Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Fostering Independent and Diverse Sources of Video Programming	)	MB Docket No. 24-115
	)	
	)	

REPLY COMMENTS OF PUBLIC KNOWLEDGE

Public Knowledge submits these Reply Comments in response to the Federal Communications Commission ("FCC" or "Commission") April 17, 2024, Notice of Proposed Rulemaking ("NPRM"): Fostering Independent and Diverse Sources of Video Programming.[1] The NPRM represents the Commission's second extensive inquiry into how anti-competitive contractual provisions are undermining the viability of independent video programmers and the independent networks that they operate following the Commission's initial inquiry in 2016. As the record demonstrates, during the intervening years, the environment for independent programmers has become more challenging.

Public Knowledge believes that the FCC, based upon the strong record before it, should move forward quickly in adopting the proposed rules. Independent programmers play an essential role in providing the public with the "…widest possible diversity of information sources and services…" an FCC mandate under the Cable Communications provisions of the Communications Act.[2] The disparity in contractual bargaining power between independent programmers and the largest multichannel video programming distributors ("MVPDs"), which dominate the industry, has resulted in a deeply flawed marketplace which calls into question the

[1] *Fostering Independent and Diverse Sources of Programming*, Notice of Proposed Rulemaking, MB Docket No. 24-115, FCC 24-44 (Apr. 19, 2024).
[2] 47 U.S.C. Section 521(4).

viability of independent programmers—much less their ability to survive and flourish. The reforms proposed in the NPRM would go a long way toward fixing the current inequalities.

Public Knowledge has the following responses to some of the issues raised by commentors.

Definition of Independent Network Several commentors raised concerns about the definition of "independent video programmer" as proposed in the NPRM as being too broad in that it would include large programming conglomerates, such as Warner Brothers Discovery, which are fully capable of bargaining with the large MVPDs on an equal basis.[3] Commentors also are concerned that the definition is too narrow in that it would exclude independent programmers affiliated with companies which hold any broadcast licenses. Public Knowledge agrees with both concerns.

Clearly, multibillion dollar conglomerates controlling many "must see" video channels do not need protection under the FCC's rules because they command market power when they bargain with the large MVPDs. On the other hand, some level of common ownership with broadcast station licensees (e.g., a single radio license) does not automatically bestow market power when dealing with MVPDs. Similarly, small television broadcast groups serving an inconsequential percentage of the national television broadcast audience lack market power and should not disqualify an entity from being included as an independent under an appropriate FCC definition. Public Knowledge believes that American Independent Media proposed a definition of Independent Network in its comments that addresses both of these concerns. In support of the

[3] Comments of American Independent Media, Inc., pp. 2-4; Comments of 2042 Media USA, LLC, pp. 3-4; Comments of Quarate Retail Group, pp. 1-2; Comments of ACA Connects, p. 4; Comments of DIRECTV, LLC, p. 16, p. 30; Comments of Aspire Channel, LLC, Up Entertainment, LLC and Ovation LLC, pp. 9-10; Comments of VERIZON, p. 7; Comments of the American Television Alliance, p. 1.

public interest and the goals of the NPRM, Public Knowledge respectfully requests that the Commission consider the following definition proposed by American Independent Media (its comments, p. 3):

> "*The term independent video programming vendor means a non-broadcast programmer (1) in which an MVPD has no cognizable interest;*[4] *(2) in which none of the four largest television networks (i.e., ABC, NBC, CBS or Fox) has a cognizable interest; (3) in which no television broadcasting station licensee with an aggregate national audience reach*[5] *exceeding seven (7) percent has a cognizable interest; and (4) that has no cognizable interest in more than seven (7) programming channels made available on one or more MVPDs*."[6]

While all such definitional exercises entail some degree of line-drawing, the AIM definition, of those in the record, better captures market realities than the current approach.

MFNs Should Be Prohibited. In a robust video marketplace, each vendor would create its own unique approach to attracting subscribers. But in today's world of MVPDs and virtual MVPDs, the same networks end up being offered in the most widely marketed and distributed programming packages on nearly all programing platforms and all too often that does not include independent programmers. Many of the dominant MVPDs are major players in the streaming world or are commonly owned with strong streaming services.

Public Knowledge was struck by the number of comments that called out the crushing effects of program bundling, primarily, the strategy used by the big programming conglomerates

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[4] The principle of "cognizable interests" is set forth in Section 76.1000(b) of the FCC's rules; *see also* Sections 76.501 and 73.3555.

[5] The term "national audience reach" is defined under Section 73.3555(e) of the FCC's rules.

[6] For this definition of independent video programming vendor, the term "channel" means an MVPD distributed linear programming network via paid subscriptions by one or more MVPDs to their subscribers, or a new network seeking such carriage, with such channel occupying its own position in an MVPD's line-up on a full time (24/7) basis. Distribution of programming via FAST channels, any form of video on demand, or other forms of repurposed recordings of an independent video programming vendor's content currently or previously distributed by MVPDs shall not be included in the count of channels.

that results in the near-monopolization of both the band width and programming budgets of major distributors. In its filing, EchoStar (parent of DISH) notes the prevalence of forced bundling and penetration requirements as "impact(ing) the ability of MVPDs to carry smaller independent networks" and further indicates that: "When programmers with outsized market power use anticompetitive practices to foreclose independent competitors, the diversity of voices on air is stifled." These concerns about the prevalence of forced bundling and penetration requirements are both justified and worrisome. They result in numerous networks owned and programmed by a handful of programming conglomerates dominating the most widely distributed offerings of virtually all MVPDs (large and small) and live TV streaming services. EchoStar further "believes that these anticompetitive practices are the biggest obstacle to its ability to offer more independent networks." Public Knowledge encourages the Commission to address these concerns in future proceedings.

The NTCA-The Rural Broadband Association echoes the concerns expressed by EchoStar/DISH concerning forced "bundling/tying" and "tiering" arrangements imposed by programming conglomerates but also notes the role that MFNs play in "unduly limit[ing] programmers' flexibility to develop creative ways to grow their business." In theory, an independent programmer should be able to arrange with an MVPD to provide a lower per-subscriber rate if the MVPD would agree to the kind of penetration requirement often granted to the big programming conglomerates that results in the network being included in tiers or packages received by the vast majority of the distributor's subscribers. Such mutually agreed to flexible arrangements would permit MVPDs to expand diverse programming offerings to the public while independent programmers would have the opportunity to expand their viewership and advertising revenues.

However, as made plain in the comments, the net effective rate MFNs that MVPDs now almost universally impose on independent programmers, prohibit such reasonable win-win terms because other MVPDs would invoke their MFN rights by demanding the lower subscriber fee without honoring the penetration requirements (or any other connected consideration) that were the predicate for receiving the lower rate.[7] If contract negotiations involve tradeoffs — a "quid pro quo" — such MFNs allow the MVPDs to accept the "quid" without honoring the "quo" consideration or providing any other parallel benefit. Thus, MFNs crush independent programmers creativity and programming offerings because independent programmers are economically disabled from entering into terms appropriate for expanded or emerging programming platforms. The burdens of these MFN provisions stymy independent programmers from flexible business terms with MVPDs, vMVPDs and other streaming services.[8] In a competitive market, small businesses like independent programmers should drive innovation and be ideal partners for MVPDs and live TV streaming services looking to find new approaches and fresh new content to serve viewers. Instead, MFNs are innovation-killers in the home video distribution marketplace. It is important to note that the NTCA encourages that, "the Commission …… adopt the NPRM proposal to prohibit the use of Most Favored Nation ("MFN") and unreasonable alternative distribution method ("ADM") provisions in program carriage agreements between independent programmers and multichannel video program distributors ("MVPDs")."[9] NTCA, a group of smaller MVPDs, understands the deleterious

[7] Comments of Public Knowledge, p. 12; Comment of FUZE, LLC, pp. 9-10.
[8] Comments of American Independent Media, Inc., pp. 2-4; Comments of NTCA–The Rural Broadband Association, p. 3; Comments of FUSE, LLC, pp. 9-10; Aspire Channel, LLC, Up Entertainment, LLC and Ovation LLC, pp. 4-5.
[9] Comments of NTCA–The Rural Broadband Association, p. 1.

effects of MFNs on independent programmers, viewers nationwide, and small distribution platforms alike.

In its comments, DIRECTV asks the Commission to believe that changes in the marketplace have obviated the need for the rules proposed in this proceeding. It states:

> Today, however, the video distribution marketplace has changed dramatically—especially in the last eight years since the Commission last examined issues related to Independent programming. Independent programmers can now offer their programming not only to numerous MVPDs but also to dozens of online distributors—many of whom dwarf MVPDs in size ..... (Comments of DIRECTV, pp. 2-3)

DIRECTV describes the opposite of current market conditions. In reality, MFNs freeze independent programmers out of the traditional *and* the streaming video distribution markets. Even a cursory look at the channel lineups of the major vMVPDs, and other streaming services, show only Hallmark among all independent programmers rated by Nielsen among the top 100 programming networks in the first quarter of 2024, was able to gain carriage in almost all cases. In fact, Hallmark was the ONLY independent entertainment programming network to gain carriage on the largest vMVPD, YouTubeTV.

Since independent programmers have, on average, substantially lower per subscriber fees than comparably ranked networks bundled by the programming conglomerates, why aren't these highly ranked Independent programmers carried? Similar to traditional MVPDs, vMVPDs feel the squeeze of the forced bundling and penetration requirements imposed by the programming conglomerates. In order to stretch their programming budgets, they maximize the value of their deals with independent programmers. They know that independent programmers have historically provided launch incentives to MVPDs including lengthy periods of free service and request the same consideration as live TV streamers. But because of MFNs in MVPD contracts, which MVPDs force independent programmers to apply to distribution by vMVPDS and other

streaming services, independent programmers cannot offer the very launch incentives—including free service for an introductory period—from which the MVPDs already have benefitted without providing that same "zero rate" to every MVPD with an MFN in its carriage agreement. The stark choice for the vast majority of independent programmers is either expand carriage into the vMVPD and streaming universe, thereby betting 100% on the future of streaming by giving up the essential economic benefits of its current MVPD arrangements, or forego vMVPD and streaming carriage and stick with the MVPDs, along with their declining subscriber bases.

It is important to acknowledge that this analysis is based on a model common to the video programing world that assumes two dependable income streams—subscriber fees and advertising fees—to support program acquisition and production costs necessary to provide unique and diverse content to the public and which attracts viewership. Currently the largest four traditional MVPDs (Comcast, Charter, DIRECTV and DISH) have more than 45 million subscribers in total.[10] In comparison, the largest four vMVPDs not commonly owned with a traditional MVPD have a little more than 15 million subscribers, about a third of the largest traditional MVPDs.[11] These numbers prove that independent programmers cannot afford to lose MVPD carriage and survive. Not only are subscriber fees a key financial driver for programmers, but the viewership generated by MVPDs continues to be the bedrock audience for generating advertising sales. Even in a changing home video marketplace, creating fair rules governing contractual

[10] According to their websites, referenced a few days before these reply comments were filed, the largest MVPDs had the following numbers of subscribers to their linear video services (not including streaming): Comcast: 14 million; Charter: 14 Million; DIRECTV: 11.3 Million; and DISH: 6.7 million.

[11] According to their websites, referenced a few days before these reply comments were filed, the four largest vMVPDs had the following numbers of subscribers: You Tube TV: 8 million; Hulu Live TV: 4.5 million (including HULU Plus): FUBO: 1.9 million; and Philo: 1 million.

relationships between MVPDs and independent programmers continues to be essential to the survival of independent programmers.

Today, MFNs serve as a poison pill which prevent independent programmers from keeping a vestige of their core MVPD business while expanding their OVD reach. Current MFNs are the worst form of ADM because they force independent programmers to stay out of streaming entirely. In order to promote an equitable marketplace, with vibrant programming choices available to viewers, the Commission must prohibit MFNs forced on independent programmers by MVPDs.[12]

ADMs must be reasonable in duration. If the unfair burdens of MFNs are abolished entirely, streaming could create revenue opportunities, such as FAST Channels and VOD, in addition to expanding viewership, which should play an increasingly important role in the future financial models for independent programming networks. To ensure that independent programmers have a fair opportunity to participate in these and other streaming opportunities, it is important that the Commission also adopt the rules proposed in the NPRM prohibiting unreasonable ADM restrictions. To be clear, the same large players in traditional MVPD platforms also are major parts of the streaming universe. To ensure that the successes which would attend prohibition of MFNs, fair restrictions on ADMs also must be enforced. Otherwise, independent programmers would be burdened with the same problems that exist today, MVPD contractual agreements which freeze them out of providing streamed programming as timely as their programming conglomerate competitors.[13]

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[12] *See* Comments of American Independent Media, Inc. p. 10; Comments of FUSE, LLC, pp. 11-12.

[13] Comments of NTCA–The Rural Broadband Association, p. 3; Comments of F FUSE, LLC, p. 13; Comments of American Independent Media, Inc., p. 14;

The Commission has legal authority to adopt its proposed rules. The Commission clearly has statutory authority to adopt the rules it proposed in the NPRM.[14] For example, 47 USC Section 536(a)(3) provides that the Commission may adopt rules which:

> contain provisions designed 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.

In addition, 47 USC Section 548(a) makes a purposed of the Cable provisions of the Communications Act for the Commission to "…promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market…" And 47 USC Section 548(b) provides that: "It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."

Thus, statutory provisions expressly provide the FCC authority to adopt the rules that it proposes based on the record in this proceeding.[15] That is the same basis for legal authority noted by the FCC in 2016. There have been no significant statutory changes or new legal

[14] *See* NPRM, paras. 29-33; *see also* Comments of FUSE, LLC, pp. 19-22; Comments of American Independent Media, Inc., pp. 13-18; Comments of Aspire Channel, LLC, Up Entertainment, LLC, and Ovation LLC, pp. 10-15.

[15] In addition to the statutory authority to ban MFNs and reasonably restrain ADMs, comments also make clear that the FCC has authority to take the steps necessary to regulate major vMVPD platforms as traditional MVPDs. *See* Comments of FUSE, LLC, p. 23.

precedent in the intervening years, nor have commentors raised new or novel theories which should cause the Commission to delay action.

To sum it up, in his comments, Mark Kaplan, Vice President of the Minneapolis City Council at the time his City's cable franchise was awarded in the 1980s noted:

> Over the years the reality of cable TV diverged more and more from those original company promises. ..... The promise of high-quality programming in parallel with the diverse interests of the public at reasonable costs is a figment of the past, never fulfilled.

Public Knowledge believes that millions of Americans share former Alderman Kaplan's disappointment and frustration that cable television not only over promised but continues to under deliver in providing diverse programming that reflects the background and interests of the viewing public. Independent programmers remain the best opportunity to fulfill that promise. They desperately need the lifeline that the proposed rules would provide and Public Knowledge strongly encourages the Commission to adopt them quickly.

Respectfully submitted,

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