Viacom nor any other programmer has market power, content owners have no ability to coerce MVPDs to do anything.

In addition, many small cable system operators carry only one or two of Viacom’s programming networks, a fact that severely undermines any suggestion that the pricing of stand-alone channels is coercive. Indeed, 11 percent of small cable systems that contract for carriage directly with Viacom purchase one channel; an additional 19 percent purchase two channels; and

---

<sup>57</sup> *Owen Rebuttal Report*, at 4.

<sup>58</sup> *See, e.g., ACA Comments*, at 13; *NTCA Comments*, at 18; *Small System Operators Comments*, at 3-4.

<sup>59</sup> *See id.*

<sup>60</sup> *Owen Report*, at 25.

another 19 percent purchase 3 channels.<sup>61</sup> More than 95 percent of these small operators carry less than half of Viacom's programming networks.<sup>62</sup> Dr. Owen found similar results for Fox and NBC Universal: for example, 49 percent of small cable systems carry 3 or fewer Fox networks (with 20 percent carrying one network) and 91 percent of small cable systems carry 3 or fewer NBC Universal networks (with 50 percent carrying one network).<sup>63</sup>

Against the backdrop of this highly competitive programming market where any MVPD can purchase as many or as few channels it desires, ACA argues that programmers use "must have" networks to compel carriage of other networks.<sup>64</sup> As Dr. Owen made clear, however, just because a product is preferred by some customers does not mean that the supplier of that product has market power. A "must have" network "is simply a network that makes an MVPD more profitable than otherwise, given its other carriage choices and the price it would pay for the network."<sup>65</sup> There is no reason to believe that an MVPD would go out of business for lack of a particular network. An MVPD would "simply adjust other programming choices, prices, and marketing strategy."<sup>66</sup>

The Small System Operators allege, moreover, that there is no economic justification for the different prices programmers charge for stand-alone networks and packages of networks.<sup>67</sup> This assertion is flatly contradicted by the realities of the marketplace. As Dr. Owen explained

---

<sup>61</sup> *See id.* at 12, Figure 1.

<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 16, Figure 5; 20, Figure 9.

<sup>64</sup> *See ACA Comments*, at 16.

<sup>65</sup> *Owen Report*, at 29.

<sup>66</sup> *Id.*

<sup>67</sup> *See Small System Operators Comments*, at 3-4.

in his report, packaged offerings enable programmers to take advantage of economies of scale and scope in production and distribution, and accordingly afford programmers the ability to offer MVPDs more attractive pricing on programming networks.<sup>68</sup> This phenomenon is not limited to the video programming market. Dr. Owen observed that “in any business the price for a product bundle will be less than the sum of the stand-alone prices for the elements of the bundle . . . .”<sup>69</sup> It is undisputed that “bundling generally promotes consumer welfare and increases efficiency by lowering the prices of goods and services.”<sup>70</sup>

MVPDs and programmers reach agreements to distribute networks in packages precisely because packaging is efficient and reduces transaction costs for both parties. Even ACA recognizes that the “sale of bundles of channels can result in efficient transactions that provide programmers, distributors and consumers with desired content at reasonable prices.”<sup>71</sup> Nonetheless, ACA argues that small operators’ per-subscriber license fees are higher than those of large multiple system operators (“MSOs”) even though there is no difference in distribution cost.<sup>72</sup> ACA appears to believe that distribution cost alone should determine license fees. But the cost of distribution is only part of the analysis; a programmer also must account for its ability to generate advertising revenues, which is tied directly to the breadth of a channel’s distribution.

---

<sup>68</sup> See *Owen Report*, at 63.

<sup>69</sup> *Id.* at 39 (emphasis added).

<sup>70</sup> *Id.* at 62.

<sup>71</sup> *ACA Comments*, at 21.

<sup>72</sup> See *id.* at 17.

The higher a channel's audience penetration the more advertising revenue it can generate.<sup>73</sup> The ability to negotiate for more favorable rates based on aggregated viewership is, of course, why collective bargaining groups like the National Cable Television Cooperative ("NCTC") exist. NCTC is a not-for-profit member-operated purchasing organization that negotiates and administers master affiliation agreements with cable programming networks on behalf of small and mid-sized cable systems.<sup>74</sup> NCTC has more than 1,000 member companies ranging in size from operators with fewer than 100 subscribers to more than 1 million.<sup>75</sup> By purchasing and negotiating for all of its members, NCTC matches the size and scope of a large MSO and therefore has substantial bargaining leverage. This allows NCTC, on behalf of small operators, to negotiate more favorable pricing and terms than the members might be able to achieve individually.

Surprisingly, with the exception of a cursory mention in ACA's comments,<sup>76</sup> small and rural MVPDs neglect to even mention that they can and many do negotiate for carriage through collective bargaining agents such as NCTC. As discussed in its opening comments, Viacom's carriage agreements with NCTC typically include agreed-upon rates for all Viacom channels, which reflect volume discounts and pricing based on wider distribution and aggregated viewership. A member of the NCTC can purchase any Viacom network for the discounted rate,

---

<sup>73</sup> Even NTCA realizes that programmers "make much of their money by selling advertising, and can charge higher rates if they deliver more potential viewers." *NTCA Comments*, at 37. This is far from a foreign concept. Section 628 of the Communications Act, for example, expressly permits vertically integrated programmers to establish "different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." 47 U.S.C. § 548(c)(2)(B)(iii). In fact, when considering price differentials relating to "volume discounts," programmers are not limited to considering cost, but may also rely on "non-cost economic benefits related to increased viewership." 47 C.F.R. § 76.1002(b)(3) nt.

<sup>74</sup> NCTC, <http://www.cabletvycoop.org/abouts.asp> (last visited Feb. 8, 2008).

<sup>75</sup> *See id.*

<sup>76</sup> *See ACA Comments*, at 17 (noting that small operators pay programming fees through the NCTC).

regardless of the number of channels that particular MVPD elects to carry. Thus, an NCTC member could carry any number of Viacom networks and it still would be entitled to benefit from a volume discount.

Ultimately, small cable operators are not really asking the Commission to ban a practice (“bundling”) that does not exist, but instead are asking the Commission to tip the scale in their favor so that they can obtain the benefits of discount pricing without having to provide a fair exchange of value in return. This explains why, contrary to their anti-bundling mantra, small MVPD associations such as the Small System Operators are “wary about proposals to wholly redefine the [video programming] industry, and every contract along with it, which has the potential to create widespread disruption that, in turn, will likely result in unanticipated but no less harmful consequences;”<sup>77</sup> and ACA emphasizes that the “Commission should not prohibit programmers or broadcasters from offering bundles of channels at wholesale.”<sup>78</sup> As former members of ACA recognize, this seemingly inconsistent stance is especially troubling when one considers that ACA and small operators are opposed to retail a la carte.<sup>79</sup> Small operators’

---

<sup>77</sup> *Small System Operators Comments*, at 5.

<sup>78</sup> *ACA Comments*, at 20 (emphasis in original).

<sup>79</sup> *See, e.g., ACA Comments*, at viii (“[N]o lawful basis exists for imposing regulated a la carte.” However, “the [wholesale] marketplace needs some help from the Commission.”) *See also* Linda Moss, *Midcontinent Becomes Third Op to Ankle ACA: Joins Atlantic Broadband, Bresnan in Defecting Over Program Issue*, Multichannel News, Jan. 18, 2008, available at <http://www.multichannel.com/article/CA6524043.html> (reporting that Midcontinent Communications, Bresnan Communications and Atlantic Broadband have left the ACA because they “don’t believe that the FCC has jurisdiction in [this] matter.” Tom Simmons, Midcontinent Communications’ senior vice president of public policy, for example, declared that he found ACA’s wholesale packaging position to be “very inconsistent” with its position on retail a la carte: “It’s very difficult to ask the FCC to unbundle on a wholesale basis for us, when we really can’t agree with the position the chairman has taken on unbundling in the form of a la carte.”).

incompatible positions only serve to highlight their ulterior motive in this proceeding: wholesale video programming price regulation.<sup>80</sup>

The Commission should recognize complainants' motives for what they really are and reject the invitation to "tinker[]"<sup>81</sup> with the rates of wholesale video programming services. As Dr. Owen observed in his initial report, "[i]f the Commission were to take seriously a complaint that stand-alone prices to MVPDs are too high to provide a real alternative, the Commission would be required to determine when rates are 'too high' for every cable network at issue, including any change in pricing with regard to such variables as transmission quality, channel placement, minimum subscriber guarantees, and the like."<sup>82</sup> In particular, because "virtually all production and many distribution costs are joint and common with respect to individual customers," the Commission would have to craft rules that would "result in different prices for each network to each customer, related to that customer's elasticity of demand for each network. . . . [and] take into account the feedback effect of distribution on advertising revenues."<sup>83</sup> Dr. Owen concludes that this would clearly be "an unworkable regulatory scheme;" indeed, "[n]either the traditional tools of utility regulation nor more modern tools such as rate caps [would offer] a practical solution" to these inherent problems.<sup>84</sup>

---

<sup>80</sup> See, e.g., *ACA Comments*, at 21 (arguing in favor of government regulation, to "[e]nsur[e] . . . reasonable prices" for the purchase of stand-alone programming networks).

<sup>81</sup> Hearn, *supra* note 8 (quoting FCC Commissioner McDowell).

<sup>82</sup> *Owen Report*, at 39.

<sup>83</sup> *Id.* at 40.

<sup>84</sup> *Id.*

## **II. THE TERMS AND CONDITIONS OF VIACOM'S CARRIAGE AGREEMENTS ARE ALWAYS NEGOTIATED IN GOOD FAITH AND REFLECT BARGAINED-FOR CONCESSIONS**

Several small operators contend that video programmers compel them to accept objectionable conditions in programming agreements relating to IPTV, VOD programming, website promotion, shared headends and non-disclosure agreements.<sup>85</sup> By and large these allegations are made generically and not against any particular programmer. This, of course, makes it difficult for either programmers or the Commission to know how to respond. Absent a specific allegation, programmers cannot possibly know the context or circumstances that might explain legitimate bargaining behavior. Thus, unsubstantiated claims should not be relied upon for Commission policy decisions. Indeed, programmers cannot even be certain whether they are the subject of any particular complaint and the Commission has no way to know whether the allegations – even if true – are indicative of a significant industry issue or merely an individual dispute between only two parties.

OPASTCO, for example, alleges that unnamed video programmers restrict or deny access to content for IPTV providers and otherwise impose onerous provisions on MVPDs that rely on IPTV technology.<sup>86</sup> Viacom, however, does not discriminate against MVPDs that rely on IPTV technology. Viacom treats IPTV providers like any other MVPD, and merely negotiates to ensure that its high-value content is appropriately protected against unauthorized use. Viacom does not demand that IPTV providers provide it with data or fees related to providers' broadband customers as alleged by OPASTCO.<sup>87</sup>

---

<sup>85</sup> See, e.g., *ACA Comments*, at 11-12; *OPASTCO Comments*, at 12-17; *NTCA Comments*, at 19-39; *RIITA Comments*, at 2-4; *Small Operators Comments*, at 2-4.

<sup>86</sup> See *OPASTCO Comments*, at 12.

<sup>87</sup> See *id.*

ACA, moreover, contends that one of its members allegedly had to expand carriage of Viacom channels in order to obtain Viacom VOD content.<sup>88</sup> It is difficult for Viacom to respond to such an allegation without knowing the party making this uncorroborated claim and the relevant context, but in any case, the allegation tells only one side of the story. First, it is important for the Commission to recognize that MVPDs maintain a strong desire for VOD programming, which provides great value to their subscribers by enabling viewers to access and enjoy valuable content in a more flexible manner. While making content available on-demand presents challenges to programmers' traditional business models, Viacom has nonetheless worked with small cable operators to facilitate the provision of VOD programming for the benefit of consumers.

Thus, when MVPDs seek access to VOD content from Viacom, Viacom negotiates for fair compensation in return. Since most VOD content is offered to consumers by MVPDs without additional charge, cable systems are loathe to pay a cash price to programmers for VOD rights. Accordingly, Viacom seeks alternate forms of compensation, such as expanded distribution of existing or new programming services, or promotional opportunities for Viacom websites or programming. No MVPD is compelled to accept these terms, and agreements are reached only when both parties recognize a fair exchange of value. The Commission should not permit cable systems to demand something of great value (in this case VOD programming) without allowing programmers to bargain for fair compensation in return.

Individualized marketplace negotiations, moreover, should determine the terms of contracts relating to programmers' undisputed need to secure high-value content. OPASTCO, again without specifying who, claims that some programmers refuse to allow rural MVPDs to

---

<sup>88</sup> See *ACA Comments*, at 12.

use shared headends.<sup>89</sup> As Viacom explained in its comments, however, it makes every effort to accommodate the legitimate need of some small and rural MVPDs to share a headend. When multiple MVPDs share a headend the opportunity for theft and general wrongdoing increases, especially if there are third-party vendors involved. Accordingly, Viacom merely seeks to ensure that MVPDs sharing a headend can adequately protect Viacom's content. Any regulation requiring programmers to permit unrestricted sharing of headends would seriously jeopardize protection and security for high-value content.

Finally, the Commission need not be concerned with the laments of NTCA and OPASTCO that programmers often seek confidentiality for their business agreements.<sup>90</sup> It is entirely reasonable for programmers to bargain for non-disclosure agreements. Not only do these confidentiality provisions benefit both parties because the fruits of the bargain are preserved for their sole advantage, they also allow programmers to be more flexible on terms and conditions because they know that any concessions made would be solely for the purposes of their negotiations with a particular MVPD. Without the assurance of confidentiality, programmers would be less likely to make concessions to MVPDs because every concession would become public and effectively utilized industry-wide.<sup>91</sup>

---

<sup>89</sup> See *OPASTCO Comments*, at 14.

<sup>90</sup> See *NTCA Comments*, at 36-39; *OPASTCO Comments*, at 14-15.

<sup>91</sup> NTCA and the Small System Operators, moreover, encourage the Commission to subpoena carriage agreements from video programmers pursuant to Section 403 of the Communications Act (the "Act"). See *NTCA Comments*, at 38-39; *Small System Operators Comments*, at 3 n.3. Section 403 only authorizes the Commission to inquire into matters concerning "any provision" of the Act or "relating to the enforcement of any provision" of the Act. 47 U.S.C. § 403. Quite clearly, however, Section 403 does not provide the Commission the requisite authority to compel the production of carriage agreements because, as Viacom explained in its opening comments, the Commission has no express authority to regulate the wholesale video programming market. See also *Disney Comments*, at 70. In any case, as the record in this proceeding makes clear, no video programmer has market power and programmers do not engage in take-it-or-leave-it bargaining. MVPDs, moreover, are not forced to carry unwanted programming. Small MVPDs' argument that stand-alone prices of networks are too high to offer a meaningful alternative to program packages are belied by the fact that

*(cont'd)*

In sum, the video programming marketplace is competitive and dynamic. What remains constant, however, is programmers' desire to provide consumers an assortment of diverse programming options. Viacom's networks are carried by MVPDs through complex business negotiations that succeed only when the result provides value to both Viacom and a given MVPD, generally on the basis of the networks' ability to convince an MVPD that they offer high-quality programming that is attractive to a discerning audience. To that end, Viacom employs a flexible approach in carriage negotiations to ensure that consumers continue to receive the attractive programming they have come to expect from Viacom's networks. The Commission should not interfere with these marketplace negotiations, which have provided countless benefits to MVPDs, programmers and consumers.

### **III. THE COMMISSION HAS NO AUTHORITY TO REGULATE INDEPENDENT PROGRAMMERS OR THE WHOLESALE VIDEO PROGRAMMING MARKET**

As Viacom's opening comments make clear, the Commission has no authority to regulate programming networks that are not affiliated with a cable operator, nor does it have jurisdiction to regulate the wholesale market for video programming.<sup>92</sup> A number of other commenters also submitted extensive showings confirming that the Commission has no authority to regulate this market. Disney, for instance, pointed out that if Congress intended to confer on the Commission the power to prohibit packaging, it would have done so expressly.<sup>93</sup> And NBC Universal affirmed that extension of Section 628 of the Communications Act to independent programmers would "actually subvert" Congress's intent by weakening the bargaining power of these non-

---

*(cont'd from previous page)*

hundreds of small MVPDs purchase no more than one or two networks from video programmers. The Commission's inquiry should stop here – no further action is necessary.

<sup>92</sup> See *Viacom Comments*, at 23-32.

<sup>93</sup> See *Disney Comments*, at 10.

affiliated entities vis-à-vis MVPDs.”<sup>94</sup> Moreover, Disney, NBC Universal and Time Warner joined Viacom in stressing that Commission regulation of wholesale sales practices would run afoul of the First Amendment.<sup>95</sup>

Nonetheless, ACA and NTCA contend that Sections 601(4), 628(a) and 628(c)(4) of the Act can serve as sources of Commission jurisdiction to regulate the wholesale video programming market and independent video programmers.<sup>96</sup> These provisions are unavailing. First, regulation precluding the sale of networks in packages would in fact undermine Congress’ directive in Section 601(4), which provides that one of the purposes of Title VI is to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”<sup>97</sup> As Viacom explained in its opening comments, any regulation of the wholesale video programming market would in fact create a substantial risk of reduced program diversity. The sale of programming in packages has proven to be an important tool in expanding diversity of cable programming choices for consumers and ensuring that channels targeting niche audiences are carried on cable systems.

Moreover, no part of Section 628, which addresses program access, including 628(a) and 628(c)(4), applies to non-vertically integrated programming networks.<sup>98</sup> This section was intended to prevent vertically integrated programmers from favoring their own programming so

---

<sup>94</sup> *NBC Universal Comments*, at 24.

<sup>95</sup> *See Disney Comments*, at 72-83; *NBC Universal Comments*, at 30-32; *Time Warner Comments*, at 8-12; *Viacom Comments*, at 31-32.

<sup>96</sup> *See ACA Comments*, at 47-52; *NTCA Comments*, at 19. ACA and NTCA also argue that 47 U.S.C. §§ 151 and 152(a) provide the Commission the requisite ancillary jurisdiction to regulate independent programmers and the wholesale video programming market. As Viacom made clear in its opening comments, however, the Commission’s “constrained” ancillary authority serves as an insufficient basis for jurisdiction. *See Viacom Comments*, at 28-29.

<sup>97</sup> 47 U.S.C. § 521(4).

<sup>98</sup> *See* 47 U.S.C. § 548. *See also Viacom Comments*, at 27-28.

that independent programmers would not be precluded from carriage. Accordingly, the Commission cannot rely upon Section 628 to regulate the manner in which an independent programmer such as Viacom negotiates for the sale of its networks.

Finally, neither ACA nor any other commenter urging expanded regulation has even attempted to explain how regulation of the programming market would comport with Section 624(f) of the Act. Section 624(f) definitively curtails the Commission’s authority to regulate the provision of cable programming, providing that “[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.”<sup>99</sup> Section 624(f) reflects Congress’ belief that it is inappropriate “for government officials to dictate the specific programming to be provided over a cable system . . . .”<sup>100</sup> Congress also has repeatedly expressed its preference for marketplace negotiations, rather than regulation, to ensure competition in the market for video programming. The Statement of Policy that Congress included as part of the 1992 Cable Act, for example, confirms that reliance “on the marketplace” to achieve “a diversity of views and information through cable television” is paramount.<sup>101</sup> The Commission, therefore, is clearly without power to promulgate regulations restricting free market negotiations between independent programmers and MVPDs, and no commenter in this proceeding has shown otherwise.

#### **IV. CONCLUSION**

No commenter in this proceeding has presented the Commission with any evidence that would warrant interfering with a functioning free market that has generated countless benefits for

---

<sup>99</sup> 47 U.S.C. § 544(f).

<sup>100</sup> H. Rep. No. 98-934, at 26 (1984).

<sup>101</sup> H. Rep. No. 102-862, at 4 (1992).

video programmers, MVPDs and consumers alike. Indeed, the comments filed in this proceeding confirm that video programmers do not engage in tying practices. Viacom and other programmers offer their programming networks on a stand-alone basis at prices, terms and conditions determined by a competitive and efficient free market. Quite simply, there is no market failure for the Commission to address. Programmers do not possess market power and do not engage in take-it-or-leave-it bargaining. In any event, the Commission has no jurisdiction under the Communications Act to regulate either independent video programmers or the wholesale market for video programming. Accordingly, Viacom urges the Commission to promptly conclude this proceeding without taking further action.

Respectfully submitted,

VIACOM INC.

By: /s/ Antoinette Cook Bush

Antoinette Cook Bush

Jared S. Sher

Daudeline Meme\*

of

Skadden, Arps, Slate, Meagher & Flom LLP

1440 New York Avenue, N.W.

Washington, DC 20005

(202) 371-7000

Its Attorneys

\*Licensed to practice in Virginia only.

Keith R. Murphy  
Vice President, Government Relations  
& Regulatory Counsel  
Viacom Inc.  
1501 M. Street, N.W., Suite 1100  
Washington, DC 20005  
(202) 785-7300

February 12, 2008