Before the
Federal Communications Commission
Washington, DC 20554

In the matter of beIN Sports, LLC, Complainant, v. Comcast Cable Communications, LLC, and Comcast Corporation, Defendants	MB Docket No. 18-384 File No. CSR-8972-P

RESPONSE TO OPPOSITION TO PETITION FOR REVIEW OF PUBLIC KNOWLEDGE

This should be a straightforward issue. beIN has met its burden of making a *prima facie* case that Comcast discriminated against it. It should therefore have the opportunity to substantiate its case with evidence, which requires that it be granted discovery. The program carriage rules attempt to carry out the Congressional directive that the Commission take steps to prevent vertically-integrated cable companies from disadvantaging independent programmers. They remain more important than ever, and the Commission's procedures should not frustrate their purpose.

I. The Underlying Policy Issues Are of Great Importance

Although beIN has put forward a strong case, Public Knowledge is not here weighing in on the merits of the underlying issues. PK simply maintains that this case would benefit from further proceedings, including discovery. However, it is important to note that the underlying policy issue that Congress sought to address in the Cable Television Consumer

Protection and Competition Act of 1992—discrimination against independent programmers by vertically-integrated cable operators—is more pressing now than ever. Consolidation in the media is proceeding at a rapid rate—among content producers, among cable networks, among broadcasters, and among cable providers and ISPs.[1] Even the most competitive and dynamic area of the video marketplace, online streaming, is rapidly being reorganized around a handful of vertically-integrated content and distribution silos.[2] The ability of independent programmers to access cable distribution is of utmost importance, and the incentives of vertically-integrated cable companies to favor their own properties are obvious and well-known, even if this means they offer inferior programming and are not serving viewers well.[3] The Commission and the Bureau must take these marketplace

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[1] For example, AT&T has recently merged with Time Warner (now WarnerMedia) and DirecTV, Disney acquired 21st Century Fox (and had earlier acquired Marvel and Lucasfilm), Charter acquired Time Warner cable, Viacom and CBS have agreed to merge, and Nexstar intends to acquire Tribune.

[2] The streaming video marketplace is dominated by Netflix, Hulu, and Amazon. *See* Sarah Perez, *Hulu and Amazon Prime Video Chip Away at Netflix's Dominance*, TECHCRUNCH (Aug. 22, 2019), https://techcrunch.com/2019/08/22/hulu-and-amazon-prime-video-chip-away-at-netflixs-dominance. Disney plans to launch a new streaming service that will be bundled with Hulu, which it now controls, as does Apple and WarnerMedia. However the most pertinent fact about the streaming marketplace is how it is increasingly driven by service-exclusive content, both original and back catalog. This is very different from the MVPD model where program access and carriage rules meant that content was widely licensed. For example, WarnerMedia is making Friends (previously one of Netflix's most popular shows) exclusive to its service, and Apple's new service is driven entirely by original programming. This world of vertically-integrated services will make it even more difficult for independent programmers like beIN to find distribution, making the FCC's program carriage process all the more important.

[3] To retain subscribers, in the presence of competition a cable company that just offered cable service would have the incentive to make the service as attractive as possible in terms of price and quality. However a vertically-integrated cable company may prefer to have fewer subscribers if this means prioritizing its own programming over that of independent programmers, because this may be a worthwhile tradeoff for the overall enterprise. *See Copperweld Corp. v. Indep. Tube Corp*., 467 U.S. 752, 770 (1984) ("[a] division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself.")

realities into account and ensure that complainants have the ability to actually make their case, as Congress intended.

II. Discovery is Necessary Here

Discovery is necessary any time a party has put forward a credible *prima facie* case of discrimination, as beIN has. Public Knowledge is not taking issue here with how the Bureau weighed the evidence it reviewed. However, the entire purpose of discovery is to permit beIN to locate new evidence, and that new evidence may put the evidence that Comcast has produced in a new light or context, might be more persuasive, or may even contradict what has so far been produced. The Bureau simply should not have denied beIN's case before it has had the fair opportunity to actually make its case that discovery allows. In fact, the Bureau has pointed to certain types of evidence as potentially dispositive that, as beIN notes, could only be accessed via discovery.[4] This is not to say that the Bureau is required to permit all complaints to go to discovery, merely that once a party has met its burden of making a *prima facie* case that a violation of the law has occurred, it should be permitted to fully and completely prosecute is claim. A decision on "the merits" that is made without a complete record is almost a contradiction in terms.

III. beIN Has Not Waived Its Rights

Comcast notes that beIN, in earlier stages of this proceeding, was so sure of its position that it felt it could be victorious even without discovery.[5] But this does not mean that beIN has waived any of its rights. Legal documents typically show confidence in their

[4] beIn Petition at 13.
[5] Comcast Opposition at 4-5.

positions. Comcast's argument is akin to saying that a party who has asked for summary judgment (and was denied) has thereby waived its right to a jury trial. beIN's belief that its case is strong cannot be used against it.

IV. A Restrictive Underlying Legal Standard Should Not Limit Procedural Rights

Public Knowledge believes that the underlying legal standard, which allows a cable operator to discriminate against independent programmers provided it has a "reasonable business purpose" for doing so is deeply flawed. Unfortunately this is the position the Commission has held for some time and its representation of the law has been accepted (but not found to be mandatory) by the DC Circuit.[6] Such a strict standard of evidence makes it excessively difficult for a complainant to make its case (which is contrary to Congressional intent), is potentially self-contradictory since discrimination itself can be seen as a business purpose (even if an unlawful one), and makes it too easy for a defendant cable operator to offer pretextual reasons for its decision, along with "evidence" to support them. But Public Knowledge is not here asking the Commission to revisit this issue, however ripe it may be for reconsideration in the proper forum or context.

However, it would be perverse if the extremely high bar that complainants must meet was used as a justification for putting before them even more obstacles to meeting their already-difficult burden. From a high level, it could appear as if the Bureau has decided that since program carriage complaints are often unsuccessful, that it should adopt procedural standards that dispose of them quickly. But this is a self-fulfilling prophecy, and the Bureau's approach here raises the question of whether any complaint, no matter how

[6] *See Comcast Cable Communications, LLC v. FCC,* 717 F. 3d 982, 985 (DC Cir. 2013).

favorable the facts, can withstand the most cursory rebuttal from a cable operator. Simply in meeting its initial burden of presenting a *prima facie* case beIN has overcome substantial odds—the Commission's procedures should not create a further obstacle to justice.

V. Conclusion

For the reasons above, the Commission should grant beIN's petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Bergmayer, hereby certify that on August 26, 2019, I caused true and correct copies of the foregoing Reply to Opposition of Public Knowledge, to be served by overnight mail and electronic mail on the following:

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