

FCC Adopts Notice of Inquiry Regarding Independent Programming

February 19, 2016

On Thursday, February 18, 2016, the Federal Communications Commission (FCC or Commission) held an Open Meeting during which it considered and unanimously adopted a Notice of Inquiry (NOI) that seeks comment on the current state of programming diversity and the obstacles that independent programmers face in obtaining carriage on both traditional and emerging video distribution platforms.

The NOI launches an FCC fact-finding exercise to better understand the state of the independent programming marketplace generally, and to ultimately consider possible FCC action to enhance diversity and competition in the programming that is available to consumers. The NOI also asks questions about the viability of the over-the-top (OTT) platform for independent programmers, inquiring specifically into the costs and benefits of pursuing OTT carriage instead of multichannel video programming distributor (MVPD) carriage. Additionally, the NOI seeks information about specific practices of cable operators and other MVPDs that independent programmers allege are obstacles to obtaining content distribution, including questions related to:

- Typical contractual provisions in carriage agreements, such as most favored nation and alternative distribution method provisions;
- Program bundling arrangements; and
- MVPDs' negotiation practices, including failing to respond to carriage negotiation requests, avoiding negotiations until just before expiration of existing agreements, as well as whether MVPDs discriminate against providers of public, educational,

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and governmental programming.

Finally, the NOI seeks input on the Commission's legal authority to address these obstacles faced by independent programmers.

In their statements at the Open Meeting, the Commissioners discussed the importance of diversity and the current state of the marketplace. Commissioner Clyburn noted that there may be obstacles for consumers to access diverse programming, and Chairman Wheeler explained that independent programmers are "often unable to reach enough viewers to have a viable business model." Commissioner Rosenworcel described as "daunting" the challenges independent programmers face in securing carriage on cable and satellite systems and highlighted the lack of female and minority voices. On the other hand, Commissioner Pai described the current programming landscape as "the Golden Age of television," pointing to an "amazing range of diverse content." He stated that this diversity is not the result of government regulation, but instead is the result of the free market. Commissioner O'Rielly likewise cautioned against government overreaching, and described the NOI as the Commission's "latest regulatory push."