

April 22, 2016

The Honorable Thomas Wheeler
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

RE: Docket No. 16-42, *Expanding Consumers' Video Navigation Choices*

Dear Chairman Wheeler,

As programmers and creators, the viability of our businesses rest on our ability to license our content – whether to traditional TV providers or “over-the-top” services – under fair terms. These distribution deals are the foundation of the modern television ecosystem, covering everything from the fees for carriage to channel location and promotion to digital, on-demand, and advertising rights. Critically, they also include penalty clauses and enforcement mechanisms, so that if a distributor uses our work in a way that violates our agreement, we have clear legal rights and recourse.

The set-top box mandate the Commission has proposed renders these agreements effectively meaningless – with deep and lasting effects that will radiate out into virtually every aspect of the TV business. The mandate requires distributors to turn our content over to third party tech companies, with whom we have no licensing arrangements or contractual relationships, to repackage into their own video products and apps without paying anything for the rights. These tech companies would be free to profit from our creative works – by mining valuable viewer data and selling ads to viewers watching or searching for our work – without paying a single penny for the rights.

The FCC does not have the authority to rip up contracts or rewrite copyright laws. But this mandate would let tech companies like Google profit from our content without permission or payment. This is an affront to the most basic principles of fair markets, and a violation of our basic rights as creators and owners of valuable intellectual property.

As previously explained in a letter dated February 17th (**see Appendix A**), it should not be difficult to understand how this dramatic intervention in the marketplace will devalue our content, reduce our revenues, and limit our ability to invest in the creation and development of world-class video content. This will result in audiences having fewer and less diverse options for programming on TV.

First, it destroys the market for our work, by giving an entire class of potential paying customers free access. Why would a company like Google ever consider licensing and paying for video programming to launch its own competitive video service if the FCC has already handed it the rights for free?

Second, this mandate makes our content less valuable to the existing TV distributors with whom we must regularly negotiate deals for carriage. If these distributors are forced to turn over valuable programming rights to competitors for free, the value they can create for their own businesses using our content is diminished, and so the prices they'll be willing to pay for it will drop substantially. After all, no company will pay a premium just to subsidize free-riding competitors. The Commission's claim that "deals made between MVPDs and content providers are not affected by this proposal" is naïve and deeply misleading. The fees in existing contracts may not change, but the fees we can command in our next negotiation will unquestionably plummet, forcing drastic cuts to production budgets.

Third, this mandate gives tech companies the right to siphon away our advertising revenue. These device makers and app developers would have the right under this mandate to insert new pop-up, banner, wraparound, search, and pre-roll advertising, while charging us for "search priority" or other forms of paid promotion – in short, the standard advertising practices we already see in Google's existing search and video platforms. And all that extra advertising would necessarily weaken the impact and value of the existing native ads in the underlying program feed, diminishing what advertisers will be willing to pay for placements in our programming.

Despite repeated promises that the rule would prohibit extra advertising, the published text blatantly contradicted these promises, stating in paragraph 80: "*[We] do not believe it is necessary for us to propose any rules to address these issues.*" In effect, this proposal will force us to compete for the business of advertisers looking to reach our audience against tech companies getting free access to our own content – a rigged game on an uneven playing field.

With both licensing fees and advertising revenues plummeting, independent networks will have no choice but to cut back significantly on production costs. The effects of these cutbacks will ripple throughout the creative industry, limiting economic and creative opportunities for the hundreds of thousands of writers, producers, directors, actors, and crew members who work in the television industry today. The windfall profits Google would enjoy under this sweetheart deal would come at the direct expense of independent programmers, content producers, and artists whose work would be commoditized and devalued by this rule.

Advocates for this mandate have claimed that blending streaming and pay-TV content into the same devices would actually benefit diverse and independent content creators, by giving us "greater access" to audiences on the web. These arguments don't hold up to even basic scrutiny. The suggestion that audiences are currently inhibited from accessing streaming or OTT video services is absurd. Netflix's nearly 45 million subscribers don't seem to have any challenge, nor do the 60% of Americans who have already connected their TV to the Internet, using platforms and devices that run apps from pay-TV companies and streaming services side-by-side.

If an entrepreneur or content creator wants to launch their own web channel, the barriers to entry are already virtually non-existent. But simply existing on the Internet is no guarantee of meaningful (or any) revenue, whether you're accessed through a computer, smartphone, smart TV, or FCC-designed box. This mandate proposes to tear down the carriage-based business models that have allowed the emergence and growth of independent television networks, and

offers in return little more than an opportunity to be included in search results in a new Google box, alongside every other video on YouTube. How exactly is that going to lead to a sustainable business model with revenue streams that can support the production of high-quality content?

The unvarnished truth is that this mandate will devastate the entire television creative ecosystem, with small and independent networks taking the hardest hit. This begs the question why the Commission would choose to go down this path, especially when there are alternative options for increasing set-top box competition that don't risk the considerable harms we've laid out. Apps, for example, allow TV providers to make their programming available on a wide range of consumer-owned devices, but without shredding the licensing agreements or content protections we rely on. If a TV providers' app is installed on a Roku or a smart TV, that provider is still bound to honor the terms we've negotiated in our licensing agreement, and the economic models that support our industry are left intact.

Apps offer a pathway to accelerating innovation in video devices and services without destroying the economic models that support the creation of great television programming. The Commission should reject this deeply flawed mandate and instead embrace the video market's app-powered future.

Sincerely,

Victor Cerda, Senior Vice President
VMe Media Inc.

Feliciano Garcia, President & CEO
Manteca Media

Timothy Greenfield Sanders, President
Perfect Day Media

Bel Hernandez, Creator/Executive Producer
Hola! LA, Latin Heat Media

Catherine Pino, Founder
Freemind Beauty

Melissa Narvaez, Vice President of Productions
Stateless Media

Mario Solis Marich, President & CEO
Feel Good TV

Tommy Walker, Producer and Partner
Freemind Ventures

Frank Washington, CEO
Crossings TV

Appendix A

Sen. John Thune, Chairman
Sen. Bill Nelson, Ranking Member
Senate Committee on Commerce, Science, & Transportation
512 Dirksen Senate Office Building
Washington, DC 20510

Rep. Fred Upton, Chairman
Rep. Frank Pallone, Ranking Member
House Energy & Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Thune, Ranking Member Nelson, Chairman Upton, and Ranking Member Pallone,

As independent programmers and content creators, we're proud to be a part of the most vibrant, diverse period in the history of American television. Where viewers once had only three broadcast networks to choose from, today's television fans enjoy an almost unimaginable number of choices from broadcast networks, satellite and cable TV providers, an exploding number of streaming services and devices, and web-based digital channels.

The programming that we produce and our audiences enjoy does not come free. Passion and creativity alone won't keep the lights on; if the revenue we generate from our work isn't sufficient to cover the cost of producing it, our businesses won't survive very long and our audiences' viewing options will shrink. That's why true media diversity requires a level playing field where independent voices like ours can negotiate with distributors and advertisers to build lasting, sustainable businesses.

The set-top box proposal Chairman Tom Wheeler plans to introduce tomorrow at the Federal Communications Commission would fundamentally undermine this level playing field, stacking the deck against creators by giving tech companies a license to repackage and profit from our work without any need to negotiate, much less pay, for the rights. We're grateful to the Members of Congress from both parties who have voiced serious concerns about this proposal, and we urge your Committees to fully consider the devastating and lasting harm this ill-conceived proposal would have on the diversity of independent choices available to American television viewers.

This proposal shares the same fundamental flaws as the "AllVid" plan the Commission wisely chose to shelve in 2010. Third party device-makers will be allowed to unbundle licensed video streams from TV providers, repackage these shows and movies into their own devices and

services, and generate revenue from advertising and data collection – without having to negotiate with us for licensing rights or pay any licensing fees.

Meanwhile, these device makers will be free to ignore the hard-fought terms of licensing contracts we have negotiated with TV distributors to govern channel placement, advertising restrictions, digital rights and much else. Box makers would be free to shuffle channels or replace traditional lineups with opaque search algorithms, becoming a gatekeeper between independent networks and our audience.

It's not hard to understand why tech giants like Google are lobbying for this rule. Right now, if they want to incorporate our programming into YouTube or other video products, they must negotiate for the rights and pay fair market licensing fees. If this rule passes, Google will instead be able to strip-mine our creative work for free, while collecting valuable data on users' viewing history and monetizing it through ads. The Commission should not be in the business of placing its thumb on the scale by giving billions of dollars of business value to tech companies at the expense of independent programmers.

Chairman Wheeler has stated repeatedly in recent weeks that this rule wouldn't diminish the licensing fees that programmers earn from carriage agreements. That's simply not the case. As Google exploits this government handout to skim ad revenue out of the TV ecosystem, the value of our content to distributors will shrink. That means that the next time we sit down to negotiate a carriage deal, the revenue we'll be able to generate from licensing fees will be diminished. The value of our programming will quickly become pegged to price that the FCC has allowed Google to set for it: zero.

Some advocates for this set-top box proposal have suggested that it would benefit independent content creators, and particularly those focused on serving minority audiences, by allowing streaming services and digital-only channels to more easily reach their audience. These arguments are deeply flawed. Digital channels and streaming services are already widely accessible today to anyone with a computer, smartphone, tablet, smart TV, video game console, Roku player, Apple TV, or any other connected device. Netflix already has more subscribers than any cable company; it strains credibility to hear AllVid advocates suggest that consumers in 2016 are somehow confused about where and how to find video on the web.

The challenge facing web-only content producers today isn't accessibility – the challenge is revenue. Without the stable revenue stream afforded by negotiated carriage deals with TV distributors, web-only channels will struggle to ever afford the production budgets necessary to create the quality programs our audiences expect and deserve. It's remarkable that the streaming video entrepreneurs who recently met with FCC Commissioners in support of this proposal complained existing carriage fees aren't high enough– but then suggested we'd somehow all be better off with a model that eliminates these fees altogether. We don't follow that logic.

It's clear that the independent programming landscape would quickly become a "race to the bottom" if this rule were to pass. Entrepreneurs and artists would be free to launch online-only video services – just as they already can today – but the business model that supports full service independent networks today would be torn down. Putting web-only content "on an equal footing" with traditional TV content does creators – and audiences – little good if that equal footing is on the bottom step of a broken escalator.

In light of these significant concerns, we hope your Committees will challenge the Commission to fully examine the impact this proposal will have on independent content producers, and to reject any new regulations that will limit the diversity of independent voices available to American television viewers.

Sincerely,

Victor Cerda, Senior Vice President
VMe Media Inc.

San Cho, President & CEO
MNET America

Brett Dismuke, President & COO
Swirl Group

Jorge Fiterra, President & CEO
Condista Networks

Feliciano Garcia, President & CEO
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Robert Radnor, General Counsel
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Marisa Rivera, President
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