**DISSENTING STATEMENT OF COMMISSIONER AJIT PAI**

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41.

As an FCC Commissioner and as a citizen, I believe that our media ideally should reflect the diversity of the country in which we live. And when it comes to the video marketplace, we have made a lot of progress over the last decade. There are now more outlets through which creators of video content can distribute their programming than ever before. Over-the-top video, in particular, has been a game changer: It's given diverse voices a new way to be heard, and it has given Americans access to novel content they might never have previously seen.

In my statement on the *Notice of Inquiry* in this proceeding, for example, I discussed the second episode of *Master of None*, a Netflix series starring Aziz Ansari, who is also its co-creator and co-writer. That episode focused on the relationship between Asians who came to this country in the 1960s and 1970s and their American-born children. As an American-born son of Indian immigrants, that episode really hit home with me. It told a story I had never really seen before on American television.

Evidently, that episode impacted a lot of other people as well. Earlier this month, it won the Emmy for Outstanding Writing for a Comedy Series. I'm sure that most of the Emmy voters weren't the children of Asian immigrants, which just goes to show that compelling storytelling has a universal appeal.

Given my support for greater diversity in the video marketplace, I had hoped that I would be able to support this Notice of Proposed Rulemaking (*Notice*). Indeed, it used to be the case that almost all FCC votes on Notices were unanimous. Notices were meant to represent the beginning of the rulemaking process, not its end. Their purpose was to identify all pertinent issues and ask the right questions so that the Commission would be able to make a decision about whether to move forward with new rules, and if so what those new rules should be, on the basis of a complete factual record. For this reason, Commissioners were generally able to add questions to draft Notices. Even if Commissioners were ultimately likely to disagree on how substantive issues should be resolved, I remember hearing many times within this building that "there's nothing wrong with asking a question."

Unfortunately, those days are long gone. Too often, Notices are now one-sided documents that leave little doubt that the Commission has already made up its mind on the issues about which it is purporting to seek the public's input. They suggest that the "comment" part of "notice-and-comment rulemaking" is merely an administrative hoop through which the Commission must jump rather than a critical component in shaping the FCC's decision-making. Accordingly, questions that could generate answers suggesting flaws with the Commission's pre-determined conclusions are excluded from the document. Efforts to bring balance by describing each side's arguments in a fair manner are rejected out of hand.

I was disappointed when the draft of this *Notice* that I received three weeks ago reflected that approach. As a result, I suggested a number of edits to make it less slanted—edits that would not have blocked the Commission's intended direction. I proposed a number of questions to ensure that all aspects of the issues raised in the document were explored. And I believe that it is especially critical to make one other point: Had my ideas been accepted, there still would have been adequate notice for adopting the final rules this *Notice*'s most vocal proponents favor. But the vast majority of my edits were rejected.

In critical respects, this is effectively an *Order* titled as a *Notice*. This is a *Notice* littered with statements indicating that the Commission has already decided many of the most important issues about which we are seeking comment. This is a *Notice* that doesn't include many questions that could yield answers the Commission might find inconvenient. And this is a *Notice* that I cannot support.

In particular, I would like to briefly discuss two of my most serious concerns.

*First*, I am not convinced that the FCC has the legal authority to adopt the proposals set forth in

this *Notice*, prohibiting "unconditional" most favored nation (MFN) provisions and unreasonable alternative distribution method (ADM) provisions in program carriage agreements between multichannel video programming distributors (MVPDs) and independent video programming vendors.

The *Notice* contends that section 616(a) of the Communications Act gives the FCC general rulemaking authority over programming contracts. In particular, the Commission points to the part of that provision that reads, "the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors." Section 616(a) goes on to list six specific things that those regulations should "include," "contain," or "provide." The Commission claims that regulations promulgated under section 616(a) need not be limited to those six things and may include others, such as prohibiting unconditional MFN and certain types of ADM provisions. But I have my doubts.

To begin with, in the almost quarter-century since section 616(a) was enacted into law, the Commission has never issued regulations under this provision that go beyond the six requirements specified under the provision. We have only implemented the specific terms set forth in section 616(a)(1)–(6).

Moreover, if section 616(a) does give the Commission general rulemaking authority over programming agreements, what are the limits on that authority? No one has yet answered this question. The *Notice*'s interpretation simply gives the Commission carte blanche to regulate programming contracts. And I see no evidence that Congress intended to give the FCC such limitless authority.

I am also concerned that such an interpretation of section 616(a)(1) could give rise to serious constitutional difficulties. Under the non-delegation doctrine, Congress must provide agencies with an intelligible principle upon which to base its regulations. But under the portion of section 616(a) that the Commission believes provides it with general rulemaking authority, what is that intelligible principle?

Additionally, the *Notice* fails to ask about the significance (if any) of the contrast between the structure of section 616(a) and that of section 628(c). In section 628(c)(1), Congress directed the FCC to establish regulations to prohibit cable operators and others from engaging 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 MVPD from providing satellite cable programming or satellite broadcast programming to consumers. Then, in section 628(c)(2), Congress specified four different types of regulations that the Commission must adopt. This provision, however, is entitled "Minimum Contents of Regulations," thus signaling that Congress did not intend for the FCC's rulemaking power under section 628(c)(1) to be cabined by the particular regulations discussed in section 628(c)(2).[1]

Consequently, Congress, in Title VI of the Communications Act, clearly knew how to indicate that particular regulatory mandates established a floor for the Commission's authority rather than a ceiling. Such an indication is found in section 628(c), but not within section 616(a). Moreover, section 628(c) contains a clearly intelligible principle that can be used to guide a general grant of rulemaking authority. Section 616(a), by contrast, does not appear to include any such principle. Shouldn't these differences impact the Commission's interpretation of section 616(a)?

*Second*, I am concerned that the proposals set forth in this *Notice* could have unintended consequences. In my meetings with independent programmers, I have heard their concerns about how unconditional MFN provisions as well as ADM provisions are impacting their businesses. And I have sympathy for their perspective, particularly with respect to unconditional MFNs.

[1] *See also Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, MB 07-51, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20258, para. 48 (2007) (title of section 628(c)(2) "strongly suggests that the rules the Commission was required to implement had to cover the conduct described in Sections 628(c)(2) at the *least*, but that the Commission's authority under Section 628(b) was broader"), *aff'd*, *NCTA v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

But we need to consider fully the potential results of Commission action here. Remember that MVPDs are under no legal obligation to carry any particular independent programmers in the first place. So we have to consider whether banning unconditional MFN and certain types of ADM provisions would make it less likely that independent programmers would be able to secure carriage by MVPDs. Would banning such contract terms make it more likely that those independent programmers already being carried by MVPDs would be dropped? Or would prohibiting such provisions make it more likely that a large MVPD would insist on exclusive deals with independent programmers, thus limiting these programmers' reach? In short, would the Commission's proposals make it easier or harder for independent programmers to gain distribution? Unfortunately, it is evident from the *Notice* that the Commission has already fixed upon an answer before the record has been compiled.

One last point. I voted against the Charter-Time Warner Cable-Bright House merger because I was concerned numerous conditions imposed upon that transaction would, over time, be transformed into industry-wide rules. When I took that stand, I heard from many who insisted that this wouldn't be the case.

Yet less than five months after that vote, here we are: The FCC is already proposing in this *Notice* to impose, on an industry-wide basis, restrictions on programming agreements agreed to by the Department of Justice and a single company during a merger proceeding. Even before the use of the Time Warner Cable name has been completely phased out, we see the Commission's first effort to demand of the entire industry the regulatory tribute extracted from Charter. Mark my words: It won't be the last.

I dissent.