Before the
Federal Communications Commission
Washington, DC 20554

In the matter of Modernization of Media Regulation Initiative	 MB Docket No. 17-105

REPLY COMMENTS OF PUBLIC KNOWLEDGE

John Bergmayer
Public Knowledge
1818 N St. NW, Suite 410
Washington, DC 20036
john@publicknowledge.org

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The Commission can modernize its media rules in many ways. Some commenters in this proceeding suggest that the Commission approach outdated rules by simply doing away with them, instead of adjusting them to fit the current market.[1] But with some exceptions this is the wrong approach; the Commission's rules (and their underlying statutes) generally serve to promote broad purposes that are not themselves outdated. Promoting consumer choice, ensuring that new entrant video programmers can access video programing, and keeping prices low are goals the Commission should pursue today as much as ever.

I. Promote Video Device Competition

Section 629 directs the Commission to ensure that consumers can access subscription video on the devices of their choice, from an open and competitive market. This Congressional mandate has not been fulfilled—while CableCARD rules serve an important function, Section 629 is much broader.

Naturally, the Commission has an obligation to fulfill its statutory directives even if individual Commissioners feel they are outdated. But Section 629 is not outdated: if properly implemented, it would save consumers money while providing them with access

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1 E.g., Comments of Competitive Enterprise Institute and Techfreedom, https://ecfsapi.fcc.gov/file/107060899606483/TF-CEI%20Comments%20FCC%20Media%20Modernization.pdf (calling for sunsetting of Section 629); Comments of R Street Institute, (opposing classifying any OVDs as MVPDs and proposing to reduce carriage-related rules); Comments of Verizon, (opposing classifying any OVDs as MVPDs).

to more content from diverse voices, on more modern devices than the clunky rented set-top box.[2]

A Competitive App and Device Market Will Save Consumers Money

Senators Markey and Blumenthal released information[3] that highlights the cost of the Commission's so-far incomplete implementation of Section 629 of the Communications Act. They found that about 99% of customers rent devices from their operator rather than purchasing them on the commercial market, and that the average household pays more than $231 per year on device rental fees.

Meanwhile, consumers can outright buy similar devices (that cannot access MVPD content, but are broadly similar technologically) for significantly cheaper. Roku devices, for instance, start at $50, Amazon sells a Fire TV stick for $40 and an advanced device that supports 4K video for $100, and even a high-end device like the TiVo Roamio or Bolt, which has significant onboard storage space for recorded programs and which can record at least four programs simultaneously, starts at $200 (plus service), with a version that is not burdened by having to support CableCARD starting at $50 (plus service).

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[2] *See* Comments of Public Knowledge in Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42 (filed April 22, 2016), which is the basis for much of the language in this section of these reply comments.

[3] Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace, (July 20, 2015), https://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace.

This adds up. An analysis of the set-top box market by the Consumer Federation of America, comparing the price of such devices in 1994 to their price today, when contrasted with the declining price in real terms of other consumer electronics, revealed that consumers are overpaying as much as $14 billion per year in unnecessary rental fees for obsolete devices.[4]

There is clearly an imbalance here. Two decades after Congress directed the FCC to create a competitive market for MVPD video devices, barely any such market exists. Meanwhile, openness and competition have driven the market for online video devices, tablet computers, smartphones, and other devices forward faster than most would have predicted possible. Broadly speaking, the MVPD market has proven itself more able to fend off "disruption" from new technologies and new competitors than has the print media or music industries, due, among other things, to how MVPDs control not only the programming their hopeful competitors need to access, but the very infrastructure (broadband) they must access to reach customers. The best way for the Commission to remedy this multi-billion dollar ripoff is to promote a competitive market.

A Competitive App and Device Market Will Benefit Video Competition and Video Distributors

Allowing viewers to use the apps and devices of their choice will enable them to access online video alongside MVPD video. Making online video more accessible will

[4] Letter from Consumer Federation of America and Public Knowledge to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-64 (Jan. 20, 2016), https://www.publicknowledge.org/documents/pk-and-mark-cooper-set-top-box-letter-to-fcc.

benefit video competition in a number of ways—online video providers will be better able to provide alternatives to MVPD video services, and the increased accessibility of online video on open devices will enhance competition between online video providers themselves. This will benefit viewers, by giving them more choices at different price points and in variously-sized on-demand and linear bundles, while also giving creators more control over which distribution services to do business with.

But none of this needs to be a loss for MVPDs. Of course, MVPD services will improve simply as a result of increased competition. But viewers who have the ability to watch MVPD programming on the devices and with the apps of their choice may be more willing to become MVPD subscribers to begin with. For example, a survey of pay TV customers found that

> 51% of North American consumers planning to cancel or reduce their pay-TV subscriptions would maintain their monthly spend if service providers offered a unified interface for searching, discovering and watching both pay-TV and OTT content.[5]

In other words, competitive apps and devices themselves will represent an improvement over the current, siloed MVPD experience, to the benefit MVPDs themselves.

No MVPD on its Own Can Offer the Range of Choices and Supported Devices That a Competitive Market Can Provide

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[5] Brett Sappington, *Cord Cutting? 'Fraid So*, Light Reading (Oct. 7, 2015), http://www.lightreading.com/video/ott/cord-cutting-fraid-so/a/d-id/718597

For an MVPD to truly support a wide array of consumer devices would be a substantial, and likely infeasible undertaking. No MVPD to date has created apps for all the platforms and devices that consumers own and use. Smart TVs, game consoles, streaming devices, Blu-Ray players, and other devices may each support a different hardware architecture and software platform, necessitating specialized development for each. Even phones, PCs, and tablets run on various operating systems and support different methods for installing apps, including but not limited to FireOS, the Amazon app store, iOS, the Apple app store, OS X, the Mac App Store, Android, the Google Play Store, Tizen, the Tizen store, Windows, the Windows store, Linux, the Ubuntu Software Center, Debian (apt) repositories, Red Hat (rpm) repositories, as well as many specialized or embedded systems. The development and support costs of supporting all of the hardware and software platforms users might have in their homes would be formidable.

Thus it is not surprising that MVPD app support has tended to favor established, dominant platforms, such as those from Apple and Google—and even then, partially. For example, Charter would not authenticate certain apps for the Nvidia Shield,[6] an Android device, even though it will authenticate apps for other Android devices. The only difference between the Nvidia Shield and a typical Android phone is that the Nvidia device is designed to be attached to a TV. Nor is the phenomenon of MVPDs refusing to authenticate TV-

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[6] Letter from NVIDIA to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-149 (Feb. 17, 2016), http://apps.fcc.gov/ecfs/document/view;NEWECFSSESSION=7WGxWL5TFvFrHBFRqLYdPlDQ27xLZqQGchT3h1RHtJhr26v8WpCG!-22619469!1749169674?id=60001491536.

connected apps unique to Charter. Comcast would not authenticate the March Madness app for Apple TV or other TV-connected devices, for instance, even though it authenticated it for mobile devices,[7] and it will not authenticate the just-launched app from Starz.[8] Even when MVPDs do support various platforms they often drop support for them, leaving their customers in the lurch.[9] The world under the "MVPD-provided app" approach is therefore far from truly open and competitive.

By contrast, a competitive market based on open standards removes from MVPDs the burden of supporting a diverse and ever-changing array of software platforms and devices. Instead, each app or device would itself undertake the development and licensing costs necessary to ensure their products can be used by viewers to access their MVPD

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[7] Comcast Help and Support Forum, Post by "ComcastAndrew" (who is indicated as "Official Employee"), March Madness Live Web and Mobile Apps - Now Available (March 13, 2016), http://forums.xfinity.com/t5/Channels-and-Programming/March-Madness-Live-Web-and-Mobile-Apps-Now-Available/td-p/2720564 ("Please note that Comcast will not be supporting any authentication on Apple TV, Roku, Amazon Fire TV or Chromecast devices.").

[8] Kent Gibbons, *Comcast Won't Authenticate Subs for New Starz App*, Multichanel News (Apr. 20, 2016), http://www.multichannel.com/news/cable-operators/comcast-wont-authenticate-subs-new-starz-app/404340.

[9] *See* Jeff Baumgartner, *AT&T U-verse TV To Drop Support For Xbox 360 on December 31*, Multichannel News, Nov. 26, 2013, http://www.multichannel.com/news/content/att-u-verse-tv-drop-support-xbox-360-december-31/356856; Richard Lawler, *Next month Comcast will turn off the Xbox 360 app Netflix hated*, Engadget, Aug. 17, 2015, http://www.engadget.com/2015/08/17/comcast-will-turn-off-its-xbox-360-app-september-1st/; Jeff Baumgartner, *Dish Stops Sales of 'Virtual Joey,'* Multichannel News, Oct. 2, 2015, http://www.multichannel.com/news/content/dish-stops-sales-virtual-joey/394246; Laura Northrup, *Verizon Ends FiOS Streaming Apps for Xbox and Smart TVs March 31*, Consumerist, March 21, 2016, https://consumerist.com/2016/03/21/verizon-ends-fios-streaming-apps-for-xbox-and-smart-tvs-march-31.

subscriptions. This approach more properly aligns incentives and costs and is more likely to result in a competitive, contestable market.

A Competitive Device Market Would Reduce the Number of Devices a Consumer Needs to Access Video Programming

Today, nearly all MVPD subscribers use dedicated hardware devices attached to their TVs to access their MVPD subscriptions: the set-top box. But this is not a technological necessity—simply a result of the leased, locked-down box business model that most MVPDs have embraced. We should move past this into a "no-box" world. This would save consumers money, reduce energy consumption, make the experience of accessing video a simpler process with fewer devices, software, and hassles to manage. A competitive device marketplace, supported by modern standards would allow for this. Proprietary MVPD solutions, even of the "app" oriented variety, do not guarantee this for all consumers.

The Current MVPD Approach to Providing Viewers Access to Video Programming Can Be Cumbersome and Confusing

The existing MVPD set-top box is a closed system which offers consumers little if any choice in how they access the content they pay for. As a system completely under the control of the MVPD, consumers are offered little choice in hardware, being forced to use the MVPD's remote rather than a remote that came with their TV and needing to purchase additional hardware and switch between device inputs to be able to access content from other sources. Consumer-friendly features such as multi-service search are only available at the discretion of the MVPD, rather than in response to consumer demand.

The closed system of the cable set top box also impacts discovery of new content. As the MVPD has complete control over the navigation experience, the extent to which any set-top box offers programming recommendations, or places particular on-demand or pay-per-view content in front of consumers, is entirely at the discretion of the MVPD. Those same MVPDs may themselves have incentives via program agreements or their own programming offerings, to place certain affiliated programming more prominently.

Particularly problematic is the impact this total MVPD control on the navigation experience has on access to minority and independent content. For example, on proprietary devices, categories for minority and independently produced content may be buried in the user interface, which has little capability for customization.

MVPDs do make a subset of their programming available on some third-party devices, such as the Roku. But accessing content of major broadcast networks via devices like this, for example, requires that a consumer's MVPD choose to authenticate that particular app on that particular device. Such authentication requires the use of a separate internet connection, and several steps that are repeated on a per-app basis—hardly a consumer-friendly mechanism for accessing content that consumer is already paying for, particularly when compared to the simple channel guide consumers are accustomed to using.

MVPD mobile apps also restrict consumers' ability to access content on any hardware they might like. Even where apps are available (such as those programmer apps which MPVDs choose to authenticate), live content is typically not available. The offerings are limited to on-demand content delayed days or more.

A Competitive App and Device Market Protects Consumer Privacy Better Than an MVPD Monopoly Model

By promoting competition, the Commission can bring about a marketplace that provides privacy-conscious viewers with even greater control of their private viewing data than they have under the monopoly cable/MVPD model of rented devices and proprietary apps.

Unfortunately, the privacy status quo for MVPD subscribers who do not have the option to choose different devices and apps is far from adequate. Most subscribers simply don't understand the extent to which their pay TV companies collect data about their viewing habits, monetize it in various way, and even target ads to individual households[10] in much the same way that online companies can serve up individually-targeted ads. Indeed, as many MVPDs are also broadband ISPs, these network operators are in a unique position to cross-reference data across different services.

But even without addressing the endemic privacy issues that exist throughout the MVPD and cable industries, by promoting competition the Commission can at least ensure that competitive apps and devices more strictly follow the letter of the law than MVPDs

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[10] Philip Elliott, *New Political TV Ads Can Target Individual Homes*, PBS (Feb. 17, 2014), http://www.pbs.org/newshour/rundown/new-political-tv-ads-can-target-individual-homes.

themselves do, while adopting enforcement mechanisms designed to encourage compliance, disclosure, and customer choice.

A Competitive App and Device Market is Necessary to Prevent the MVPD Experience from Becoming A 'Pay for Play' Model

An MVPD device monopoly market gives MVPDs control at multiple choke points. Public Knowledge and many programmers have described how dominant MVPDs use their power as distributors to extract onerous conditions from MVPDs, such as restrictions on online distribution and various forms of "most favored nation" clauses.[11] (Among the many benefits of a competitive device and app market will be to limit dominant MVPDs' power as "must be carried by" distributors by making online video more accessible to more viewers.) But MVPD control over the set-top box itself gives them the power to exert control over the programming market in ways that go beyond carriage and carriage conditions.

Put simply, control of the user interface is valuable for MVPDs because they can use that control for their own benefit—to promote some content and not other content, to sell preferred access to some programmers, to cross-promote their own non-video services, and to sell advertising space. By itself it is not surprising or even objectionable that control of the user interface can create these opportunities—assuming that viewers have choice.

[11] *See generally* Comments of Public Knowledge, *Promoting the Availability of Diverse and Independent Sources of Video*, MB Docket No. 16-41 (Mar. 31, 2016); Reply Comments of Public Knowledge, *Promoting the Availability of Diverse and Independent Sources of Video*, MB Docket No. 16-41 (Apr. 18, 2016), *available at* https://www.publicknowledge.org/documents/public-knowledge-video-programming-noi-reply-comments.

But it becomes troubling when a single user interface can impose itself on viewers, because this eliminates the ability of users to switch to devices that do things differently, and increases the effects on the programming and other markets. For example, a competitive device needs to work to present its customers with the best experience it can, or people won't buy it. But an MVPD monopoly device does not face these competitive forces, meaning that if it degrades the user experience it won't suffer in the marketplace.

A Competitive App and Device Market is Necessary to Ensure That Consumers Have Access to Diverse Programming, Including Minority-Owned Content

The pay TV marketplace, and the cable TV industry in particular, have a poor track record when it comes to diversity. The Ralph J. Bunche Center for African American Studies at UCLA found that minorities are underrepresented by a factor of more than 2 to 1 among lead roles in cable, by a factor of nearly 5 to 1 among creators of cable shows,[12] and by a factor of greater than 4 to 1 among writers credited for cable scripted shows.[13] Byron Allen has recently drawn sharp attention to diversity in the cable industry—in particular the lack of carriage of any 100% African American-owned media. [14] While MVPD diversity itself

[12] Bunche Center, Hollywood Diversity Brief: Spotlight on Cable Television (2013), http://www.bunchecenter.ucla.edu/wp-content/uploads/2013/10/Hollywood-Diversity-Brief-Spotlight-10-2013.pdf.

[13] Bunche Center, 2016 Hollywood Diversity Report: Busine$$ as Usual?, http://www.bunchecenter.ucla.edu/wp-content/uploads/2016/02/2016-Hollywood-Diversity-Report-2-25-16.pdf.

[14] Press Release, Byron Allen Issues Official Statement on Comcast's Recently-Filed Opposition to the Entertainment Studios/NAAAOM Petition to the FCC, (April 6, 2016),

remains a vital issue of concern, online distribution is a way for creators to reach viewers that has fewer obstacles, and one that many creators are already taking advantage of. A more open market for devices and apps would ensure this content is accessible to viewers who do not want to use multiple devices just to watch TV in their living rooms.

A Competitive App Would Reduce Copyright Infringement

Allowing allow MVPD subscribers to access their paid video subscriptions on the device, and with the apps of their choice will benefit copyright holders by reducing the incentives for infringement and increasing the demand for lawful content.

People unlawfully obtain copies of copyrighted material for a number of reasons—cost, convenience, availability, and flexibility among them. While these factors do not *excuse* unlawful behavior, a pragmatic approach to combating infringement should be cognizant of them, and address them when possible, instead of focusing solely on enforcement, litigation, creating new liability for intermediaries, and attempts to excessively lock down networks and devices. Device and app competition addresses this demand side of infringement, by making lawful, paid-for video programming cheaper and/or more convenient for viewers to access than ever before.

Here, the music industry provides a salutary example. The single most effective counter to music piracy has been the rise of lawful streaming services (both paid and ad-supported). Many listeners who, for various reasons, found piracy a more compelling

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http://www.fiercecable.com/press-releases/byron-allen-issues-official-statement-comcasts-recently-filed-opposition-en.

alternative to purchasing physical compact discs moved to lawful options as they became available. But this did not involve requiring customers to use particular devices—Spotify is not only available on particular devices or brands of mobile phone. Rather, bringing lawful content to listeners and making it easy for them to access it has encouraged more and more users to enter the legitimate music ecosystem, to the extent that streaming now comprises the majority of the music industry's revenue.[15]

Cost

Competition would make it cheaper for viewers to access MVPD programming, by eliminating the requirement that they use MVPD-supplied equipment on each television they want to use. These cost savings will reduce the overall cost of accessing copyrighted programming without reducing the amount of money actually paid to creators. This decreases one of the perceived advantages of infringement, making it more likely that viewers will pay for an MVPD subscription.

Convenience

At times, unlawful sources of content are simply easier to use than lawful ones, which incentivizes some people to engage in infringing behavior. Device and app competition will reduce this. An open app and device market will incentive technologists to compete with each other to create better and more accessible user experiences—currently,

[15] Charlotte Hassan, *Streaming: The Music Industry's Largest Revenue Generator*, Digital Music News (March 22, 2016), http://www.digitalmusicnews.com/2016/03/22/streaming-revenue-music-industrys-largest-generator.

MVPD-supplied devices and apps face little or no competition in this regard, so competitive forces prevent those products from improving.

Availability

Much video programming is not available at all online, or on the devices people want to use to watch TV. Additionally, much programming that is available online is not available via MVPDs. This means that there are some viewers who pick one or the other—which means that programming carried by other distributors is, to them, unavailable. Competition would empower technologists to change that, by creating integrated apps and devices that allow people to watch MVPD programming alongside MVPD programming. A viewer who is able to access more sources of lawful programming in this way is less likely to turn to illicit sources.

Flexibility

Consumers want to watch video programming on the device and time of their choice. A competitive market is more likely to bring consumers these options than the monopoly MVPD model. For example, a competitive device maker may be more likely to enable viewers to exercise their judicially-recognized fair use rights to time- and device-shift recorded programming. Viewers who are able to lawfully interact with their programming in this way are less likely to turn to infringement.

Additionally, a more open device market will increase competition among video services themselves, including competition between MVPDs and over-the-top video providers. A market of this kind is more likely to give viewers access to programming in packages and formats tailored to their interests than the market as it stands today.

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Objections to Section 629 generally point to the evolving video marketplace, online video, and the growing use of video apps as reasons for its obsolescence. But this fundamentally misunderstands one of the rationales for Section 629—that facilities-based communications networks such as cable systems should not force consumers to use particular consumer-premises equipment. Companies that control facilities-based video distribution—whether through cable, fiber, or spectrum licenses, using IP or QAM or any other delivery technology—already have inbuilt technical and legal advantages over, for example, purely online video services. They should not be permitted to extend this dominance into adjacent markets. This is even more true today than is was when Section 629 was enacted, as the set-top box can be an important hub for connected devices, voice assistants, security, and communications, in addition to video.

It is worth reminding the Commission again that "app-based" approaches do not fulfill the law. Apps are generally targeted to specific platforms and devices. MVPD-supplied proprietary apps are little more than software set-top boxes that do not provide consumers with the full range of control and choice that a fully competitive market would provide. Thorough adopting or promoting industry standards, the Commission can ensure that apps are available on any competitive device, not just those devices selected by a particular MVPD.

Finally, in recent months the cable industry appears to have walked away from its pledge to create more apps for competitive device, regardless. As has been widely reported,[16] the cable industry has walked away from its "Ditch the Box" initiative,[17] and most customers still rent boxes and have no meaningful app alternative. Indeed, many consumers are paying more for set-top box rentals than ever. Thus, the best way for the FCC to "modernize" its approach to regulations in this area is to resume work on the paused "Unlock the Box" proposal, instead.[18]

II. Update MVPD Rules to be Technology-Neutral

The Commission should update its rules by abandoning, wherever the statute allows, technology-specific rules that artificially favor some kinds of video services over

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[16] *See, e.g.*, Rob Pegoraro, Big Cable broke its promise and you're paying for it, Yahoo Finance, (June 23, 2017), https://finance.yahoo.com/news/big-cable-broke-promise-youre-paying-191135140.html; Karl Bode, Cable Industry Quietly Shelves Its Bogus Plan To Make Cable Boxes Cheaper, More Competitive, Techdirt, (June 27, 2017), https://www.techdirt.com/articles/20170626/08473537668/cable-indus...lves-bogus-plan-to-make-cable-boxes-cheaper-more-competitive.shtml; Tali Arbel, Why you still can't ditch your cable box, Associated Press, (July 27, 2017), https://www.washingtonpost.com/business/technology/why-you-still-cant-ditch-your-cable-box/2017/07/27/5cb5bb36-72b4-11e7-8c17-533c52b2f014story.html.

[17] Future of TV, #DitchTheBox: A New Approach to IncreaseConsumer Choice in the Video Marketplace, http://futureoftv.com/wp-content/uploads/2016/06/FOTV-DitchTheBox-proposal-outline.pdf.

[18] Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42, Notice of Proposed Rulemaking and Memorandum Opinion and Order (rel. February 18, 2016), https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1_Rcd.pdf.

others.[19] Specifically, the Commission should find (as it was poised to do[20]) that online services that offer multiple channels of linear video are “multichannel video programming distributors” under the law. This regulatory clarification would benefit consumers by increasing competition, by permitting purely online services to negotiate for and retransmit broadcast programming under the existing legal framework, as well as benefit from statutory protections that prevent incumbents from denying programming to new entrants. At the same time, the Commission could clarify that some MVPD- or cable-specific rules (e.g. those having to do with signal leakage or competitive devices) would apply only to facilities-based MVPDs.

[19] As a general matter the Commission’s rules should be “technology-neutral.” But this concept is sometimes misunderstood, or misused. Technology neutrality only requires that the Commission treat like services alike, to the extent that they are alike. For example, satellite spectrum licensing rules would apply only to DBS providers, but such rules do not fail to be technology-neutral. More to the point, a rule that applies to facilities-based MVPDs, specifically because they have facilities, does not fail to be technology-neutral simply because online services do not control last-mile facilities. By contrast, rules relating to access to programing or certain public interest requirements are not technology-neutral insofar as they burden or benefit only specific kinds of MVPD.

[20] Comments of Public Knowledge in Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261 (filed March 3, 2015).

III. Fix Retransmission Consent

The Commission should also update its retransmission consent rules to better reflect today's marketplace.[21] It is a travesty that consumers are paying more and more simply to access "free" TV, as a result of a tilted negotiating process that holds viewers hostage, while failing to promote the purported goal of broadcast localism. Thus, to best protect consumers and localism, the Commission should find that certain retransmission consent negotiating tactics are per se bad faith, such as, but not limited to:

- Restricting online video and consumer device usage
- Ceding control over negotiations to third parties
- Timing blackouts to coincide with marquee events
- Demanding per user fees for non-subscribers

The Commission should also be aware of the disparate bargaining power that large broadcast chains have, particularly when they negotiate for stations across different areas, and affiliated with different networks. Finally, the Commission should also establish a process for challenging bundling and tiering demands, adopt baseball-style arbitration rules, and require interim carriage, when necessary.

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[21] *See* Comments of Public Knowledge and Open Technology Institute at New America, Implementation of Section 103 of the STELA Reauthorization Act of 2014, MB Docket No. 15-216 (filed December 1, 2015).

IV. Eliminate Basic Tier Buy-Through

The Commission's basic tier buy-through rules go further than the statute requires and needlessly prevent MVPDs from offering à la carte service. There is no reason why viewers who wish to subscribe to cable service should be required (as opposed to having the option) of paying for over-the-air programming they can get for free with an antenna. While these rules are far from the only barrier preventing more consumer choice, the Commission can at least help move the industry closer to more subscriber-friendly plans.

The Commission's regulation implementing the buy-through requirement states that "Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming."[22]

However, the buy-through requirements in the statute itself apply only to cable systems for which there is no effective competition: the basic tier itself is defined as the "basic tier subject to rate regulation," and the prohibition on buy-through of other tiers is found in subsection (b) of 47 U.S.C. § 543, which pursuant to 47 U.S.C. §§ 543(a)(2) and (a)(2)(A) may only be used to regulate the rates of cable systems not subject to effective competition. Yet the Commission's implementation in 47 CFR § 76.920 has no such limitation. (A related provision, 47 CFR § 76.921, does.) While Public Knowledge disagrees with the Commission's 2015 finding that all cable operators should be presumed to face

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[22] 47 CFR § 76.920.

effective competition,[23] it is anomalous at least to continue applying buy-through requirements to cable operators in that context.

The Commission's reasoning in applying the buy-through prohibition to all video subscribers, not just subscribers of systems that do not face effective competition, was based on reading the basic tier regulation provisions in the context of must-carry rules. The Commission reasoned, agreeing with the National Association of Broadcasters, that since all cable systems must "provide" their subscribers with must-carry stations,[24] and because must-carry stations are part of the basic tier, that all cable customers must subscribe to the basic tier. [25]

However, this analysis was flawed. While it is true that cable systems in markets not subject to effective competition may not offer a version of the basic tier that consists only of must-carry stations, but are required to offer a basic tier that meets the "minimum contents" described in the statute, there is no such statutory requirement as to systems for which there is effective competition. Thus, even accepting the (debatable) interpretation that for a cable system to "provide" a must-carry station, all its customers must actually subscribe to it, there is no reason why customers in markets that are subject to effective

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[23] Public Knowledge Disappointed by FCC Effective Competition Vote, June 4, 2015, https://www.publicknowledge.org/press-release/public-knowledge-disappointed-by-fcc-effective-competition-vote.

[24] 47 U.S.C. § 534.

[25] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, Report and Order and Further Notice Of Proposed Rulemaking, 8 FCC Rcd 5631, ¶¶ 164-66 (1993).

competition should be required to pay for stations that elect retransmission consent, instead of simply using an antenna.

Additionally, even as to markets that may be found not to be subject to effective competition, the Commission should take note of how the market for retransmission of broadcast stations has changed since the early 1990s. When the 1992 Cable Act was passed, cable systems carried broadcast stations for free (paying only a statutory copyright license to the programmers, but not to the broadcaster itself). In that context, it was a reasonable consumer protection measure to make sure that cable systems offered those programs to their customers on a standalone basis, and did not require that subscribers first pay for access to premium programming to gain access to broadcast programming with their cable subscribers. But due to the provisions of the 1992 Act itself, the market has changed, and local broadcast stations now command a premium price from cable operators—a price which is ultimately paid by consumers. Given that digital broadcast television is available to many viewers for free, in HD quality, with the purchase of a low-cost antenna, it makes no sense to require that customers pay for that programming with their cable subscriptions. Thus, in addition to finding that buy-through requirements do not apply to cable systems for which there is effective competition, the Commission should use the statute's waiver provision to find that the buy-through requirements do not apply even to cable systems for which there is no effective competition.

It is absurd that Commission regulations, unsupported by a sound reading of the statute, currently prohibit à la carte with respect to broadcast stations. For these reasons, the Commission should modernize it rules to require that consumers purchase, at most, a tier containing must-carry stations, not all broadcast stations.

V. Explore Updating Ownership Restrictions

Under the Cable Communications Policy Act of 1984, 47 U.S. Code § 533 ,"The Commission may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community served by a cable system."

The Commission should use this authority to update its media ownership rules to better reflect today's media landscape. "Media of mass communications" today includes not only newspapers or television stations, but online media such as online video services, as well. The Commission should explore modernizing its media ownership rules to prevent cross-ownership between cable systems and these new media. Rules of this kind can ensure a that viewers can access diverse voices, promote localism, and promote competition by preventing anti-competitive vertical leveraging, among other things.

Respectfully Submitted,

/s John Bergmayer
Senior Counsel
Public Knowledge

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