Viacom

BET NETWORKS
MTV NETWORKS
PARAMOUNT PICTURES

March 27, 2008

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

Re: Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-198 – Notice of Ex Parte Presentation

Dear Ms. Dortch:

On March 27, 2008, the undersigned along with Antoinette Cook Bush of Skadden, Arps, Slate, Meagher & Flom LLP, met with Amy Blankenship of Commissioner Tate's office to discuss matters relating to the above-captioned proceeding.[1] In this proceeding, the Commission sought comment on the status of carriage negotiations in today's "video programming market" and asked whether independent video programmers that are not affiliated with a cable operator engage in "tying practices" that result in harm to cable operators and consumers.[2] We explained that with the benefit of the full record in this proceeding, it is abundantly clear that there is neither the authority nor need for Commission intervention.

We also summarized key points contained in the Viacom submissions in this proceeding.[3] In particular, we pointed out that the Commission has no statutory authority to regulate either

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1 *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). Viacom, a leading global entertainment content company, owns and operates 24 specialized music and entertainment networks targeted to consumers ranging from young children to teenagers to adults. These programming networks provide consumers a wide array of diverse, high-quality programming choices.

2 *See id.*

3 *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*"); Reply Comments of Viacom Inc. (filed Feb. 12, 2008) ("*Viacom Reply Comments*"). We also discussed the information contained in Exhibit 1 attached hereto.

independent programmers or the wholesale market for the sale of video programming.[4] Notably, Section 628(b) of the Communications Act, which was enacted as a part of the 1992 Cable Act to "ensure that cable operators do not favor their *affiliated* programmers over others,"[5] does not apply to non-vertically integrated programming networks, such as Viacom.[6] This provision was purposely "*limited to vertically integrated companies* because [Congress found that] the incentive to favor cable over other technologies is most evident with them."[7]

Even with regard to vertically integrated programmers, however, Section 628(c)(2)(B)(iii) of the statute expressly permits carriage agreements to contain "*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*."[8] Similarly, in the context of Section 325 of the Communications Act and retransmission consent rights for broadcast signals, Congress specifically recognized that the marketplace should permit broadcasters wide latitude to pursue their right to compensation.[9] Indeed, Congress observed that "[some] broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as . . . the right to program an additional channel on a cable system."[10] It is clear that Congress intended broadcasters to have the right to package programming in negotiations with cable operators.[11]

It follows that if Congress has not granted the Commission authority to regulate packaged sales and volume-based pricing by vertically integrated cable programmers and broadcasters, then certainly it did not intend for the Commission to regulate the sales practices of independent

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4 *See Viacom Comments*, at 9-11; *Viacom Reply Comments*, at 21-23. *See also In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., at 32-38 (filed Jan. 4, 2008) ("*Fox Comments*"); Comments of NBC Universal, Inc. and NBC Telemundo License Co., at 16-30 (filed Jan. 4, 2008) ("*NBC Universal Comments*"); Comments of The Walt Disney Company, at 3-11 (filed Jan. 4, 2008) ("*Disney Comments*"); Reply Comments of Discovery Communications, LLC, at 2-7 (filed Feb. 12, 2008) ("*Discovery Reply Comments*").

5 S. Rep. No. 101-381, at 25 (1990) (emphasis added).

6 *See* 47 U.S.C. § 548(b).

7 S. Rep. No. 101-381, at 26 (emphasis added).

8 47 U.S.C. § 548(c)(2)(B)(iii) (emphasis added).

9 *See* 47 U.S.C. § 325. While Section 325 established that broadcasters should have a right to bargain for compensation, Congress declined "to dictate the outcome of the ensuing marketplace negotiations." S. Rep. No. 102-92, at 36 (1991).

10 S. Rep. No. 102-92, at 35-36.

11 The Commission also has noted that "offering retransmission consent in exchange for the carriage of other programming such as a cable channel" is "consistent with competitive marketplace considerations." *In Re 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).

programmers. Furthermore, any attempt to regulate this market would be arbitrary and capricious and violative of the First Amendment rights of programmers.[12]

In any event, the American Cable Association ("ACA") and the National Telecommunications Cooperative Association ("NTCA") have essentially conceded that video programmers *do not* engage in "tying practices."[13] Indeed, they and the small and rural cable operators they represent have little choice but to yield before the overwhelming, unrefuted record evidence that programmers offer their video programming networks on a stand-alone basis and cannot and do not compel cable systems to purchase unwanted programming.[14] Given that their unsubstantiated claims cannot withstand the barest of scrutiny, these small and rural cable operators have admitted their true motive in this proceeding: an unwarranted invitation for government price regulation of the wholesale video programming market.[15]

As Viacom and many other parties have demonstrated through uncontroverted economic analyses, however, even if the Commission had the requisite authority (which it does not), price regulation would cause vast unintended consequences, fail to achieve the apparent goal of this proceeding – retail a la carte – and prove nearly impossible to implement.[16] The Commission

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[12] *See Viacom Comments*, at 31-32. *See also In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of Time Warner Inc., at 8-12 (filed Jan. 4, 2008); *Disney Comments*, at 72-83; *NBC Universal Comments*, at 30-32.

[13] Neither ACA nor NTCA submitted with its initial comments any credible evidence that programmers engage in tying practices. After using their reply comments merely to restate the same unsubstantiated tying allegations, both parties then effectively acknowledged that video programming is available for purchase on a stand-alone basis (though they quarrel with the price they must pay to carry high-quality content). In no event did either group even attempt to address the rigorous economic analyses submitted by Viacom and other programmers in this proceeding. While NTCA's reply comments included a supporting paper by Professor Dale Lehman, the paper merely presented a theoretical discussion of bundling and tying practices. Professor Lehman did not attempt to conduct any empirical research – and he did not refute any of the expert conclusions presented by Viacom and its economic expert, Dr. Bruce Owen. Accordingly, Professor Lehman's report should not be relied upon by the Commission as the basis for any policy determinations. *See In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, American Cable Association Reply Comments (filed Feb. 12, 2008) ("*ACA Reply Comments*"); National Telecommunications Cooperative Association Reply Comments (filed Feb. 12, 2008) ("*NTCA Reply Comments*") & Attachment A, Dale Lehman, *Programming Obstacles Facing Small Cable Companies* (Feb. 12, 2008) ("*Lehman Paper*").

[14] *See Viacom Comments*, at 9-11. *See also Disney Comments*, at 49-51; *Fox Comments*, at 21-26; *NBC Universal Comments*, at 34-42; *Discovery Reply Comments*, at 8.

[15] *See ACA Reply Comments*, at 27; *NTCA Reply Comments*, at 3; *Lehman Paper*, at 13-14.

[16] *See Viacom Comments*, at Appendix 2, Dr. Bruce M. Owen, Economists Incorporated, *Wholesale Packaging of Video Programming*, at 39-40 (Jan. 4, 2008) ("*Owen Report*"); *Viacom Reply Comments*, at 17. *See also In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Reply Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., at 17 (filed Feb. 12, 2008); Reply Comments of NBC Universal, Inc. and NBC Telemundo License Co., at 21-25 (filed Feb. 12, 2008); Reply Comments of The Walt Disney Company, at 3-11 (filed Feb. 12, 2008) &

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has no basis for wasting corporate and governmental resources on such a fruitless, plainly unjustified endeavor. Accordingly, Viacom urges the Commission to find that there is absolutely no factual or legal basis for the government to intercede in the competitive video programming marketplace.

As Dr. Bruce Owen demonstrated in his expert reports appended to Viacom's comments and reply comments, no video programmer has market power.[17] Although Viacom is the largest independent video programmer, it controls only about 8 percent out of the hundreds of programming networks available in the United States today.[18] Moreover, the competitive marketplace continually fosters the entry of independent new networks. Dr. Owen has found that 134 new national networks were launched between 2000-2007, and more than 50 percent of these new networks were introduced by programmers that do not own any other channels.[19] Given these facts, and Dr. Owen's unrefuted conclusions about the market, no programmer has the ability to coerce cable operators to do anything, let alone purchase programming they do not want or pay prices based on anything other than competitive marketplace considerations.

Viacom offers for sale all of its programming networks on a stand-alone basis at rates, terms and conditions determined by the competitive free market.[20] Dr. Owen's analysis of carriage data for small cable systems confirms that Viacom does not compel MVPDs to purchase multiple networks, nor does Viacom mandate that cable systems carry any specific package of networks: of the 205 small cable systems that contract for carriage directly with Viacom, 30 percent carry only one or two of Viacom's networks, 68 percent carry four or fewer, and 95 percent carry less than half of Viacom's networks.[21] Not a single system carries every Viacom network.[22] Dr. Owen reached similar conclusions with respect to programming offered by Fox and NBC Universal.[23] Nonetheless, ACA claimed in its comments, without any evidence or support, that the rights to distribute 13 popular channels are "tied" to "obligations to distribute 60

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Exhibit A, Jeffrey A. Eisenach, *Why the FCC Should Not Increase Regulation of Wholesale TV Programming: Reply to Comments in MB Docket No. 07-198*, at 12-17 (Feb. 12, 2008).

17 *See Owen Report*, at 25-28; *Viacom Reply Comments*, Appendix 1, Dr. Bruce M. Owen, Economists Incorporated, *Wholesale Packaging of Video Programming: Reply to ACA and Dish Network*, at 6 (Feb. 12, 2008) ("*Owen Rebuttal Report*").

18 *See Owen Report*, at 26.

19 *See id.* at 27-28.

20 Other programmers, including, Disney, NBC Universal, Fox and Discovery have made clear that they, too, offer their programming networks on a stand-alone basis. *See supra,* note 14.

21 *See Owen Report*, at 12, Figure 1.

22 *See id.*

23 *See id.* at 14-21.

other channels."[24] Dr. Owen thoroughly discredited this unsupported allegation. For example, Dr. Owen found that, contrary to ACA's claim, 98 percent of small cable systems that contract for carriage of Nickelodeon directly with Viacom do not carry the "bundle" that ACA asserted was tied to the channel.[25]

Moreover, small system operators need not negotiate directly with Viacom. Instead, they have the option of bargaining with programmers collectively, in groups such as the National Cable Telecommunications Cooperative ("NCTC"), which aggregates subscribers (approximately 11 million) across many systems in order to negotiate for prices, terms and conditions akin to those sought by large cable operators. Tellingly, ACA's comments and reply comments fail even to mention that its members can, and many do, negotiate collectively through bargaining agents such as NCTC. Yet this fact plainly undercuts small and rural MVPDs' claims of imbalance in the wholesale video programming market.

Significantly, small and rural MVPDs' calls for government regulation of this competitive market also would undermine the growth of diverse channels, including networks that target minority and niche audiences. Programmers often use packaging to ensure distribution of niche networks that otherwise would find it extremely difficult to obtain cable carriage. By offering price discounts on highly popular channels, Viacom, for instance, can encourage cable systems to carry networks such as Noggin, which provides commercial-free programming to pre-school-aged children.

Equally important, the new and diverse channels promoted by these packages serve as a place for independent producers to showcase their talent, as many do on BET, for example.[26] Thus, any Commission action that interferes with the wholesale programming market would threaten the thriving market for independent producers. The Commission should reject calls for regulatory intervention and abide by Congress' directive to "rely on the marketplace, to the maximum extent feasible, to achieve" the "availability to the public of a diversity of views and information through cable television . . . ."[27]

In light of the overwhelming and unrebutted record evidence confirming that the wholesale video programming market is competitive and functioning as Congress intended,

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[24] *In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, American Cable Association Comments, at 7 (filed Jan. 3, 2008).

[25] *See Owen Rebuttal Report*, at 2. Dr. Owen made similar findings with respect to MTV, the other Viacom channel about which ACA made allegations of forced bundling. *See id.*

[26] Several minority-owned independent production companies have used the opportunities provided by BET to launch the careers of promising new producers. For example, James Dubose has produced a number of shows for BET, including *Season of the Tiger* and *Keyshia Cole – The Way It Is*. Other minority independent programmers that have worked with BET include Sean Rankine, Shotcaller Productions, QD3 and Donna Michelle Anderson.

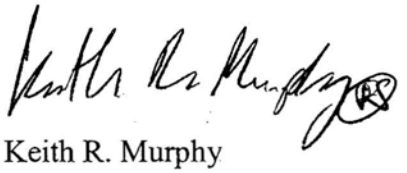
[27] H. Rep. No. 102-862, at 4 (1992).

small and rural cable operators have simply failed to make the case for Commission regulation or price controls.[28] They should not be rewarded for their refusal to provide programmers with a fair exchange of value (*i.e.*, carriage and distribution of a range of networks to a wide audience in return for volume discounts and other incentives), especially at the cost of harm to diverse programming and independent production.[29]

For all of these reasons, Viacom urges the Commission to conclude this proceeding promptly without taking further action or wasting more corporate and government resources in a fruitless attempt to achieve the apparent goal of this proceeding: retail a la carte – a policy undeniably fraught with legal, technical and public interest infirmities, as the Commission and Congress have previously acknowledged.

The above-referenced proceeding has been accorded permit-but-disclose status, and notice of this meeting is made pursuant to Section 1.1206(b) of the Commission's Rules.

Respectfully submitted,



Keith R. Murphy
Vice President, Government Relations and Regulatory Counsel

Encl.

cc: Amy Blankenship

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[28] The small and rural MVPDs' request for intrusive government regulation is particularly ironic given their ardent belief that the Commission should *not* attempt to impose a la carte regulation on the retail market. These operators' inconsistent positions – requesting interference in the wholesale market while insisting on a hands-off policy for retail sales – merely highlights their real motive in this proceeding.

[29] For the same reasons, the Commission should not impose mandatory arbitration obligations on programmers and MVPDs. Arbitration is a costly and highly burdensome process for both sides of any dispute. In a competitive market in which carriage contracts are entered into freely, there is no public interest rationale for the imposition of an intrusive arbitration mandate.

EXHIBIT 1

THE VIDEO PROGRAMMING MARKETPLACE: SEPARATING FACT FROM FICTION

PREPARED BY VIACOM INC.
MB DOCKET NO. 07-198
MARCH 6, 2008

- Viacom, a leading global entertainment company, owns and operates 24 programming networks that provide consumers with diverse, high-quality television content. Viacom's networks include MTV, Nickelodeon, BET, CMT, Noggin (a 24-hour commercial free network for preschoolers) and MTV Tres, among others.

- Viacom, News Corp. and NBC Universal submitted a study by noted economist, Dr. Bruce Owen, which confirms that the wholesale video programming marketplace is highly competitive – for both small and large cable operators – and provides a wealth of options and competitive pricing.

  - Dr. Owen demonstrates that no video programmer has market power. With 24 networks, Viacom controls only about 8 percent of the hundreds of national programming networks. Moreover, the competitive marketplace continually fosters the entry of independent new networks. Dr. Owen has found that 134 new national networks were launched between 2000-2007, and more than 50 percent of these new networks were introduced by programmers that do not own any other channels.

  - If no programmer has market power, then small and rural cable operators cannot be compelled to purchase unwanted channels or pay prices determined by anything other than competitive marketplace considerations.

- ACA, NTCA and other small cable operator commenters fail to rebut Dr. Owen's economic conclusions and the substantial record evidence confirming that the wholesale network purchasing market is characterized by wide choice, genuine flexibility in terms and conditions, and competitive pricing.

  - Small cable operators provide only unsubstantiated allegations that are demonstrably without merit.

- In contrast, Viacom has shown that it offers all of its programming networks for sale on a stand-alone basis at rates, terms and conditions determined by the competitive free market.

  - Viacom also offers its programming channels in packages that are tailored to meet the needs of individual cable operators, large and small. These packages come in hundreds of varieties dictated by the needs of the cable operator (for example, operators carrying 4 Viacom networks carried them in 12 unique combinations) and frequently include volume discounts and other incentives to encourage wider distribution of Viacom's networks.

- Small cable systems can and do purchase Viacom channels on a stand-alone basis (when they choose not to purchase programming in packages). In fact, most of the small cable operators that contract for carriage directly with Viacom do not even carry the Viacom networks often presumed to be the most popular – MTV and VH1. Fully 70% of these small systems do not carry MTV and 64% do not carry VH1.

- Indeed, of the 205 small cable systems that contract for carriage directly with Viacom, 30% carry only one or two of Viacom's networks, 68% carry four or fewer, and 95% carry less than half of Viacom's networks. Not a single system carries every Viacom network.

- Viacom does not, and could not, force any small cable operator to purchase programming that it does not desire, nor does Viacom coerce those operators to accept prices, terms or conditions that they find objectionable. Viacom does not engage in take-it-or-leave-it bargaining.

- Although they are loathe to admit it, small cable operators can and do bargain collectively with programmers through the National Cable Telecommunications Cooperative. NCTC aggregates subscribers (approximately 11 million) across many systems in order to negotiate for prices, terms and conditions similar to those sought by large cable operators.

- Any regulation of the competitive wholesale programming market would undermine the growth of new and diverse networks, which often rely on their inclusion in packages for distribution. If these networks suffer, so too will the thriving market for independent producers that support them.

- Small cable operators are really asking the Commission to impose price controls on a competitive market. These operators should not be rewarded for their refusal to provide programmers with a fair exchange of value (*i.e.*, carriage and distribution of a range of networks to a wide audience in return for volume discounts and other incentives), especially at the cost of harm to diverse programming and independent production.

- In any event, the Commission has no authority, express or ancillary, to regulate the wholesale market for video programming or independent program companies such as Viacom. Any attempt to interfere with the competitive programming market would be arbitrary and capricious and violative of the First Amendment rights of programmers.