

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF FREE PRESS

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Introduction and Summary

Free Press respectfully submits these comments in response to the Notice of Inquiry (the “NOI”) seeking comment on the state of the marketplace for independent video programming, as well as the principle obstacles independent and diverse programmers face as they seek carriage via traditional multichannel video programming distributors (“MVPDs”) and over-the-top (“OTT”) distributors.¹

As the Commission notes, ensuring a diverse and competitive marketplace for video programming is a “central objective”² of multichannel video programming regulation. Free Press values diversity of viewpoint in all of its forms, of course, but suggests at the outset that the Commission also must focus especially on issues of racial and gender inequity. It should use the input gathered in this proceeding to promote ownership of communications facilities and opportunities for content dissemination by members of such traditionally and currently disadvantaged communities and demographics.

Independent and diverse programmers face higher barriers to distribution than incumbent and vertically integrated programmers do, often as a result of structural racial and gender inequities built into our media landscape by public policies. These policies have produced a video market that does not reflect the cultural diversity of America, nor the experience of its people. Historically and still today, women and people of color have owned few TV stations, cable systems, and cable channels, even though women make up the majority of the U.S. population, and even though people of color today represent approximately 40 percent of it.

¹ *In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Inquiry, FCC 16-19 (rel. Feb. 18, 2016) (“NOI”).

² *Id.* ¶ 2 (citing, *inter alia*, 47 U.S.C. § 257).

In its infancy, cable television was thought of as a medium that might better promote viewpoint and ownership diversity than broadcasting, due to the national scale of a cable channel and the larger number of available channels. However, despite some legislative efforts to promote this potential,³ the multichannel video market continues to suffer from the same lack of diversity as broadcast television. The video marketplace remains one controlled by entrenched gatekeepers. A small number of corporations hold the vast majority of broadcast licenses, cable systems and programming assets – with a level of market concentration that increases the already-high barriers to entry for independent and diverse programmers. Nothing about this outcome is “natural” or the result of a “free market.” It is the outcome of decades of public policy decisions that create, increase and cement these barriers, including the Commission’s long history of tolerating and even promoting consolidation while ignoring the diversity problem.

The media plays a critical role in informing us about the world we live in as well as how we view each other and ourselves. Yet people of color and women are often unable to tell their own stories and must convince gatekeepers to tell them instead. This too frequently results in stereotypical representations of diverse voices, which causes these communities significant harm as outlined below.

I. The Commission Has Failed to Implement and Enforce Policies to Foster Diverse and Independent Voices.

Congress and the Commission have at times adopted policies putatively designed to promote competition and open avenues for diverse and independent voices. These policies have largely failed, however, due to poor implementation or outright abandonment of them, as lawmakers repeatedly rolled them back or abdicated their responsibility to enforce them.

³ See, e.g., 47 U.S.C. § 532(g).

In 1970, for example, the Commission adopted the Financial Interest and Syndication Rules, restricting the ability of incumbent television networks to own and syndicate their own programming in order to “limit network control over television programming and thereby foster diversity of programming through the development of diverse and antagonistic programming sources.”⁴ Those rules worked to increase the number of television programs produced by independent studios and content creators. But when the Fin-Syn rules were repealed in the early 1990s, the market saw a dramatic reduction in the percentage of diverse and independent programming from nearly half of prime time shows to less than one-fifth.⁵

Similarly, in 1978 the Commission decided to use tax certificates to encourage sales of broadcasting facilities to racial minorities. Tax certificates allowed companies to defer paying their capital gains taxes if they sold a communications-related property to a person of color. The Commission at the time expressed concern about inadequate representation of minority views, and stated its belief that ownership of broadcast facilities would help foster the inclusion of diverse content.⁶ But Congress repealed the program in 1995. During the seventeen years it was in place, the number of minority-owned broadcast stations increased from 10 to 350, making it one of the most valuable mechanisms the Commission employed to enhance diverse ownership.⁷

⁴ *In re Review of the Syndication and Financial Interest Rules, Sections 73.659-73.663 of the Commission’s Rules*, MM Docket No. 95-39, Report and Order, 10 FCC Rcd 9414 (1995).

⁵ See Mark Cooper, Consumer Federation of America, “The Impact of the Vertically Integrated, Television-Movie Studio Oligopoly on Source Diversity and Independent Production,” at 34-35 (2006), *available at* http://www.ifta-online.org/sites/default/files/Impact_Intergrated_TV-Movie_Independent_Production.pdf.

⁶ See Statement of Policy on Minority Ownership of Broadcasting Facilities, Public Notice, 68 F.C.C.2d 979, 980-81 (1978).

⁷ See Kofi Asiedu Ofori & Mark Lloyd, “The Value of the Tax Certificate,” 51 *Fed. Comm. L.J.* 693, 699 (1999).

Despite its success, the minority tax certificate fell prey to concerns about lost tax revenues and minority preference policies.

Attempts to make video programming more affordable to more people also saw spotty and only temporary success. For example, the 1992 Cable Act sought to stem the inexorable rise in prices on consumers' cable bills by regulating rates in the absence of effective competition. Congress theorized that preventing incumbent cable operators from collecting monopoly rents went hand-in-hand with promoting new distribution platforms like satellite TV as competition to cable operators. But the methodology for determining the presence of effective competition was flawed to begin with; loopholes in the program access rules remained open for more than a decade; and important rate oversight provisions in the 1992 Cable Act were eliminated by the 1996 Telecommunications Act.⁸ The net result was a healthy satellite TV industry competing against cable, but without the kind of checks and balances needed to loosen incumbent cable operators' dominance and overall market power during their transition to broadband. That left cable operators with significant power to foreclose competition from new distributors as cable began to cross-subsidize its legacy video business with booming broadband revenues.

Section 257 of the Act recognizes diversity as a critical goal, requiring the Commission to routinely consider policies "favoring diversity of media voices" that would break down barriers to market entry.⁹ Section 309(j)(3)(b) of the Communications Act likewise mandates that the Commission promote economic opportunity by "avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including . . . businesses owned by members of minority groups and women." Despite these explicit statutory commands

⁸ See S. Derek Turner, Free Press, "Combating the Cable Cabal: How to Fix America's Broken Video Market," at 34-35, May 2013, *available at* http://www.freepress.net/sites/default/files/resources/Combating_The_Cable_Cabal_0.pdf.

⁹ 47 U.S.C. § 257(b).

to the Commission and the agency's own longstanding stated goals of promoting diversity, competition, and localism in broadcasting, the Commission's flawed attempts to pursue these objectives have resulted too often in destructive consolidation that undermines diversity of ownership and viewpoint in the broadcasting and cable industries. It is simply antithetical to the statutory goals and the Commission's stated policies to allow rampant media consolidation, which removes opportunities for ownership of channels and for distribution of independent programming, while claiming that such steps will lower barriers to entry.

In spite of some merger conditions intended to promote diversity and check market power, runaway media consolidation has left us with a broadcast dial dominated at the national and local level by a handful of owners, as well as a highly concentrated cable industry controlled by a cabal of incumbent video programmers and distributors.¹⁰ Instead of opening up their platforms for independent and diverse content, vertically integrated distributors have chosen to carry more of the same, prompting FCC Commissioner Tate to note during the Adelphia transaction that "when Hispanic-focused channels have trouble getting carriage in Los Angeles and other large Hispanic markets – when I hear these and other similar reports I am far from convinced that cable providers are doing an adequate job in promoting a diversity of voices on television."¹¹

¹⁰ Combating the Cable Cabal at 36.

¹¹ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner, Inc., Transferee; Time Warner Inc, Transferor, to Comcast Corporation Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (Statement of Commissioner Tate).

The Commission has relied more and more on such diversity commitments in merger conditions, but the results have been underwhelming to put it mildly. In the Comcast-NBC Universal acquisition, Comcast promised to add ten independent cable channels to its lineup, including four African-American owned channels.¹² Comcast also promised to improve local news and Spanish-language programming, and to increase representation of people of color in programming. Instead, the company initially failed to comply with a number of reporting requirements regarding its local news commitments and offered only a “very minimal” increase in Latino representation.¹³ The independent networks it chose focused heavily on entertainment provided by established industry partners.¹⁴

Even if Comcast had lived up to its promises, diverse programmers have lost out on new opportunities as rising consolidation forced them out of the market or shut the door to entry in the first place. Broadcast television consolidation has taken away almost any opportunity for new entry by diverse owners, and made it increasingly difficult for existing owners to remain. Relying on their substantial market power, incumbent programmers and MVPDs have formed a comfortable cabal that forces people to accept bloated bundles of channels. Cable distributors cross-subsidize their video business with revenues from their highly profitable broadband business.¹⁵ And independent diverse programmers face significant barriers to gaining carriage.

¹² David L. Cohen, “Comcast to Bring Four New Independent Minority-Owned Networks to Consumers,” Feb. 21, 2012.

¹³ Corie Wright, Free Press, “No News is Bad News: An Analysis of Comcast-NBCU Compliance with FCC Localism Conditions,” May 2011; “New Study: Executives Break Promises to Improve Diversity Following Media Mergers,” *Media Matters*, Jan. 19, 2016.

¹⁴ Anthonia Akitunde, “Channels of Diversity,” *The Root*, Mar. 12, 2012., *available at* http://www.theroot.com/articles/culture/2012/03/black_cable_networks_magic_and_diddy_offer_new_opportunity_for_diversity.html.

¹⁵ Combating the Cable Cabal at 36.

II. MVPD Industry Barriers Prevent the Promise of Increased Opportunities on Cable Systems From Materializing.

During the early years of widespread cable TV adoption, many hoped the development of the new industry would open doors to diverse voices. As William Wright of Black Efforts for Soul in Television said, “With the increased number of channels possible with cable TV, we should make certain that some of those channels are set aside for us. It is fantastic what we would be able to do with them.”¹⁶ Yet the opportunity faded as public policy permitted the rise of MVPD gatekeepers who took the reins and erected barriers to independent programmers.

Vertically integrated ownership of cable systems and cable programming channels can foreclose opportunities for entry by new programmers who refuse to surrender an ownership stake in exchange for carriage. Congress acted to prevent such demands for ownership stakes in return for carriage when it adopted Section 616 of the Cable Act.¹⁷ This law has perhaps disciplined market behavior to some degree yet not remedied the problem entirely.¹⁸ But even without direct ownership and control over the content on the cable dial, incumbent operators and programmers can hamper or outright prevent distribution opportunities on their own networks and other platforms.

¹⁶ Joseph A. Torres, Free Press, “Unlocking the Set-Top Box Could Help Level the Playing Field for Programmers of Color,” Feb. 19, 2016, *available at* <http://www.freepress.net/blog/2016/02/18/unlocking-set-top-box-could-help-level-playing-field-programmers-color>.

¹⁷ 47 U.S.C. § 536(a)(1) (“[T]he Commission shall establish regulations governing program carriage agreements and related practices . . . designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator’s systems[.]”)

¹⁸ *See* Testimony of Andrew Jay Schwartzman, Media Access Project, Committee on the Judiciary, “Hearing on Competition in the Media and Entertainment Distribution Market” (Feb. 25, 2010), *available at* http://judiciary.house.gov/_files/hearings/pdf/Schwartzman100225.pdf (“[T]he existing statute does not work. The cost of litigating program carriage cases has proven to be prohibitive, and the FCC has adopted almost insuperable legal hurdles for complainants to overcome.”).

The NOI seeks comment on contractual provisions including most favored nation (“MFN”) and alternative distribution method (“ADM”) clauses that limit the freedom of programmers seeking MVPD carriage to distribute their content via OTT platforms. The Commission’s questions about such contractual provisions are understandable: MVPDs have both the incentive and the market power to force independent programmers into unfavorable deals. Although cord-cutting and cord-shaving by pay-TV customers remains relatively slow, cable providers indeed face increasing pressure from OTT video and pay-TV subscribership is falling. The consumers cancelling pay-TV services in this slow but steady drip typically cite the high price of cable and the availability of OTT services like Netflix and Hulu as key factors in their decision to drop cable.¹⁹ To preserve and replace their legacy video business revenues and retain a customer base, MVPDs have a vested interest in ensuring the exclusivity of their programming – even if only during initial release windows – and in controlling the growth of online video distribution. We discuss in Part III below methods that cable operators use to extend the life of their business model by exercising such control over OTT. But barriers to MVPD carriage of independent content play a key role in this strategy too.

ADM and MFN clauses may have some economic justification in some instances. In a market in which consumers could express their demand effectively, they might be less likely to pay an MVPD for access to content if they could find the same programming online for free, plausibly making the programming less economically valuable in the estimation of the MVPD. Yet the potential for abuse of market power in such situations is high. Without more data regarding the nature, context, and impact of these clauses, however, it is difficult to assess which

¹⁹ Michael Newberg, “TV’s Cord-Cutting Trend Picking Up Steam: Survey,” *NBC News*, Sep. 19, 2015, *available at* <http://www.nbcnews.com/tech/tech-news/tvs-cord-cutting-trend-picking-steam-survey-n429976>.

are anti-competitive and which may be reasonable. Even if the Commission were to establish some criteria for this analysis, enforcement would be difficult too.

Cable bundling practices – with or without ADM restrictions – present an even more serious barrier to independent and diverse programmers seeking traditional multichannel distribution. Luckily, this problem is easier to address from a legal standpoint, though neither Congress nor the Commission have taken steps to do so yet.

Giant cable programming conglomerates are just as much to blame or more than are MVPDs alone for these forced bundling practices as they exist today. Incumbent programmers use bundling arrangements to tie their unpopular channels to must-have content, leveraging the popularity of marquee networks to force MVPDs to pay for less desirable programming that they might otherwise choose not to carry. That’s why Cablevision filed suit in 2013 against Viacom, claiming that the latter’s bundling practices violated antitrust laws. By requiring Cablevision to carry an entire suite of unpopular channels (some of which had recently seen a nearly 75 percent ratings decline) in order to purchase a handful of must-have channels such as Nickelodeon and Comedy Central, Viacom would crowd out significant distribution capacity. For the privilege of carrying only the handful of channels Cablevision wanted, Viacom would have charged the distributor \$1 billion *more* than the cost of the entire bundle.²⁰ Viacom later settled the suit, but bundling arrangements like those Cablevision described are rampant, harming both consumers and independent programmers.

Bundling persists because it benefits incumbent programmers by ensuring they continue to profit from content that no one is watching. Between 2002 and 2011, nine of the 25 most-watched cable channels faced a decline in primetime viewership – coupled counter-intuitively

²⁰ Combating the Cable Cabal at 22-23.

and almost inexplicably with a simultaneous increase in licensing fees. Six of those nine channels raised their operating profit margins, despite flagging popularity.²¹ Yet the seemingly inexplicable becomes readily understandable when we understand how much control both incumbent programmers and incumbent cable operators retain over distribution opportunities, even as the balance of power between these industry segments shifts from time to time or deal to deal. And the result is always the same for overlooked independent and diverse voices.

Expansive bundling requires MVPDs to devote outsized financial resources to purchasing incumbents' undesirable programming, crowding out capacity and financial resources that cable distributors could commit instead to independent and diverse programs. Michael Schwimmer, the CEO of SiTV, declared that in his own experience, "unrestrained tying practices, when combined with the current state of consolidation among both cable operators and programmers alike, have left American viewers without . . . rich and diverse content from a broad array of providers."²²

Both MVPDs and vertically integrated programmers reap substantial benefits from these anti-competitive bundling practices. Incumbent MVPDs often try to pass these enormous programming bundles onto customers and charge them more for the supposed added value of additional channels. As a result, the basic cable tier has become bloated with content that most consumers do not watch. Free Press released a report in 2013 that demonstrated this wasteful bloat, noting that "in 1995 the average multichannel subscription household received 41 channels, but tuned into only 11 of these stations. In 2008 (the last year Nielsen reported this

²¹ *Id.* at 22.

²² See Letter from Michael Schwimmer, Chief Executive Officer, Si TV, Inc., MB Docket No. 07-198 (filed Feb. 12, 2008).

data), the average multichannel household tuned into only 18 of the 130 channels received.”²³ Prices have risen in correspondence with the growth in number of channels received, rather than the minimal growth in channels watched, and thus preserved significant financial benefits for MVPDs despite rising programming costs.

Bloated bundles hide the prices of each individual channel, making consumers appear less sensitive to price changes for a particular channel or group of channels. For example, Lifetime Network lost nearly two-thirds of its primetime audience over a decade, but still maintained an operating profit margin nearly three times that of Exxon Mobil.²⁴ When content is packed into inflexible, more-than-you-can-eat bundles, consumers lose their ability to express demand for particular programming. This “ensure[s] consumers have little sovereignty when it comes to translating their demands into the products available in the market. A distributor like Comcast protects its interests, not its subscribers’, when negotiating channel carriage contracts.”²⁵ That too is a problem for diversity. Independent programmers may be offering diverse and in-demand content; but unless it is in the interest of MVPDs like Comcast to carry that content, the cable bundles consumers are offered will not reflect that demand.

As the NOI notes,²⁶ some MVPDs argue that it is precisely this forced bundling practice that allows cable providers to protect diverse and independent programmers from the travails of

²³ Combating the Cable Cabal at 24.

²⁴ *Id.* at 5.

²⁵ *Id.*

²⁶ NOI ¶ 18.

the marketplace. They claim that without bundles effectively subsidizing and hiding the cost of diverse content, such “niche” programming would not be viable.²⁷

This argument displays a fundamental misunderstanding of modern America. Diverse content is not “niche.” According to the U.S. Census Bureau, a majority of the nation’s children are expected to be non-white by 2020.²⁸ By 2044 a majority of the entire population will likely be non-white.²⁹ Americans of diverse racial and ethnic backgrounds currently make up nearly 40 percent of the population (and a similar percentage of key video-watching demographics such as 18 to 49 year olds), playing hugely important roles in our nation and economy.³⁰ And According to the Bunche Center’s 2015 Hollywood Diversity Report, television shows with diverse casts and writing corps earned higher ratings than both scripted and unscripted programming that sidelined people of color and women. It noted, “Evidence from this report . . . shows clearly that America’s increasingly diverse audiences prefer diverse content created with the input of diverse talent. Diversity sells.”³¹ Demographically these communities hold significant purchasing power, and as a result they will demand programming that serves their needs, even without the “protection” of bloated content bundles.

²⁷ *E.g.*, “Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers,” Questions for the Record Submitted by Senator Orrin G. Hatch, at 1-2 (Apr. 9, 2014) (statement of David Cohen), <http://www.judiciary.senate.gov/imo/media/doc/April%209,%202014%20-%20Cohen%20Responses.pdf>. Testifying before the Senate, Comcast’s Cohen argued that “without access to a large subscriber base, and the corresponding subscription and advertising revenues, many smaller programming networks would not be viable” and suggested that “*à la carte* would have a particularly adverse effect on diverse and niche programming.”

²⁸ *See* Projections of the Size and Composition of the U.S. Population: 2014 to 2060, *U.S. Census Bureau* (Mar. 2015).

²⁹ Rachel Janik, “Over 50% of Americans Will Be Nonwhite Within 30 Years,” *Time*, Mar. 3, 2015.

³⁰ Projections of the Size and Composition of the U.S. Population, *supra* note 28.

³¹ *See* Ralph J. Bunche Center for African American Studies at UCLA “2015 Hollywood Diversity Report: Flipping the Script,” Feb. 2015.

Diverse programming has nothing to fear from the competition that comes with allowing viewers to express their preferences. Only the incumbent programmers profiting from selling undesirable channels have anything to lose. To fulfill the objective of promoting diverse voices, Congress and the Commission should explore policies that encourage the availability of “skinny bundles” and wholesale unbundling to increase consumer choice, and to open up financial resources and capacity for independent programmers seeking traditional MVPD carriage.

III. The Commission Must Address OTT Barriers To Prevent Repeating Online The History of Diminished Opportunities Over the Air and on Cable TV.

The development and popularization of OTT online video platforms presents a unique opportunity for independent and diverse programmers who have struggled to obtain traditional cable distribution. OTT platforms are not restricted by the same technical capacity limitations as MVPDs channel lineups, eliminating the scarcity problem that has traditionally forced independent content producers off the cable menu. Creating content for OTT distribution typically requires fewer financial resources too, which can otherwise be a stumbling block for independent programmers, particularly those that represent marginalized communities such as women and people of color. Online video also allows programmers a better chance to avoid middlemen by engaging in a direct relationship with their audiences, who are more fully able to express their demand without the intervention of a cable company with its own agenda.

OTT distribution is by no means a perfect substitute for MVPD carriage at this point. Although current trends suggest an ongoing shift towards online video, millions of Americans still subscribe to some form of traditional pay-TV service. To compete with incumbent and vertically integrated programmers, independent voices must have an opportunity to reach these consumers as well as those who use OTT platforms. Yet OTT distribution can be a useful alternative and tremendous opportunity for independent and diverse programmers if we pursue

policies that preserve and promote Internet access in the form of what Free Press has called “Big Open Pipes.”

The Internet must remain an open and nondiscriminatory platform, like it always has been, or it will be difficult for innovative online distribution models to grow and earn investment capital. Now that the Commission has corrected course and returned broadband telecommunications services to the strong legal foundation of Title II, this openness is protected by robust Net Neutrality rules. It is critical that the Commission continue to defend these protections through the current court case and any further legal challenges. The Commission also must be vigilant about the enforcement of Net Neutrality protections to prevent discrimination against OTT platforms carrying independent and diverse content. As the Commission well knows, MVPDs are not only video competitors to these OTT platforms: the MVPDs also double as broadband providers that provide the main pathway for consumers to access OTT options.

As Free Press noted in our 2013 report, “When the owners of the physical infrastructure can prevent anyone else from being a distributor, that’s a problem.”³² If Net Neutrality is undermined, or if broadband providers can use the many other tools at their disposal to favor their own pay-TV and online content over that of their competitors, innovative online distributors will suffer. Investors know that, and will likely pull their support for OTT platforms if the Internet’s openness becomes uncertain.³³ For OTT distribution to be a viable alternative for independent and diverse programmers, the Commission must staunchly defend the open Internet and ensure that cable companies are not free to use their leverage in anti-competitive ways.

Net Neutrality ensures that the pipes are open, but they must also be big – and that means free from arbitrarily low and punitive data caps. Wired and wireless broadband providers are

³² Combating the Cable Cabal at 42.

³³ *Id.* at 43.

increasingly implementing pricing and data schemes that impose penalties on users who exceed their usage allowances. These caps tend to serve no legitimate technical or business need. As Comcast instructed its customer service reps to say, they have more to do with creating a (false) sense of “fairness”³⁴ in pricing for usage. In this case, “fairness” to the providers’ means conditioning people to avoid OTT content, specifically by double-charging users who have already paid to connect to the Internet for the privilege of actually using their connection.

Broadband providers have typically set these data allowances low enough to discourage use of bandwidth intensive applications, including online video consumption. In particular, wireless smartphone usage offers a cautionary tale: 43 percent of black smartphone owners and 49 percent of Latinos say they hit their data limits at least occasionally.³⁵ This funnels price-sensitive customers away from cheaper OTT options by effectively raising the price of watching online video, and correspondingly makes MVPD pay-TV packages appear more attractive by comparison. AT&T’s recent decision to exempt its U-verse users from data caps for customers who also subscribe to its pay-TV service is a particularly telling example of an MVPD using these caps to preserve its legacy television revenues.³⁶ The proliferation of zero-rating schemes that allow vertically integrated broadband providers to exempt their own content from these punitive caps (or charge content providers for the privilege of exemption) also may erect new barriers for independent and diverse programmers, who do not have relationships with

³⁴ Jon Brodtkin, “Comcast brings data caps to more cities, says it’s all about ‘fairness,’” *Arstechnica*, Nov. 5, 2015.

³⁵ Pew Research Center, “The Smartphone Difference,” April 2015, *available at* <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/>.

³⁶ Karl Bode, “AT&T Follows Comcast, Will Charge \$30 More to Avoid Usage Caps,” *DSLReports*, Mar. 29, 2016.

broadband providers and may not have the financial resources to afford an exemption.³⁷ The Commission should pursue policies that account for arbitrary data usage caps and ensure that users can freely access independent OTT programming without limitations capriciously imposed by broadband providers.

It is also critical for broadband service to be affordable for all Americans. For independent and diverse programmers to succeed via OTT distribution platforms, the Internet's Big Open Pipes must be accessible by diverse audiences. Currently, people in communities of color and low-income families lag behind the rest of the nation in terms of broadband adoption, due in large part to the consistently high prices of high-speed broadband.³⁸ If independent and diverse programmers find carriage via OTT distribution networks, but access to broadband is too expensive for many families to afford, then these programmers will face serious barriers to competition with MVPD channels. We commend the Commission's efforts to make broadband more affordable through the expansion of the Lifeline program. More work is needed to ensure that everyone, including people in historically marginalized and vulnerable communities, has affordable access to broadband – which is the basic communications platform of our time.

When it comes to other critical policy prescriptions to ensure that OTT distributors have access to big, open and affordable pipes, Chairman Wheeler said it best: "Competition, competition, competition." We have seen the impact of consolidation and vertical integration in the video market, and it has spelled calamity for independent and diverse programmers.

³⁷ See Free Press, "Issue Brief: How to Deal with Data Caps, Sponsored Data and Zero-Rating," Feb. 2016, *available at* http://www.freepress.net/sites/default/files/resources/data_caps_and_arbitrary_exemptions.pdf.

³⁸ See John B. Horrigan and Maeve Duggan, Pew Research Center, "Home Broadband 2015," Dec. 21, 2015.

One of the most troubling trends is the ever-increasing concentration in the cable industry, where we see the emergence of massive conglomerates wielding unprecedented control over both the MVPD and broadband markets. Without competition, these cable giants are free to use their highly profitable broadband business to cross-subsidize their video business. Comcast, Time Warner Cable and Charter all saw declines in their video-operating margins between 2007 and 2012, but they were each able to maintain a steady overall operating margin by raising broadband prices to cover their video costs.³⁹

The ability to cross-subsidize gives MVPDs a leg-up on OTT platforms, and gives incumbent and vertically integrated programmers an advantage over independent programmers attempting to compete via online distribution. Rising broadband prices also raise the price of consuming online video for consumers. If cable providers faced more significant competition in the broadband market, there would be competitive pressure to keep prices low, keeping MVPD content on a more level playing field with OTT.

History has completely discredited the regulatory theory that consolidation promotes diversity. The Commission should break from this bankrupt strategy and work to preserve competition where it currently exists, rolling back the pro-consolidation policies that have created such a highly concentrated industry rife with market failures. The best way to break down the barriers faced by independent and diverse programmers using OTT delivery platforms is to ensure they have access Internet users over big, open, and affordable pipes.

³⁹ Combating the Cable Cabal at 13-14.

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