

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

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

“You’ve been dropped!”

Three of the most paralyzing words a small or independent programmer could ever hear. They render a content provider powerless and frustrated. As for the consumer? With little or no warning, they suddenly discover that a favorite network or show has been removed from their channel lineup, leaving them with little or no alternative means for accessing ‘niche content.’

But what some may call ‘niche programming’ is that customer’s preferred viewing. Strong ratings? Rave reviews? Neither of these seem to matter. Their favorite station is now missing from the programming line-up, because the cruel reality is that independent programmers live by a different set of rules. Some understandable. Others quite perplexing.

Just last month, as part of my office’s #ConnectingCommunities tour, I visited one such programmer in a small town called Indian Land, South Carolina, an unincorporated community just south of Charlotte. There I toured the facilities and met with the leadership of INSP, a family-focused content provider that reaches more than 80 million U.S. households. INSP, like countless other independent programmers I have heard from, faces a number of significant challenges that make it difficult to compete on a level playing field, though they will be the first to admit that comparatively speaking, they are quite fortunate.

And it is because of INSP and dozens of others not as fortunate, that I urged seven months ago, for the adoption of a Notice of Inquiry (NOI) that enabled the Commission to embark on a fact-finding mission on the current state of programming diversity, consumer choice and the evolving video marketplace. Just what did we learn from this exercise? After combing through more than 36,000 filings and reviewing the transcripts of two public workshops, several themes emerged. Most notably, independent programmers from all ends of the ideological spectrum told us that they regularly must accept clauses in their program carriage agreements, including most favored nation (MFN) and alternative distribution method (ADM) provisions that inhibit their ability to grow and innovate.

Now I must admit, that when we launched the NOI in February, I was unsure of what path, if any, we would tread. I knew that there were significant problems facing independent programmers, but I was always aware that tackling these issues head on, would require a robust docket, and clear legal authority. Building on the extensive record and the authority granted under Section 616 of the Communications Act, the NPRM we consider today, appropriately targets two troubling practices: “unconditional” MFNs and unreasonable ADMs.

For those outside of the communications law space, imagine that as an independent programmer eager to grow subscribership, you strike a carriage deal in which you agree to accept a lower rate per subscriber in exchange for say, better channel placement. Now in negotiating with another distributor, you are told, that because of your previous deal with the other entity, that they will not only take your discounted rate, but put your channel in a tier with just a quarter of the subscribers you thought you were negotiating for. How fair does that sound? Similarly, what if you were told, that to strike a carriage deal with a traditional pay-TV provider, you must agree to a clause that will forever prevent you from striking similar agreements in the future, with online video distributors or what we call OVDs? These are very real scenarios independent programmers face each and every day.

But do not just take my word, when it comes to the nature of these practices. Look at what the Department of Justice (DOJ) said in its review of the Charter-Time Warner Cable deal earlier this year. DOJ stated that ADMs and other contractual provisions have the effect of making OVDs “less competitive.” As a result of this determination, the DOJ imposed conditions on New Charter that prohibit the company from entering into or enforcing ADMs with programmers as well as MFNs if they are inconsistent with this underlying prohibition.

I am also pleased that this NPRM asks about potential recourse when customers’ find, that their favorite programming network has been dropped from the channel lineup. For many consumers who are locked into a multi-year contract, the prospect of finding another pay-TV provider that carries their favorite channel (if one even exists), means paying stiff cancellation penalties. The NPRM at my urging also asks a series of questions about other practices such as bundling that may prevent independent programmers from gaining carriage. For new entrants, some who are even willing to initially offer free carriage, it can be a challenge just to get their telephone call returned.

In sum, I respectfully ask this body: Are we satisfied with a few large conglomerates dominating the paid TV channel lineup? Do we believe that independent and diverse voices have a place in a vibrant media landscape? Do these voices play a role in a strong democracy? The adoption of today’s NPRM ensures that these questions and more are addressed, and for that I sincerely thank the Chairman for his support of this fact-finding exercise, the Media Bureau staff, including Michelle Carey, Martha Heller, Raelynn Remy and Calisha Myers for diving into the complex issues surrounding carriage agreements and producing this NPRM, and my adviser David Grossman, for his keen attention to detail.