Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Fostering Independent and Diverse Sources of Video Programming	MB Docket No. 24-115

COMMENTS OF PUBLIC KNOWLEDGE

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I. Introduction

Public Knowledge (PK) submits these Comments in response to the Federal Communications Commission's ("FCC" or "Commission") April 17, 2024, Notice of Proposed Rulemaking[1] regarding the use of most favored nation (MFN) clauses and unreasonable alternative distribution method (ADM) provisions. As Public Knowledge first indicated in its January 27, 2017, comments in response to the Commission's September 29, 2016, Notice of Proposed Rulemaking ("2016 NPRM"), PK fully supports the Commission's efforts to provide relief to independent programmers in the video marketplace noting:

Increasing the diversity of viewpoints in the video marketplace, including programming intended for underrepresented audiences, is beneficial to both content creators and consumers.

It has become increasingly obvious that incumbent MVPDs hold back tomorrow's competition through economic coercion, forcing programmers to agree to limit who they sell to and how they sell it, in an effort to ensure they receive every advantage granted to other MVPDs while limiting new services' ability to compete with traditional pay TV head-on. Changes to the system would assist content creators to compete more fairly in the rapidly growing and evolving ADM marketplace, while providing flexibility to meet the different strategies being developed by MVPDs.

Viewers would be the ultimate beneficiaries of the Commission's proposed action. Ensuring that small and independent creators can reach viewers across different distribution methods will allow new voices, new kinds of programming, and new services to thrive. Enhancing competition and diversity in the video marketplace would allow underrepresented

[1] Fostering Independent and Diverse Sources of Video Programming, Notice of Proposed Rulemaking, MB Docket No. 24-115 (April 17, 2024).

communities to see themselves represented through programming created by new voices, while spurring incumbents to compete for those viewers.

Although program carriage contracts are generally confidential, there is enough in the public record to demonstrate that MVPDs are free to, and do, require that programmers distribute their programming online subject to restrictive conditions. Since the 2016 NPRM, MVPD-imposed blanket contractual prohibitions on OTT carriage have largely gone away. However, the use of ADM provisions with respect to online video remains an area of concern. MVPDs continue to restrict programmers from distributing programming online by making distribution subject to significantly limited windows. In addition, the use of MFN clauses in programming contracts can also harm consumers and programmers. These clauses state that an MVPD who is able to demand such a provision automatically benefits from terms another distributor is able to secure—terms that might not only relate to programming costs but business models. MFNs can be used to simply assure that a particular MVPD gets the best possible deal in terms of the price paid for programming on a per-subscriber basis. Most troubling are MFNs that keep the marketplace from evolving by preventing programmers from offering video in new ways and through new services, or that have the same practical effect as ADMs and keep programming from online platforms entirely.

Because of these kinds of terms, a programmer might not be able to give a special break to a new entrant in order to promote competition, or to grant an online provider on-demand access to programs, without also granting these rights to an incumbent cable company. As an example, many independent networks have offered free service periods as an inducement to MVPDs to launch their networks. But based on MFN provisions, should an independent network offer a period of free service to a streaming service, this "zero rate" would then become available

to other MFN-protected MVPDs which have already previously benefited from such a free period, thereby allowing a "double dip." This MFN impact creates an often insurmountable obstacle to obtaining carriage on streaming services. Thus, MFNs and ADMs can restrict competition and prevent the market from evolving toward new methods of video distribution and new business models; making it difficult for independent programmers to reach their niche audience.

In our 2017 comments, Public Knowledge urged caution about "bright-line" approaches. But in the intervening years, we believe the harm caused by MFNs has already been clearly demonstrated and justifies eliminating the use of MFN clauses entirely in all MVPD carriage agreements with independent networks. Public Knowledge continues to believe a more contextual approach to enforce "unreasonable" ADM restrictions may be justified given the clear trend away from absolute prohibitions against any OTT carriage and the market forces related to establishing fair and competitive restrictive windows for ADM distribution.

II. Imbalances in Bargaining Power Lead to Market Conditions That Place Independent Programmers at a Disadvantage

Many of the incumbent companies in the traditional cable marketplace have extraordinary leverage over the smaller players they negotiate with. The cable market is two-sided, where cable companies negotiate with programming companies to buy their content. In the negotiating process, MVPDs can exert monopsony power over independent programmers. At the same time, larger programmers can use their leverage to obtain favorable terms that ultimately harm independent programmers. These imbalances in bargaining power lead to market conditions that prevent independent programmers from gaining carriage or doing so with unfavorable contract terms.

A. Some MVPDs Can Exert Monopsony Power Over Independent Programmers

A monopoly exists when a single seller of a good or services has market power, which means it can raise prices at will without being afraid of losing business to competitors. A monopsony, on the other hand, exists when a single buyer has the ability to demand that it pays less for goods or services or is able to extract other kinds of onerous terms, leaving sellers with nowhere else to go, or to face financial ruin if they walk away. In a business negotiation between two companies, contract terms will tend to be mutually beneficial. But when one side has significant leverage as a monopsonist, it can force the other side to "agree" to terms that are disadvantageous in the medium or long term.

MVPDs can exert monopsony power over independent programmers in a number of ways that prevent them from getting carriage or doing so with unfavorable terms. For example, vertically integrated cable companies that produce their own programming have an incentive to favor that programming over similar programming from independent programmers. Many programmers have alleged that they have faced discrimination in this regard.[2] Additionally, some MVPDs will not carry a programmer unless it is already carried by a particular other MVPD, or unless it has already reached a certain level of distribution. It is not difficult to see how this can create "chicken or the egg" kinds of problems for smaller programmers, who might find themselves with no path to nationwide carriage.

The harms to independent programmers can be more straightforwardly economic, as well. Large cable distributors typically enjoy "volume discounts" on the programming they carry. While in an electronic age it is not necessarily cheaper for a programmer to supply a larger

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[2] *See, e.g.*, The Tennis Channel, Inc. Program Carriage Complaint, File No. CSR-8528-P (July 5, 2010). (Tennis Channel filed a program carriage complaint alleging that Comcast placed its programming in a less favorable tier than similar programming that was vertically integrated with the MVPD.)

cable company with programming instead of a number of smaller cable companies (apart from transaction costs), larger distributors are able to use their bargaining power (and frequently, their status as must-have distribution platforms) to pay lower rates than other distributors. The harmful effects of anticompetitive volume discounts that result from this kind of leverage can hurt independent programmers, particularly those of diverse or niche interests. This may undermine their business or keep them off the cable dial entirely. Other independent programmers may be tempted to sell to larger conglomerates in a tit-for-tat of consolidation. Such an outcome would be contrary to the Commission's established goal of ensuring that "no single operator can, by simply refusing to carry a programming network cause it to fail."[3]

Monopsony power also presents itself even when an independent programmer is able to get carried through unfavorable contract terms—MFNs and ADMs. MFNs can be used to simply assure that a particular MVPD gets the best possible deal in terms of the price paid for programming on a per-subscriber basis. These favorable terms are often conferred upon the MVPD without providing any of the bargained-for benefits to the independent network. This could create competitive harms, of course, but provisions such as these are not necessarily the most concerning kinds of MFNs. More troubling are MFNs that keep the marketplace from evolving, by preventing (directly or in practice) programmers from offering video in new ways and through new services, thereby keeping independent networks off of online platforms entirely. Because of these kinds of terms, an independent programmer might not be able to give a special break to a new entrant or to grant an online provider on-demand access to programs without also granting these rights to an incumbent cable company. Further, as it relates to incumbent MVPDs, a contract negotiation providing for broader distribution or a better channel

[3] *See, e.g.,* Cable Horizontal and Vertical Ownership Limits, Fourth Report & Order and /further Notice of Proposed Rulemaking, 23 FCC RCD 2134 § 40 (2008).

line up position in return for a lower per subscriber rate may be impossible to achieve due to MFNs which would provide the same low rate to other MVPDs without the obligations benefiting the independent network.

Many independent programmers commented on the Commission's Notice of Inquiry highlighting the frequent use of MFNs and ADMs by MVPDs.[4] 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."[5] Independent programmers also commented on the common use of ADMs in carriage contracts with MVPDs.[6] Programmers uniformly mentioned the common use of ADMs not to simply describe the marketplace, but discuss it in terms of what types of MVPD behavior limits their ability to provide diverse programming.[7] Overall, the Commission correctly acknowledges that 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

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[4] *See* Comments of beIn Sports, LLC, 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 Network, Inc., Promoting the Availability of Diverse and Independent Sources of Video Programming, MN Docket No. 16-41 (March 30, 2016) ("HITN Comments"); Comments of INSP, LLC, Promoting the Availability of and Independent Sources of Video Programming, MB Docket No. 16-41 (March 30, 2016) ("INSP Comment").

[5] beIn Sports Comments at 1 (emphasis added).

[6] HITN Comments at 4; Comments of TheBlaze Inc., Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, at 5-6 (March 301, 2016) ("The Blaze Comments"); Comments of Altitude Sports & Entertainment, Outdoor Channel, Sportsman Channel and World Fishing Network, 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").

[7] *See* Altitude Sports & Entertainment et. al Comments at 11.

programming in the video marketplace.[8] Public Knowledge observes that while absolute prohibitions from offering programming through ADMs are now rare, barriers—particularly those created by MFNs—still exist.

Independent programmers also face harms from MVPDs outside of MFNs and ADMs. For example, MVPDs that engage in the practice of "neighborhooding," where an MVPD groups channels with similar programming adjacent to each other in its channel lineup, have the ability to leave independent programmers out of these neighborhoods. Neighborhooding makes it easier for consumers to find channels with similar programming but more difficult to find channels that are not located within the neighborhood. Neighborhooding also allows MVPDs to favor their own programming by placing independent programmers outside of the neighborhood. Indeed, Bloomberg filed a complaint against Comcast for not placing it in news neighborhoods it had created consistent with a condition of its merger with NBCUniversal.[9] While Bloomberg ultimately won its dispute with Comcast at the FCC after a drawn-out battle,[10] independent programmers who do not have the financial resources to engage in channel placement disputes over neighborhooding are still harmed by this practice. Another channel placement practice MVPDs can impose on independent programmers is tiering. Tiering allows MVPDs to place independent programmers on less desirable channel tiers. Consumers are less likely to purchase expanded tiers outside of an MVPD's basic tier service, making it more difficult for independent programmers to generate a sustainable viewership. Once again, MFNs hamper independent networks in negotiating with MVPDs for better neighborhoods or more favorable tiering.

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[8] NPRM, 31 FCC Rcd at 11355 § 7 (2016).

[9] *See* Bloomberg L.P. v. Comcast LLC, Complaint, MB Docket No. 11-104 (June 13, 2011).

[10] *See* Bloomberg L.P. v. Comcast LLC, Memorandum Opinion and Order, 28 FCC Rcd 14346 (2013).

B. Larger Programmers Can Also Use Their Leverage to Obtain Favorable Terms That Ultimately Harm Independent Programmers

Large programmers play a significant role in the negotiating process with MVPDs. There could be instances when programmers have leverage over MVPDs that have negative effects on third parties including independent programmers. One example is bundling, a negotiating tool where large programmers are able to force MVPDs to carry less desirable programming in order to access their popular programs.[11] The National Cable Television Cooperative ("NCTC") reported that it negotiated master agreements with nine of the largest media groups including Disney/ESPN, Fox, Comcast/NBCU, Turner, Viacom, AETN, AMC, Discovery, and Scripps, which required the bundling of 65 of the 115 individual networks to be carried.[12] Therefore, a cable company who opts in to the NCTC deal with these programmers is forced to carry 65 networks.[13] This practice forces small and midsize cable companies to devote much of their capacity to carrying undesired networks at the expense of independent programmers. Similarly, the use of minimum penetration standards by large programmers limits the capacity available for MVPDs to carry independent programming.[14] Perhaps the clearest example of the large programmers' dominance is economic. Similarly-rated, bundled channels often receive as much as five times (or more) in subscriber fees than comparable independent networks.

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[11] Promoting the Availability of Diverse and Independent Sources of Video Programming, Notice of Inquiry, 31 FCC Rcd 1610, 1616-17 § 15 (2016).

[12] Comments of the American Cable Association, Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, at 14 (March 30, 2016) ("ACA Comments").

[13] *See* id at 14-15.

[14] ACA Comments at 26; Comments of ITTA, Promoting the Availability of Independent Sources of Video Programming, MB Docket No. 16-41, at 7 (March 30, 2016).

Large programmers also exert leverage over MVPDs through retransmission consent, the process where cable operators must negotiate with broadcasters in order to carry their programming.[15] The retransmission consent marketplace was originally created to protect the rights of local broadcasters, who often lacked leverage against monopolistic cable companies.[16] However, the marketplace has changed since then. While cable operators are still dominant, consolidation among programmers and broadcasters and increasing video competition has turned carriage negotiations from routine business to high-stakes negotiations. Consequently, retransmission consent fees have increased substantially over the years.[17] Large programmers with broadcast stations are therefore able to extract large sums of money from MVPDs turning the retransmission consent process into an additional revenue stream. This hinders the ability of independent programmers to negotiate carriage agreements with MVPDs on the same playing field as large programmers that own broadcast stations.[18]

When retransmission consent negotiations come to a standstill, large programmers have another negotiating tool at their disposal—programming blackouts. The FCC's rules do not prevent broadcasters from timing the expiration of contracts to coincide with marquee programming events, such as the Super Bowl, or other events of significant public interest. This

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[15] *See* generally FCC, Retransmission Consent, available at https://www.fcc.gov/media/policy/retransmission-consent.

[16] *See* Implementation of Section 103 of the STELA Reauthorization Act of 2014, Notice of Proposed Rulemaking, 30 FCC Rcd 10237, 10238 § 2 (2015).

[17] *See* Mike Farrell, Kagan: Retrans Fees to Reach $11.6b by 2022, Multichannel News (June 29, 2016), available at http://www.multichannel.com/news/networks/kagan-retrans-fees-reach-116b-2022/406026.

[18] Public Knowledge notes that some independent networks are owned by companies which also hold television broadcast stations serving only a small portion of the United States. Since such television ownership does not create undue influence in negotiations, independent networks affiliated with small television station groups should not be excluded from the protections that would be afforded by the proposed rules.

timing only enhances large programmers' leverage turning users against the MVPDs and harming their subscriber numbers. Blackouts remain a persistent threat, harming consumers by blacking out desirable content in numerous markets. A DirecTV dispute in Utah, for example affected 200,000 subscribers.[19] In 2013, Time Warner Cable alleged that its dispute with CBS led to the loss of 306,000 subscribers due to the broadcaster blacking out its programming.[20] In a recent carriage dispute with Charter Communications, NBCUniversal threatened to blackout its broadcast network along with certain cable networks, which would have affected 17 million Charter subscribers.[21] The ability to use blackouts, potentially affecting millions of consumers, is another bargaining chip that is not afforded to independent programmers.

C. Ensuring Fair Competition in the Streaming Age

Even with the rise of streaming services, the issue of MFNs remains crucial for ensuring a competitive and diverse video marketplace. MFNs restrict the ability of independent programmers to negotiate fair carriage agreements and innovate in their distribution methods, thereby limiting their reach and revenue potential. By prohibiting MFNs, the FCC can promote a more level playing field where new and diverse voices can thrive, ultimately benefiting consumers with more varied and affordable programming options. Furthermore, eliminating MFNs would encourage competition among streaming services, driving innovation and

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[19] Daniel Frankel, After 1-Day blackout, Dish and Tegna strike long-term retransmission agreement, available at FierceCable (Oct. 12, 2015), http://www.fiercecable.com/cable/after-1-day-blackout-dish-and-tegna-strike-long-term-retransmission-agreement.

[20] Joe Flint, Time Warner Cable loses 306,000 subscribers, cites fight with CBS, Los Angeles Times (Oct. 31, 2013) available at http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warner-cable-cbs-earns-20131031-story.html.

[21] Mike Snider, NBCUniversal and Charter extend talks averting pay-TV blackout, USA Today (Dec. 31, 2016), available at http://www.usatoday.com/story/tech/news/2016/12/31/nbcuniversal-and-charter-talks-avoid-blackout/96047572/.

improving service quality for viewers. Thus, addressing MFNs is not only relevant but also essential for fostering a healthy, competitive media environment that adapts to the evolving landscape of video distribution.

III. The Commission Has Rightly Determined That a Ban on MFN Clauses is Warranted

Since the 2016 NPRM, Public Knowledge has come to understand that the negative impact of MFNs on the ability of independent networks to grow and flourish far outweighs any resulting consumer benefit. For example, in his testimony before the House Committee on Energy and Commerce, John Bergmayer of Public Knowledge emphasized the critical importance of fostering competition in the video marketplace through fair access to content. Bergmayer highlighted the success of satellite television as an example of how public policies can enable new distribution technologies to flourish by ensuring equitable content access. He argued that policies preventing anticompetitive behavior and fostering new video distribution methods benefit the public interest.[22]

Canada's regulatory framework has also offered a compelling model for supporting independent programmers. The Canadian Radio-television and Telecommunications Commission (CRTC) has implemented specific protections, such as the prohibition of MFN clauses in program carriage agreements, to ensure the survival and success of independent programming services.[23] These measures include mandatory carriage for certain independent services, equitable marketing support, and reasonable access terms across multiple distribution

[22] John Bergmayer, Testimony Before the House Committee on Energy and Commerce, Subcommittee on Communications and Technology, June 4, 2019.

[23] CRTC, Broadcasting Regulatory Policy CRTC 2015-438 (2015).

platforms. Such regulations have been effective in mitigating the leverage that large distributors hold over independents, fostering a more diverse and competitive media landscape.

As such, we endorse the Commission's proposal to eliminate all MFNs in MVPD contracts with independent networks and support the suspension of the enforcement of MFNs in existing contracts as soon as the proposed rule is adopted and becomes effective.

MFNs, by their nature and without regard to the various types of MFNs which may exist, confer significant benefits on the MVPD without necessarily creating any benefit for the independent network and consequently, viewers. They work as a ratchet—only moving in the direction that helps the MVPD. Recognizing

First, in all instances, the MFN provides the MVPD with additional competitive knowledge. That is, when an independent network strikes a deal with terms that are potentially more beneficial than those in other MVPD's contracts with MFN protection, it is incumbent on the independent network to notify those other MVPDs of the relevant terms of the new contract. This provides useful competitive information to all other MVPDs whether they avail themselves of the new terms or not.

Second, MFNs are structured to provide protection on major economic and marketing issues. Even MFNs which are not unilateral or "cherry picking" in nature, nonetheless can allow an MFN-protected MVPD to reap the benefit of the new contractual term. So a "free period" associated with a launch on a new platform can translate into a zero rate for other MVPD competitors—even though they had previously benefited from similar launch incentives. MFNs are all about the present, not past history. Likewise, if an independent network offers a lower rate in exchange for placement in a "better neighborhood" on a MVPD's channel lineup or as an incentive to be included in a programming package that is marketed to more of the MVPD's

subscribers, the rate becomes available to other MFN-protected MVPDs—generally without the corresponding benefits to the independent network.

Third, MFNs are weaponized against independent networks. The fear of MFN audits is real. These procedures, which allegedly are meant to only ensure compliance with MFN obligations, often take months and result in significant expenditures of network executives' time and resources paid to outside lawyers and accounting firms. Often MFN audits are either threatened or actually conducted just before carriage contract renewal negotiations are set to begin.

Finally, MFN clauses evolve. These clauses, which often go on for several pages of the carriage agreement, are carefully drafted by the MVPDs' lawyers to protect the MVPDs' interest. Given the inequality of bargaining power that is the defining characteristic of independent network—MVPD negotiations, independent networks have little ability to make changes to what is proposed. With movement of MVPD executives between companies and the availability of outside counsel who gain insight into how other MVPDs approach their MFNs, new and beneficial MFN terms developed by one MVPD soon become industry standards. In fact, some MVPDs even require MFNs that include their competitor's MFN clauses. "MFNs on MFNs" has become the logical (albeit absurd) conclusion to this MFN arms race. As such, banning MFNs as they relate to independent networks is the best policy.

IV. Conclusion

Congress charged the Commission "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, … and to spur the development of communications technologies."[24] The Commission

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[24] 47 U.S.C. § 548(a).

should continue to prohibit anticompetitive practices to promote diverse viewpoints in the video marketplace. For the foregoing reasons, Public Knowledge encourages the Commission to move forward with all due speed to provide relief to independent programmers in their negotiations with larger MVPDs.

Respectfully submitted,

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