

**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

John Bergmayer
Dallas Harris

PUBLIC KNOWLEDGE
1818 N St. NW
Suite 410
Washington, DC 20036
dharris@publicknowledge.org

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I. Introduction

The Commission has opened this proceeding in an attempt to gather evidence about marketplace dysfunctions, anticompetitive practices, and imbalances in negotiating leverage that can prevent the evolution of the video marketplace in pro-consumer and pro-creator ways. In this, it has succeeded. Programmers of all stripes have explained the Commission how they are being inhibited from engaging in new business practices or are harmed in ways that affect their ability to create the programming viewers demand. Evidence for this continues to come in even outside the Commission's record—shortly after comments were filed in this proceeding, for instance, Liberman Broadcasting filed a complaint against Comcast alleging discrimination over the carriage of its Spanish-language programming.¹ To be sure, the record has also identified other factors. Not all programmers are alike, nor are all MVPDs, and bargaining disparities can have many effects. Nevertheless, the Commission has established a clear record that supports changes to its rules or other policies that could benefit viewers by ensuring that programmers are not unnecessarily inhibited by major incumbent MVPDs.

¹ Liberman Broadcasting, Inc. and LBI Media, Inc. vs. Comcast Corporation and Comcast Cable Communications, LLC, Program Carriage Complaint, File No. CSR ____ (filed April 8, 2016); Press Release, Complaint Against Comcast by Spanish-Language Program Network Highlights Video Market Problems, *available at* <https://www.publicknowledge.org/press-release/complaint-against-comcast-by-spanish-language-program-network-highlights-video-market-problems> (rel. April 8, 2016).

II. There is a Substantial Record Showing that the Use of MFN and ADMs Inhibits the Distribution of Independent Programmers.

A. The Use of MFNs and ADMs is Ubiquitous

Many independent programmers commented in this proceeding on the frequent use of MFN's and ADMs by MVPDs.² Independent programmer, beIN Sports LLC, states quite explicitly that "its efforts to grow and serve its historically underserved audience are *frequently hampered* by contractual restrictions in the form of contractual most favored nations clauses."³ From the perspective of an independent programmer, "virtually all distribution agreement between MVPDs and program networks include complex, labyrinth MFNs."⁴ MFNs are pervasive and routinely imposed on independent programmers resulting in higher prices for consumers and less diversity in the market.⁵

The record indicates that MVPDs not only use these provisions frequently but are increasingly using the strictest form of MFNs, called "unconditional MFNs."⁶ These provisions require that a programmer turn over new rights or grant new concessions to distributors on matters that were never even part of the initial bargain. An MFN of this kind is more likely to be anticompetitive in that it grants a distributor with market power more than it bargained for.

"Under the terms of an unconditional MFN, the distributor is entitled to receive whatever special

² See Comments of beIN Sports LLC, In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41 (March 30, 2016) ("beIn Sports Comments"); Comments of Hispanic Information and Telecommunications Network, Inc., In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41 (March 30, 2016) ("HITN Comments"); Comments of INSP, LLC., In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41 (March 30, 2016) ("INSP Comments").

³ beIN Sports Comments at 1.

⁴ INSP Comments at 16.

⁵ *Id.* at 2-3.

⁶ Comments of The Blaze, In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41 (March 30, 2016) ("The Blaze Comments"); Comments of Univision Communications Inc., In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41 (March 30, 2016) ("Univision Comments").

consideration or superior term that another distributor receives in a later deal without having to give the video programmer consideration equivalent to that which secured the superior term in the later deal.”⁷ Hence, independent programmers, who are especially impacted by the use of MFNs, are being further pressured through the ubiquitous use of unconditional MFNs.

In addition many programmers commented on the common use of ADMs in carriage contracts with MVPDs.⁸ The Hispanic Information and Telecommunications Network, Inc. noted the pervasive use of ADMs in MVPD carriage contracts, stating that they “are *routinely* included by cable MVPDs in carriage contracts with independent programming providers.”⁹ Programmers uniformly mention the common use of ADMs, not to simply describe the market place, but discuss it in terms of what types of MVPD behavior limits their ability to provide diverse programming.¹⁰ This Notice of Inquiry has made it clear MVPDs are increasingly using both MFNs and ADMs in their contracts with programmers and that these contract provisions have negative consequences on the diversity of programming in the video marketplace.

B. Independent Programmers Have Shown How MFNs and ADMs Adversely Affect Their Ability to Compete in the Marketplace.

As discussed above, the comments in this proceeding reveal that one way that MVPDs limit the ability of independent programmers to reach audiences is through the pervasive use of MFNs and ADMs. The Commission’s inquiry has also clarified the harms that these provisions result in for programmers, minority and independent programmers in particular because they

⁷ *Id.* at 4., *See also* Comments of Public Knowledge, In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, 21 (March 30, 2016) (“Public Knowledge Comments”).

⁸ HITN Comments at 4; The Blaze Comments at 5-6; Comments of Altitude Sports & Entertainment, Outdoor Channel, Sportsman Channel and World Fishing Network, In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, 11 (March 30, 2016) (“Altitude Sports & Entertainment et. al Comments”).

⁹ HITN Comments at 4 (emphasis added).

¹⁰ *See* Altitude Sports & Entertainment et. al Comments at 11.

lack the leverage to push back against unreasonable contract terms.¹¹ A non exhaustive list of the harms these provisions cause include:

- **Dis-incentivizing independent programmers from negotiating for favorable terms in subsequent contracts.** MFNs allow an MVPD to receive any superior term that another distributor receives. This results in programmers negotiating against themselves and a race to the bottom. The MVPD essentially gets the best terms in every contract. This leads to programmers effectively negotiating against itself. Programmers have no incentive to negotiate better terms because those terms will then be retroactively applied to the large MVPD, ultimately benefiting the distributor and not the programmer.¹²
- **Discouraging programmers from innovating in ways that benefit consumers.** MFNs also discourage programmers from innovating non-price terms.¹³ “MFNs would force it to offer that term to *all* of its other distributors, thus denying any of the network’s current or potential viewers the benefits of the innovative new terms.”¹⁴ Further, MFNs can lead to collusion and standardized terms between MVPDs creating an environment where independent programmers and consumers lose out on innovative, diverse offerings.¹⁵
- **Preventing programmers from providing programming to over the top distributors.**
The very nature of the ADM restricts a programmer’s ability to distribute their content over-the-top (OTT). While most ADMs are not infinite restrictions on OTT distribution, they content is sufficiently delayed to reduce the demand and interest in the content. This leads to

¹¹ See e.g. INSP Comments at 21; The Blaze Comments at 4.

¹² See The Blaze Comments at 4.

¹³ INSP Comments at 20.

¹⁴ *Id* (emphasis in original).

¹⁵ See *id* at 21.

a decreased chance of being distributed on the Internet even after the restriction imposed by the ADM is lifted.¹⁶

- **Reduces an independent programmer’s ability to advertise and promote its content.**

When ADMs restrict the ability of a programmer to place their content online, it becomes exponentially more difficult for the programmer to advertise and promote its content outside of the MVPD environment.¹⁷ The Internet is where programmers can share their content and build an audience, but without that ability, the programmers are further reliant on MVPDs for success in the market.

- **Increased legal and administrative costs to comply with these provisions.** The

complexity of these provisions result in prolonged contract negotiations and increased legal fees in complying with the provisions.¹⁸ “MFNs force independent programmers to continuously negotiate and renegotiate very term of every contract.”¹⁹ Independent programmers are weakened by the continuous legal battles, resulting in less and less bargaining power over time.

C. Public Knowledge’s Suggested Factors for Evaluating Contract Terms are Consistent With Problems Independent Programmers Identified in Their Comments.

In comments for this notice, Public Knowledge offered factors that the Commission could consider when determining whether MFNs and ADMs are anticompetitive.²⁰ The comments submitted demonstrate that those factors are in fact what independent programmers see as situations where these contract provisions are especially harmful. For example, Public

¹⁶ See HITN Comments at 5.

¹⁷ The Blaze Comments at 8.

¹⁸ See Altitude Sports and Entertainment et. al Comments at 4; The Blaze Comments at 4-5.

¹⁹ The Blaze Comments at 4.

²⁰ Public Knowledge Comments at 20.

Knowledge suggested that the Commission consider whether there is disparate bargaining power between the programmer and MVPD, and several programmers cited the lack of bargaining power as a reason why MFNs and ADMs are detrimental to their ability to distribute diversity programming.²¹

Making the market even more unfriendly for diverse programming, the most onerous of contract provisions are imposed on the programmers with the least bargaining power, and thus are unable to resist unfair MFNs.²² This reflects the suggestion that the Commission consider exactly who the restrictions effect.²³ Anytime the provisions are imposed on those with less bargaining power, the result is less competition and thus they are more likely to have an anticompetitive effect.

It was also suggested that the Commission consider the actual effect these provisions have on competition.²⁴ Programmers have clarified that these contracts provisions do have negative effects on competition in the video marketplace. As discussed above, MFNs discourage providers from independent programmers from offering better terms to select MVPDs, where circumstances might warrant them doing so.²⁵ Further programmers commented that MFNs and ADMs “limits the ability of independent programmers to provide their programming services to OTT distributors and other distributors using innovative technologies.”²⁶

²¹ The Blaze Comments at 4 (“the extent and severity of these clauses are generally conditional upon two major factors: the leverage of the programmer (or lack thereof) and the size of the MVPD.”); beIN Sports Comments at 1 (“as an independent programmer with limited business leverage, its efforts to grow and serve its historically underserved audience are frequently hampered by contractual restrictions in the form of contractual most favored nations clauses.”)

²² See INSP Comments at 16.

²³ Public Knowledge Comments at 22.

²⁴ Public Knowledge Comments at 21.

²⁵ INSP Comments at 20.

²⁶ See Altitude Sports & Entertainment et. al Comments at 11.

In addition, the Commission should consider contracts with unbargained-for benefits as especially anticompetitive. There is an abundance of support in the record that it is exactly those types of provisions that have the most anticompetitive effects on programmers. When MFNs are unconditional, MVPDs receive benefits without any consideration in return.²⁷ As Univision explained:

“The chilling effect of such broad, unconditional MFNs is obvious: during negotiation of any given deal, a programmer must examine each term of the deal individually to determine whether it is more favorable to a competing distributor than the comparable term is to the incumbent. If a term arguably is more favorable (and therefore would have to be offered to the incumbent under the MFN), the programmer must determine whether extending that term to the incumbent would be detrimental to its business. If it would be, then the MFN has effectively foreclosed the programmer’s ability to offer the term to the competing distributor.”²⁸

Clearly, the factors outlined by Public Knowledge as signs that contract provisions are anticompetitive, are consistent with characteristics outlined by independent programmers. The Commission should adopt these factors as guidelines to assess when certain contract provisions have an anticompetitive effect on the video marketplace.

III. Given the Realities of the Current Marketplace, Independent Programmers Agree That OTT Distributors are not a Sufficient Substitute for Carriage on Traditional MVPDs.

The control MVPDs exert over independent programmers would not have such an impact on the video market if independent programmers could succeed solely by distribute their content over-the-top. Programmers commented that the current state of the market place is such that OTT distributors “are merely additive to, but not a substitute for, linear distribution via MVPD systems, which remains *absolutely essential* for independent networks to survive, let alone

²⁷ The Blaze Comments at 5.

²⁸ Univision Comments at 10.

thrive.”²⁹ Not only do programmers need carriage by MVPDs to survive in the market place, they need to be carried by a majority of the large distributors.³⁰ This results in the substantial disparity in bargaining power between independent programmers and MVPDs.

The record shows that independent programmers, those who know the market place best, do not consider OTT as a replacement for traditional MVPD carriage. Until such a time where programmers are not reliant on MVPDs for success, the Commission should examine the behavior of MVPDs carefully due to their almost uniform control over the video marketplace. With such control, regulating contract provisions used to dictate the behavior of independent programmers, and in many cases the terms of their contracts with other MVPDs, are an important first step in opening up the video marketplace to diversity programming.

IV. Other Commenters Raise Important Issues but Agree that the Commission Should Continue Monitoring how MVPDs Limit the Ability of Independent Programmers to Succeed in the Video Marketplace.

Several commenters, including smaller MVPDs, have discussed the effect large programmers have on the availability of diverse programming. They point to the negative effects of forced bundling and penetration requirements as the driving force behind the lack of independent, diverse programming the video marketplace.³¹ The American Cable Association blatantly states “the forced bundling requirements imposed by large programmers present perhaps the biggest impediment to program diversity.” Similarly, commenters claim that the use

²⁹ INSP Comments at 2.

³⁰ See Altitude Sports & Entertainment et. al Comments at 5-6.

³¹ See e.g. Comments of the American Cable Association, In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, 13 (March 30, 2016) (“ACA Comments”); Comments of AT&T, In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, 15 (March 30, 2016) (“AT&T Comments”); Comments of ITTA, In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, 5,7 (March 30, 2016) (“ITTA Comments”); Comments of Verizon, In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, 4 (March 30, 2016) (“Verizon Comments”).

of minimum penetration standards by large programmers limits the capacity available for MVPDs to carry independent programming.³²

These commenters argue that forced bundling and penetration requirements result in increased programming costs and inhibit their ability to provide indecent programming by forcing them to carry programming that they neither their customers truly want.³³ While it is true that contractual provisions such as MFNs and ADMs are not the only factors that have led to the current unfriendly video marketplace, there is a clear record calling for Commission action to protect independent programmers from large MVPDs.³⁴ For example, the ACA, while blaming large programmers for the lack of diversity programming, also concedes that MFNs and ADMs can harm diversity.³⁵ Going forward, the Commission should examine all the ways marketplace imbalances can harm viewers and inhibit the evolution of the marketplace. However, the record supports the need for action on ADMs and MFNs in particular.

V. Conclusion

As demonstrated in the record, there is a clear issue with MFN and ADM contractual provisions when used anticompetitively, leaving independent and diverse programming largely absent from the video market. These provisions can and do have anticompetitive effects on the video marketplace. The Commission should look to the factors outlined by Public Knowledge and discussed by programmers to determine when these provisions are anticompetitive. There is support in the record for the Commission to act to free up the video marketplace and the

³² ITTA Comments at 7. ACA Comments at 26.

³³ AT&T Comments at 15.

³⁴ See Comments of National Association of Broadcasters, In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, 3 (March 30, 2016) (“NAB Comments”) (“Programmers do not have the market power to force MVPDs to accept terms like bundling or tier placement against their will, and regulating these terms will not enhance the diversity of programming.”).

³⁵ ACA Comments at 34-35 (“ACA Members have cited beIN Sports and the Hallmark Channel as independent programmers that they could not carry because of MFNs.”).

persistent use and anticompetitive effects of these provisions lead to the conclusion that examining the contracts between MVPDs and independent programmers is the best way to achieve that end.

Respectfully Submitted,

/s/ Dallas Harris
Policy Fellow

PUBLIC KNOWLEDGE
1818 N St. NW, Suite 410 Washington, D.C.
20036
(202) 861-0020

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