

October 10, 2012

*VIA ELECTRONIC FILING*

The Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry  
MB Docket No. 12-203

Dear Madam Secretary:

The undersigned content interests (collectively, the "Content Interests"), hereby jointly respond to comments in the above-referenced proceeding.<sup>1</sup> Each of the Content Interests: (1) is an industry leader in the creation and packaging of high-quality video programming; (2) invests in innovative and compelling content; and (3) is actively engaged in the development of digital products and services for multiple platforms. Each also agrees with the National Cable and Telecommunications Association ("NCTA") that the current video programming marketplace is competitive and vibrant, with consumers able to choose among more content and delivery options.<sup>2</sup> Accordingly, the Content Interests urge the Commission to broadly focus this inquiry on the dynamic and evolving nature of today's video marketplace, not attempts to raise specific proposals or matters that have been squarely addressed in other proceedings.

In the NOI, the Commission sought data, information, and comment regarding the current state of the video programming marketplace. However, a few comments instead encourage the Commission to revise FCC procedures or to consider substantive changes with respect to certain programming-related issues. Among other matters, these comments argue for broader program access or carriage requirements,<sup>3</sup> seek a regulatory mandate that multichannel video programming distributors ("MVPDs") must make program networks available to consumers on an "a la carte" basis,<sup>4</sup> or claim concerns with the cost of particular programming,<sup>5</sup> even while

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<sup>1</sup> *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 12-203, 27 FCC Rcd 8581 (released July 20, 2012) (the "NOI").

<sup>2</sup> See Comments of National Cable and Telecommunications Association, MB Docket No. 12-203, at 1-2 (submitted Sept. 10, 2012) ("NCTA Comments").

<sup>3</sup> See, e.g., Comments of Cox Communications, Inc., MB Docket No. 12-203, at 2-3 (submitted Sept. 10, 2012) ("Cox Comments") (urging "hard look" at "anticompetitive volume discounts" and programmer pricing practices under Section 628 of the Communications Act of 1934, as amended (the "Act")); Comments of Public Knowledge, MB Docket No. 12-203, at 14 (submitted Sept. 10, 2012) ("PK Comments"); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association, MB Docket No. 12-203, at 7-8 (submitted Sept. 10, 2012) ("OPASTCO Comments"); Comments of Writers Guild of America, West, Inc., MB Docket No. 12-203, at 14 (submitted Sept. 10, 2012) ("WGAW Comments").

<sup>4</sup> See WGAW Comments at 16-17.

acknowledging, at least in one instance, that the Commission “is not broadly authorized to regulate the rates programmers charge.”<sup>6</sup> Another comment advocates for reinstatement of primetime program quota requirements,<sup>7</sup> which were terminated after comprehensive proceedings more than 15 years ago. This focus on the past and reliance on regulatory intervention in the marketplace belies the innovations currently underway that are greatly enhancing how consumers experience and interact with video content.

The video programming marketplace today is the most dynamic it has ever been, affording consumers with an unprecedented and growing array of options for accessing and experiencing video content.<sup>8</sup> Content creators and programmers help to drive this growth through investment in high-quality content and innovative new ways to access it. A key element enabling this investment and innovation is the flexibility of the content industry to enter into distribution agreements that address challenges that emerge in today’s dynamic environment. It is for this reason that in recent proceedings multiple comments<sup>9</sup> demonstrated that the Commission must avoid any suggestion or implication that may restrain or otherwise impact the ability of programming vendors to package or otherwise structure their distribution agreements.<sup>10</sup> These submissions reinforce past filings explaining why these decisions by programmers not only lead to reduced costs and expanded consumer access to programming, but also are protected by statutory and constitutional considerations.<sup>11</sup> They further detailed why additional regulations

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<sup>5</sup> See Cox Comments at 2-3; Comments of AT&T Inc., MB Docket No. 12-203, at 2-3 (submitted Sept. 10, 2012) (“AT&T Comments”); OPASTCO Comments at 6-10.

<sup>6</sup> Cox Comments at 3. In its recent decision to sunset the ban on cable-affiliated exclusive programming deals, the Commission acknowledged these statutory limitations in citing findings by the DC Circuit that the program access rules are not underinclusive in so far as they are focused on vertically integrated cable operators. See *Revision of the Commission’s Program Access Rules, et al.*, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, MB Dockets No. 12-68, 07-18, 05-192, and 07-29 at n.278 (released Oct. 5, 2012).

<sup>7</sup> See WGAW Comments at 13 (urging that broadcast networks must air “independent” programming during at least 25 percent of primetime).

<sup>8</sup> See Comments of Time Warner Inc., *Video Device Competition Implementation of Section 304 of Telecommunications Act of 1996, et al.*, MB Docket No. 10-91, at 2-6 (submitted July 13, 2010).

<sup>9</sup> See *Revision of the Commission’s Program Access Rules, et al.*, Notice of Proposed Rulemaking, MB Dockets No. 12-68, 07-18, and 05-192, 27 FCC Rcd 3413 (2012); *Revision of the Commission’s Program Carriage Rules*, Notice of Proposed Rulemaking, MB Docket No. 11-131, 26 FCC Rcd 11494 (2011). This latter rulemaking was issued simultaneously with a 2011 Report and Order on other issues relating to program carriage complaints

<sup>10</sup> Joint Letter from CBS Corporation, Fox Entertainment Group, NBCUniversal, Time Warner Inc., The Walt Disney Company Inc. & Viacom Inc., MB Docket No. 11-131, at 2-3 (submitted January 11, 2012) (“Program Carriage Reply”); see Comments of National Cable and Telecommunications Association, MB Docket No. 11-131, at 2, 7-8, 11-12 (submitted Nov. 28, 2011).

<sup>11</sup> See, e.g., Comments of Time Warner Inc., *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, at 6-12 & 19-22 (submitted Jan. 4, 2008) (explaining that, among other matters, packaging may increase programming available to the public, is outside Commission authority in the program-access context, is fundamentally different from tying as understood in antitrust context, and is protected by First Amendment considerations); Comments of The Walt Disney Company, MB Docket No. 07-198, at 9-42 & 72-83 (submitted Jan. 4, 2008) (addressing similar issues, including limits on Commission statutory or ancillary authority on pages 9-20, the public interest benefits of packaging on pages 21-42, with attached study relating to same, and First Amendment considerations on pages 72-83); Comments of Fox Entertainment

or expansion of current Commission policies, including to programmers that are not vertically integrated, risk significant adverse impacts on today's competitive and innovative video marketplace.<sup>12</sup> In a similar vein, attempts to reinstitute legacy regulations such as independent programming quotas<sup>13</sup> would only disrupt the transformative marketplace changes underway and impede content creators and programmers in their efforts to provide consumers with rich and innovative ways to experience high-quality video content.

In sum, the Commission should focus its next video competition report on the vibrant nature of the current marketplace, and how quickly it continues to evolve. Comments in this docket have adduced significant evidence relating to the extensive competition in, and the evolving nature of, the video marketplace. Consistent with this evidence, the Commission should acknowledge these dynamic conditions and generally refrain from any premature recommendations or conclusions that may skew the continued development of innovative content and technologies becoming available to consumers.

Respectfully submitted,

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Group, Inc., and Fox Television Holdings, Inc., MB Docket No. 07-198, at 21-25 (submitted Jan. 4, 2008); Comments of Viacom Inc., MB Docket No. 07-198, at 9-15 (submitted Jan. 4, 2008). Many of these comments also refer to earlier filings and studies that offer similar evidence and conclusions.

<sup>12</sup> See, e.g., Content Companies, *Ex Parte* Communication, MB Docket No. 12-68, at 1-2 (submitted Aug. 23, 2012) (explaining proper scope of program-access discovery); Reply Comments of The Walt Disney Company, Viacom Inc., News Corporation, Time Warner Inc., and CBS Corporation, MB Docket No. 12-68, at 2-5 (submitted July 23, 2012) (showing why FCC should not expand program access to restrict practices that reduce costs and expand consumer access to programming or encompass non-vertically integrated programmers in light of policy, statutory and constitutional considerations); Reply Comments of Time Warner, Inc., *Revision of the Commission's Program Access Rules, et al.*, MB Docket No. 12-68, at 2-7 (submitted July 23, 2012). See also Reply Comments of Motion Picture Association of America, Inc., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, MB Docket No. 07-269, at 1-3 (submitted Aug. 28, 2009).

<sup>13</sup> The concerns that at one time were used to justify these complex and burdensome requirements disappeared more than a decade ago amid the abundance of content and delivery options then available. These options have continued to rapidly grow, as discussed *supra* and demonstrated by materials submitted in other, more recent Commission dockets. See, e.g., Reply Comments of CBS Corporation, Fox Entertainment Group Inc. and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., and the Walt Disney Company, *2006 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, MB Docket No. 06-121, at 2-11 (submitted Jan. 16, 2007) (explaining, with attached study, why such proposals make "even less sense now than they did when the original regulations were struck down").

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