Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promoting the Availability of Diverse and	)	MB Docket No. 16-41
Independent Sources of Video Programming	)	

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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I. Introduction

Public Knowledge submits these Reply Comments in response to the Federal Communications Commission ("FCC" or "Commission") September 29, 2016 *Notice of Proposed Rulemaking*[1] regarding the use of unconditional most favored nation (MFN) clauses and unreasonable alternative distribution method (ADM) provisions in program carriage contracts. The Commission adopted this NPRM in an effort to provide relief for independent programmers harmed by anti-competitive contractual provisions. To be clear, the Commission has ample legal authority under Sections 616 and 628 of the Communications Act to promulgate rules prohibiting the use of harmful contractual clauses such as unconditional MFNs and unreasonable ADMs in program carriage agreements. Further, the Commission's proposed rules are not in violation of the First Amendment as they are content-neutral rules that promote competition. Indeed, the goal of this proceeding is to encourage a diversity of voices in the video marketplace.

It is evident from the robust record of comments from independent programmers and small multichannel video programming distributors (MVPDs) that imbalances in bargaining power lead to market conditions that prevent independent programmers from gaining carriage or doing so with unfavorable contract terms. The use of unconditional MFNs and unreasonable ADMs is one form of monopsony power some MVPDs can impose on independent programmers, and the record makes clear that these provisions present a number of harmful anti-competitive effects. Independent programmers discussed how these contractual provisions impede their ability to generate new audiences, engage in new business practices, and ultimately compete with larger programmers. Small multichannel video programming distributors

[1] *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, 31 FCC Rcd 11352 (2016) ("NPRM").

(MVPDs) also explained that MFNs and ADMs can prevent them from carrying independent programmers and competing with larger MVPDs. Prohibiting unconditional MFNs and unreasonable ADMs has also garnered support from Members of Congress as Senator McCaskill has spoken out against the use of anti-competitive clauses in program carriage contracts.[2] Overall, the Commission has established a clear record expressing support for prohibiting unconditional MFNs and unreasonable ADMs.

II. The Commission has the Legal Authority Under Section 616 and 628 to Adopt the Proposed Rules.

To prohibit the use of unreasonable ADMs and unconditional MFNs, the Commission can rely on several statutes. Section 616 grants the Commission broad authority to regulate program carriage agreements between MVPDs and programming vendors.[3] Further, this authority is not limited to the specific practices described in Section 616(a)(1)-(6).[4] The Commission could also rely on Section 616(a)(3) as a basis for restricting anticompetitive practices, as applied to vertically integrated MVPDs.[5] Lastly, if the Commission accepts the argument that diversity in programming provided by OVDs should be considered as part of the current state of the marketplace, Section 628 would also provide legal authority to prohibit unreasonable ADMs and unconditional MFNs.

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[2] Claire McCaskill, United States Senate, Letter to Ajit Pai, Federal Communications Commission (Feb. 6, 2017), http://www.hsgac.senate.gov/download/mccaskill-letter-to-fcc-chairman-pai ("McCaskill Letter").

[3] 47 U.S.C. § 536.

[4] *In the Matter of Revision of the Commission's Program Access Rules et. al*, 26 FCC Rcd at 11536, para. 65 (March 2012)("Program Carriage NPRM").

[5] 47 U.S.C. 536(a)(3) directs the Commission to adopt regulations to "prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."

A. Commission precedent clearly states that the Commission's authority to promulgate rules under Section 616 is not limited to those enumerated in Section 616(a)(1)-(6).

Some commenters argue that Section 616 does not convey regulatory powers beyond those enumerated in Section 616(a)(1)-(6).[6] Yet, this question has been answered definitively by the Commission, finding that the grant of authority under Section 616 is not limited by subsection (a)(1)-(6).[7] Specifically, the Commission determined that "[section 616] does not preclude the Commission from adopting additional requirements beyond the six listed in the statute."[8] Contrary to any interpretation limiting the Commission's authority, Section 616 contains broad language directing the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors."[9]

As the Commission has acknowledged, the introductory language in Section 616(a) conveys authority to "establish regulations governing program carriage agreements and related practices between cable operators and multichannel video programming distributors and video programming vendors."[10] In enacting Section 616, Congress recognized the potential harms MVPDs could inflict on video marketplace by extracting concessions from programmers.[11] Congress empowered the Commission to curb MVPD practices that "discourage entry of new programming services, restrict competition, *impact adversely on diversity*, and have other undesirable effects on programming quality and viewer satisfaction."[12] The record clearly demonstrates that the pervasive use of ADMs and MFNs in carriage agreements between parties

[6] *See e.g.* Comments of Comcast, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 26 (Jan. 26, 2017) ("Comcast Comments")
[7] Program Carriage NPRM, 26 FCC Rcd at 11536, para. 65.
[8] *Id.*
[9] 47 U.S.C. § 536.
[10] *See generally* 47 U.S.C. § 536; NPRM, 31 FCC Rcd at 11352, ¶ 36.
[11] H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 27 (1992) (House Report).
[12] *Id*. at 42-43 (emphasis added).

with unbalanced negotiating leverage have a negative impact on diversity in the video marketplace.[13] Thus, Section 616(a) gives the Commission the requisite authority to promote diversity by prohibiting the use of unreasonable ADMs and unconditional MFNs, when they are anticompetitive and unreasonable.

B. Section 616(a)(3) also provides a basis for restricting anticompetitive MFN and ADM provisions.

Section 616(a)(3) requires the Commission to adopt rules that "prevent [an MVPD] from engaging in conduct" that restrains the ability of an unaffiliated programmer to compete due to discrimination on the basis of affiliation or non affiliation of programmers "in the selection, *terms,*or conditions for carriage of video programming."[14] Vertically integrated MVPDs clearly pose the most threat to the video marketplace. The main concerns surrounding vertical mergers are that the vertically integrated firm may have the incentive to disadvantage rivals, and therefore harm consumers and competition.[15] The Commission has acknowledged the incentive vertically merged firms have to compete in anticompetitive behavior and the negative impact that would have on programming and consumers. Specifically, stating that a potential danger of the Comcast-NBCU merger is that the merged entity "either temporarily or permanently, will block Comcast's video distribution rivals from access to the video programming content the [joint venture] would come to control or raise programming costs to its video distribution rivals. These exclusionary strategies could raise distribution competitors' costs or diminish the quality of the content available to them."[16]

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[13] *See supra* III. B.
[14] 47 U.S.C. § 536(a)(3) (emphasis added).
[15] *See* Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: A Post-Chicago Approach, 63 ANTITRUST L.J. 513 (1995);
[16] *See Applications for Consent to the Transfer of Control of Licenses, General Electric Co., Transferor, to Comcast Corp., Transferee,* Memorandum Opinion and Order, 26 FCC Rcd 4238, 4250-51, ¶ 29 ("Comcast-NBCU Order").

Adopting rules that would prohibit vertically integrated MVPDs from including unreasonable ADMs and unconditional MFNs in contracts with independent programmers would provide significant relief to independent programmers, because vertically integrated MVPDs certainly have more leverage in negotiations than any non integrated programmer. However, narrowing the rules, would still leave smaller programmers without relief when contracting with larger MVPDs that are not vertically integrated. Thus, the Commission can clearly prohibit this practice as it relates to vertically integrated MVPDs and independent programmers under Section 616(a)(3), but such a rule would be necessarily under-inclusive.

C. Given that MFNs and ADMs limit access to independent programming by smaller MVPDs, Section 628 also grants the Commission authority to promulgate the proposed rules.

When large MVPDs harm independent programmers, it becomes harder for other, often smaller MVPDs to carry independent programming. Unconditional MFNs and unreasonable ADMs could result in less independent programming and programming of lower quality. Programmers who are at the mercy of large MVPDs, and who cannot distribute online, might have to charge more to small MVPDs in order to profit. Thus the use of unreasonable ADM and unconditional MFNs "hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[17] And fall squarely within the statute.

Section 628 grants the FCC "broad and sweeping" powers to promote video competition.[18] Congress wanted to ensure that cable operators did not engage in anticompetitive behavior that would ultimately harm the availability of programming to consumers. This is the effect ADMs and MFNs have on the marketplace. ADMs explicitly prevent independent

[17] 47 U.S.C. §548.
[18] *Nat. Cable & Telecommunications Assoc. v. FCC*, 567 F. 3d 659, 664 (DC Cir. 2009).

programmers without sufficient leverage from reaching their customers, while unconditional MFNs do so constructively. Therefore, the Commission could use Section 628 to prohibit these anticompetitive contract terms.

III. A Majority of Comments Show That the True Harm to Independent Programmers are the Result of Unbalanced Negotiations.

The record indicates that imbalances in bargaining power lead to market conditions that prevent independent programmers from gaining carriage or doing so with unfavorable contract terms. Several commenters pointed out how both MVPDs and large programmers can exert market power that ultimately harms independent programmers. The use of unconditional MFNs and unreasonable ADMs is one form of monopsony power some MVPDs can impose on independent programmers, and the record makes clear that these provisions present a number of harmful anti-competitive effects. Therefore, in providing relief, the Commission should consider a flexible definition of independent programmer not just to to combat unconditional MFNs and unreasonable ADMs but also to mitigate imbalances in bargaining power.

A. MVPDs Can Exert Monopsony Power Over Independent Programmers and Large Programmers Can Use Their Leverage To Harm Independent Programmers.

As Public Knowledge states in its comments, MVPDs can exert monopsony power over independent programmers in a variety of ways that prevent them from gaining carriage or doing so with unfavorable terms.[19] Independent programmers stress in their comments how large MVPDs can use their monopsony power to act as distribution gatekeepers, harming independent programmers. FUSE Media discusses how the significant distribution rates of large MVPDs can force independent programmers to "make anti-competitive concessions or, if unheeded, face

[19] *See* Comments of Public Knowledge, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 4-7 (Jan. 27, 2017) ("Public Knowledge Comments"); *see also* McCaskill letter at 8 (explaining that "the cable industry is both concentrated with respect to distribution, and with respect to development of programming.").

losing potential (or actual) distribution and significant risk to … financial viability."[20] In program carriage negotiations, beIN Sports argues that the mere threat of removing "beIN's service gives the distributor significant leverage, regardless of proven consumer demand for beIN's programming."[21]

MVPDs can also use their monopsony power to impose anti-competitive channel placement practices such as tiering to place independent programmers on less desirable channel tiers. As FUSE Media states, non-independent networks are in more popular programming tiers, which puts its programming "at a competitive disadvantage and depriving a major market segment of the benefits of differentiated content and true competition."[22] Tiering becomes even more harmful when MVPDs place their own programming on favorable distribution lineups at the expense of independent programmers.[23] In addition tiering, MVPDs can utilize monopsony power in other ways such as obtaining volume discounts on programming, creating channel neighborhoods that exclude independent programmers, and limiting distribution opportunities through set-top boxes they exclusively control.[24]

Large programmers can also use their leverage in negotiations with MVPDs to harm independent programmers. Bundling practices are a key negotiating tool large programmers use to force MVPDs to carry undesirable programming. Several commenters including small MVPDs and independent programmers urged the Commission to address the bundling practices of large programmers.[25] The Rural Broadband Association states that nearly all of its members

[20] Comments of FUSE Media, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 3 (Jan. 26, 2017) ("FUSE Media Comments").
[21] Comments of beIN Sports, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 6 (Jan. 26, 2017) ("beIN Sports Comments").
[22] FUSE Media Comments at 4.
[23] *See* beIN Sports Comments at 8.
[24] *See* Public Knowledge Comments at 6-7.
[25] Comments of NTCA, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 3-5 (Jan. 26, 2017) ("NTCA Comments); Comments of ITTA, *Promoting the Availability of*

"report that major content providers require them to take content they would not otherwise offer for the right to carry 'must have' content."[26] Similarly, the American Cable Association reiterates that its member companies are forced to carry a minimum of 65 networks if they opt into the NCTC deal.[27] As a result, small and midsize cable companies are forced to devote much of their capacity to carrying undesired networks at the expense of independent networks.[28] Ultimately, bundling limits the ability of independent programmers to gain carriage or do so with unfavorable terms as MVPDs are forced to cater to the demands of large programmers.[29] As abusive as bundling practices can be, large programmers have other negotiating tools at their disposal to exert leverage such as retransmission consent and programming blackouts.[30] Indeed, Univision's stations went dark earlier this month on Charter Spectrum Cable Systems as a result of a program carriage dispute.[31] The ability to blackout programming, affecting millions of consumers, is another bargaining chip not afforded to independent programmers.

As several commenters point out abuses in market power by both large MVPDs and large programmers, it is evident that the harm to independent programmers is not caused by the presence of unconditional MFNs or unreasonable ADMs per se, but by any contract terms or practices that are the result of exerting leverage in an unbalanced negotiation.

Diverse and Independent Sources of Video Programming, MB Docket No. 16-41 at 3-7 (Jan. 26, 2017) ("ITTA Comments"); Joint Comments of The American Cable Association, MAVTV Motorsports Network, One America News Network and AWE, and Ride TV, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 2-10 (Jan. 26, 2017) ("ACA et al Comments"); beIn Sports Comments at 9-11; FUSE Media Comments at 4-6; Comments of RFD-TV, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 12-14 (Jan. 26, 2017) ("RFD-TV Comments"); *see also* McCaskill Letter at 11.

[26] NTCA Comments at 4.

[27] ACA et al Comments at 3.

[28] ITTA Comments at 5.

[29] FUSE Media Comments at 5; beIN Sports Comments at 10.

[30] Public Knowledge Comments at 8-9.

[31] Veronica Villafañe, Fee Dispute Escalates To Univision Blackout On Charter, Forbes (Feb. 1, 2017), *available at* http://www.forbes.com/sites/veronicavillafane/2017/02/01/fee-dispute-escalates-to-univision-blackout-on-charter/#393491e21337.

B. The Record Shows Unconditional MFNs and Unreasonable ADMs Can Harm Independent Programmers.

Several commenters specifically discussed the use of unconditional MFNs by MVPDs as a form of monopsony power that harms independent programmers. The Rural Broadband Association states that 35 percent of its members "report they have been directly told by content providers that a MFN clause with another operator prevented the content provider from offering the small MVPD a better price."[32] beIN Sports discusses how MFNs have curtailed its ability to enter into innovative business arrangements and gain carriage on traditional MVPD platforms.[33] FUSE Media explains how unconditional MFNs have prohibited it from gaining distribution on over the top platforms.[34] Independent programmers are unable to offer emerging video distribution platforms the best rates and terms if they are forced to offer those same rates and terms to MFN-holding MVPDs who do not have to provide any benefit in exchange.[35] As a result, an MVPD can prevent an independent programmer from entering into an agreement with another MVPD that would have offered a better carriage deal for a lower rate.[36] This situation not only creates a no-win scenario for independent programmers but also highlights how unconditional MFNs can result in imbalances in negotiating leverage.

The record also indicates how unreasonable ADMs prevent independent programmers from providing programming to over the top distributors, which limits their carriage opportunities and prevents the market from evolving to new distribution platforms.[37] beIn Sports and FUSE Media discuss the types of unreasonable ADMs they face include restrictions on the

[32] NTCA Comments at 7.
[33] beIN Sports Comments at 12-13.
[34] Fuse Media Comments at 6.
[35] *Id*. at 13.
[36] *See* McCaskill letter at 6-7 (explaining how MVPDs have used MFNs and affiliation agreements to exclude potential rivals in the past).
[37] *See id*. at 14 (discussing how many carriage agreements include ADM provisions that explicitly limit the ability of programmers to provide content to online distributors).

number of hours or types of content they can offer online.[38] These restrictions work to reduce the demand and interest in independent programmers' content online even as they continue to face carriage challenges on traditional distribution platforms. As Cinémoi points out, ADMs "prevent independent programmers from leveraging OTT, the one universal distribution platform available to them, while they work to secure carriage on linear platforms required for survival."[39]

While the record demonstrates unconditional MFNs and unreasonable ADMs can be harmful to independent programmers, not all of these contractual provisions are inherently harmful. There are many legitimate business reasons to include MFNs in a contract between programmers and MVPDs. Nevertheless, MFNs and ADMs that exist solely because of market power of distributors are harmful. As discussed, these provisions illustrate that the true harm to independent programmers is the result of unbalanced negotiations.

C. A Flexible Definition to Target Undesirable Negotiating Practices is the Best Path To Mitigate Unbalanced Negotiations.

In the NPRM, the Commission posed many questions in asking commenters to define an independent programmer in a manner that would give relief to the programmers that need it most.[40] Consequently, commenters gave varied responses to how best to define an independent programmer. Several commenters support ITTA's proposal to define an independent programmer as as a video programming vendor that is not affiliated with a broadcast network, movie studio, or MVPD.[41] However, some commenters offer modifications to ITTA's proposed definition[42] while others suggest the FCC include or exclude specific groups.[43] Further,

[38] beIn Sports Comments at 14; FUSE Media Comments at 8.
[39] Comments of Cinémoi, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 6 (Jan. 26, 2017) ("Cinémoi Comments").
[40] NPRM, 31 FCC Rcd at 11360-62 ¶¶ 15-17 (2016).
[41] *Id*. at 11362 ¶ 17; ITTA Comments at 4; beIn Sports Comments at 15; FUSE Media Comments at 9;
[42] Comments of New Tang Dynasty, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 2 (Jan. 26, 2017) ("New Tang Dynasty Comments")

ReelzChannel and INSP propose their own unique frameworks[44] for defining an independent programmer while CBS and other large programmers call for the Commission to maintain its historical definition.[45] The varied responses suggest that there will inevitably be some programmers who need relief that would be left out of any definition the Commission would adopt while simultaneously protecting some programmers who do not. Thus, the Commission should adopt a flexible definition that does not single out one type of independent programmer but rather a class of programmers that face imbalances in negotiating leverage from both large MVPDs and large programmers.

IV. The First Amendment is not Implicated by the Commission's Proposed Rules.

The proposed rules do not violate the First Amendment for the same reason that previously-challenged cable rules do not: they are content-neutral rules that promote competition. Comcast argues that the Commission's proposed rules run afoul of the First Amendment because they are designed to favor independent programming "at the expense of other categories of programming."[46] This description of the proposed rules is not accurate. The rules as proposed will foster competition in the video marketplace, but will not do so at the expense of other programmers. In fact, the converse it true. Promoting diversity in the marketplace benefits consumers and programmers alike. Opening up the marketplace to more diverse voices, leading to more competition, is beneficial for everyone. Success in the video marketplace is not a zero sum game.

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[43] Cinémoi Comments at 2 (encouraging the FCC to recognize women in its definition); New Tang Dynasty Television Comments at 2 (proposing that the FCC's definition have no direct or indirect affiliation with a U.S. or foreign government body).
[44] Reelz Channel Comments at 2-4; Comments of INSP, LLC, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 4 (Jan. 26, 2017) ("INSP Comments").
[45] Comments of CBS Corporation, The Walt Disney Company, TIme Warner Inc., 21st Century Fox, Inc. and Viacom Inc., Viacom Inc., *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 at 7 (Jan. 26, 2017) ("CBS et al Comments").
[46] Comcast Comments at 35-37.

Further, the record demonstrates that the incentive behind restricting the use of unconditional MFNs and unreasonable ADMs is to promote competition in the video marketplace, not to disfavor certain messages or ideas. "Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech."[47] Therefore, because the restrictions are justified by their impact on the video marketplace, they are content neutral for the purposes of First Amendment analysis, and subject to intermediate scrutiny.[48]

To pass intermediate scrutiny, the regulations must "advance[] important governmental interests unrelated to the suppression of free speech and do[] not burden substantially more speech than necessary to further those interests."[49] Increased competition in the video marketplace is an important government interest, and the pointed restriction on the use of unreasonable ADMs and unconditional MFNs is undoubtedly narrowly tailored to address that important interest. The Commission made a concerted effort to first identify the most harmful practices by carefully considering comments and reply comments filed in response to the *NOI*, and only then did the Commission propose to prohibit those practices.[50] Given that these contract terms limit independent programmers ability to enter the market, closely examining and prohibiting the use of these contract terms is entirely reasonable and well within the Commission's authority.

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[47] *BellSouth Corp. v. FCC,* 144 F.3d 58, 69 (D.C.Cir.1998)(quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

[48] *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 717-18 (D.C. Cir. 2011) ("*Cablevision*") (Finding that although restrictions may be content based in a formal sense, when the decision is based on economic characteristics, and not on its communicative impact, the restrictions are content neutral, subject to intermediate scrutiny.) (citing *BellSouth Corp.*,144 F.3d 58, 69.).

[49] *See Time Warner Entm't Co., L.P.*, 240 F.3d at 1130 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180,180 (1997)("*Turner II*")).

[50] *See supra* III. B (discussing in detail the evidence in the record that ADMs and MFNs are particularly harmful).

V. Conclusion

The record clearly shows that unreasonable ADMs and unconditional MFNs harm independent programmers. There are several statutes that give the Commission legal authority to provide relief to programmers who cannot breakthrough the bottleneck created by large MVPDs to reach their target audiences. More competition and more diverse voices will benefit consumers, programmers, and the video marketplace writ large. Given the voluminous evidence on the record documenting the harms caused by the misuse of MFNs and ADMs[51], the Commission should act swiftly to prohibit them when they prevent independent, diverse programmers from reaching their target audience.

[51] *See supra* III. A (noting that MFNs and ADMs are particularly harmful when they are the result of imbalances in negotiating power.).