

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
LIBERMAN BROADCASTING, INC.)	MB Docket No. 16-121
and)	
LBI MEDIA, INC.,)	
Complainants,)	File No. CSR-8922-P
)	
vs.)	
)	
COMCAST CORPORATION)	
and)	
COMCAST CABLE)	
COMMUNICATIONS, LLC,)	
Defendants.)	

To: Chief, Media Bureau

REPLY TO ANSWER TO PROGRAM CARRIAGE COMPLAINT

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Liberman Broadcasting, Inc. and LBI Media, Inc. (collectively “Complainant” or “LBI”), hereby reply to the June 7, 2016 Answer (“Answer”) of Comcast Cable Communications, LLC and Comcast Corporation (collectively “Defendant” or “Comcast”) to LBI’s above-captioned April 8, 2016 Program Carriage Complaint against Comcast (“Complaint”).

INTRODUCTION AND SUMMARY

1. Comcast’s Answer distills to nothing more than an unavailing exercise in misdirection and evasion, premised on a misreading and misapplication of governing law. It provides no basis whatsoever for the Complaint’s dismissal; rather, it supports grant of the Complaint in important respects.

2. Comcast recites three arguments at the threshold, none of which has merit.

3. First, Comcast ineffectually tries to rewrite the statutory definition of video programming vendor (“VPV”) to mean only “cable network,” excluding broadcasters per se. In fact, LBI is a classic VPV in all aspects of the definition and relevant precedent. It produces, creates, *and* distributes video programming for sale to a wide variety of MVPDs and affiliates.

4. Second, Comcast ineffectually tries to rewrite Section 616’s prohibition on an MVPD requiring a financial interest in VPV programming as a condition of carriage, so that “financial interest” would mean only “ownership interest” and broadband feeds and video on demand (“VOD”) libraries would be treated as lacking independent value. In fact, during the Discussion Period, Comcast consistently required that, if LBI wanted a retransmission consent agreement from Comcast for basic carriage on Comcast’s cable systems (with no compensation therefor), LBI would also need to provide Comcast with a financial interest in the increasingly valuable broadband feed and VOD rights *LBI* possesses in the programming *it* produces.

5. Third, Comcast ineffectually tries to rewrite the three complaint filing “time limits” established by Rule 76.1302(h) so as to create an immutable one-year deadline that begins to run from the moment an MVPD makes an initial offer inconsistent with the requirements of Section 616. In fact, even though LBI need satisfy only *one* of the subparts of Rule 76.1302(h), LBI filed its Complaint comfortably within the letter and spirit of all three of the Rule’s prongs. That is, LBI filed the Complaint with the Commission on April 8, 2016, within twelve months of: (i) the date (October 15, 2015) the parties’ negotiations ended without a signed agreement; (ii) any and all of the dates after April 8, 2015 in which Comcast made an offer that violated Section 616; and (iii) the date (February 12, 2016) LBI served notice of its intention to file a Section 616 complaint.

6. In attempting to show that its denials of Estrella TV's proposals during the course of this proceeding were nothing more than good faith, reasonable business decisions, Comcast proves the opposite. [REDACTED]

[REDACTED]

[REDACTED] Yet the undisputed record evidence shows Estrella TV's *national* ratings to be [REDACTED] than NBC Universo's. Given Estrella TV's ratings dominance over NBC Universo, a rational business decision maker would conclude that the far more popular Estrella TV commands a per subscriber fee well in excess of NBC Universo's [REDACTED], *and* substantially more than the [REDACTED] that LBI was initially seeking. The facts in the Answer to which Comcast attests concerning NBC Universo *puncture* Comcast's repeated protestations that LBI's proposals for Estrella TV were completely out of step with reasonable good faith business considerations. Comcast itself has persuasively disproved an argument on which it repeatedly relies.

7. On this issue of reasonable good faith business considerations, the Answer fails to deal with key facts central to the Complaint (e.g., Estrella TV's impressive ratings performance

in multiple markets as measured by Nielsen over the May and November 2015 sweeps periods, Estrella TV's value as recognized by a bevy of sophisticated, non-conflicted MVPDs and broadcast affiliate partners, and the discriminatory implications of Comcast's Hispanic Channel Additions for Comcast's dismissive treatment of Estrella TV's much more popular programming). The Answer badly distorts other facts (e.g., by making a demonstrably inaccurate claim that Estrella TV is a "weak" ratings performer in the Los Angeles market).

8. The Answer fails to draw sustainable conclusions from a self-appointed attempt to jam a "square peg" (i.e., the requirement that a complainant make at the *pre-discovery* "starting gate" a prima facie showing of discrimination on the basis of affiliation in the selection, terms, and conditions of carriage) into a "round hole" (i.e., a reviewing Court's task to find at the "finish line" substantial evidence of unlawful discrimination in the overall *post-hearing* record of a particular case). The Answer fundamentally errs in placing inflexible reliance on just one of the *multiple* tests identified by the *Tennis Channel* Court for application, post-discovery and post-hearing, to the facts of *that* case. Those multiple tests articulated in *Tennis Channel*, a case which did not purport to identify all relevant Section 616 tests, include net benefit analysis, incremental loss analysis, the illegitimate hobbling of a competitor, and pretextual cover for a deeper discriminatory purpose, all of which hold relevance for this case.

9. In sharp distinction to prior program carriage disputes at the Commission relating to narrowly focused specialty, niche programming, this case involves three general interest Spanish language programming networks (Estrella TV, Telemundo, and NBC Universo). The record shows that these three networks all target the broad U.S. Hispanic audience that is of increasing importance in this country, that they target the same pool of advertisers, and that Estrella TV's constantly evolving competitive mix of programming has substantial genre overlap

with the ever-evolving programming lineups of Comcast-owned Telemundo and NBC Universo. Two experts retained by Comcast completely fail to show otherwise, actually support the Complaint in important ways, and contradict each other in material respects along the way.

10. Finally, the Answer interposes a First Amendment challenge to FCC enforcement of the prohibition on affiliation-based discrimination *without even acknowledging* the express commitment Comcast made when it merged with NBCUniversal *not* to contest the FCC's authority to enforce Merger Condition III.1. Because that Merger Condition incorporates verbatim the non-discrimination proscriptions of Section 616 and the Carriage Rules, Comcast has waived its right to advance this claim. In any event, on the merits, pronouncements from the Third Circuit, Chairman Wheeler, and Commissioner Clyburn even since LBI filed the Complaint make clear how First Amendment principles favoring diversity of viewpoint *support* grant of relief to LBI.

11. The discriminatory actions of this country's largest cable company vis-à-vis family- and minority-owned LBI are particularly egregious when viewed in the context of the obligations Comcast has under longstanding law (reinforced by the NBCUniversal merger commitments Comcast freely made) not to discriminate against competing VPVs on the basis of affiliation. With the motive and means to harm LBI that come with vertical integration and immense size and wealth, Comcast has consistently frustrated and stymied over an extended period of time LBI's fully supported and justified efforts to expand its service to the public. This case therefore becomes a seminal test of whether FCC commitments to vigorously enforce merger conditions in an increasingly consolidated industry have real "teeth." Because current Commission processes do not allow for the award of damages to LBI for the harm it suffers every day Comcast's actions continue, it is vitally important that the FCC not only promptly

award redress to LBI, but that it fashion and impose an effective enforcement penalty on Comcast.

ARGUMENT

12. Comcast advances eight arguments in opposition to the Complaint. All fail. LBI addresses them below in sequence.¹

I. LBI Is A VPV, Fully Entitled To Bring Its Program Carriage Complaint Against Comcast.

13. Comcast first argues that a broadcaster cannot be a VPV within the meaning of Section 616, the Carriage Rules and the Merger Order, and that a broadcaster therefore cannot demonstrate standing to bring program carriage complaints premised on affiliation-based discrimination. According to Comcast, broadcasters' exclusive remedy is to complain of an MVPD's failure to negotiate in good faith in a retransmission consent context.² This argument lacks any statutory or policy basis, and should be summarily rejected by the Commission.

14. Comcast conspicuously fails to apply to LBI the plain language of the definition of VPV set forth in Section 616, the Carriage Rules and the Merger Order, obviously because

¹ Initially capitalized terms used but not otherwise defined in this Reply have the meanings given them in the Complaint.

² Comcast glibly claims to find significance in the fact that no entity holding broadcast licenses has previously brought a Section 616 complaint. LBI could just as easily point out that no Section 616 complaint has ever been dismissed by the Commission on the "broadcaster" grounds urged by Comcast, and that no MVPD has ever owned a suite of programming networks as expansive and extensive as Comcast, giving it such ample incentive to discriminate against a VPV like LBI. LBI notes that Comcast's professed fear that grant of relief to LBI will open the floodgates to Section 616 complaints by broadcasters is a classic red herring. Unlike LBI, most broadcasters are not programming vendors who compete directly with cable networks by marketing broadly to MVPDs programming they create and produce themselves. Those who do, like CBS and ABC, generally receive fair distribution and compensation from a vertically integrated MVPD like Comcast. Section 616 only applies in limited (far from floodgate) circumstances – when a vertically integrated MVPD discriminates against a VPV that is similarly situated to a network or networks that MVPD owns.

that definition defeats Comcast's argument. The definition ("a person engaged in the creation, production, *or* wholesale distribution of video programming for sale") (emphasis added) squarely fits LBI in all respects.³ Comcast also has nothing whatsoever to say about *additional* support LBI cited in its Complaint for the clear proposition that broadcasters are VPVs, protected by Section 616, the Carriage Rules, and the Merger Order.⁴

15. Comcast takes the Commission instead on a circuitous and entirely unavailing road trip in search of supposed "context" that somehow proves that the VPV definition means "cable network," something *quite different than* what the definition says. But Comcast's argument attempts to build a bridge much too far, to a "cable network haven" that would insulate Comcast from the consequences of discriminatory behavior in cases like this one. In fact, the definition of VPV is as plain as it gets, allows no creative Comcast gloss, and easily encompasses LBI. LBI is a quintessential VPV because it creates and produces some 75 percent of its own programming at its own studios in Burbank, California, programming which it

³ Where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)). See also *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842-843 (1984) (If the statute is clear and unambiguous, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

⁴ See Complaint at 5-6 (¶ 9) (citing October 21, 2015 Brief for Respondents in *The Tennis Channel, Inc. v. FCC*, Case No. 15-1067 at 4). If Comcast's claims about broadcasters' exclusion from the scope of Section 616 protection were even remotely plausible, then the Commission's General Counsel would not have so simply explained the obvious to the D.C. Circuit (in *Tennis Channel*, a case involving Comcast itself), namely that "[p]rogramming vendors, *such as broadcast stations or cable networks*, produce the video programming that consumers receive on a given channel." Complaint at n.11 and accompanying text. And, contrary to Comcast's claims (Answer at 38 (¶ 56)), there is nothing "novel" (requiring referral to the full Commission) about LBI's explaining in the Complaint how it fits comfortably within the plain language of Section 616's VPV definition, an explanation that is fully consistent with the General Counsel's basic representation to the *Tennis Channel* Court quoted above. The only novelty here is Comcast's contrived argument.

sells/distributes through owned stations, many affiliates, *and* many MVPDs.⁵ LBI, in other words, meets *all three* prongs of the VPV definition, even though it need meet only one.

16. Comcast fails to cite even a single instance where Congress or the Commission said that broadcasters were meant to be *excluded* from protection against affiliation-based discrimination, or that *only* cable networks were entitled to such protection. The most Comcast can muster is to draw self-serving inferences, and supply imagined FCC reasoning from FCC orders relating to the must carry/retransmission consent regime that have nothing to do with program carriage discrimination on the basis of affiliation.⁶ As the Supreme Court has explained, the must carry/retransmission consent provisions are intended primarily to protect television *viewers*, recognizing the important public interest in ensuring carriage of broadcast television signals in the local markets they serve.⁷ Program carriage protections, on the other hand, are directed toward maintaining a level playing field for video programming *vendors*,

⁵ If a broadcaster did not produce or create any of its programming and distributed no programming for sale, it would not fit within the VPV definition. That is decidedly not this case. In fact, the 75 percent of programming which LBI creates and produces itself and then broadly distributes for sale is extremely high for *any* broadcaster or cable network.

⁶ *See, e.g.*, Answer at 30 (¶ 45), *citing* Cable Television Consumer Protection and Competition Act of 1992 § 2(a)(12), 106 Stat. 1460, 1461. Contrary to Comcast’s inference, the Commission’s use of the term “*noncable-affiliated programmers*” in the cited text (emphasis added by Comcast) strongly suggests broad coverage of all programmers that are unaffiliated with cable operators, not just unaffiliated *cable* networks – it does not say, for example, “non-affiliated *cable* programmers.”

⁷ *See Turner Broadcasting System, Inc. v. FCC*, 512 US 622, 646 (1994) (“*Turner I*”) (“Congress’ overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable”).

regardless of their primary transmission technology, who must negotiate with vertically-integrated MVPDs in order to obtain carriage on those MVPDs' systems.⁸

17. The only example the Answer (at n.118) cites where the FCC addressed program carriage complaints in the context of must carry and retransmission consent rights is the 1993 Order implementing must carry-retransmission consent, *and that example supports LBI*.⁹ In that Order, the FCC quoted the definition of VPV cited above in its entirety before making clear that, “*it is possible that Section 616 may apply separately to retransmission consent agreements.*”¹⁰ (Emphasis added). The clear import of this language is that the FCC recognized from the very beginning of this regulatory regime that broadcasters who fit the definition of VPV “separately” enjoy protection under Section 616 *and* must carry/retransmission consent regulations. As noted above, the VPV definition fits LBI as snugly as possible. Comcast does not even bother to try to allege otherwise.

18. In the end, the essence of Comcast's argument is that because broadcasters possess must carry/retransmission rights, they cannot *also* invoke protection against MVPD discrimination based on affiliation.¹¹ But the simple fact is that MVPDs *and* broadcasters have

⁸ See Complaint at 9-10 (¶¶ 17-20); *Comcast v. FCC*, 717 F.3d 982, 983 (D.C. Cir. 2013) (“*Tennis Channel*”) (noting applicability of Section 616 to “unaffiliated programming networks”). MVPD carriage is critical to the ability of a programming network like Estrella TV to compete in today's video marketplace by helping it reach viewers in all markets, including not only markets in which the programming network has O&Os and affiliates, but markets in which the network has no over-the-air presence (so-called white areas).

⁹ See *Implementation of the Cable Television Consumer Prot. and Competition Act of 1992*, 8 FCC Rcd 2965 (1993).

¹⁰ *Id.* at 3006 n.452.

¹¹ Comcast's suggestion that must carry rights are “a far-reaching structural protection against potential [MVPD] restraints” (Answer at 29 (¶ 44)) is misleading at best in the context of this case. Must carry rights confer neither rights to distribution beyond the station exercising the rights nor any rights to compensation.

multiple rights and obligations in the program carriage arena. MVPDs like Comcast have good faith negotiation rights/obligations in the retransmission consent context *and* they have obligations not to discriminate in favor of any of the programming channels that they own in making distribution decisions. In the same way, broadcasters have good faith negotiation rights/obligations in the retransmission context *and* broadcasters that meet the VPV definition have rights to protection against MVPD discrimination on the basis of affiliation in distribution decisions.¹² 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, those whose ownership of programming networks gives them an obvious incentive and motive to favor their own networks over their competition.

19. Viewed from a different perspective, discrimination on the basis of affiliation and refusal to negotiate in good faith are quite different violations, and they carry quite different remedies. Where an MVPD is found not to have negotiated in good faith, the Commission will order the admonished MVPD back to the bargaining table, hardly a “robust protection[]” despite the Answer’s claim (at 2-3) to the contrary. In sharp contrast, the Commission has a wide range of effective remedies at its disposal (e.g., mandated distribution and compensation) when it finds that a vertically integrated MVPD has violated the Carriage Rules.

¹² Contrary to the Answer’s contention (at 38-40 (¶¶ 57-59)), the fact that the Commission imposed a condition in the Merger Order that applied only to a limited group of specific broadcasters (Condition IX) does nothing to *exclude* broadcasters in general from the scope of the Merger Order’s plain language defining VPVs or the scope of Condition III.1.

20. In sum, acceptance of Comcast's irrational and unsupported position would have the direct, pernicious, and unlawful effect of creating a safe haven within which MVPDs could freely discriminate against VPVs that happen to hold a broadcast license.

II. Comcast Required A Financial Interest In Estrella TV As A Condition Of Carriage.

21. With respect to the issue of whether it required a financial interest in Estrella TV programming, Comcast follows the same ineffectual playbook it employs to try to redefine "VPV." That is, Comcast tries to convert the specific statutory provision prohibiting it from requiring a "financial" interest in a program service as a condition of program carriage, into a proscription relating solely to "ownership" interests. Again, the plain language of the statute controls. And a financial interest is different from and broader than an ownership interest. Therefore, rights in a VPV's programming that, if obtained by an MVPD, confer on that MVPD a financial benefit give the MVPD a "financial interest" in that programming.

22. Here, Comcast's acquisition of the rights to: (i) expand its distribution of Estrella TV to the internet (through "broadband feeds"); and (ii) to provide Comcast subscribers with an expansive suite of video on demand ("VOD") services that would allow those subscribers the time and opportunity to access Estrella TV programming at their leisure,¹³ would unquestionably provide a financial benefit to Comcast. The Answer (at 42 (¶ 64)) effectively concedes that there is a difference between basic "carriage rights" (also referred to by Comcast as the "transmission of linear signals to cable customers in their homes") and "additional distribution rights" (here, broadband and VOD distribution rights). And that difference is central to this count of LBI's Complaint.

¹³ See Answer at 12 (¶ 8) (defining what Comcast calls "New Media Rights" as "the right to distribute Estrella TV content to Comcast customers digitally (via broadband feed and video-on-demand)").

23. LBI is *not* saying that Comcast's acquisition of the basic right to *carry* a VPV's programming *on the Comcast cable platform* gives Comcast a "financial interest" in LBI's "program service" within the meaning of Section 616. However, LBI *is* saying that:

(i) "additional distribution rights" to disseminate LBI programming through Internet broadband feeds as well as rights to add LBI programming to *Comcast's* digital library to be accessed by Comcast subscribers on demand at times other than the time of basic carriage, go well *beyond* the basic carriage right;¹⁴ (ii) acquisition of these rights by Comcast would give Comcast a financial interest in LBI's program service within the meaning of Section 616; and (iii) the express terms of Section 616 prohibit Comcast from requiring that it be given these additional rights for free as "a condition for *carriage* on one or more of *such operator's systems*."

(Emphasis added).¹⁵ Yet that is precisely what Comcast tried to accomplish here with respect to digital rights that have increasing value in today's multifaceted, constantly evolving video marketplace.¹⁶

24. Comcast protests that it did not formally "demand" LBI's digital rights in the Estrella TV programming.¹⁷ But Comcast consistently took (and never relented from) the

¹⁴ The basic carriage right which is at stake during retransmission negotiations is the same right to which "must carry" applies. In neither the retransmission consent nor the must carry context does that basic carriage right also give an MVPD rights to distribute a signal over broadband feeds or to warehouse programming in, and distribute it from, a VOD library.

¹⁵ See also the Expert Report in Reply of Harold W. Furchtgott-Roth attached hereto as Exhibit 1 ("Furchtgott-Roth Report in Reply").

¹⁶ Comcast's focus on "ownership" rights is not persuasive in any event. Even if Congress had prohibited MVPD from requiring "ownership" rights in return for carriage, this issue would still be in play – broadband and VOD rights are adjuncts of ownership interests in programming and go beyond the basic carriage rights that have always been the focus of Congress and the Commission.

¹⁷ Section 616 and Carriage Rules use the term "require," not "demand."

position that it required LBI's broadband feed and VOD digital rights before it would maintain what had been must carry distribution, and gave no indication that this position was negotiable, [REDACTED].¹⁸ With, at the very least, constructive knowledge of the statutory prohibition against requiring financial interests as a condition of carriage, Comcast had every incentive to avoid the language of "demand" in negotiation documents.¹⁹ However, negotiation inflexibility over an extended period of time, exhibited by an MVPD with such massive presence in the individual markets in question and the overall clout that a market capitalization of \$139.73 billion (as of December 2015)²⁰ confers, is the functional equivalent of a "requirement" or "demand."²¹ And there can be no doubt that Comcast was requiring these vital LBI rights *for free*. [REDACTED]

[REDACTED] So

¹⁸ See, e.g., the February 13, 2015 email from Jake Martinez to Michael Nissenblatt [REDACTED]

¹⁹ LBI cannot help but note, however, the rich irony created by Comcast's Answer characterizing *LBI* negotiating positions (inaccurately) as "demands." See, e.g., Answer at 4 ("the fees demanded by LBI"); Answer at 5 ("the terms LBI demanded"); Answer at 14 (¶ 14) [REDACTED]. See also Answer at 16 (¶ 18), 21 (¶ 26), 24 (¶ 35), 26 (n.94), 50 (¶ 78), 51 (¶ 79), 52 (¶ 82), 54 (¶ 84), 55 (¶ 86), 56 (¶ 87), 58 (¶ 89), 61 (¶ 98), 62 (¶ 99), 63 (¶ 103), 64 (¶ 105), 65 (¶ 106-108), and 66 (¶ 108-109).

²⁰ Complaint at 6 (¶ 11) & n.14.

²¹ Or, in the words of the Commission's 1993 Program Carriage Order, quoted by Comcast in the Answer at 44 (¶ 66), such behavior is "tantamount to an unreasonable refusal to deal with a vendor who refuses to grant financial interests. . . in exchange for carriage." *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd. 2642, 2649, ¶ 17 (1993).

there can be no pretense that Comcast was proposing to compensate LBI in any way for these important and valuable broadband feed and VOD digital rights.

III. The Complaint Is Timely Filed Under 47 C.F.R. § 76.1302(h).

25. Comcast advances the proposition that its *opening* carriage agreement offer in November 2014, one that Comcast concedes *started* a negotiation that involved multiple in-person meetings, letters, and emails over a period of approximately one year, until October 2015,²² itself triggered an immutable one-year period under the Carriage Rules (a period Comcast apparently believes expired in November 2015) within which Estrella TV had to file its Complaint. Under Comcast's brand of logic and statutory/administrative rule interpretation, Estrella TV's complaint is time-barred. Comcast's argument on this issue fails on every count.

26. Rule 76.1302(h) provides that program carriage complaints "must be filed within one year of the date on which *one* of the following events occurs[.]" (Emphasis added). *Three* events follow in the rule, *each* of which independently triggers the start of a one-year time limit under the Rule's plain language. They are: (1) an MVPD and VPV enter into a contract that one party alleges to violate a Carriage Rule; (2) an MVPD makes an offer, unrelated to any existing contract, to carry a VPV's programming pursuant to terms that one party alleges to violate a Carriage Rule; or (3) a VPV notifies an MVPD of its intent to file a program carriage complaint.

27. The first of these three independent "time limits," which allows a program carriage complaint to be filed within one year after a program carriage agreement is *signed*, is germane to the Complaint's filing date. That is, this time limit necessarily allows enough time for the negotiations which precede an agreement to play out, in that this one year clock does not start until such negotiations result in a signed agreement. Under Comcast's approach, starting

²² Answer at 50 (¶ 77) ("the parties discussed and negotiated Estrella TV carriage for over a year").

the clock at the time a VPV *initially* finds any MVPD negotiating position to be problematic, would disrupt, inhibit, and undermine this negotiation process by forcing VPVs who have no idea if negotiations will ultimately result in a signed agreement to begin contemplating a complaint at the negotiation starting gate, and it would create a substantial risk of wastefully involving the FCC in the process, casting a shadow over any and all negotiations before they had a chance to bear fruit. Even more perversely, Comcast's self-serving interpretation of Rule 76.1302 would incentivize MVPDs to drag out negotiations for an extended period of time, and then refuse to sign an agreement at the end of the one-year period, thereby using this contrived Comcast interpretation of Rule 76.1302 to insulate themselves from Section 616 complaints.

28. A logical corollary of this first time limit is that the *earliest* a time limit could begin to run is the date negotiations *either* result in an agreement's signing *or* reach a final impasse. As made clear by note 22 *supra*, the Answer concedes that in November 2014 the parties were only at the beginning of a negotiation road that ran until October 2015. The length of the negotiating period in this proceeding is reflected in the documents LBI submitted with the Complaint as Exhibit 19, a duration which is *confirmed* by Comcast itself in various parts of the Answer.²³ LBI filed the Complaint less than six months after the October 2015 end of the negotiations, in full compliance with the rationale necessarily underpinning this first "one-year" time limit.

²³ See, e.g., Nissenblatt Declaration in its entirety and the Expert Declarations of Robin Flynn ("Flynn Declaration") and Tomás López-Pumarejo ("López-Pumarejo Declaration") respectively at 3 (¶ 6) (Flynn understands from Comcast that "the relevant time period for the events underlying this dispute . . . generally runs from late 2014, when Estrella TV sought to elect retransmission consent, to late 2015 when EstrellaTV and Comcast ended negotiations . . .") and 9-10 (¶ 23) (same understanding for López-Pumarejo).

29. The second one-year time limit yields a similar result when applied to the facts of this case. Its plain language provides that it starts to run when an MVPD makes an offer that a VPV believes to violate the Carriage Rules. The time limit does not specify that the *only* offer that triggers the start of the relevant one-year clock is the *initial* offer in a negotiation that continues on from there. Here, the record reflects (and Comcast concedes in the Answer)²⁴ that at different points during the Discussion Period that began in October 2014 and ended on October 15, 2015, Comcast made offers to LBI that LBI believed to violate the Carriage Rules,²⁵ Comcast ineffectually tries to elude this key fact's consequences by citing to an inapposite (*and unpublished*) case involving the "accumulation" of discrimination claims.²⁶ In similar fashion, the Answer (at n.179 and accompanying text) improperly conflates precedent involving post-dispute settlement discussions and pre-dispute business negotiations.

30. Just as LBI noted above in the discussion of the first time limit, Comcast's self-serving interpretation of this second time limit would inhibit the multiple offers and counteroffers that typically characterize ongoing negotiations, risk wasteful, premature FCC

²⁴ Answer at 49 (¶ 76): "Comcast *continued to offer* carriage to LBI on terms that LBI alleges reflect affiliation-based discrimination. . . ." (Emphasis added).

²⁵ See, e.g., August 31, 2015 Nissenblatt Letter to Winter Horton contained in Exhibit 19 to the Complaint, [REDACTED]

²⁶ See Answer at 49 (¶ 76) & n.182, citing *Citta v. Borough of Seaside Park*, 2010 WL 3862561, at *17 (D.N.J. Sept. 24, 2010). *Citta* concerned the issue of whether an employment discrimination plaintiff could reach back in time to establish a hostile work environment based on the aggregation of discrete acts alleged to constitute "a continuing pattern of discrimination" rather than treating each act as a separate, isolated occurrence and ignoring those outside the two-year statutory limitation period. *Citta* is inapposite to this case, which involves both different governing law and different conduct – Comcast's continuing contractual offers contrary to the statutory anti-discrimination provisions of Section 616 of the Cable Act, including offers that were on the table within the one-year statutory limitation period covering Section 616 complaints.

involvement in the negotiation process, and incentivize MVPDs to drag out negotiations or even to decline to withdraw a contract demand that violates Section 616 (in order not to reset a ticking statute of limitations clock). In this regard, LBI notes that all of Comcast's offers incorporated the Digital Rights Demand, which was continually made until Comcast stated on October 15, 2015 that it was no longer interested in making *any* further offers to LBI. The Complaint's filing on April 8 of this year was therefore in full compliance with this second "one-year" time limit.

31. Finally, LBI indisputably complied herein with the third, fully independent one-year time limit for the filing of the Complaint, which allows LBI to file a program carriage complaint within one year of LBI's service on Comcast of LBI's notice of intent to file the complaint ("Notice").²⁷ That is, LBI filed the Complaint less than two months after it gave Comcast detailed notice of its intent to file a program carriage complaint. And, LBI served the Notice just four months after the parties' negotiations ended (in October 2015). LBI's April 8, 2016 filing of the Complaint was therefore in full compliance with the express terms of this third "one-year" time limit.

32. In an unavailing attempt to defeat LBI's reliance on Rule 76.1302(h)(3), Comcast (at n.184 and accompanying text) cites the non-precedential concurring opinion of Judge Edwards in *Tennis Channel*. But the facts concerning the timing of the filing of the complaint in *Tennis Channel* were entirely different than the facts which underlie LBI's Complaint. Tennis Channel had entered a carriage agreement with Comcast in 2005, which gave Comcast the discretionary right to carry Tennis Channel on a distribution tier of Comcast's choosing. Under Rule 76.1302(h)(1) (discussed above) the date that contract was signed started a one-year clock which expired in 2006. Yet Tennis Channel did not seek carriage on a more

²⁷ The Answer (at 50 (¶ 77)) puts it succinctly: "[T]he rule, on its face, provides LBI with one-year from its pre-filing notice letter to file its Complaint"

widely distributed tier until 2009, nor did Tennis Channel file a complaint with the FCC until 2010. Judge Edwards focused on what he found to be an unjustified use of Rule 76.1302's subsection (h)(3) to defeat subsection (h)(1), inconsistent with prior FCC decisions stating that subsection (h)(3) applies whenever an MVPD *denies* or refuses to acknowledge a request for carriage. Here, when by means of its October 15, 2015 letter Comcast *denied* LBI carriage in a more comprehensive fashion than any other time during the negotiations – [REDACTED]

[REDACTED] – Comcast pulled the Rule 76.1302(h)(3) trigger identified by Judge Edwards.

33. In sum, while it is unsurprising that Comcast strains to try to find some way to read Rule 73.1302(h) in an illogical fashion that favors it and deprives LBI of its “day in court,” the timing of LBI’s filing of its Complaint in this case, viewed against the entirety of the factual record, was prompt and compliant with both the letter and spirit of Rule 76.1302(h). The Complaint’s filing is also fully consistent with the essential purpose that underlies that Rule’s three independent time periods (as cited by Comcast itself in its Answer at 45 (¶ 70)) – “to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.” There is nothing stale or unreasonable about a complaint filed within six months of the end of the parties’ period of negotiation, and just two months after proper notice of intent to file the complaint was given.

IV. Comcast’s Denials Of Estrella TV’s Carriage Proposals Cannot Be Explained Away As Reasonable Good Faith Business Decisions.

34. Comcast would have the Commission believe that its negotiating positions throughout this proceeding and its ultimate decisions: [REDACTED]

[REDACTED], were premised on reasonable, good faith business decisions, free of discriminatory intent or consequence. Comcast's argument fails.²⁸

35. At the threshold on this issue, a critical clarification is needed. Comcast has written its Answer, and Comcast's economic expert Mark A. Israel has authored his Expert Declaration ("Israel Declaration") from a tunnel-vision perspective – namely that analysis of the reasonableness of Comcast's business decisions in this proceeding is essentially to be conducted solely by peering through the prism of: (i) the *Tennis Channel* Court's references to a "net benefit" test;²⁹ (ii) the opening negotiating position LBI took in November 2014;³⁰ and (iii) LBI's remedy request [REDACTED], made after a year of negotiation frustration at the hands of Comcast.³¹ Comcast's narrow approach to the factual record in this proceeding totally ignores both: (i) other positions taken by LBI along the approximately year-long negotiation pathway [REDACTED];³² and (ii) Comcast's essentially holding

²⁸ At the outset of this portion of its Argument, Comcast disingenuously tries to substitute post-hearing burdens of proof (Answer at nn.187 & 190 and accompanying text) for LBI's simpler obligation at this stage of the proceeding to make a prima facie showing of discrimination on the basis of affiliation.

²⁹ See discussion of *Tennis Channel* in Section V *infra*.

³⁰ The Nissenblatt Declaration (at 21 (¶ 49)) [REDACTED]

³¹ See the discussion of remedy *infra* at pp. 36-37.

³² See Letter dated April 20, 2015 from Lenard Liberman to David Cohen, Executive Vice President, Comcast [REDACTED] included at Exhibit 19 to the Complaint [REDACTED]. Mr. Cohen never responded to Mr. Liberman's letter.

to *its* key negotiating positions during the Discussion Period,³³ until Comcast bluntly stated at the end of the negotiation trail that it was not going to offer LBI anything – [REDACTED]

[REDACTED]. The Israel Declaration makes no reference to Comcast’s various positions during the long Discussion Period [REDACTED], much less any analysis of the reasonableness thereof.

36. From the beginning of the negotiations in this proceeding to the present day, LBI has presented Comcast with compelling evidence of the positive relative value of Estrella TV programming.³⁴ The Complaint reviews key examples of this evidence in Sections V.A. and C. thereof and in the Expert Report of Harold W. Furchtgott-Roth (“Furchtgott-Roth Report”). That evidence includes: Nielsen data drawn from a vital demographic group as measured in weekday evening prime time during May and November 2015 Nielsen sweeps periods, showing that when given fair and competitive MVPD distribution in large markets like Los Angeles and Dallas, the Nielsen ratings of Estrella TV programming exceed or closely rival those of Telemundo; Nielsen data drawn from the Houston and Denver markets that reinforce these conclusions; a showing that Estrella TV’s prime time daily newscasts consistently generate high Nielsen ratings; and data showing that Estrella TV’s performance in *national* ratings substantially exceed NBC Universo’s despite the national distribution advantages NBC Universo enjoys over Estrella TV. LBI further demonstrated that the inherent value of Estrella TV’s programming is evidenced by the decisions of a plethora of sophisticated, profit-oriented broadcast affiliates and

³³ Martinez’s 10:59 p.m. February 19, 2015 email to Nissenblatt (*see* Complaint, Exhibit 19)

³⁴ *See, e.g.*, the many emails from LBI to Comcast in Exhibit 19 to the Complaint.

MVPDs to carry Estrella TV programming. The Furchtgott-Roth Report confirmed that the positive ratings of Estrella TV's programming have value to Comcast, that Estrella TV is one of the most popular Spanish language TV networks, and that the discontinuation of Comcast carriage of Estrella TV programming has damaged LBI and benefitted Comcast.

37. Comcast's Answer ineffectually attempts to divert attention from this accumulation of compelling evidence supporting Estrella TV's request for expanded distribution and compensation on Comcast's extensive MVPD platform by characterizing Comcast's decisions as to whether to carry Estrella TV as predicated solely on coldly calculated, hard-headed business decisions. In this parallel Comcast universe, Estrella TV programming supposedly lacks value and each and every one of LBI's requests to Comcast during the Discussion Period were unjustified, yet such Comcast decisions as those to distribute many Spanish language networks that lag far behind Estrella TV in the ratings (the Hispanic Channel Additions) *were* warranted. Comcast bases its positions in substantial part on its skewed comparison of Telemundo and Estrella TV ratings, and its conspicuous, studious avoidance of NBC Universo's poor marketplace performance in comparison to Estrella TV.³⁵ Such an approach is fatally flawed.³⁶

³⁵ Comcast's Telemundo-centric defense only calls more attention to the Achilles heel that is NBC Universo.

³⁶ Comcast even goes so far as to claim (Answer at 16-17 (¶ 19)) that its negotiators "never once considered Estrella TV's potential impact on Telemundo or NBC Universo" in making decisions concerning distribution of Estrella TV during the Discussion Period. For his part, Nissenblatt is willing to enter the realm of the absurd on this discrete topic by making *definitive* representations in his Declaration under penalty of perjury (at 26 (¶ 65)) about the *state of mind of each (unidentified) member of his team*: "I can say *with certainty* that *my team and I* never once took into account the interests of NBC Universo in determining the appropriate terms and conditions of carriage of EstrellaTV." (Emphasis added). But Nissenblatt is not omniscient – he is not qualified to testify about others' states of mind.

38. As it did during the Discussion Period, Comcast reverts to the kind of “apples to oranges” comparison of the relative *national* ratings performances of Telemundo and Estrella TV.³⁷ As LBI pointed out in the Complaint, such ratings are badly skewed in Telemundo’s favor by the massive distribution advantage Telemundo enjoys on Comcast’s MVPD platform – Telemundo is distributed to some 23,000,000 Comcast subscribers vs. fewer than 6,000,000 million such subscribers for Estrella TV.³⁸

These sweeping claims are in any event inconsistent with Nissenblatt’s admission elsewhere that LBI expressly raised with him the issue of Telemundo/NBC Universo favoritism during the Discussion Period. See Answer at 47 (¶ 73) (“In a November 26, 2014 email, Mr. Martinez openly alleged that Comcast was not giving Estrella TV a chance to compete fairly with Comcast affiliate Telemundo, [REDACTED]

[REDACTED] See also Nissenblatt Declaration at 21 (¶ 48); the February 13, 2015 email from Jake Martinez to Michael Nissenblatt [REDACTED]

[REDACTED]; and the September 30, 2015 letter from Winter Horton to Michael Nissenblatt [REDACTED]

[REDACTED] both included as part of Exhibit 19 to the Complaint. Discovery would be necessary to test how it is even possible for Nissenblatt “never once” to give thought to an issue LBI placed *right in front of him* multiple times, at a time when Comcast was focused on boosting the profiles in the Spanish language video marketplace of *both* Telemundo *and* newly rebranded and relaunched NBC Universo. How could Nissenblatt *not* consider or even wonder, faced with the lengthy explications of Estrella TV’s value LBI gave him, whether it would benefit NBC Universo’s relaunch into the marketplace vis-à-vis Estrella TV [REDACTED]

[REDACTED], while the distribution on that same platform of Estrella TV, a network with NBC Universo’s national ratings, was artificially stunted [REDACTED]. In any event, given the *facts* which underlie the Complaint, Nissenblatt’s untested state of mind assertions are irrelevant to LBI’s prima facie showing.

³⁷ Answer at 53 (¶ 83) (referring to Comcast’s review of “national Nielsen data”). As detailed at p. 30 *infra*, the Israel Declaration [REDACTED]

³⁸ Comcast’s continued reliance in the Answer on contentions it made repeatedly during the Discussion Period – that it was being magnanimous [REDACTED], and that Comcast still carries Estrella TV in other [REDACTED]

39. As the Complaint shows, the most relevant comparison between the performance of Telemundo and Estrella TV is in those markets like LA and Dallas where both networks enjoy relatively equal distribution by that market’s dominant cable provider, Time Warner, as well as by other MVPDs serving those markets. To the extent Comcast bothers to address that reality (Comcast ignores Dallas entirely), it makes a breezy, unsupported, and unsupportable claim that “[r]atings in the Los Angeles market, EstrellaTV’s strongest, were similarly weak.”³⁹

40. The only support Comcast cites for this startling claim is paragraph 54 of the Nissenblatt Declaration, where Nissenblatt says that in preparation for a March 23, 2015 meeting with LBI representatives, he reviewed a prior LBI claim [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] But

Nissenblatt’s conclusory statement *does not dispute* that [REDACTED]

[REDACTED], nor does Nissenblatt

markets – is disingenuous at best. [REDACTED]

[REDACTED]

As to legacy (formerly Tribune) Estrella TV carriage in New York and Chicago, that carriage of LBI *low power* stations has been severely restricted to more narrowly distributed, standard definition tiers (*see* Complaint at vi). And carriage of multicasts of large Estrella TV affiliates is due to those affiliates’ leverage to secure carriage as part of package deals. Viewed in this perspective, Comcast’s contentions are unavailing and do nothing to excuse Comcast suppression of *LBI’s* chances to compete with Telemundo and NBC Universo which are at issue here. In any event, whatever interim positions Comcast took during the Discussion Period, Comcast closed negotiations with LBI in October 2015 [REDACTED]

[REDACTED]

³⁹ Answer at 55 (¶ 85).

cite *any* specific supporting data *at all* for his claims about Estrella TV's performance in the Los Angeles market.⁴⁰ Nissenblatt's vague assertions do nothing to support in any cognizable way the Answer's assertion that Estrella TV was a "weak" performer in Los Angeles.⁴¹ The more Comcast evades ratings facts, the more it cements its position in the realm of irrational decisionmaking.

41. LBI emphasizes that it based its showing of Estrella TV's *robust* performance in the LA market on a review of evening prime time (7-11 p.m.) Nielsen data from the *May* and *November* 2015 sweeps for the standard, key industry demographic of adults 25-54. Tellingly, in the very recent Hispanic TV Study⁴² (which examines the relationships between minority ownership of television stations, program content and viewer popularity), the Commission's Office of Strategic Planning and Policy Analysis together with the Media Bureau's Industry Analysis Division employed a methodology *very similar to that used by LBI* in the Complaint. That is, in the Hispanic TV Study, FCC Staff relied heavily on their review of Nielsen data from two Nielsen sweeps periods, as LBI did (the Hispanic TV Study consulted November 2011 and May 2012 Nielsen ratings). The basic pedigree of the approach LBI took to compiling relevant performance data is therefore *confirmed* by the Hispanic TV Study, and stands in stark and

⁴⁰ Compare the showing LBI made in the Complaint (at 17-19 (¶¶ 28-29)) of Estrella TV's robust performance in the Los Angeles market *with* Nissenblatt's opaque claims.

⁴¹ Comcast does nothing in its Answer to refute LBI's showing in the Complaint that prime time is the most important daypart by far and the primary focus of networks' programming efforts. Indeed, Comcast expert Robin Flynn confirms in her Declaration (at 4 (¶ 8)) that during the "well-accepted prime-time period . . . broadcasters and cable networks generally air their most popular programming."

⁴² Federal Communications Commission, *Hispanic Television Study* (May 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-339345A1.pdf ("Hispanic TV Study").

dispositive contrast to Comcast's.⁴³ Comcast's tactics in its Answer – including badly distorting Estrella TV's performance in the Los Angeles market as “weak,” despite the overwhelming evidence presented in the Complaint proving the opposite – compellingly illustrate for the Commission what LBI was up against during the approximately year-long negotiation with Comcast. It is effectively impossible to get a fair deal when facts rooted in reality are met with diversionary obfuscation predicated on opaque claims.

42. Comcast's assertion that it treated Estrella TV strictly in accord with good faith, reasonable business judgment completely falls apart when the parallel facts concerning Comcast's handling [REDACTED] of its *second* owned Spanish language network NBC Universo are consulted. Comcast's Answer helpfully clarifies and confirms key facts – [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],⁴⁵ and that NBC Universo's ratings are inferior to Estrella TV's.⁴⁶ LBI's Complaint

⁴³ LBI also notes that the Hispanic TV Study: (i) shows (at 21 (Table 8)) that LBI is the licensee of more television stations than any other Hispanic owner in the United States; (ii) characterizes (at 45, ¶ 82) Estrella TV as a “major network;” and (iii) reviews (at 44, ¶ 81) ratings data illustrating that Estrella TV competes closely with Telemundo. All of these Hispanic TV Study conclusions, independently reached by the FCC's own staff, belie Comcast's denigration of Estrella TV's importance and marketplace stature.

⁴⁴ Answer at 63 (¶ 102).

⁴⁵ Nissenblatt Declaration at 26 (¶ 64). [REDACTED]

[REDACTED]

made clear, and Comcast does not dispute, that even with a substantial distribution handicap vis-à-vis NBC Universo, Estrella TV programming earned national ratings in prime time during the May and November 2015 sweeps that were [REDACTED] the ratings of NBC Universo.⁴⁷

43. Against this factual backdrop, throughout the Answer, Comcast repeatedly protests, in hyperbolic terms,⁴⁸ that there is no reasonable basis to find that Estrella TV programming was worth anything close to [REDACTED]
[REDACTED]
[REDACTED].⁴⁹ In light of Comcast's concessions in the Answer about its broad distribution of NBC Universo [REDACTED], these arguments fall flat. That is, Comcast knew full well [REDACTED]
[REDACTED], as it has now revealed, [REDACTED]

⁴⁶ Israel Declaration at 22 (¶ 47).

⁴⁷ Complaint at 21-22 (¶ 34).

⁴⁸ See Answer at 50 (¶ 78) (LBI “demanded” a “high price tag”) and 51 (¶ 79) (“indisputable” evidence shows that Comcast acted in good faith in this proceeding).

⁴⁹ See Nissenblatt Declaration at 14 (¶ 30). Comcast further tries to distract the Commission by complaining that LBI did not divulge in the Complaint details from its agreements with third party MVPDs. The relevant comparison at this stage of the proceeding is [REDACTED]

LBI notes that *Comcast* fails to divulge specifics about any payments *it* makes to third party VPVs. In any event, as Comcast knows, the fact that Estrella TV receives more robust “white area” carriage from MVPDs like Time Warner and Charter than it does from Comcast is *public knowledge*, and does not require access at the prima facie stage to private LBI agreements. See, e.g., Time Warner program listings for the Kansas City, Missouri and Winston-Salem, North Carolina markets, where Time Warner provides white area coverage to Estrella TV. See Time Warner Cable Channel Lineup, Kansas City (April 2016), available at <http://www.timewarnercable.com/Midwest/support/clu/clu.ashx?downloadPdf=true&cluid=271>, and Time Warner Cable Channel Lineup, Winston-Salem, Forsyth Co. (April 2016), available at <http://www.timewarnercable.com/east/support/clu/clu.ashx?downloadPdf=true&cluid=405>.

[REDACTED]

[REDACTED]

[REDACTED] Comcast also knew that Estrella TV was contemporaneously delivering national audience ratings that were [REDACTED] those of NBC Universo.

44. So Comcast, a company that enjoys a panoramic view of per subscriber compensation across today’s video marketplace due to the nearly seventy markets it serves nationwide (which gives it access to per subscriber fee specifics of virtually all VPVs) and the expansive suite of programming networks it owns (which gives it knowledge of how much other MVPDs pay for Comcast-owned programming networks), knew *during the Discussion Period* that LBI initially requested [REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Viewed in the light of the facts conceded by Comcast’s Answer, LBI’s “ask” for Estrella TV compensation was the opposite of unreasonable. In fact, it was modest [REDACTED]. Whatever allegations Comcast may advance about other factors consulted in setting compensation levels, it has never denied (nor could it) that the primary driver of value is programming’s appeal to the audience that pays the

subscriber bills Comcast sends out each month.⁵⁰ Indeed, [REDACTED]
 [REDACTED] of NBC Universo, the audience appeal of which pales in comparison to Estrella TV, puts the lie to a central tenet of Comcast’s defense (Answer at 52 (¶ 82)): “LBI demanded carriage and fees that bore no relationship to Estrella TV’s popularity among Hispanic audiences, both nationally and in relevant local markets.”⁵¹

45. So, these simple facts beg the equally simple rhetorical question – how could a coldly calculating, hard-headed business decision maker agree to [REDACTED]
 [REDACTED] a general interest, mass appeal Spanish language network that has earned only a small fraction of the demonstrated viewership of Estrella TV, a competing general interest, mass appeal Spanish language network? Phrased another way, if Comcast actually followed a strict, rational approach [REDACTED], can there be any doubt that

50 [REDACTED]

⁵¹ As it did during the Discussion Period, Comcast in the Answer (at 55) continues to perpetuate the myth that [REDACTED]
 [REDACTED] Not only does the Complaint show (at 18-19 (¶ 29) & n.52) that [REDACTED], but the Answer clarifies (at 55 (¶ 86)) that [REDACTED]

See also p. 30 infra.

Comcast would [REDACTED], based on Estrella TV's demonstrably superior ratings performance over NBC Universo?

46. Comcast's Answer does not even acknowledge this central question, much less try to respond to it. Yet the answer to both questions is apparent – no such decision could be made *rationally, reasonably or in good faith*. Instead, Comcast's decision to [REDACTED] [REDACTED] *only* makes sense as designed to advance the prospects of a far less successful *owned* network on the basis of affiliation, while simultaneously hamstringing the marketplace prospects of Estrella TV, a direct competitive threat.

47. Comcast also draws an unsupportable conclusion from its untested claim in the Nissenblatt Declaration (at 22 (¶ 52)) that, in a five-week period after Comcast carriage [REDACTED] [REDACTED] ceased in February 2015, “only” [REDACTED] subscribers reported to Comcast that they were canceling their Comcast subscriptions as a result. In fact, *any* such reported cancellations support LBI's complaint, given that Comcast has no way to know how many subscribers canceled *without* notifying Comcast of a connection to the loss of Estrella TV.⁵² As the Commission is well aware, canceling one service and switching to another

⁵² Nor is it known how many subscribers were unable to cancel as a practical matter because they were tied into long-term Comcast contracts, how many were enticed to stay by Comcast incentives, or how many complained of the loss of Estrella TV carriage. As LBI stated in the Complaint (at 44-45 (¶ 71)), it received a substantial spike in viewer calls when Comcast carriage ended, yet Comcast does not reveal the number of calls/complaints it received about the loss of Estrella TV carriage. LBI notes that the Comcast-volunteered number of *cancellations* in this case solely attributable to the loss of Estrella TV carriage stands in sharp contrast to the facts in *Tennis Channel*, where Comcast adduced evidence that it received *zero complaints* when, upon buying a cable system, it relocated Tennis Channel from a more widely distributed tier to a more costly and less widely distributed sports tier. *See Tennis Channel*, 717 F.3d at 986 (“When Comcast repositioned Tennis to the sports tier (a “negative repo” in MVPD lingo), thereby making it available to Comcast's general subscribers only for an additional fee, not one customer complained about the change”). In any event, this metric has no discernible relevance to the facts of *this* case, where [REDACTED]

is time-consuming and a reflection of extraordinary anger and dissatisfaction. The fact that [REDACTED] consumers canceled Comcast service because Estrella TV disappeared points toward the existence of a much larger pool of dissatisfaction and consumer harm.⁵³

48. As for Comcast's reliance on the Israel Declaration to support the reasonableness of Comcast's treatment of Estrella TV, that Declaration helpfully *confirms* that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁴ [REDACTED]

[REDACTED]

[REDACTED]⁵⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁶ Altogether, these and other findings of the Israel Declaration support LBI's Complaint.

[REDACTED] Comcast cannot seriously contend that its subscribers in any material number (if any at all) would leave Comcast if its NBC Universo distribution was terminated tomorrow.

⁵³ See, e.g., *Protesters Gather Outside Comcast in Denver Over Pulling of Estrella TV*, CBS Local, Denver (Mar. 2, 2015), <http://denver.cbslocal.com/2015/03/02/protesters-gather-outside-comcast-in-denver-over-pulling-of-estrella-tv/>.

⁵⁴ Israel Declaration, Appendix 2, Exhibit 2.

⁵⁵ Israel Declaration, Appendix 2, Exhibit 3.

⁵⁶ Israel Declaration, Appendix 2, Exhibit 4.

49. The Israel Declaration also confirms other essential facts underlying the Complaint – e.g., that positive network ratings are valuable (at 7 (¶ 16)), that “advertisers rely on Nielsen data to purchase advertising on networks” (at 20 (¶ 44)), and that NBC Universo ratings are lower than Estrella TV’s (at 22 (¶ 47)). But, the Israel Declaration as a whole is *not* probative on the issues before the Commission at this time. Indeed, the attached report in reply from Harold W. Furchtgott-Roth (the “Furchtgott-Roth Report in Reply”) highlights multiple deficiencies in the Israel Declaration:

- The infirm legal foundation for Dr. Israel’s study leads him both to misstate the economic evidence necessary to assess the Complaint’s prima facie showing in this case, and to take inadequate account of the unique facts of this case;
- Dr. Israel fails to recognize that supplemental facts supplied by Comcast in its Answer help provide a foundation for an ultimate “incremental loss” analysis (discussed in this Reply’s next section);
- Dr. Israel fails to distinguish between bid and ask prices, fails to recognize that certain analyses cannot be conducted without discovery of evidence, engages in a misleading discussion of Nielsen data, provides the wrong framework for analyzing discrimination, and ignores evidence that Comcast benefitted from its treatment of Estrella TV;
- Neither Dr. Israel’s quantitative analysis, nor his observations about whether Estrella TV is similarly situated to Telemundo and NBC Universo are reliable.

V. Comcast's Reliance On Net Benefit Analysis Is Misplaced And Irrelevant To LBI's Prime Facie Showing Of Discrimination On The Basis Of Affiliation.

50. Comcast argues that the *Tennis Channel* line of cases⁵⁷ imposes an obligation on LBI to make a showing in its Complaint that Comcast carriage of Estrella TV programming would provide Comcast a net benefit. Comcast is wrong.

51. As the Complaint makes clear, under the Merger Order, LBI's burden *at this stage* of a program carriage complaint proceeding against Comcast, during the Post-Merger Complaint Window, is relatively simple *and* reduced below what the Carriage Rules typically require – LBI need only make a prima facie showing that Comcast has discriminated against Estrella TV on the basis of affiliation. Apparently based on the false premise Comcast tried to establish in the initial section of the Answer's Argument (that LBI is not a VPV), Comcast nowhere addresses the reality of the reduced burden LBI must meet in the Complaint. The Complaint easily carries it.⁵⁸

52. Comcast's claims about net benefit are predicated on its misguided conflation of the facts underlying this dispute at this prima facie stage and those involved in *Tennis Channel* after discovery and a full administrative hearing. Comcast improperly attempts to supplant the

⁵⁷ Answer at 63 (¶ 103) & n.248 (citing *Tennis Channel, Inc. v. Comcast Cable Comm'ns, LLC*, 30 FCC Rcd. 849, 852, ¶ 7 (2015); and *Tennis Channel*, 717 F.3d at 985 (citing *MASN*, 25 FCC Rcd. at 18103, ¶ 22)).

⁵⁸ The Complaint, this Reply, and even the Answer itself (*see* Section IV *supra*) are replete with evidence showing that Comcast has discriminated against Estrella TV on the basis of affiliation. To cite only several examples thereof: (i) Comcast's continued insistence that Estrella TV's programming lacks value puts Comcast at odds with a plethora of non-conflicted broadcast affiliates and MVPDs that distribute Estrella TV; (ii) Comcast does not materially dispute in the Answer what the Complaint showed: in lieu of Estrella TV, Comcast distributes a package of Hispanic Channel Additions that do not come close to matching Estrella TV's ratings or posing Estrella TV's competitive threat to Telemundo and NBC Universo; and (iii) Comcast [REDACTED] despite the fact that Estrella TV earns [REDACTED] NBC Universo's national ratings.

well-established complaint-stage requirement of a prima facie showing of affiliation-based discrimination with a post-administrative hearing net benefit test that is nowhere to be found in the Carriage Rules, cannot even be applied until an MVPD divulges essential facts, and is only one of multiple potentially applicable Section 616 tests identified by the *Tennis Channel* Court.

53. Comcast's efforts to pluck a singleton "net benefit" test from *Tennis Channel* and apply it here fail on several counts.⁵⁹ In *Tennis Channel*, the Court reviewed a particular set of unique facts developed over an extensive, six-day evidentiary hearing before an administrative law judge. The Court found in the record of that case no evidence that Comcast's decisions vis-à-vis the *distribution tiers* on which Tennis Channel would be carried (carriage per se was not involved in Tennis Channel) were based on anything other than reasonable business purpose. However, at one point in the opinion where the Court referenced an *overall* Section 616 test applicable to the *Tennis Channel* case facts, the Court also articulated a vital *exclusion* to any application of a reasonable business purpose test: "Thus, if the MVPD treats vendors differently based on a reasonable business purpose (*obviously excluding any purpose to illegitimately hobble the competition from Tennis*), there is no violation."⁶⁰ At another point in the opinion, the *Tennis Channel* Court made clear that a complainant is entitled to "invoke[] the concept that an otherwise valid business consideration is merely pretextual cover for some deeper discriminatory purpose."⁶¹ The Court *also* posited that a Section 616 complainant could carry its burden by showing that the "incremental losses" an MVPD would incur by carrying the

⁵⁹ The *Tennis Channel* Court did *not* purport to identify *all* relevant tests for evaluating substantial evidence showings in program carriage complaint review cases.

⁶⁰ 717 F.3d at 985 (emphasis added).

⁶¹ *Id.* at 987. See also *Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 156 (2d Cir. 2013) ("*Time Warner Cable*") ("an adverse carriage decision based on . . . [an allegedly] legitimate business purpose is permissible only insofar as it is not a pretext for affiliation-based discrimination"), citing *Tennis Channel*, 717 F.3d at 985.

complainant's network were less than the incremental losses that would result from that same MVPD's carriage of its owned channels.⁶²

54. The illegitimate hobbling “exclu[sion],” the “pretextual cover” exception, and the “incremental loss” analysis, all of which may ultimately be used by a complainant to undercut reasonable business purpose claims, are directly implicated in this case. Here, LBI has already adduced compelling evidence showing that Comcast has “illegitimately hobble[d]” Estrella TV. This evidence suffuses the Complaint, but is perhaps most starkly embodied in Comcast’s decision to coddle and promote in February 2015 its own rebranded and relaunched network NBC Universo, at the very same time it was unfairly denigrating Estrella TV’s far more successful and popular programming. Throughout the year-long negotiation period, Comcast used its biased and inaccurate version of Estrella TV ratings performance and demonstrated viewer appeal as a pretext for denying expanded carriage of and the payment of compensation to Estrella TV. There can be no clearer illegitimate hobbling of Estrella TV’s ability to compete with Comcast-owned channels than keeping proven ratings-getter *Estrella TV* off Comcast’s critically important platform while simultaneously [REDACTED], which had no comparable track record of viewer appeal.

55. The disparate treatment of Estrella TV and NBC Universo, among other showings made by LBI, also helps to demonstrate that Comcast’s claims of reasonable business purpose are “pretextual cover for some deeper discriminatory purpose.” In many key markets, Comcast’s actions illegitimately pinned Estrella TV to the sidelines, to the direct benefit of market competitor NBC Universo, whose lackluster ratings made it a prime candidate for this unlawful

⁶² *Id.* at 986.

Comcast boost.⁶³ Furthermore, even without reference to other comparative factors, the substantial ratings disparity between Estrella TV and NBC Universo point toward a conclusion that “incremental losses” from Comcast carriage of NBC Universo exceed any that might be incurred from commensurate Comcast carriage of Estrella TV.

56. In all events, Comcast’s attempt to focus exclusively on net benefit analysis at this stage of this proceeding, without mention of such alternative analyses as illegitimate hobbling, pretextual cover, and incremental loss is predictable. Comcast knows full well that many of the facts relevant to any net benefit analysis are within its sole possession, not yet available to LBI. To give just one example, even assuming *arguendo* that net benefit analysis may ultimately play a role in this case, LBI cannot, without full discovery, begin to examine intelligently the cost/benefit structures that underlie Comcast’s deals with, among others, its extensive suite of Comcast-owned channels, including Telemundo and NBC Universo, with programming networks that attract ratings comparable to Estrella TV, and with the Hispanic Channel Additions.⁶⁴ The record in this case already creates substantial doubt that Comcast will be able

⁶³ There has also been a spate of recent publicity about Comcast’s pouring resources into supporting Telemundo’s pursuit of Spanish language ratings leader Univision. *See, e.g.*, Complaint at Exhibit 5, Bob Fernandez, *With Comcast’s Backing, Telemundo Ready to Compete*, Philadelphia Business Journal (Dec. 28, 2015), http://articles.philly.com/2015-12-28/business/69337161_1_telemundo-rival-univision-cesar-conde (“The nation’s cable giant, with tentacles all over the media landscape, is spending hundreds of millions of dollars to take on the No. 1 Spanish language network, Univision”); Adam Buckman, *With Eye on Rival Univision, Telemundo Outlines Upfront Program Strategy*, Television News Daily (May 15, 2016), <http://www.mediapost.com/publications/article/275743/with-eye-on-rival-univision-telemundo-outlines-up.html>. Comcast’s refusal to give Estrella TV the distribution “oxygen” it requires to compete with Telemundo is the negative and discriminatory flip side of this very public, concerted Comcast effort to promote Telemundo vis-à-vis Univision. Keeping its closest pursuer (Estrella TV) uncompensated and completely off major portions of the massive Comcast MVPD platform is decidedly *not* a *legitimate* business strategy.

⁶⁴ Perhaps Comcast was thinking of LBI’s need for such information when it conceded in the Answer (at 2) that “extensive discovery” would precede a hearing in this case. And *another* Comcast concession in the Answer (at 9 (¶ 4), citing Nissenblatt Declaration) is that the scope of

to demonstrate that “reasonable business considerations” led Comcast to put the far less popular Hispanic Channel Additions on the Comcast MVPD platform in lieu of Estrella TV programming, doubt the Answer does nothing to dampen.

57. With Comcast’s single-minded and inapt reliance on *Tennis Channel’s* references to net benefit analysis placed in context, it is clear that LBI’s Complaint fully satisfies the sole burden established in the Merger Order for designation of a program carriage complaint against Comcast during the Post-Merger Window – namely, the Complaint makes a prima facie showing that Comcast has discriminated against LBI on the basis of affiliation.

58. *Tennis Channel* also provides useful background for a discussion of remedy in this case. The *Tennis Channel* Court was asked to review only the specific relief which the Commission awarded the complainant in that case, based on a complete evidentiary record. In the Complaint in this case, LBI has asked for the relief to which it believes it is entitled (namely parity with Telemundo), based on precedent establishing that unaffiliated VPVs which compete with vertically integrated MVPDs that “have the incentive and ability to favor affiliated programmers” “may suffer harm to the extent that [the VPVs] *do not receive such favorable terms.*”⁶⁵ But, LBI’s Complaint has also requested *in the alternative* distribution and compensation “on such other equitable terms as the Commission may determine.” The

that discovery will encompass Comcast’s approach to negotiations for networks in both English and Spanish language.

⁶⁵ Complaint at 10 (¶ 20) (citing *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report & Order, 9 FCC Rcd 2642, 2643, ¶ 2 (1993)) (emphasis added). This established “favorable terms” test illustrates another reason why Comcast’s criticisms of the Complaint’s lack of detail about specific terms of its distribution deals with other MVPDs are misguided and irrelevant. Where unlawful Comcast discrimination is shown, Comcast’s relevant legal obligation is to grant the discrimination target the same “favorable terms” as Comcast gives its *owned* channels, not to mix and match relief against the terms of agreements reached with other, non-conflicted MVPDs.

Complaint also more generally asks the FCC to “order any other relief that the Commission may deem appropriate.” Such a flexible request for relief leaves the FCC free to fashion ultimate relief in this proceeding based on the record that is ultimately compiled. That relief will include expanded distribution and/or compensation as warranted by the record.

VI. Estrella TV Is Similarly Situated To Telemundo And NBC Universo.

59. Comcast’s efforts to show that Estrella TV, Telemundo, and NBC Universo are not similarly situated fail. Indeed, the Answer succeeds only in confirming what the Complaint showed: Unlike Tennis Channel and Game Show Network, both of which involved more limited specialty niche channels, all three of the networks involved in this case, Estrella TV, Telemundo, and NBC Universo, are *general interest Spanish-language* networks airing a constantly evolving *mix* of substantially overlapping broadly defined programming genres to target the same U.S. Hispanic viewer pool in a fiercely competitive marketplace. The relevant test for determining whether networks are *similarly* situated is not whether the networks being compared carry *substantially identical* programming.⁶⁶ Rather, the similarly situated analysis effectively determines whether networks *compete* in their programming, giving a vertically-integrated MVPD the motive to discriminate against a competing VPV by treating its owned networks more favorably than the non-affiliated network.

60. Comcast shoots wide of the mark in arguing that LBI’s stated effort to “explicitly counterprogram” against Telemundo (and Univision) somehow constitutes an admission against

⁶⁶ Comcast knows that it made an argument in a prior case closely patterned on the one it advances here, and that argument was rejected by the Commission. *See Herring Broadcasting Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 23 FCC Rcd 14787, 14812, ¶ 51 (2008) (“Comcast appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.”). Acceptance of a “substantially identical” rationale would obviously eviscerate VPVs’ ability to bring Section 616 complaints.

interest. The opposite is true. Counterprogramming is the essence of competition among similarly situated broadcast and cable networks. Participants in the video marketplace do not try to counterprogram against networks with which they are *not* closely competitive, but only those networks that are seeking to serve the same basic viewers. Counterprogramming is a proven way to attract a share of the same target audience in the context of a dynamic contest for viewers every day across all dayparts, particularly the all-important weekday prime time hours.⁶⁷

Comcast's outsized emphasis on a few narrow genres within its program schedule rather than shared and overlapping genres, target audience, overall content similarity and common advertiser targets, is a failed effort to divert attention from the forest through a laser focus on a few trees.⁶⁸

⁶⁷ Estrella TV's counterprogramming strategy is one of the factors that led to Estrella TV's carrying *news* opposite what had been a Telemundo telenovela scheduled in the last hour of prime time, precisely the kind of competition-based public interest benefit that Section 616 is designed to protect and promote. The *public interest* benefits of such "counterprogrammed" news, particularly when compared with telenovelas (*see* the telenovela plot lines so painstakingly rehearsed in the López-Pumarejo Declaration (at 12-15 (¶¶ 30-35)), are manifest. More recently, as Estrella TV continues to air its prime time newscast, Telemundo is counterprogramming against Univision in this time slot with what it calls a "super series" (*Señor de Los Cielos IV*), that revolves around themes of drug use, drug trafficking, sex, and violence. For a description of a relevant plotline, see '*El Señor de Los Cielos 5' Telemundo: Rafael Amaya Set to Return for Fifth Season of Series*, Latin Times (May 15, 2016), <http://www.latintimes.com/el-senor-de-los-cielos-5-telemundo-rafael-amaya-set-return-fifth-season-series-385100>.

⁶⁸ Symptomatic of Comcast's contrived attempt to skew the competition analysis to interpret "similarly situated" to mean "substantially identical" is its selective quotation of an analogy LBI employed in 2012 comparing its counterprogramming strategy to opening a chicken restaurant in a neighborhood over-served by burger places. *See* Answer at 70 (¶ 120) & n.272. In fact, no one familiar with the fast food restaurant marketplace would deny that plucky upstart Chick-fil-A, which emphasizes chicken sandwiches, is a fierce competitor of established burger purveyors McDonald's and Burger King. Among the many indicia of this competitive relationship are Chick-fil-A's long-term advertising campaign (cows urging the public to "Eat Mor Chikin") and McDonald's recent menu retooling to better compete with Chick-fil-A. *See, e.g.*, Hayley Peterson, *McDonald's is Trying to be More Like Chick-fil-A*, Business Insider (Apr. 9, 2015), <http://www.businessinsider.com/mcdonalds-is-copying-chick-fil-a-2015-4>. Estrella TV, Telemundo, and NBC Universo have a similar competitive relationship, but one that is even more tightly aligned than these fast food restaurant chains.

61. As for the Flynn and López-Pumarejo Declarations, they illustrate, contrary to their intended purpose, that Estrella TV, Telemundo, and NBC Universo are *all* general interest Spanish language networks seeking to appeal to broad Hispanic audiences.⁶⁹ For example, the fact that all three networks assemble and air a *wide mix* of programming genres is strikingly illustrated by the many different colors needed in the Flynn Declaration to depict the multiple genres which each network carries (e.g., purple for news, white for talk, light blue for sports events, green for entertainment, yellow for Spanish, orange for soap, pink for educational).⁷⁰

62. The Flynn Declaration bar charts (at 14 (¶ 27) and 15 (¶ 29)) go on to show that, while the three networks' 24-hour programming mix *percentages* differ somewhat (and, as shown below, are subject to change), there is substantial genre overlap between Estrella TV and Comcast's two channels. That is, those two bar charts demonstrate that Estrella TV and Telemundo *both* carry news, talk, and newsmagazine.⁷¹ Estrella TV and NBC Universo *both* carry variety and educational.⁷² *All three networks* carry shopping, Spanish, soap, entertainment,

⁶⁹ See, for example, the Comcast-prepared slide deck (at 2 and 13) included as Exhibit 6A to the López-Pumarejo Declaration that [REDACTED]

⁷⁰ A critical flaw in the methodology of the Flynn Declaration is its failure to define, or even list in their entirety, the many programming categories that Gracenote employs, and upon which the Flynn Declaration relies. The link provided to the Gracenote website (at 4 n.2) provides no information on these genre categories, and one must be a registered user of the company's OnConnect application programming interface (API) to gain access to a complete listing. See Gracenote OnConnect API Explorer at <http://developer.tmsapi.com/io-docs> and http://developer.tmsapi.com/Getting_Started.

⁷¹ Exhibit 2 to the Flynn Declaration also shows genre overlap between Estrella TV and Telemundo in the programming categories of "Children" and "Consumer."

⁷² Exhibit 2 to the Flynn Declaration also shows genre overlap between Estrella TV and NBC Universo in the programming category of "Music."

and sports event programming.⁷³ Viewed holistically, the Flynn and López-Pumarejo Declarations serve to confirm what is self-evident to U.S. Hispanic audience members when they make their viewing choices – Estrella TV, Telemundo, and NBC Universo are all similarly situated general interest, mass appeal Spanish language networks which compete for viewers’ attention and allegiance with evolving and differing mixes of largely overlapping program genres.⁷⁴

63. The discussion in the Flynn Declaration focuses on only fourteen program categories, some of which are very closely related, i.e., “news” and “news magazine,” “sports event” and “sports non-event,” “drama” and “soaps,” and “variety” and “entertainment.” Flynn’s analysis indicates significant overlap among these fourteen categories on the three

⁷³ Exhibit 2 to the Flynn Declaration also shows genre overlap between Estrella TV, Telemundo, and NBC Universo in the programming category of “Special.”

⁷⁴ Rather than doing a general comparison of the shows carried on each of the networks, the López-Pumarejo Declaration focuses on the time of day when programming airs. Networks make different judgments as to the particulars of program scheduling, but that factor has no material impact on the similarly situated analysis. In fact, more particularized comparison of specific shows on the three networks reveals many more similarities in the programming than differences. To give just several illustrative examples: NBC Universo’s *Larrymania* and *A Todo Gloria* (described on p. 21 (¶ 50) of the López-Pumarejo Declaration) matches up with Estrella TV’s *Rica Famosa Latina* (described on p. 19 (¶ 46) of the López-Pumarejo Declaration). *Titulares y Mas*, a late night talk show on Telemundo that features celebrity guests, parallels Estrella TV’s *Noches de Platanito*, which also “features interviews with celebrities.” López-Pumarejo Declaration at 28 n.52. Both Telemundo and Estrella TV feature talent competitions – *La Voz Kids* on Telemundo and *Tengo Talento, Mucho Talento* on Estrella TV. Estrella TV previously aired a miniseries about the life of the late-singer Jenni Rivera, while Telemundo and NBC Universo have similar plans to produce a number of projects about Rivera. See *Estrella TV Slots Bio Miniseries on Jenni Rivera*, TVNewsCheck (Nov. 11, 2013), <http://www.tvnewscheck.com/article/71891/estrella-tv-slots-bio-miniseries-on-jenni-rivera>. See also Griselda Flores, *Telemundo and Jenni Rivera Estate to Produce Bio-Musical Series Based on Singer’s Life*, Billboard (May 18, 2016), <http://www.billboard.com/articles/columns/latin/7377433/telemundo-jenni-rivera-estate-bio-musical-series>. Over the course of her career, Jenni Rivera had been a judge on an Estrella TV talent show and hosted a talk show on Estrella TV called “Jenni.” At the same time, she starred in the NBC Universo reality show “I Love Jenni.”

networks. Exhibit B to the Flynn Declaration, however, shows many more categories not discussed in the text at all. Excluding the designations “Special” and “Unknown,” these additional program genres number 34, 28 of which account for less than one percent of the programming on *any* of the three networks analyzed. And it is far from clear that even this aggregation of Gracenote program types is exhaustive (*see* n.70 *supra*); indeed, it seems probable that there are more, perhaps many more, than fifty such categories. Accordingly, the fact that so much of Estrella TV, Telemundo and NBC Universo programming falls predominantly into a cluster of fourteen, often closely-related, categories – out of what is clearly a much broader range of program types utilized – shows just how similar these networks are.

64. It is relevant and revealing that with respect to the genre overlap between Estrella TV on the one hand and Telemundo and NBC Universo on the other, Comcast’s experts conflict with each other in material ways. For instance, the Flynn Declaration (at 17 (¶ 35)) says Estrella TV carries 0% reality programming, but the López-Pumarejo Declaration (at 19 (¶ 46)) highlights a real housewives-style reality show on Estrella TV (Rica Famosa Latina) “tracking the inner lives of wealthy Latin American or Latina women.” The Flynn Declaration (at 17-18 (¶ 35)) says Estrella TV carries 0% game show programming, but the López-Pumarejo Declaration (at 15 (¶ 36)) claims to find significance in the fact that Estrella TV’s programming strategy highlights, *inter alia*, “game and competition shows” and (at 19 (¶ 46)) references a “late-night-style game show” on Estrella TV. The López-Pumarejo Declaration (at 20 (¶ 49)) claims NBC Universo’s programming “is heavily focused on sports,” yet the Flynn Declaration (at 14-15 (¶ 28)) says sports events comprise just 10% of NBC Universo programming.⁷⁵

⁷⁵ The López-Pumarejo Declaration (at 20 (¶ 47)) again focuses narrowly on the particular times programming airs, and strains to find significance in the fact that Estrella TV “does not air news, talk, or *telenovelas*” weekdays between 11 p.m. and 1:00 a.m. Yet the Flynn Declaration (at 14-

65. Importantly, Comcast’s experts’ snapshot-in-time⁷⁶ comparisons of the three networks’ dynamic general interest programming mixes both ignore the key fact that these mass appeal mixes are subject to change, as the three networks continually search for ways to better compete with each other. In fact, an article published in Adweek on May 18, 2016 and titled “Future of Telenovelas Split at Telemundo and Univision as the Genre Evolves, One Doubles Down and Another Moves Away,”⁷⁷ reviews imminent changes in Telemundo’s programming strategy mix that will rely *less* on the telenovelas so central to the erroneous bottom-line conclusions of the Flynn and López-Pumarejo Declarations that Estrella TV is not similarly situated to Telemundo or NBC Universo.⁷⁸ Another example of how these competitors’ dynamic

15 (¶¶ 27-29)) shows news and talk to be common Estrella TV programming genres overall, and the López-Pumarejo Declaration recites (at 17 (¶ 40)) that Estrella TV airs a news magazine/news block during 10-11 p.m. prime time hour.

⁷⁶ For example, in his declaration (at 12 (¶ 30)), López-Pumarejo avers, as if it were a truism, that: “In M-F primetime, Telemundo airs *telenovelas* to the exclusion of every other genre of programming.”

⁷⁷ Chris Ariens, *Future of Telenovelas Split at Telemundo and Univision as the Genre Evolves*, Ad Week (May 18, 2016, 9:24 AM), <http://www.adweek.com/news/television/future-telenovelas-split-telemundo-and-univision-genre-evolves-171520>.

⁷⁸ See the Comcast-prepared slide deck attached as Exhibit 6C (at 13) to the López-Pumarejo Declaration [REDACTED] Adam Buckman, *With Eye on Rival Univision, Telemundo Outlines Upfront Program Strategy*, Television News Daily (May 15, 2016, 4:00 PM), <http://www.mediapost.com/publications/article/275743/with-eye-on-rival-univision-telemundo-outlines-up.html> (“Telemundo’s new programming reflects the network’s strategy . . . that means moving away from the network’s reliance on telenovelas”); *For Telemundo, Evolving the Programming Model*, Media Life Magazine (May 16, 2016), <http://www.medialifemagazine.com/telemundo-evolving-programming-model/> (“Telemundo has shifted its approach over the past few years[,] moving away from telenovelas.”); *Telemundo Tries Out a New Strategy This Summer*, Media Life Magazine (June 21, 2016), <http://www.medialifemagazine.com/telemundo-tries-new-strategy-summer/> (“We really want people to come on that one night and experience a whole new lineup.” A lineup that “exemplifies our new strategy.”). These same articles suggest that Telemundo is migrating toward programming content comparable to that Estrella TV has been using to “counterprogram.”

and overlapping programming mixes evolve is sports programming (supposedly an emphasis of NBC Universo), where the López-Pumarejo Declaration (at 25 (¶ 58)) (footnote omitted) states that Estrella TV's "small percentage of sports programming [as of October 2014] . . . was Mexican league soccer matches."⁷⁹ As Comcast itself no doubt knows, in September 2015, Estrella TV added live boxing matches coverage to its lineup.⁸⁰ Again, the point is that the genre mixes of the three Spanish language general interest programming networks involved in this proceeding evolve and change over time in the crucible of competition;⁸¹ each network embraces similarly formatted programs based on perceived audience taste and the relative success achieved by competitors.

66. The López-Pumarejo Declaration's conclusions (at 27-29 (¶¶ 62-66)) about "look and feel" are entirely anecdotal, based on both selective and subjective comparisons of individual programs on the two networks, and fail to address the overall competition for U.S. Hispanic viewers between Estrella TV and Telemundo.⁸² In the hurly burly of the general interest Spanish

⁷⁹ Like Estrella TV, NBC Universo *and* Telemundo carry Mexican league soccer matches. See Exhibit 6A (at p. 13) to the López-Pumarejo Declaration [REDACTED]

⁸⁰ Dan Rafael, *Golden Boy Partners with Spanish-language Estrella TV in 3-Year Deal*, ESPN (July 28, 2015), http://espn.go.com/boxing/story/_/id/13329556/golden-boy-promotions-spanish-language-estrella-tv-televiser-two-boxing-cards-per-month.

⁸¹ See, e.g., *Telemundo Premieres Three Original Productions on Tuesday July 19*, Produ (June 23, 2016), <http://www.produ.com/english/hispanictv/noticia.html?IDNoti=5214> (quoting Carmen Cecilia Urbaneja from Telemundo Studios, discussing *Silvana*, a new romantic comedy on Telemundo: "Telemundo has evolved with the market. In everything Telemundo does, innovation is always in mind. For example, we are considering *Silvana* a romantic comedy. Novelas are no longer traditional.")

⁸² This selective analytical approach is exactly the sort of skewed evidence of which the FCC has been highly critical. See *Herring Broadcasting Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 24 FCC Rcd 12967, 12979 (¶ 25) (ALJ 2009) ("Nothing in the record establishes that the selections of WealthTV's programming viewed by [its expert] are representative of WealthTV's

language competitive marketplace in which Estrella TV is trying to survive, even thrive, the distinctions the López-Pumarejo Declaration cites are merely hallmarks of competition between similarly situated networks targeting the same broad audience. Moreover, the López-Pumarejo Declaration's conclusions on this score are not internally consistent. For example, the López-Pumarejo Declaration makes reference (at 4 (¶ 11)) to the “highly sexualized” content of Estrella TV programming as if it somehow materially differentiates Estrella TV from Telemundo and NBC Universo. Yet, the attachments to that same Declaration make reference to how NBC Universo [REDACTED].⁸³ The shallowness of López-Pumarejo's emphasis on elliptical evidence concerning perceived tonal differences in the networks is also revealed by the Declaration's failure to acknowledge that Estrella TV produces and regularly schedules traditional newscasts such as Noticiero Cierre de Edición (10:30 p.m.) and Noticiero Estrella TV (5:30 p.m.), which compete with Telemundo newscasts such as Noticiero Telemundo.⁸⁴ The López-Pumarejo Declaration's attempt (at 27-28 (¶¶ 64-65)) to differentiate Estrella TV's Alarma TV from Telemundo's Al Rojo Vivo on the basis of how the hosts are

programming as a whole”). In addition, the “look and feel” analysis in that case was designed to show that two niche networks were targeted at fundamentally different demographic groups; here the alleged differences are untethered to any cogent argument regarding differences in target audience.

⁸³ See, e.g., p. 3 of the Comcast-prepared slide deck included as Exhibit 6A to the López-Pumarejo Declaration, [REDACTED]; the unpaginated Exhibit 6B to the López-Pumarejo Declaration, [REDACTED]

⁸⁴ More evidence of the many ways in which Comcast competes with LBI is the very recent announcement that Telemundo will be launching a 5 p.m. newscast in September 2016 on 14 Telemundo stations, including the Los Angeles O&O that competes with LBI's KRCA. *Telemundo Station Group to Launch a New 5pm Newscast*, Hispanic Ad (June 22, 2016), <http://hispanicad.com/el-blog/television/telemundo-station-group-launch-new-5pm-newscast>. *KRCA has long carried local news at 5 p.m.*

dressed does nothing to change the fact that the shows are both examples of a type of newsmagazine popular with U.S. Hispanic audiences.⁸⁵

67. Any Mexican influence in Estrella TV's programming does nothing to dampen the competitive realities Estrella TV faces vis-à-vis Telemundo and NBC Universo.⁸⁶ That is again shown in the Answer (at 78 (¶ 136)) which states that the viewer pools of all three of these competitors are *majority* Mexican – [REDACTED] for Estrella TV, [REDACTED] for NBC Universo, and [REDACTED] for Telemundo. These numbers demonstrate a material *similarity* among the three much more than they do a difference. And the logical extension of Comcast's argument that a somewhat greater Mexican influence/appeal of one network insulates an MVPD from application of Section 616 is that such insulation would greenlight discrimination by Comcast against today's leading general interest Spanish language network, Telemundo and NBC Universo competitor, Univision.⁸⁷

⁸⁵ Even the selective descriptions offered in the López-Pumarejo Declaration (at 27-28 (¶ 65)) of the types of "informal" stories found on Al Rojo Vivo (involving a march against cat-calling, a hippopotamus on the loose, and the rescue of a man from a burning car) make clear that Alarma and Al Rojo Vivo are similarly counterprogrammed versions of popular, competing Spanish-language news magazines that attract viewers with non-traditional news-related stories. Notably, the Executive Producer of Telemundo's Al Rojo Vivo previously served as the Executive Producer of Estrella TV's Alarma TV. *See Garibotto quits Estrella TV, Joins Telemundo*, Media Moves (July 26, 2012), <http://www.mediamoves.com/tag/pilar-garibotto>.

⁸⁶ Estrella TV does not by any means rely exclusively on Mexican talent. For example, its program Alarma TV is hosted by Columbian-born Lianna Grethel and Rica Famosa Latina features talent from Cuba and Argentina. It should also be noted that Telemundo and NBC Universo have hired talent previously employed by Estrella TV. Examples of such talent include Jenni Rivera from "I Love Jenni" and Diego Schoening, Penelope Menchaca, and Elva Saray, to name just a few of many. *See, e.g., Omar Germentos Replacement is Ex Timbiriche Diego Schoening on Telemundo Show 'Un Nuevo Dia'*, Latin Times (Aug. 22, 2013 2:22 PM), <http://www.latintimes.com/omar-germentos-replacement-ex-timbiriche-diego-schoening-telemundo-show-un-nuevo-dia-exclusive-report>; Gabriela Alvarado, *A Talk with Elva Saray, Our Next Quince Expo Emcee*, Quinceanera, <http://www.quinceanera.com/celebrities/talk-elva-saray-next-quince-expo-emcee/>.

⁸⁷ *See* p. 6 n.4 of the López-Pumarejo Declaration, which makes clear that Univision programming is heavily Mexican-influenced, supplied in large part by Mexican television industry giant Televisa. Numerous recent articles make clear that Comcast is investing heavily

Such a proposition is as untenable as Comcast's assertion that Section 616 does not protect Estrella TV from Comcast's blatant favoritism of Telemundo and NBC Universo.⁸⁸

68. Furthermore, Comcast's reliance on any Mexican orientation within Estrella TV programming must be viewed in the context of Comcast's refusals to expand LBI carriage, as detailed in the Complaint. That is, the fact that LBI's coverage footprint currently favors the Western portion of the United States, where Mexican-American's presence is greatest, itself can be traced in part to the Comcast discrimination which lies at the core of this case – Comcast's refusal to expand LBI carriage into such major Eastern U.S. markets as Washington, DC, Atlanta, Philadelphia, and Boston, where Puerto Rican and Cuban influences are more prominent.

69. In the same way, Comcast's singular and misplaced focus on program genre cannot conceal the fact that Comcast has nothing effective to say about *other* recognized indicia of how Estrella TV, Telemundo, and NBC Universo are similarly situated, namely the fact that the target audiences and target advertisers of these general-interest Spanish language networks

in Telemundo to make a major competitive push to challenge Univision. One such report makes clear the principal way in which Telemundo has sought to differentiate itself from Univision is through "original content that's . . . tailor-made for U.S. Hispanics who live in this country It's not imported programming made by another broadcaster for another consumer audience." Adam Buckman, *With Eye On Rival Univision, Telemundo Outlines Upfront Program Strategy*, MediaPost (May 15, 2016), <http://www.mediapost.com/publications/article/275743/with-eye-on-rival-univision-telemundo-outlines-up.html>. Like Telemundo, Estrella TV differentiates itself within the general interest Spanish language TV marketplace by originating programming tailored to U.S. Hispanic viewers. These articles vitiate the notion that Telemundo does not directly compete with a general interest Spanish language network like Estrella TV.

⁸⁸ Unpaginated Exhibit 3 to the López-Pumarejo Declaration contains various examples of Estrella TV promotional materials that are *not* Mexican-centric, but present Estrella TV *broadly* as an up-and-coming U.S. Hispanic network that "features top Latin American performers" using "proven formats created and produced for U.S. Hispanics." Unpaginated Exhibit 4 to the López-Pumarejo Declaration describes Estrella TV's Alarma TV as broadly appealing: "With exclusive reporters all over Latin America, this riveting daily television news magazine delivers the stories that will surprise and inform."

are similar. The most Comcast can muster on that score are citations to some immaterial differences in audience median age between Estrella TV and NBC Universo and gender composition among the three networks⁸⁹ and an observation that Telemundo commands higher rates from the same pool of advertisers that all three networks court. Nothing Comcast says obscures the central relevant fact under Commission precedent – all three of these networks *target* the same basic viewer and advertiser pools.

70. To the limited extent that Comcast addresses LBI's showing that Estrella TV, Telemundo and NBC Universo have many advertisers in common (LBI cited sixteen advertisers in its Complaint at Exhibit 12), its arguments are focused merely on often modest differences in the dollar value of advertising purchased by these advertisers on the three networks, and each network's relative proportion of the *total advertising* budgets of these common advertisers.⁹⁰ These arguments fail to rebut LBI's *prima facie* showing that there is significant overlap in target advertisers among the three networks.⁹¹ Comcast addresses only four of the twelve advertisers cited by LBI, and provides no explanation as to why it discusses only Ford, Clorox, Wendy's and State Farm. In the process, however, it helpfully confirms that it shares all of these advertisers with Estrella TV on either or both Telemundo and NBC Universo. Comcast also fails to distinguish between English-language advertising and Spanish-language advertising. It is wholly irrelevant, for example, that Ford spent a total of \$2.5 billion on U.S. advertising in 2014, when

⁸⁹ Answer at 78-79 (¶ 136). Comcast's attempt to find significance in the fact that Estrella TV's equal appeal to both genders falls squarely in the middle of the gender leanings of Telemundo (59% female) and NBC Universo (61% male) audiences. This limited factor, however, shows only that Estrella TV is more similar to *both* Telemundo and NBC Universo than Comcast's networks are to each other.

⁹⁰ See Answer at 80-81 (¶ 41) and Israel Declaration at 23-25 (¶¶ 50-52).

⁹¹ Commission precedent attaches no relevance to the comparative advertiser *expenditures* on which Comcast relies. See *also* the Furchtgott-Roth Report in Reply at 29 (¶ 54).

that figure aggregates television, radio, print, internet and outdoor advertising in English and all other languages. What is relevant is how Estrella TV, Telemundo and NBC Universo compete in the *Spanish language television advertising* market. Comcast is well aware that its general interest Spanish-language networks compete on a daily basis with Estrella TV for a share of the advertising campaigns that target Hispanic television viewers. The evidence recounted in the Answer reinforces that fact rather than disproving Estrella TV's showing that the three networks compete for advertising revenue.

71. The tone-deaf proposition in the Israel Declaration (at 22 (¶ 48)) that higher SNL Kagan-estimated programming expenditures at Telemundo [REDACTED] and NBC Universo [REDACTED] versus Estrella TV [REDACTED] somehow equate with higher perceived viewer demand for Comcast's two owned networks must be rejected out of hand. These programming budget discrepancies reflect nothing more than the reality that Telemundo and NBC Universo draw support from a *multinational corporate giant* with financial resources that dwarf those available to *family-owned* LBI.

72. The real story those comparative budget numbers tell is that LBI does *remarkably* well meeting viewer demand in the marketplace despite the tremendous disparity in financial resources LBI must overcome to compete with a company of Comcast's size and wealth. And, of course, the fact that Comcast pours more money into NBC Universo programming than LBI is able to invest in Estrella TV, yet this comparatively high-priced NBC Universo programming yields such comparatively poor audience ratings, directly informs the incremental loss and illegitimate hobbling analyses discussed in Section V *supra*. Comcast could *cut* any and all NBC Universo incremental losses dramatically by dropping NBC Universo and its high-priced programming production budget altogether and replacing that programming across its platform

with Estrella TV. Viewed from a different perspective, Comcast's ill-advised sinking of [REDACTED] into *just* the programming of ratings-challenged NBC Universo (without regard to other NBC Universo costs) gives Comcast a clear motive to hobble competitor Estrella TV in the marketplace, obviously enhancing Comcast's chances of salvaging its NBC Universo investment.

73. For all of these reasons and those advanced in the Complaint, Estrella TV is similarly situated to Telemundo and NBC Universo.

VII. Under The Merger Order, LBI Need Not Show That Comcast Has Unreasonably Restrained LBI's Ability To Compete; LBI Made Such A Showing Nonetheless.

74. Although Comcast misleadingly fails to acknowledge it, the entirety of the Answer's Section VII is predicated on the demonstrably incorrect argument in Section I of the Answer that LBI is not a VPV entitled to the protections afforded by the Merger Order and its conditions. As the Complaint made clear, the Merger Order explicitly provides that any VPV bringing a program carriage complaint against Comcast during the Post-Merger Complaint Window need *not* make a prima facie showing therein that the VPV has been unreasonably restrained in its ability to compete fairly.⁹² As LBI has shown in Section I *supra*, LBI is indisputably a VPV, and therefore had no obligation to make such a showing in its Complaint.⁹³

⁹² Complaint at 11-12 (¶ 21).

⁹³ LBI notes that in Section VII of the Answer (at n.321 and accompanying text) Comcast continues its practice of trying to rewrite the law to suit its purposes. A concurring, non-precedential opinion in a court case evaluating a full evidentiary record does not establish what a complainant "must" show to satisfy a prima facie burden.

75. LBI notes for the record that, in any event, the entirety of the evidence in this proceeding in fact constitutes a compelling prima facie showing that Comcast's actions herein have unreasonably restrained LBI's ability to compete.⁹⁴

VIII. Comcast Has Waived Its Right To Raise A First Amendment Defense In This Proceeding; The Argument Is Unavailing In Any Event.

76. The Answer's final contention is that Commission grant of the relief requested by LBI would violate Comcast's First Amendment rights. This claim should be summarily dismissed.

77. As the Complaint explains (at note 30 and accompanying text), when it acquired NBCUniversal in 2011, Comcast accepted the Merger Order conditions as binding and expressly waived any right it may have "to challenge the Commission's legal authority to adopt and enforce such conditions" As the Complaint also makes clear, Merger Condition III.1 was a prohibition on discrimination against competitors on the basis of program affiliation, a condition that mirrors the language of Section 616 and the Carriage Rules. The Complaint expressly relies on Condition III.1. By freely accepting this condition in return for FCC grant of its NBCUniversal acquisition, Comcast waived its right to challenge enforcement of Condition III.1 on the basis of generalized First Amendment grounds that have nothing to do with the facts of a particular discrimination case.

78. Even if Comcast had not waived this argument, as Comcast is well aware, this very contention has previously been rejected by the Commission, on grounds that the program

⁹⁴ See, e.g., Complaint at n.89. See also pp. 25-29 *supra* (discussing Comcast's starkly disparate treatment of NBC Universo and Estrella TV, which unreasonably favors NBC Universo and Telemundo, and stunts Estrella TV's ability to compete in the marketplace with both of these Comcast-owned networks).

carriage requirements are content-neutral, and survive intermediate (not strict) scrutiny.⁹⁵

Furthermore, Comcast's First Amendment argument, while disguised as specifically relating to this case, is really an attack on the constitutionality of the program carriage rules themselves, which have already been held to be constitutional.⁹⁶

79. In this case, Comcast's First Amendment argument comes with particularly poor grace. In effect, Comcast contends that it is not enough that it enjoys the discretionary right to distribute without restriction all of its owned programming on its MVPD platform [REDACTED]

[REDACTED]. In addition, Comcast apparently believes it should be permitted, in the name of the First Amendment, to discriminate not only in its decisions of whether to carry a competitor on its MVPD platform but also the terms and conditions pursuant to which it will carry that competitor. The facts of this case cogently illustrate the profoundly *negative* consequences acceptance of Comcast's position would have for viewpoint diversity,⁹⁷ specifically including minority viewpoints, a concept which is grounded in well-established First Amendment principles⁹⁸ and is very much a source of major concern today both in a prominent court case and

⁹⁵ See *Tennis Channel*, 27 FCC Rcd 8508, 8544-45, ¶¶ 93-96 (2012), *rev'd on other grounds sub nom. Comcast v. FCC*, 717 F.3d 982 (D.C. Cir. 2013).

⁹⁶ See *Time Warner Cable*, 729 F.3d at 154-55 (citing *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 91 (2d Cir. 2009)). See also *Time Warner Cable*, 729 F.3d at 158-59 ("The program carriage regime expresses no government content preference for particular ideas or viewpoints. It simply prohibits MVPDs from discriminating against unaffiliated networks similarly situated to the MVPDs affiliated networks. As such, the regime is properly considered content neutral").

⁹⁷ See *Time Warner Cable*, 729 F.3d at 160-64 for a discussion of the importance of this principle.

⁹⁸ See, e.g., *Time Warner Cable*, 729 F.3d at 145 & 160 ("It is the 'physical connection between the [subscriber's] television set and the cable network' that affords cable operators this power to 'silence the voice' of a particular network," and "assuring that the public has access to a

at the Commission. These concerns are directly implicated in this proceeding, as LBI is minority-owned.⁹⁹

80. In just the two months since LBI filed its complaint, the critical importance of promoting viewpoint diversity through minority ownership in the communications industry has been underscored in multiple forums. To cite three:

81. First, in *Prometheus Radio Project v. FCC*, Nos. 15-3863, 15-3864, 15-3865 & 15-3866 (3d Cir. May 25, 2016) (“*Prometheus III*”) the third judicial installment in a long-running (more than a decade) case involving various issues relating to FCC regulation of the broadcasting industry, the United States Court of Appeals for the Third Circuit took great pains to emphasize the importance of the FCC’s statutory obligation to promote minority ownership.

The Court explained:

The Commission has a statutory obligation to promote minority and female broadcast ownership. For instance, Congress has provided, in the context of applications for licenses or construction permits, that a ‘significant preference shall be granted to any applicant controlled by a member or members of a minority group.’ 47 U.S.C. § 309(i). And for licenses and permits that the Commission awards using competitive bidding, one of its objectives must be promoting opportunities for ‘businesses owned by members of minority groups and women.’ *Id.* § 309(j).¹⁰⁰

82. Second, in a series of recent responses to a joint letter from 55 members of Congress (asking the FCC to suspend its set top box rulemaking proceeding until more studies are completed) FCC Chairman Tom Wheeler disapprovingly cited large internet service providers’ practice of furthering their own financial interests through set top box fees at the

multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment”), *quoting Turner I*, 512 U.S. at 656 & 663.

⁹⁹ See Complaint at 3.

¹⁰⁰ *Prometheus III*, slip op. at 15.

expense of the carriage and compensation of independent and minority-owned programmers. In Chairman Wheeler's words: "While the most popular MVPD packages contain 200 to 500 channels, there are currently only two Hispanic-owned and four African-American owned networks. Not only is there limited carriage, but there is also limited financial support. While a channel like ESPN is paid over \$7.00 per month per subscriber by MVPDs, minority channels receive pennies. What's more, minority networks are often placed on premium tiers requiring an additional payment from the consumer which also limits potential advertising revenues by limiting potential audience reach."¹⁰¹

83. Third, in an April 19, 2016 speech delivered at the National Association of Broadcasters Convention in Las Vegas, Nevada, Commissioner Mignon Clyburn, a champion of the robust FCC inquiry now underway concerning viewpoint diversity in the video marketplace, articulated central concerns in that proceeding that reverberate in this proceeding: "From my conversations with stakeholders, three core issues emerged: there are insurmountable challenges, when it comes to acquiring program carriage; it is difficult to receive fair or reasonable contract terms; and growth in their online distribution model is inhibited, because program distribution access[] is often restricted via contract."¹⁰²

84. These three examples underline how high the stakes are in this proceeding, which involves Comcast's blatant efforts to critically damage, if not foreclose, the efforts of a leading

¹⁰¹ See, e.g., Letter from FCC Chairman Tom Wheeler to The Honorable Alma Adams (May 23, 2016), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0601/DOC-339632A3.pdf. LBI notes that despite Estrella TV's hard-won, established status in the Spanish language video marketplace as a "major network" (recognized in the Hispanic TV Study), Comcast has not deigned to offer LBI even "pennies" for Estrella TV carriage.

¹⁰² FCC Commissioner Mignon L. Clyburn, Remarks at the 2016 NAB Show (Apr. 19, 2016) (transcript available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-338902A1.pdf).

minority voice in this country, Estrella TV, to compete with not just one, but two of Comcast's expansive suite of owned channels.¹⁰³

* * *

85. LBI elected retransmission consent in lieu of must carry in the autumn of 2014 and approached Comcast to propose expanded carriage and compensation for its popular general interest, mass appeal Spanish language network Estrella TV across Comcast's expansive national distribution platform. LBI presented Comcast with solid evidence of Nielsen ratings demonstrating that since its launch in 2009, Estrella TV had rapidly become a formidable competitor in a space where many had failed before. But rather than embrace the chance to facilitate the growth of Estrella TV consistent with both its oft-expressed desire to promote the development of a rich and diverse Hispanic video ecosystem and the enforceable commitment it made in order to gain governmental permission to acquire the programming networks of NBCUniversal, Comcast embarked on a path of repeatedly rebuffing LBI's proposals, even as LBI changed the shape and content of those proposals in an effort to facilitate a positive result over the course of the next year. Comcast argued on multiple occasions that Estrella TV ratings did not warrant expanded Comcast carriage or compensation, and that reasonable, good faith business considerations therefore supported their positions. On multiple occasions, Comcast

¹⁰³ At pp. 85-92, Comcast supplies its "Response to Numbered Paragraphs." Because LBI's Complaint and this Reply speak for themselves as to LBI's positions, a granular reply to this section of the Answer is unnecessary. LBI notes, however, that a mere listing of several illustrative Comcast's "denials" of facts that are demonstrably true shows how the Answer itself lacks factual foundation: (i) in response to the Complaint's ¶ 5, Comcast denies that Hearst, Nexstar, Sinclair, and Tegna are major broadcasters that carry Estrella TV programming; (ii) in response to the Complaint's ¶ 6, Comcast denies that LBI is a VPV (Answer at 25-26 (¶¶ 36-38) & 86 (¶ 6)); (iii) in response to the Complaint's ¶¶ 29 and 32 respectively, denies the May and November 2015 prime time sweeps data for LBI's KRCA (Los Angeles) and denies that "Estrella TV's prime time newscast is very popular with viewing audiences, as the ratings demonstrate."

essentially offered LBI a version of must carry in three markets, so long as LBI surrendered to Comcast broadband feed and video on demand rights for free, but without meaningful expansion of Estrella TV carriage and without compensation.

86. Throughout the negotiations, Comcast played a type of ratings game, trying to use *national* ratings data relating to a general interest, mass appeal Spanish language network that Comcast owns, Telemundo, to diminish LBI's showing of Estrella TV's demonstrable popular appeal across many markets, starting with the nation's largest Hispanic market by far, Los Angeles. With the filing of Comcast's Answer, however, the smoke has cleared, and Comcast's reliance on skewed Telemundo ratings has backfired, with a focus now placed on the ratings of the *other* Spanish language network Comcast owns. That is, with the Answer's filing, the record before the Commission shows that at the same time Comcast was throttling Estrella TV by denying LBI's proposals for expanded distribution and compensation, Comcast was *simultaneously* planning to rebrand and relaunch broadly across its massive subscriber platform [REDACTED] its *second* general interest, mass appeal Spanish language network NBC Universo, despite Estrella TV's [REDACTED] national ratings advantage over NBC Universo.

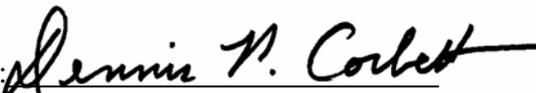
87. These facts go to the heart of what Section 616, the Carriage Rules, and the Merger Condition are designed to prevent – a vertically integrated MVPD giving more favorable carriage, terms and conditions to its affiliated network(s) than it does to its competition. Comcast's behavior is the very definition of the illegitimate hobbling of a competitor which the law forbids, and provides compelling evidence of Comcast's deeper discriminatory purpose, behind pretextual cover. The brazenness is breathtaking. The need for remedial Commission intervention is clear.

CONCLUSION

88. For all the reasons set forth in the Complaint and this Reply, LBI asks that the Commission enforce Section 616, the Carriage Rules, and Merger Order Condition III.1 to protect the marketplace overall and LBI in particular against the damaging discriminatory actions of Comcast, by granting relief as requested by LBI in the Complaint and this Reply.

Respectfully submitted,

**LIBERMAN BROADCASTING, INC.
LBI MEDIA, INC.**

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June 27, 2016

Their Attorneys

EXHIBIT 1

[Redacted in its Entirety from Public Version]

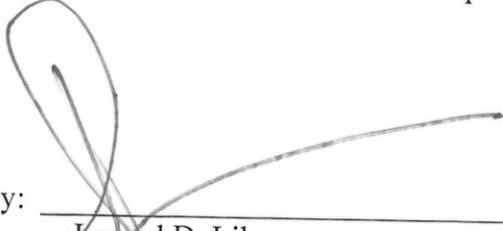
DECLARATION OF LENARD D. LIBERMAN

I, Lenard D. Liberman, hereby declare, under penalty of perjury, that the following statements are true and correct:

1. I am the Chief Executive Officer and President of both Liberman Broadcasting, Inc. and LBI Media, Inc.

2. I have read the foregoing "Reply to Answer to Program Carriage Complaint" ("Reply"). To the best of my knowledge, information and belief formed after reasonable inquiry, the Reply is well grounded in fact, is warranted under existing law, and is not interposed for any improper purpose.

By: _____


Lenard D. Liberman
Chief Executive Officer & President
Liberman Broadcasting, Inc.
LBI Media, Inc.

Dated: June 27, 2016

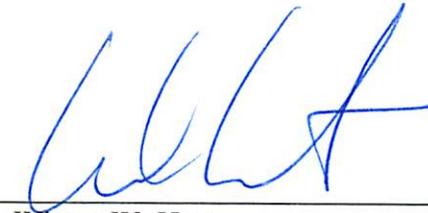
DECLARATION OF WINTER W. HORTON

I, Winter W. Horton, hereby declare, under penalty of perjury, that the following statements are true and correct:

1. I am the Chief Operating Officer of both Liberman Broadcasting, Inc. and LBI Media, Inc.

2. I have read the foregoing "Reply to Answer to Program Carriage Complaint" ("Reply"). To the best of my knowledge, information and belief formed after reasonable inquiry, the Reply is well grounded in fact, is warranted under existing law, and is not interposed for any improper purpose.

By: _____



Winter W. Horton
Chief Operating Officer
LBI Broadcasting, Inc.
LBI Media, Inc.

Dated: June 27, 2016

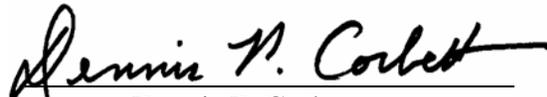
CERTIFICATE OF SERVICE

I, Dennis P. Corbett, certify that on this 27th day of June, 2016, I caused a copy of the foregoing Reply to Answer to Program Carriage Complaint, as well as a copy of the redacted version thereof electronically filed with the Commission this day, to be served by overnight delivery on the following:

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