Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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<tr><td>In the Matter of

LIBERMAN BROADCASTING, INC.
and
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Complainants,

vs.

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MB Docket No. 16-121

File No. CSR-8922-P</td></tr>
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To: Chief, Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

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OPPOSITION TO PETITION FOR RECONSIDERATION

Comcast Corporation and Comcast Cable Communications, LLC (together, "Comcast") submit this Opposition to the Petition for Reconsideration (the "Petition") filed by Liberman Broadcasting, Inc. and LBI Media, Inc. (together, "LBI") requesting reconsideration of the Media Bureau's August 26, 2016 order (the "Order") dismissing LBI's program carriage complaint (the "Complaint").[1] The Petition is nothing more than a rehash of arguments previously made to the Media Bureau, which correctly applied the law and Commission policy and precedent in the Order. Accordingly, the Petition should be denied.

[1] *Liberman Broadcasting, Inc.* v. *Comcast Corp.*, MB Docket No. 16-121, Memorandum Opinion and Order, DA 16-972 (rel. Aug. 26, 2016) ("Order").

INTRODUCTION

The Media Bureau correctly concluded that LBI, as the owner of the Estrella TV broadcast television network and broadcast television stations, is not a "video programming vendor" with standing to bring a complaint under Section 616. In so holding, the Bureau reached the proper conclusion that in the statutory framework Congress deliberately provided different rights and remedies to broadcasters such as LBI. In fact, the correctness of the Bureau's conclusion is demonstrated by the Commission's citation of the Order in its recently released NPRM concerning Section 616.[2]

The Petition fails to meet the narrow test for reconsideration set forth in Section 1.106 of the Commission's rules. LBI introduces no facts that have come to light since it filed its Reply. LBI cites no intervening change in law. And LBI identifies no other error, omission, or reason warranting reconsideration. Instead, LBI merely repeats claims it previously made to the Bureau, arguing, in essence, that the Bureau came to the wrong conclusion in dismissing LBI's carriage Complaint. The Bureau routinely dismisses petitions for reconsideration that are based on nothing more than an attempt at a second bite at the apple.

Even if the Bureau entertains it, the Petition fares no better on the merits. The Bureau considered the statutory text on which LBI relies, but properly held that the definitions of "video programming" and "video programming vendor" must be read *in context*, not in isolation. The Bureau appropriately interpreted the text in light of the statutory and regulatory text and scheme created by the Communications Act. As the Bureau recognized, that scheme establishes

[2] *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Proposed Rulemaking, ¶ 16 n.70, FCC 16-129 (rel. Sept. 29, 2016) ("Independent Programming NPRM") (citing the Bureau's holding that "a broadcast licensee is not a 'video programming vendor' within the meaning of section 616 and thus lacks standing to bring a program carriage complaint"); *see also id.* ¶ 33 n.117 (same).

separate and mutually exclusive regulatory regimes governing carriage of cable television networks, on the one hand, and retransmission consent and must-carry rights for broadcast stations, on the other. As a result, the Bureau appropriately rejected LBI's argument that the "plain meaning" of the terms "video programming vendor" and "video programming" compel the Bureau to grant LBI standing to bring a program carriage complaint.

The remaining arguments in LBI's petition are similarly wide of the mark. The Bureau did not, as LBI asserts, "ignore" the allegations in LBI's Complaint concerning Comcast's purported refusal to grant Estrella TV "white area" carriage. To the contrary, the Bureau concluded that LBI could attempt to bring such a complaint. Of course, such a complaint would not be able to state a *prima facie* case of discrimination because, as Comcast showed in its response to the dismissed Complaint, LBI's allegations are both untimely and wrong on the merits. What the evidence has shown and would show is that Comcast made a rational business decision not to pay high carriage fees to an unpopular network without any showing by LBI that any other MVPD paid comparable fees for comparable carriage.

Finally, there is no reason to grant LBI's request to open this proceeding to "permit-but-disclose" status. Nothing in the Petition demonstrates any reason to change the "restricted" status that governs adjudicatory proceedings.

ARGUMENT

I. LBI'S PETITION PROVIDES NO BASIS FOR RECONSIDERATION

The Commission's rules provide for petitions for reconsideration to be granted in narrowly circumscribed circumstances.[3] Although a petition may be appropriate where a party can point to an obvious error or, in some cases, to new arguments or new factual developments,

[3] *See* 47 C.F.R. § 1.106.

it is not intended to provide additional briefing on arguments a party has already advanced or could have advanced. Accordingly, a request for reconsideration that "[f]ail[s] to identify any material error, omission, or reason warranting reconsideration," or relies on "arguments that have been fully considered and rejected by the Commission within the same proceeding," "plainly do[es] not warrant consideration."[4] That is the case here.

The Petition offers no facts or arguments that were not or could not have been raised earlier in this proceeding. LBI identifies no material omission, error, or other reason for reconsideration of the Bureau's well-reasoned decision. LBI's principal argument—that the definition of a video programming vendor under Section 616 includes broadcast networks—has been explicitly rejected by the Bureau, which concluded that "the better reading of [video programming vendor] . . . excludes broadcast licensees."[5] The mere fact that LBI disagrees with the Bureau's conclusion is not a proper basis for reconsideration.[6]

II. THE BUREAU CORRECTLY HELD THAT LBI IS NOT A "VIDEO PROGRAMMING VENDOR" UNDER SECTION 616

A. The Text of Section 616 Does Not Compel a Different Result

Only a "video programming vendor"—"a person engaged in the production,

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4 *Id.* § 1.106(p). As the Commission explained in 2010, "petitions for reconsideration . . . [that] merely repeat arguments the Commission previously has rejected" are improper. *See Amendment of Certain of the Commission's Rules of Practice and Procedure and Rules of Commission Organization*, 25 FCC Rcd. 2430, ¶ 4 (2010).

5 *See* Order ¶ 12 & n.55.

6 *See, e.g.*, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 29 FCC Rcd. 7515, ¶ 8 (2014) (denying a petition for reconsideration based on an argument that "was specifically considered and rejected [earlier in a rulemaking proceeding]"); *Ultra-Wideband Transmission Systems*, 25 FCC Rcd. 11390, ¶ 11 (2010) (denying a petition for reconsideration that "presents no new arguments or information . . .—it merely disagrees with the Commission's analysis and conclusion").

creation, or wholesale distribution of video programming for sale"—may bring a program carriage complaint.[7] The Bureau correctly held that, because LBI brought the Complaint in its capacity as the distributor of a broadcast television network through broadcast television stations, LBI is not a video programming vendor for purposes of Section 616.[8]

LBI's assertion that the Bureau erred by purportedly "fail[ing] to account" for the statutory definition of "video programming" in construing the definition of "video programming vendor" is wrong. The Bureau expressly addressed the Act's definitions of both terms, but it simply (and correctly) declined LBI's invitation to ignore the statutory context in construing the text of those statutory fragments.[9] The Bureau instead correctly reviewed the language cited by LBI in the context of the broader statutory scheme, because "the meaning of statutory language, plain or not, depends on context."[10] Indeed, Supreme Court precedent *required* the Bureau, in interpreting the statutory text, to "look to the structure and language of the statute as a whole," rather than read snippets in isolation.[11] The *first* step in interpreting statutory text, in other words, is to "exhaust the traditional tools of statutory construction to determine whether

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7 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e).

8 *See* Order ¶ 2.

9 *See id.* ¶¶ 11–12 & n.55.

10 *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."); *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) ("[T]he meaning of words depends on their context.").

11 *Nat'l R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992); *see also King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme." (internal citations and quotations omitted)); *Dolan* v. *U.S. Postal Svc.*, 546 U.S. 481, 487 (2006) ("The definition of words in isolation . . . is not necessarily controlling in statutory construction.").

Congress has spoken to the precise question at issue . . . includ[ing] examination of the statute's text, legislative history, and structure, as well as its purpose."[12] Statutory structure is often a key determinant of meaning, and courts frequently reject statutory interpretations that either ignore the overall structure of a statute or lead to absurd outcomes.[13] An interpretation that "may seem plain when viewed in isolation" at times "turns out to be untenable in light of [the statute] as a whole."[14]

Likewise, courts frequently construe statutes to give effect to statutory structure and purpose, and uphold agency determinations that do so—as the D.C. Circuit did over 20 years ago in affirming the Commission's narrow interpretation of "video programming" for purposes of another section of the Communications Act.[15] There, the Commission ruled that a provision in the statute barring telephone companies from distributing "video programming" extended only to video programming on cable systems, and not to video programming distributed by other means.[16] The D.C. Circuit rejected a claim that the Commission's order "contradicts the plain

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12 *Petit* v. *Dep't of Ed.*, 675 F.3d 769, 781 (D.C. Cir. 2012); *see also Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989) ("[I]n expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (internal citation and alterations omitted)); *Implementation of the DTV Delay Act DTV Consumer Educ. Initiative*, 24 FCC Rcd. 3399, ¶ 10 (2009) (interpreting statute with reference to "text, legislative history, and structure").

13 *See Castillo* v. *United States*, 530 U.S. 120, 124 (2000) ("[W]hile the statute's literal language, taken alone, appears neutral, *its overall structure* strongly favors the 'new crime' interpretation.'" (emphasis added)); *Tax Analysts* v. *IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997) ("While the IRS's interpretation of 'data' in § 6103(b)(2)(A) may be linguistically possible, we . . . conclude that it is not a permissible construction of the statute *in light of its structure* and purposes." (emphasis added)).

14 *Burwell*, 135 S. Ct. at 2495.

15 *Am. Scholastic TV Programming Found.* v. *FCC*, 46 F.3d 1173, 1178–79 (D.C. Cir. 1995); *see also Petit*, 675 F.3d at 781 (crediting agency's narrower interpretation of statutory language that "[a]t first blush" had a contrary plain language meaning).

16 *Am. Scholastic*, 46 F.3d at 1177.

language of the statute," instead crediting the Commission's reasoning that "the structure of the [Cable Act] as a whole and its legislative history indicate that Congress meant only to prohibit 'video programming' over a cable system."[17] Indeed, the legislative history showed that Congress used the phrase "video programming" in the 1984 Cable Act to distinguish video from the other services cable companies provide (such as "voice and data traffic"), and not to fundamentally alter the regulatory landscape.[18]

Here, the Bureau clearly considered the definitions of video programming and video programming vendor in "the context of the statute as a whole," including "the design" of the Act, corroborated by its legislative history.[19] As the Bureau recognized, that statutory structure "evinces Congress's intent" to provide different rights and obligations for "broadcast television stations," on the one hand, and "video programming vendors," on the other.[20] Congress placed these rights and obligations in different sections of the statute.[21] In Section 616, which defines "video programming vendor," Congress directed the Commission to "establish regulations governing program carriage agreements."[22] In Section 325(b), Congress directed the Commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent" and "the right to signal carriage" under Section 614's must-carry requirements.[23] The terms "broadcast stations," "television stations," and "broadcast

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17 *Id.* at 1177–78.

18 *Id.* at 1181.

19 *See* Order ¶¶ 11–16.

20 *Id.* ¶ 14.

21 *Id.*

22 47 U.S.C. § 536(a).

23 *Id.* § 325(b)(3)(A).

signals" appear nowhere in Section 616,[24] and the term "video programming vendor" appears nowhere in Section 614 or Section 325(b).[25]

Moreover, the Bureau properly held that because broadcast stations provide their *signal* to MVPDs for further distribution, and have a right to compel carriage of that *signal* (pursuant to must-carry) or withhold that *signal* (under retransmission consent), they are not engaged in the sale of *programming* to MVPDs, such that they unambiguously qualify as video programming vendors.[26] The rights to a broadcast station's signal and the programming transmitted via that signal are not the same thing, as the Bureau recognized in citing the compulsory copyright licensing regime in 17 U.S.C. § 111, which provides compensation for video programming distributed by broadcast television stations.[27]

Indeed, interpreting the phrase video programming vendor as LBI does, so that a "television broadcast station" is always a "vendor" engaged in the distribution of "programming provided by a television broadcast station," makes no sense and is, at best, circular.[28] To the extent the phrase "television broadcast station" is incorporated into the definition of video programming (and, as LBI argues, video programming vendor), the most natural reading of that term is the one the Commission and the D.C. Circuit have already given it: the phrase video programming distinguishes cable *television* services from *other* services that cable companies

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[24] Order ¶ 14.

[25] *See* 47 U.S.C. § 534; *id.* § 325(b).

[26] Order ¶ 12.

[27] *Id.* ¶ 12.

[28] Petition at 4–5.

offer.[29]

As the Bureau found, the legislative history of the Communications Act confirms the congressional intent that is apparent from the statute's text and structure. Even though Sections 325(b), 614, and 616 were all enacted as part of the 1992 Cable Act, Congress never acknowledged any overlap among the three provisions.[30] Moreover, when Congress amended the Act in 2004 to apply good-faith retransmission consent negotiation obligations to MVPDs, it made no mention of Section 616.[31]

Based on the text, structure, and history of the Communications Act, the Bureau rightly concluded that Congress did not express an unambiguous intent to define broadcast television stations as video programming vendors for purposes of Section 616.[32] Nothing in LBI's petition gives a reason for the Bureau to reconsider its well-founded holding in this regard. Consequently, there is no reason to reconsider the Bureau's further conclusions—that Congress established "separate and mutually exclusive regulatory regimes" for broadcast stations and

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[29] *See Am. Scholastic*, 46 F.3d at 1181. There is no support in the legislative history of the 1984 Cable Act for LBI's assertion that Congress meant to define "video programming" so that broadcast stations would have program carriage rights (which, after all, did not exist until passage of the 1992 Cable Act eight years later).

[30] Order ¶ 16.

[31] *Id.* Other aspects of the statutory scheme further confirm the Bureau's conclusion. LBI never grapples with the incompatibility of and lack of fit between the program carriage and broadcast frameworks, which were created to address different entities and accordingly incorporate very different provisions. The different standards each regime establishes for review of MVPDs' carriage decisions (good-faith versus affiliation-based discrimination) would make no sense applied to the same carriage negotiation. And Section 616's prohibition on coercing content providers to confer exclusive rights cannot be applied to broadcasters, which are banned from engaging in exclusive contracts for carriage. 47 U.S.C. § 325(b)(3)(C)(ii). LBI, moreover, cannot explain what Section 616's "unreasonable restraint" element would mean in the context of broadcasters like LBI, who already possess (by dint of the must-carry provisions) the ability to reach the widest swath of an MVPD's subscribers in their local markets.

[32] *See* Order ¶¶ 12–19.

cable networks, and "a comprehensive set of rights and obligations for [] broadcasters."[33]

Unable to demonstrate that the Bureau's decision departs from the statutory text in context, LBI itself resorts to arguments that are inconsistent with the statutory language. LBI takes great pains to argue that, as a matter of policy, the remedies available under Sections 325 and 616 should not be mutually exclusive and broadcasters should have their choice among them.[34] As the Bureau recognized, however, Congress made a contrary determination which the Bureau is bound to implement: as described above and in the Order, the most natural reading of Sections 325, 614, and 616 indicates that the Communications Act grants separate rights and remedies to broadcast stations and video programming vendors.[35] In any event, even if the Bureau were free to revisit the issue, LBI has provided no persuasive reason for the Bureau—which administers both the program carriage and retransmission consent/must-carry regimes—to change its view. LBI suggests that the retransmission consent and must-carry rules can "coexist" with the carriage discrimination rules because they "redress different shortcomings in the marketplace," but this is not the case.[36] As Comcast detailed in its Answer, Congress adopted the far-reaching structural protection of the must-carry rules (which were upheld by the Supreme Court on only the narrowest margin) in order to address concerns that broadcasters would be

[33] *Id.* ¶¶ 14–15; *see, e.g.*, *Cablevision Sys. Corp.* v. *FCC*, 649 F.3d 695, 704 (D.C. Cir. 2011) (deferring to the Commission's reasonable construction of the Communications Act "if Congress has not unambiguously foreclosed the agency's construction"); *Am. Council on Educ.* v. *FCC*, 451 F.3d 226, 231–34 (D.C. Cir. 2006) ("We cannot set aside the Commission's reasonable interpretation . . . in favor of an alternatively plausible (or an even better) one.").

[34] Petition at 6–8.

[35] Order ¶¶ 14–15.

[36] Petition at 6.

foreclosed from MVPD distribution.[37] As the Bureau recognized, the must-carry and retransmission consent rights governing broadcast stations in Sections 614 and 325 are, taken together, "comprehensive," and "[t]here is no indication in the statute that broadcast stations have a third carriage option."[38]

The Bureau's holding also is in line with longstanding Commission precedent establishing that "a broadcaster has the option to elect mandatory carriage and forgo compensation for carriage of its signal or pursue retransmission consent *and risk the failure to agree and non-carriage*."[39] Therefore, based on the statutory structure, legislative history, and regulatory precedent, the Bureau reached the proper determination that giving broadcasters an additional remedy under Section 616 would "conflict with and significantly undercut the must-carry/retransmission consent election process set forth in sections 325 and 614."[40] This was not error. To the contrary, any other conclusion would lead to duplicative litigation over carriage of broadcast networks that the governing statutory framework does not contemplate.

The position advanced by LBI would also conflict with the Supreme Court's decision in *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994), in which the Court upheld the must-carry regime only because it constituted a narrowly-tailored remedy designed specifically to solve the alleged harm to broadcasters caused, in part, by the vertical integration of cable

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37 *See* Answer ¶¶ 43–46.

38 Order ¶ 15.

39 *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd. 10339, ¶ 29 (2005) (emphasis added).

40 Order ¶ 18.

operators.[41] Had broadcasters been able, as LBI urges, to bring a program carriage complaint under Section 616, the must-carry statute surely would not have passed constitutional muster.

The arguments set forth in the Petition also conflict with the repeal of the cable/broadcast cross-ownership ("CBCO") rule that prevented in-market cross-ownership between cable operators and broadcast stations. Under LBI's view of the statute, it would have been highly relevant for the court reviewing those rules (or the Commission) to observe that broadcast stations competing with competitors integrated with cable operators could protect themselves under Section 616. Instead, the court and the Commission focused on the availability of must-carry to address any competitive concerns.[42] There was no mention of Section 616 because the carriage remedy prescribed there does not apply to broadcasters.

The Bureau also reasonably rejected LBI's argument—made in reply and repeated in the Petition—that the Commission should interpret Section 616 to allow program carriage complaints by broadcast stations in the "unique set[] of circumstances where an MVPD is a vertically-integrated content provider."[43] LBI's interpretation does violence to Section 616, which contains provisions—prohibiting coerced exclusivity and demands for a "financial interest" as a condition of carriage—that apply to *all* MVPDs, whether vertically integrated or

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41 *See* Answer ¶¶ 44–46; *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 646–47 (1994); Cable Television Consumer Protection and Competition Act of 1992, §§ 2(a)(5), (16), 106 Stat. 1460, 1460–61, 1462 ("1992 Cable Act").

42 *See* Answer ¶¶ 50–51; *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, 15 FCC Rcd. 11058, ¶ 104 (2000); *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1051 (D.C. Cir. 2002).

43 *See* Petition at 7–8; Reply ¶ 18 ("Generalized good faith negotiation requirements apply to *all* retransmission consent negotiations between MVPDs and broadcasters, *whether or not the MVPD is vertically integrated*. Program carriage complaints, on the other hand, *have a more limited application and a very particular purpose* – to protect VPVs victimized by the discriminatory actions of vertically-integrated MVPDs.").

not.[44]

Finally, LBI asserts that "[t]he Commission has never held that sections 325 and 614 of the Act are mutually exclusive from section 616."[45] That statement flies in the face of the *Turner* decision and the repeal of the CBCO rule.[46] Moreover, in the past week, the Commission's NPRM concerning Section 616 (focusing on MFN and ADM clauses in carriage agreements) expressly cited the Bureau's holding "that a broadcast licensee is not a 'video programming vendor' within the meaning of section 616 and thus lacks standing to bring a program carriage complaint."[47] If the Commission believed that the Bureau had erred in concluding that the remedies granted under Section 616 do not apply to broadcasters, the citation to the Order would make no sense.

As a matter of statutory construction, legislative history, and Commission policy, the Bureau's interpretation of Section 616 is correct, and LBI has provided no valid grounds for reconsideration.

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[44] LBI asserts that giving broadcasters standing to bring Section 616 claims "would not open a floodgate of additional program carriage complaints." Petition at 7 n.20. But if broadcast stations are considered video programming vendors, they could invoke the "financial interest" provisions of Section 616 during retransmission consent negotiations with any MVPD, not just vertically integrated ones. LBI itself predicted such a result from its own "financial interest" claim with its threat that the "floodgates" of litigation will open if such claims are allowed to proceed. *See* Complaint ¶¶ 84–85; Petition at 3 n.4. Moreover, as shown in the Independent Programming NPRM (as well as prior program carriage rulemakings), the Commission has considered expanding the application of Section 616 beyond the three enumerated prohibitions.

[45] Petition at 6.

[46] The Commission has also repeatedly held in its Regulatory Flexibility Act analyses that there is no overlap between the retransmission consent and program carriage rules; the Commission could not have made this statement if Section 616 could be invoked by broadcasters. *See* Answer ¶¶ 52–54.

[47] Independent Programming NPRM ¶¶ 16 n.70, 33 n.117.

B. Commission Precedent Cited in the Petition Does Not Compel a Different Result

The Bureau's analysis of Section 616 is fully consistent with Commission precedent. In arguing that the Bureau "errs by rejecting and even ignoring Commission precedent that squarely addresses the question," LBI's argument—already made to the Bureau at the pleading stage—turns on a single statement in a Commission appellate brief that LBI cites as "precedent."[48]

But, as the Bureau has already concluded, the brief "was not summarizing prior Commission interpretations of the term 'video programming vendor' as used in Section 616."[49] That conclusion is consistent with well-established law that "[c]omments by government litigating counsel on appeal addressing peripheral issues are not entitled to deference,"[50] and the definition of video programming vendor was not, as LBI suggests, "a term central to the case before the court."[51]

The only other authority LBI cites is a report mandated by the 1992 Cable Act, which directed the Commission to "conduct an ongoing study on the carriage of local, regional, and national sports programming by broadcast stations, cable programming networks, and pay-per-view services."[52] LBI offers no reason why it did not cite the report in its earlier pleadings, and Section 1.106 of the Commission's rules make clear that a petition for reconsideration is not

48 *See* Petition at 8–10; Complaint ¶ 9.

49 Order ¶ 12 n.57.

50 *Abbott Labs.* v. *United States*, 573 F.3d 1327, 1332–33 (Fed. Cir. 2009) (holding that "no deference was due [to] the government counsel's offhand comment" on a specific question that "was not directly at issue" in that case).

51 Petition at 10.

52 1992 Cable Act § 26.

the proper vehicle to raise arguments that could and should have been presented to the Bureau in the first instance. In any event, the report concerns Section 26 of the Cable Act (which explicitly directed the Commission to study "broadcast stations"), while the definition of video programming vendor that is at issue here appears in Section 616 itself (which, as the Bureau noted, is devoid of any references to broadcast stations).[53] Moreover, Section 26 authorized the Commission to conduct a study and issue a report, not to engage in any affirmative regulation.[54] The study was not conducted subject to the Administrative Procedure Act, and the report (including interim decisions about it) was not appealable and had no substantive regulatory effect.[55] As a result, it does not constitute "established Commission policy and precedent" for the interpretation of the phrase video programming vendor under Section 616.[56]

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[53] 47 U.S.C. § 536(b) (defining video programming vendor "[a]s used in this section").

[54] *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Inquiry into Sports Programming Migration*, Interim Report, 8 FCC Rcd. 4875, ¶¶ 1, 74 (1993) ("*Sports Migration Interim Report*"); *see also Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Inquiry into Sports Programming Migration*, Final Report, 9 FCC Rcd. 3440, ¶ 3 (1994). Although a footnote in the *Sports Migration Interim Report* notes Section 616's definition of video programming vendor, its interpretation of the term as used in Section 26 is not an authoritative or precedential interpretation of the term for purposes other the scope of the study at issue. *See Sports Migration Interim Report* ¶ 74 n.169. In fact, in referencing Section 616 or otherwise, the *Sports Migration Interim Report* makes no claim, nor could it, that the interpretation of video programming vendor for the limited purpose of Section 26 should have any bearing on the interpretation of the term in another, unrelated provision of the 1992 Cable Act.

[55] *See* 5 U.S.C. §§ 551(13), 704 (providing judicial review for a final "agency action," the definition of which does not include reports). Judicial review of Commission action is available only for "final orders" and certain specific kinds of "decisions and orders." *See* 47 U.S.C. §§ 402(a)–(b); 28 U.S.C. § 2342. The *Sports Migration Interim Report* is none of these.

[56] Petition at 9. Indeed, in more than twenty years of rulemaking on must-carry, retransmission consent, and program carriage—including in pending proceedings—the Commission has consistently treated the program carriage and broadcast signal carriage regimes as distinct. *See* Order ¶ 17. This is Commission policy and precedent.

C. The Allegations in LBI's Complaint Do Not Compel a Different Result

Applying its statutory and structural analysis of Section 616, the Bureau correctly determined that LBI's Complaint focused on the retransmission of its broadcast signal, which is covered by the retransmission consent regime under Section 325, not on program carriage, which is covered by Section 616. LBI's grievances about its unsuccessful retransmission consent negotiations cannot also form the basis for a Section 616 claim. As the Bureau explained, "to the extent [LBI] seeks compensation from Comcast for carriage of its television broadcast stations, it is in fact negotiating compensation for the retransmission of its television broadcast 'signal' rather than carriage of the 'video programming' contained within that signal."[57]

The allegations in LBI's Complaint confirm as much. LBI describes itself as "the owner of television broadcast stations" which, "[d]uring an earlier stage of its evolution . . . (namely, the must-carry/retransmission consent election cycle which ended December 31, 2014) . . . elected must-carry status under the Commission's rules."[58] In late 2014, however, LBI decided to "elect retransmission consent across the board in lieu of must-carry," which is how its present dispute with Comcast began.[59] By electing to pursue its right under the retransmission consent regime and then negotiating, albeit unsuccessfully, with Comcast for distribution of "all Estrella TV O&O stations" and of "non-owned Estrella TV broadcast affiliates," LBI acted as a broadcaster distributing a signal, not a video programming vendor under Section 616.[60] As a result, the Bureau properly dismissed LBI's Complaint.

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57 Order ¶ 12.

58 Complaint ¶¶ 6, 36.

59 *Id.* ¶ 36.

60 *Id.* ¶ 37.

For similar reasons, LBI misses the mark when it argues that it should have been allowed to pursue its carriage Complaint because prior Section 616 complaints involved disputes over "the fee that the complainant sought in its negotiations with the MVPD."[61] As the Bureau properly held, video programming vendors offer video programming "for sale," while broadcasters like LBI distribute content to viewers for free over the public airwaves but seek compensation from MVPDs for the distribution of their signals.[62] The fact that LBI, which creates content and owns broadcast stations, "holds property rights in *both* its signal and its content," is insufficient to bring its Complaint within the ambit of Section 616 because LBI sought compensation for the retransmission of its signal.[63] To the extent LBI believes that it is aggrieved, the proper remedy, as the Bureau has concluded, is under Section 325, not Section 616.[64]

III. LBI HAS NOT MADE OUT A *PRIMA FACIE* CASE OF CARRIAGE DISCRIMINATION

LBI argues that it has made out a *prima facie* case of discrimination, "and therefore has standing."[65] That is a *non sequitur*. The Bureau held that LBI is not a video programming vendor that can bring a claim under Section 616. LBI's truncated, self-serving

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[61] Petition at 11.

[62] Order ¶ 12.

[63] Petition at 13. As the Media Bureau explained, "[i]n its capacity as a broadcaster, LBI is engaged in the retail distribution of programming to viewers *for free*." Order ¶ 12 (emphasis added).

[64] Because LBI lacks standing to bring a program carriage complaint under Section 616 for the reasons stated above and in Comcast's Answer, the Bureau properly found that LBI also "lacks standing to bring a complaint for an alleged violation of the *Comcast-NBCU Order* and conditions." Order ¶¶ 20–22. In fact, as Comcast's Answer explained, the *Comcast-NBCU Order* and conditions reinforce the mutually exclusive nature and intent of the program carriage and must-carry/retransmission consent regimes. Answer ¶¶ 58–59.

[65] Petition at 15.

rendition of the allegations in its Complaint is, therefore, irrelevant. In any event, for the reasons set forth in detail in Comcast's Answer, LBI has not and cannot make out a *prima facie* case of discrimination.

As a threshold matter, LBI's Complaint is time-barred. LBI's claims—that Estrella TV is not receiving "carriage parity" with Comcast's affiliated networks, and Comcast's purported demand for a "financial interest" in Estrella TV—accrued no later than November 13, 2014, when Comcast made offers to carry Estrella TV on the very terms that LBI now claims to be discriminatory.[66] Yet LBI did not file its Complaint until April 8, 2016, months after the one-year statutory deadline. In its Petition, LBI makes no effort to address Comcast's statute of limitations defense, even though the Bureau expressly reserved judgment on this issue.[67] LBI's untimely filing is an independent basis on which to dismiss the Complaint in its entirety.

LBI's claims fail on the merits as well. The Complaint contains nothing more than speculation that Comcast made its carriage decision concerning Estrella TV on the basis of affiliation instead of a "reasonable business purpose."[68] Although LBI's Petition asserts—without any support—that LBI was harmed by "Comcast's well-documented incentive to discriminate in favor of its affiliated programming, Telemundo and NBC Universo,"[69] there is not a shred of evidence that Comcast's carriage decision was grounded in any way on the non-affiliation of Estrella TV or as part of an effort to protect affiliated Spanish-language networks.

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66 *See* Answer ¶¶ 69–77.

67 *See* Order ¶ 10 ("Because LBI has failed to [establish standing under Section 616,] we need not address Comcast's argument that the Complaint was untimely filed under the program carriage rules."); *id.* ¶ 19 (same).

68 *Comcast Cable Comm'ns, LLC* v. *FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013).

69 Petition at 3.

Rather, as Comcast demonstrated in its Answer and the sworn statements that accompanied it, Comcast made a considered and good-faith business judgment not to pay exorbitant fees to carry Estrella TV, a broadcast network that had limited appeal to Comcast's customers and which had previously been provided to Comcast at no cost pursuant to LBI's election of must-carry.[70] Market evidence corroborates Comcast's conclusion that Estrella TV did not merit the fees LBI sought. When LBI pulled the Estrella TV signal from Comcast in the Houston, Denver, and Salt Lake City markets in February 2015, only a small number of Comcast customers canceled their subscriptions as a result of losing Estrella TV, even in the face of sustained public attacks against Comcast by LBI.[71] Moreover, although LBI claims that Estrella TV is "valuable" to Comcast and other MVPDs, LBI has failed to identify in the Complaint a single MVPD, vertically integrated or not, that has agreed to pay the high carriage and retransmission consent fees LBI sought from Comcast.[72]

Finally, LBI faults the Bureau for its purported failure to "consider LBI's case against Comcast in . . . 'white area' markets."[73] The Bureau did nothing of the sort. In fact, the Bureau offered "no opinion . . . on the merits" of a potential Section 616 claim based on white

[70] *See, e.g.*, Answer ¶¶ 78–95.

[71] *See id.* ¶¶ 25–30, 87.

[72] *See id.* ¶¶ 103–10. As set out by Comcast in the Answer, LBI also has failed to show either that its programing is similarly situated to networks affiliated with Comcast (and, in fact, Comcast provided extensive expert evidence showing that it is not) or that Comcast's alleged discrimination unreasonably restrained LBI's ability to compete fairly (a showing that it could not make as a national broadcast network that has lost carriage on a single MVPD in three markets). *See id.* ¶¶ 111–43.

[73] Petition at 14.

area carriage, leaving LBI free to pursue such a claim if it has a good-faith basis to do so.[74] Comcast will deal with any such complaint if and when it is filed, but it is worth noting, at least briefly, that there is, in fact, no good-faith basis for such a complaint to be filed, as LBI has offered no evidence of meaningful viewership in white areas, no evidence that Estrella TV is in demand in white areas within Comcast's footprint, no evidence that other MVPDs compensate Estrella TV for white area carriage, and no evidence that Comcast's decision not to carry Estrella TV in white areas has unreasonably restrained LBI's ability to compete.

For these reasons and the ones set forth in Comcast's Answer, there is no basis to allow this proceeding to go on any longer. In the highly unlikely event that the Bureau does choose to reconsider its decision, the only conclusion that could be reached is that LBI's Complaint should be dismissed, with prejudice, in its entirety.[75]

IV. LBI'S REQUEST TO CONVERT THIS CASE TO A "PERMIT-BUT-DISCLOSE" PROCEEDING SHOULD BE DENIED

LBI ends its Petition with a perfunctory request for "permit-but-disclose" status but has failed to carry its burden of establishing that "the public interest so requires."[76] The issue to be decided by the Bureau does not "raise[] policy issues on which broader public participation

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[74] Order ¶ 19 n.77. However, as discussed above, the Complaint as filed was untimely because it was filed months after the expiration of the statutory deadline in November 2015. A new Section 616 complaint based on white area carriage would be nearly a year late.

[75] LBI notes that it "established in the complaint" that "Comcast also sought to require LBI to give Comcast a financial interest in Estrella TV's digital rights as a condition of carriage." Petition at 3 n.4. However, LBI's claim that Comcast violated Section 616 when it sought non-exclusive digital distribution rights for Estrella TV is wrong, as a matter of law. Answer ¶¶ 60–68.

[76] 47 C.F.R. § 1.1200(a); *see also id.* § 1.1208 note 2; *AT&T Corp.* v. *Bus. Telecom, Inc.*, Order, 16 FCC Rcd. 18159, ¶ 6 (2001) (noting that proponents of converting a restricted proceeding to permit-but-disclose status "bear the burden of demonstrating that the standard is met by the preponderance of the evidence").

would benefit the public interest."[77] Instead, the Petition involves a straightforward legal analysis of "the Commission's longstanding view that the regulatory framework applicable to carriage negotiations between MVPDs and broadcasters is section 325, not section 616."[78] This conclusion does not alter the rights of the parties or, as evidenced by the fact that no broadcaster has previously sought to bring a Section 616 claim, the reasonable expectations of broadcasters who already enjoy the extensive rights afforded by Sections 325 and 614.[79] As a result, there is no reason in this proceeding to depart from the general rule—derived from fundamental principles of due process—that there should be no *ex parte* communications with the tribunal in an adjudication.[80]

LBI's citation of the *Sky Angel* proceeding in support of permit-but-disclose is unavailing.[81] *Sky Angel* presented the question of whether the statutory definition of MVPD could include OVDs, distributors that did not exist in 1992 at the time of the enactment of the Cable Act and which were not otherwise subject to Commission regulation. There is no parallel

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77 *Amendment of the Commission's* Ex Parte *Rules and Other Procedural Rules*, Notice of Proposed Rulemaking, 25 FCC Rcd. 2403, ¶ 26 (2010).

78 Order ¶ 17.

79 Indeed, as described in Comcast's Answer, the National Association of Broadcasters acknowledges that only cable programmers can bring Section 616 claims and that must-carry/retransmission consent and program carriage are mutually exclusive regimes. *See* Answer ¶ 55 n.134.

80 LBI has not explained why it is incapable of presenting its arguments fully through written submissions, and, if there is an issue that truly requires an oral presentation, then even under the rules applicable to restricted proceedings, LBI is free to make arrangements for a meeting with "advance notice to [Comcast]" and "an opportunity for [Comcast] to be present." *See* 47 C.F.R. § 1.1202(b)(2).

81 *See* Petition at 18 n.64 (citing *Media Bureau Action – "Permit But Disclose"* Ex Parte *Procedures Established for Docket Seeking Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, Public Notice, 29 FCC Rcd. 11600 (2014)).

unsettled question here. Broadcast licensees had been subject to Commission regulation for decades at the time of the 1992 Cable Act and obtained significant additional rights under the Act. Moreover, the cases differ as a procedural matter: the *Sky Angel Public Notice* issued after a tentative ruling in an interim petition for standstill,[82] whereas this proceeding involves a dispositive action in which the Bureau has already fully considered these issues.[83] The Bureau can readily decide—and, indeed, has already decided—the issue based on the existing record.

CONCLUSION

The Media Bureau's Order dismissing LBI's Complaint correctly applied the law and Commission policy and precedent. The Petition should be denied.

Respectfully submitted,

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82 *See Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" As Raised in Pending Program Access Complaint Proceeding*, 27 FCC Rcd. 3079, ¶ 5 (2012).

83 *See* Order ¶¶ 9–23.

CERTIFICATE OF SERVICE

I, Alex J. Moyer, certify that on this 6th day of October 2016, a true and correct copy of the foregoing Opposition to Petition for Reconsideration was filed with the Federal Communications Commission and copies were served on the following by e-mail and hand delivery:

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