

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of )  
 )  
Annual Assessment of the Status of )  
Competition in the Market for the Delivery ) MB Docket No. 07-269  
of Video Programming )  
 )

**COMMENTS OF CONSUMERS UNION**

Media Access Project respectfully submits these comments on behalf of Consumers Union in response to the Commission’s inquiry seeking comment regarding the Commission’s annual report regarding the status of competition in the Multichannel Video Programming Distributor (“MVPD”) market for the year 2009. *See* Supplemental Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCCRcd 4401 (2009); Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCCRcd 750 (2009). Among other things, the Commission has “encourage[d]” industry participants and regulators to provide information and data to evaluate the status of competition in the video marketplace. *See* Notice of Inquiry, 24 FCCRcd at 751. However, voluntary disclosures from the industry are inadequate, since they can lead to misleading, inaccurate, and conflicting data. Additionally, earlier Comments and Reply Comments regarding MVPD competition for 2007 and 2008, *See* Supplemental Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCCRcd 4401 (2009); Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCCRcd 750 (2009)

revealed the continued issues with access to programming by competitors and access to a MVPD platform for independent programmers. These issues continue to hinder competition and diversity in the MVPD market.

## **I. THE COMMISSION MUST ENSURE THE MVPD MARKET PROMOTES COMPETITION AND DIVERSITY**

Congress has entrusted the Commission with “assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources” and “promote competition in cable communications...” 47 U.S.C §521(4). Congress further directed the Commission to “promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market.” 47 U.S.C. §548(a). It is evident from the Comments and Reply Comments regarding MVPD competition for 2007 and 2008 (“2008 Comments”) that the current structure of the market has not encouraged competition sufficient to ensure a “diversity of information sources.” *See, e.g.*, Comments of DirecTV, Inc. (May 20, 2009) (“DirecTV Comments”); Comments of the National Telecommunications Cooperative Association (May 19, 2009) (“NCTA Comments”); Comments of Verizon Communications, Inc. (May 20, 2009) (“Verizon Comments”).

Section 628(g) of the Communications Act requires the Commission to report annually on “the status of competition in the market for the delivery of video programming.” 47 U.S.C. §548(g). Part of this analysis must include the impact of competition on diversity in the MVPD market. *See e.g.*, 47 U.S.C. §548(a). As is evident from the 2008 Comments, the ability to access and provide programming continues to be difficult. *See generally*, DirecTV Comments; NCTA Comments; Verizon Comments. Thus, in its annual report, the Commission must acknowledge that the current state of the MVPD market does not promote competition and diversity.

## **II. BARRIERS TO ACCESS PROGRAMMING HINDERS COMPETITION AND LIMITS DIVERSITY.**

In its Notice of Inquiry, the Commission has requested information regarding barriers to entry. *See* Notice of Inquiry, 24 FCCRcd at 754. The 2008 Comments reveal that there are several barriers to entry regarding program access and program carriage that have had the effect of limiting diversity in the marketplace. Consumers Union urges the Commission to recognize that the current MVPD market has not facilitated a diversity of views and to take the necessary steps to eliminate these barriers.

### **A. Program Access**

The Commission has requested information regarding the ability of providers to gain access to programming. *See id.* at 759-760. The ability to provide programming of interest to consumers enables competition while giving consumers a diverse choice of programming. However, a number of parties have raised problems related to their ability to access programming in the 2008 Comments regarding competition in the MVPD market.

For instance, some parties have expressed concern regarding the terrestrial loophole, which is employed by cable companies to prevent access to regional sports programming. *See generally*, DirecTV Comments; Verizon Comments. Under the terrestrial exemption, cable providers are able to withhold cable-affiliated programming which provides cable with an unfair advantage in competition among MVPDs. *See* DirecTV Comments at 17. For example, the terrestrial loophole allows Cablevision to withhold its HD feed of regional sports programming from Verizon even in markets where Cablevision does not compete. *See* Verizon Comments at 19.

Further, the Commission must address concern over the practice of tying and bundling programming. By tying popular programming with less popular, but vertically integrated

programming, programmers use their leverage to dominate an MVPD's bandwidth and channel positions with content that cable systems do not want to carry, but must accept as a condition of being able to carry very popular programming. *See* Written *Ex Parte* Presentation of Consumers Union, *et al.*, MB Docket No. 07-198 (July 25, 2008). This practice of "tying" is harmful to diversity since it precludes some programmers – mainly independent programmers - from gaining space on cable systems since these programmers are generally not included in the programming "bundles."

The Commission should move immediately to address the issues raised with the terrestrial loophole and the tying/bundling of programming to prevent further abuse of control over programming by cable providers. In fact, the recent decision by the U.S. Court of Appeals for the D.C. Circuit in *NCTA v. FCC* affirmed the Commission's authority to address these types of issues. In *NCTA v. FCC*, the Court found that the Commission had broad authority under Section 628 to regulate exclusivity agreements between cable companies and owners of apartment buildings and other multi-unit dwellings. *Nat'l Cable and Telecomm. Assoc. v. FCC* 567 F.3d 659 (D.C. Cir. 2009). Similarly, here, the Commission has broad authority to review the ability of competitors to enter into arrangements. Thus, the Commission must address the issues of program access in order to foster a competitive and diverse MVPD market.

#### **B. Program Carriage**

The Commission also has requested information regarding the ability of independent programmers to gain carriage on an MVPD system. *See* Notice of Inquiry, 24 FCCRcd at 757. As evidenced by the Comments of Heritage Media Services, the current regulations related to leased access have not facilitated the inclusion of more independent programming on cable systems. *See* Comments of Heritage Media Services (April 22, 2009). Though the Commission's

recent changes to the leased access regulations are held up in litigation, the Commission, at a minimum, should report the fact that leased access has not resulted in an increase of independent programming. As part of the Commission's promotion of diverse programming, the Commission should continue to look at leased access.

Additionally, if the Commission has any intention of creating a national programming marketplace in which independent programmers have a chance to reach willing viewers, it must modify its carriage complaint process. Programmers that are not affiliated with an MVPD or a broadcaster are generally unable to reach an agreement for program carriage. *See* Reply Comments of WealthTV, MB Docket No. 07-42 (October 12, 2007) ("WealthTV Reply Comments"); Reply Comments of NFL Enterprises LLC, MB Docket No. 07-42 (October 12, 2007) ("NFL Reply Comments"). Although the Commission has a carriage complaint process in place, it has not been effective in resolving disputes in a timely manner. *See* WealthTV Reply Comments at 1; NFL Reply Comments at 8; Comments of HDNet, LLC, MB Docket No. 07-42 at 1 (October 12, 2007). Although the existing regulations under Section 616 take a deliberately narrow approach, nothing in the statute so constrains the Commission. *See* Consumers Union, *et al.*'s Written *Ex Parte* Presentation, MB Docket No. 07-198 at 2 (September 25, 2008). To the contrary, Section 616 provides the Commission with broad regulatory powers. Thus, the Commission must look immediately to its broad powers under Section 616 to remedy the situation. *See* Notice of NAMAC, *et al.*'s Oral *Ex Parte* Presentations, MB Docket No. 07-42 (May 2, 2008).

### **III. VOLUNTARY INDUSTRY DISCLOSURE OF SUBSCRIBER DATA IS INADEQUATE AND MISLEADING.**

The Commission currently relies on commercially available and self-reported subscriber data to assess the current MVPD market. Commercially available and self-reported subscriber

data by market participants is inadequate and misleading for purposes of policymaking by the Commission. The 2008 Comments by industry participants provided little or no insight on subscribership for various MVPDs. Several of the larger MVPDs failed to provide any comments or data regarding subscribership. The Commission's continued reliance on insufficient and misleading data will continue to affect the policymaking of the Commission.

Consumers Union again urges the Commission to mandate now and for all future inquiries, MVPDs to disclose such information regarding subscribership and market penetration under penalty of perjury. The requirement of accurate subscriber information, with penalties for knowingly misrepresenting subscriber data, will allow for the Commission to better evaluate the current MVPD market. With better data, the Commission will have the necessary tools to adopt better rules and policy that will encourage competition and improve diversity of information in the market for the delivery of video programming. More specifically, without accurate data, the Commission will once again be unable to determine whether the Section 612(g) benchmark has been met. *See* Thirteenth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* 24 FCCRcd 542, 557-559 (2009).

Section 612(g) states "at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources." 47 U.S.C. §532. The second prong of the 70/70 threshold of section 612(g) – 70 percent of U.S. households subscribed – has been difficult to quantify. If the Commission determines that the 70/70 threshold of section 612(g) has been reached, the plain language of the statute clearly provides the Commission with broad authority to promulgate any regulations that would enhance

consumers' cable experience and ensure that consumers have access to a diversity of information sources. Consequently, since the 70/70 benchmark expands the regulatory scope of the Commission, it provides market participants systematic incentives to under-report penetration. In addition, whether this threshold has been met is especially relevant since the 2008 Comments highlighted continued problems with program access and program carriage. Thus, Consumers Union continues to urge the Commission to require cable operators to submit certified, accurate, and current subscriber information, subject to scrutiny and verification by both the Commission staff and third parties. Otherwise, the Commission will continue to rely on inadequate information in assessing the status of competition in the MVPD market.

#### **IV. CONCLUSION**

It is imperative the Commission begin mandating now and for all future inquiries, under penalty of perjury, disclosure of data regarding availability and subscribership. The Commission should acknowledge that the current practice of collecting information frustrates competition in the marketplace. Further, the current practices of both the Commission and industry participants continue to constrain Congress' purpose of promoting a diverse marketplace of voices. However, since it currently has the authority to do so, the Commission should immediately take action to address program access and program carriage issues.

Respectfully submitted,

/s/

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July 29, 2009