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Federal Communications Commission
Office of the Secretary

June 7, 2016

VIA HAND DELIVERY AND ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, DC 20554

Re: ***Liberman Broadcasting, Inc. v. Comcast Corporation, File No. CSR-8922-P, MB Docket No. 16-121***

Dear Ms. Dortch:

Enclosed are an original and two (2) copies of the Public version of the Answer of Comcast Corporation and Comcast Cable Communications, LLC (together, "Comcast") in the above-captioned proceeding.

Comcast is also serving a copy of this Public Answer via hand delivery to counsel for Liberman Broadcasting, Inc. and LBI Media, Inc.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Michael D. Hurwitz/MAM

Michael D. Hurwitz
Counsel for Comcast Corporation and
Comcast Cable Communications, LLC

Enclosures
cc: Dennis P. Corbett, Lerman Senter PLLC (via hand delivery)

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

ANSWER TO PROGRAM CARRIAGE COMPLAINT

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TABLE OF CONTENTS

Page

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

In the Matter of	)	
	)	
LIBERMAN BROADCASTING, INC.	)	MB Docket No. 16-121
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COMCAST CABLE	)	
COMMUNICATIONS, LLC,	)	
Defendants.	)	
	)	

ANSWER TO PROGRAM CARRIAGE COMPLAINT

Defendants Comcast Corporation and Comcast Cable Communications, LLC (together, "Comcast") submit this Answer to the Program Carriage Complaint (the "Complaint") filed by Liberman Broadcasting, Inc. and LBI Media, Inc. (together, "LBI") claiming that Comcast has discriminated on the basis of affiliation by not carrying LBI's Spanish-language network, EstrellaTV, on the same terms as Comcast's affiliated Spanish-language networks, Telemundo and NBC Universo, and that Comcast has demanded a financial interest in EstrellaTV as a condition of carriage, in violation of Section 616 of the Communications Act of 1934 ("Section 616"), the governing Commission regulations, and the conditions of Comcast's acquisition of NBC Universal. For the reasons set forth below, none of these claims has any merit, and the Complaint should be dismissed without further proceedings.

INTRODUCTION AND SUMMARY

The Commission has previously observed that program carriage complaints may be resolved on a written record, without any need to burden the parties or the Commission with further proceedings before an ALJ to determine if an MVPD discriminated on the basis of affiliation. This is such a case. There is nothing LBI has asserted in its Complaint—and nothing it can assert in reply to this Answer—that could lead the Commission to conclude that LBI has made out a *prima facie* case of discrimination on the basis of affiliation that would require the time, burden, and expense of a hearing, much less the extensive discovery that would precede that hearing.[1]

There are three principal reasons why the Commission should conclude, as a matter of law, that LBI's Complaint fails at the threshold:

First, and most fundamentally, as a broadcaster LBI is not a video programming vendor ("VPV") that has standing to pursue a program carriage complaint under Section 616 of the Communications Act and the Commission's rules (or the Comcast-NBCUniversal conditions, which incorporate these rules[2]). No prior decision of the Commission authorizes a broadcaster to bring such a complaint, which is designed to afford a remedy to cable networks that have been discriminated against on the basis of affiliation or otherwise harmed in violation of Section 616 by MVPDs. The carriage of broadcasters such as LBI is governed instead by an entirely distinct must-carry/retransmission consent regime that affords robust protections for broadcasters

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1 *Revision of the Commission's Program Carriage Rules: Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution & Carriage*, 26 FCC Rcd. 11494, 11502 ¶ 10 (2011) ("Second Report & Order") (finding that the *prima facie* case requirement "is important to dispose promptly of frivolous complaints and to ensure that only legitimate complaints proceed to further evidentiary proceedings").

2 *Applications of Comcast Corp., General Electric Co. & NBC Universal, Inc.*, Mem. Op. & Order, 26 FCC Rcd. 4238, 4358–59 (2011) ("Comcast-NBCUniversal Order").

seeking cable carriage. There is nothing in the Communications Act or the Comcast-NBCUniversal Order that affords broadcasters multiple remedies as to MVPD conduct, and doing so would put a burden on MVPDs and the Commission that Congress never intended.

Second, LBI's claim that Comcast violated Section 616 when it sought non-exclusive digital distribution rights is wrong, as a matter of law. Comcast's request for such rights cannot be construed as a demand for a "financial interest" as a condition of carriage. A "financial interest" has long been understood to mean an "ownership interest" in a programming network—and nothing on the face of Section 616, the policy behind it, or prior Commission proceedings supports LBI's radically expansive interpretation of that term to include a proposal for a non-exclusive license to certain digital rights.

Third, the Complaint is time-barred. LBI did not file its Complaint within the required one-year statute of limitations for program carriage complaints. Both elements of LBI's Complaint—that it is not receiving "carriage parity" with affiliated networks and the purported demand for a "financial interest"—accrued no later than November 13, 2014, when Comcast made offers to carry EstrellaTV on the very terms that LBI claims to be discriminatory. Yet LBI did not file its Complaint until April 8, 2016, months after the statutory deadline.

Even if LBI could overcome these fatal deficiencies (which it cannot), the Complaint does not make out a *prima facie* case because it contains nothing more than speculation that Comcast made its carriage decision concerning EstrellaTV on the basis of affiliation instead of a "reasonable business purpose."[3] That speculation is insufficient, even in a case based exclusively on circumstantial evidence, to discharge LBI's burden of showing that affiliation motivated Comcast's decision. There is not a shred of direct evidence that Comcast's

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[3] *Comcast Cable Comm'ns, LLC v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013) ("*Tennis Channel*").

carriage decision was grounded in any way on the non-affiliation of EstrellaTV or as part of an effort to protect affiliated Spanish-language networks. In fact, as LBI concedes in its Complaint, Comcast distributes dozens of non-affiliated Spanish-language and Hispanic-focused broadcast and cable networks, including at least nine it has launched on its systems in the last five years. This does not reflect affiliation-based favoritism, but the opposite: Comcast's good faith decision to carry the networks its customers want to watch.

As set forth below, and in the accompanying declaration of Michael Nissenblatt, the Comcast executive who led the retransmission consent negotiations with LBI, Comcast made a considered and good faith business judgment not to pay {[redacted]} retransmission consent fees to carry EstrellaTV, a network that had limited appeal to Comcast's customers and which had previously been provided to Comcast at no cost pursuant to LBI's election of must-carry. The refusal to pay retransmission consent fees to LBI was consistent with {[redacted]} The evidence shows that Comcast's carriage decisions concerning EstrellaTV were also guided by Nielsen and other viewing data that could not justify the fees demanded by LBI, decisions that are well-documented in a series of contemporaneous internal analyses that had nothing whatsoever to do with the non-affiliation of EstrellaTV or with any effort to advantage Telemundo or NBC Universo.

The reasonableness of the judgment Comcast made not to pay the exorbitant fees demanded by LBI was borne out by the muted reaction of its customers after LBI pulled the EstrellaTV signal in Houston, Denver, and Salt Lake City. What the evidence shows is that in the days and weeks after LBI pulled the EstrellaTV signal, fewer than {{[redacted]}} of Comcast's hundreds of thousands of Hispanic customers in those markets complained about losing

EstrellaTV, notwithstanding the concerted effort by LBI to gin up criticism of Comcast and to compensate those Comcast customers who would switch to its competitors. Without any meaningful customer reaction from losing EstrellaTV, Comcast saw no reason to reverse course and put EstrellaTV back on the air.

Comcast's conduct is further corroborated by an analysis performed by Comcast's expert economist, Dr. Mark Israel, who concludes that Comcast's decision to reject the terms sought by LBI for EstrellaTV was based on rational business conduct. Dr. Israel finds that the discontinuation of carriage in Houston, Denver, and Salt Lake City led to no statistically verifiable increase in Telemundo or NBC Universo viewership in those markets, indicating that Comcast would have had no incentive to discontinue EstrellaTV carriage in order to favor Telemundo and NBC Universo. Indeed, throughout the parties' negotiations Comcast repeatedly {[redacted]} To this day, Comcast continues to carry EstrellaTV to millions of customers and is one of its largest distributors.

Crucially, the Complaint fails to demonstrate that carriage on the terms LBI demanded would have provided "any benefit for Comcast from incurring the additional fees" sought by LBI.[4] The Complaint does not even allege, much less prove, that "X number of subscribers would switch to Comcast if it carried [EstrellaTV] more broadly, or that Y number would leave Comcast in the absence of broader carriage," such that Comcast could offset the incremental {[redacted]} LBI demanded.[5] Although the Complaint asserts that EstrellaTV is a "valuable" network that would generate "positive ratings" for Comcast, LBI has

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4 *Tennis Channel*, 717 F.3d at 987; *Tennis Channel, Inc. v. Comcast Cable Comm'ns, LLC*, 30 FCC Rcd. 849, 851–852 ¶¶ 7–8 (2015).

5 *Tennis Channel*, 717 F.3d at 986.

failed to come forward with any evidence that Comcast would obtain a "net benefit" from paying LBI {[redacted]} to carry EstrellaTV at the broad level of penetration sought by LBI. LBI's failure to bear its evidentiary burden warrants dismissal, particularly in light of *Tennis Channel*'s guidance concerning the proper application of the Commission's program carriage rules and precedent.

LBI has not even presented any evidence that other MVPDs have recognized any net benefit by paying carriage fees commensurate with those it sought from Comcast. LBI has failed to identify a single MVPD, vertically integrated or not, that has agreed to pay such fees (indeed, LBI has identified no MVPD in its Complaint that pays it anything at all). Although such payments by other MVPDs would not prove that Comcast would obtain similar benefits, the absence of such evidence reaffirms the reasonable and market-based grounds on which Comcast made its carriage decision.

Finally, the Complaint fails to make out a *prima facie* case for another reason: LBI has not even made a showing that EstrellaTV is "similarly situated" to either Telemundo or NBC Universo. It is true that EstrellaTV, Telemundo, and NBC Universo all transmit programming in Spanish, but that is where the similarity begins and ends. LBI has utterly failed to establish that EstrellaTV is similar in programming, ratings, carriage fees, target advertisers, or any other factor that the Commission has explicitly set out to guide such determinations.

What the evidence shows is that EstrellaTV on the one hand, and Telemundo and NBC Universo on the other, carry fundamentally different programming. In fact, LBI has repeatedly touted to Comcast and the marketplace that it intentionally "counter-programs" EstrellaTV to be different from Telemundo, which relies on *telenovelas* (Spanish-language soap opera-type dramas) as the mainstay of its programming. The analysis of Comcast's industry expert, Robin Flynn of SNL Kagan, confirms that EstrellaTV's programming is indeed quite different from that of Telemundo (and NBC Universo). Ms. Flynn's work, based on industry-standard programming genre categories, shows that EstrellaTV's programming is dominated by variety and entertainment shows that contrast with the *telenovelas* featured by Telemundo and the sports-related and reality shows showcased by NBC Universo, both of which devote precious little air time to variety and entertainment shows. The differences are apparent across the entire programming day and are even more pronounced in the primetime block focused on by LBI in its Complaint.

That analysis is supported by the opinion of Comcast's Spanish-language television expert, Professor Thomas López-Pumarejo, whose review of the programming on EstrellaTV shows, among other things, that the network is targeting and attracting a regional Mexican-American audience that is narrower than the broader Hispanic audience that Telemundo and NBC Universo seek to, and do, attract.

The economic evidence also demonstrates that EstrellaTV is not similarly situated to either Telemundo or NBC Universo. Although LBI has cherry-picked Nielsen data in an effort to support its argument that EstrellaTV is as popular as Telemundo, a more comprehensive and appropriate Nielsen analysis conducted by Dr. Israel shows that not to be true, either nationally or in the cities in which LBI pulled the EstrellaTV signal from Comcast systems. Moreover, LBI's assertion that Telemundo and NBC Universo gained viewers in Houston, Denver, and Salt Lake City after LBI pulled the EstrellaTV signals in those markets is simply not true. As Dr. Israel opines, there is no economic evidence that EstrellaTV and either Telemundo or NBC Universo are similarly situated.

For the foregoing reasons, and those below, LBI's Complaint should be dismissed in its entirety. No further proceedings are warranted.

FACTS[6]

A. LBI Requests Broader EstrellaTV Carriage and Retransmission Consent Fees from Comcast

1. The negotiations between Comcast and LBI giving rise to this dispute are set out in detail in the accompanying declaration of Michael Nissenblatt, Comcast's Senior Vice President for Content Acquisition, who led the Comcast team negotiating with LBI for continued EstrellaTV carriage between October of 2014 and February 2015. We summarize those negotiations here.

2. In September 2014, a consultant employed by LBI, Michael Ruggiero, approached Mr. Nissenblatt to negotiate a retransmission consent agreement for EstrellaTV.[7] Up to that point, Comcast had distributed EstrellaTV for a number of years through a combination of must-carry stations (including those in the Houston, Denver, and Salt Lake City markets central to this case), agreements with LBI's multicast affiliates, and voluntary carriage of LBI's low power stations in certain markets.[8] {[redacted]}[9] This was entirely consistent with the way Comcast distributed {[redacted]

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6 Comcast's specific responses to the Complaint's numbered paragraphs are below. Throughout this Answer, numbered paragraphs in LBI's Complaint are cited in the form "Compl. ¶ __," and the exhibits attached thereto in the form "Compl. Ex. __." In addition, the following sworn statements and attached exhibits are submitted in support of this Answer: the Declaration of Michael Nissenblatt ("Nissenblatt Decl."); the Expert Declaration of Robin Flynn ("Flynn Decl."); the Expert Declaration of Tomás A. López-Pumarejo ("López-Pumarejo Decl."); and the Expert Declaration of Mark A. Israel ("Israel Decl.").

7 Nissenblatt Decl. ¶ 18.

8 *Id.* ¶¶ 16–17.

9 *Id.* ¶¶ 16–17.

[redacted]}[10]

3. At an October 14, 2014 meeting between Mr. Nissenblatt, Mr. Ruggiero, and other Comcast and LBI executives, LBI proposed that Comcast pay retransmission consent fees for EstrellaTV's broadcast affiliates and owned-and-operated ("O&O") stations, including those in Houston, Denver, and Salt Lake City, and that Comcast increase EstrellaTV's distribution across the country.[11]

4. Mr. Nissenblatt considered EstrellaTV's request in light of the prudent approach Comcast takes to retransmission consent negotiations for both English and Spanish-language broadcasters. Due to rapidly-increasing programming costs, especially those arising from retransmission consent fees for the major broadcast networks, Comcast manages its programming budget carefully.[12] {[redacted]} As a result, during the period of negotiations with LBI, Comcast paid retransmission consent fees only to {{[redacted]}}[15]

5. {[redacted]

[10] *Id.*¶¶ 15–17.

[11] *Id.* ¶¶ 20, 27–28.

[12] *Id.* ¶¶ 10–15.

[13] *Id.* ¶¶ 12–13.

[14] *Id.* ¶ 14.

[15] *Id.*

[redacted]} {{[redacted]}}[16] {[redacted]}[17]

6. Therefore, based on his extensive experience in the marketplace and with EstrellaTV in particular, {[redacted]}[18] In order to gain a fuller picture of the network, prior to the October 14, 2014 meeting with LBI, Mr. Nissenblatt and his team had assembled and reviewed national and local ratings data reflecting long time periods and broad dayparts, and affirmed, based on this data, that EstrellaTV was not a particularly popular network among Hispanic audiences.[19] Specifically, the ratings data showed that EstrellaTV's viewership lagged far behind that of Spanish-language market-leaders Univision, Telemundo, and UniMás, and in most of the local markets was even lower among Hispanic audiences than the major English-language broadcast networks.[20] EstrellaTV's audience was more similar to that of the two less-popular Spanish-language networks, MundoMax and Azteca.[21] In addition to examining Nielsen ratings, Mr. Nissenblatt also reviewed publicly-available information about how other MVPDs—such as Time Warner Cable, DirecTV, and DISH—carried EstrellaTV, and determined that none of them

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16 *Id.* ¶ 15.

17 *Id.* ¶ 7.

18 *Id.* ¶ 19.

19 *Id.* ¶¶ 21–25; Compl. Ex. 19 (Nov. 23, 2014 email from M. Nissenblatt).

20 Nissenblatt Decl. ¶¶ 21–25, Ex. 1.

21 *Id.* Ex. 1.

carried EstrellaTV at a broad level of penetration.[22]

7. At the October 14, 2014 meeting LBI {[redacted]}[26]

B. Comcast Proposes {[redacted]}; LBI Rejects the Offer

8. Against this background, on November 13, 2014, Mr. Nissenblatt sent Jake Martinez, LBI's new Senior Vice President, Strategy and Distribution, a draft retransmission consent agreement reflecting {[redacted]

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[22] *Id.* ¶ 22.

[23] *Id.* ¶ 27, Ex. 2.

[24] For example, {[redacted]} *Id.* Ex. 2; *see also id.* ¶ 27.

[25] *Id.* ¶ 27.

[26] *Id.* ¶ 28.

[27] *Id.* ¶ 29; Compl. Ex. 19 (Nov. 13, 2014 email and attachment from M. Nissenblatt).

[redacted]} and a non-exclusive grant of "New Media Rights" to Comcast—*i.e.*, the right to distribute EstrellaTV content to Comcast's customers digitally (via broadband feed and video-on-demand).[29]

9. Mr. Martinez replied on November 18, 2014 with a counter-proposal that bore no resemblance to Comcast's proposal. Specifically, LBI requested {[redacted]} and "Digital distribution rights on terms and conditions (including applicable fees) to be negotiated by the parties."[30]

10. Comcast, {[redacted]}, viewed LBI's request as unprecedented and unjustified. Mr. Nissenblatt and his team calculated that it would cost {[redacted]

[28] Comcast's proposed merger with Time Warner Cable was then under regulatory review, and was expected to close. Mr. Nissenblatt's retransmission consent proposals for Time Warner Cable markets were subject, of course, to the merger going forward.

[29] Nissenblatt Decl. ¶ 29; Compl. Ex. 19 (Nov. 13, 2014 email and attachment from M. Nissenblatt).

[30] Nissenblatt Decl. ¶ 30; Compl. Ex. 19 (Nov. 18, 2014 email and attachment from J. Martinez).

[redacted]}[31] If the Time Warner Cable merger were approved, it would cost {[redacted]}[32] LBI had not justified these fees in any way.

11. Mr. Nissenblatt rejected LBI's proposal a few days later.[33] {[redacted]}[34]

12. Mr. Martinez responded in a November 26, 2014 email, in which he leveled the same claims about EstrellaTV carriage that LBI makes in its Complaint.[35] {[redacted]}[37]

13. Although Mr. Martinez's email asserted {[redacted]}, he provided no evidence that other MVPDs paid LBI the type of carriage

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[31] Nissenblatt Decl. ¶ 31, Ex. 3. "White areas" are those markets in which EstrellaTV sought distribution on Comcast systems despite not having a local station broadcasting its over-the-air signal. *Id.* ¶ 9 n.1.

[32] *Id.* Ex. 3; *see also id.* ¶ 31.

[33] Compl. Ex. 19 (Nov. 23, 2014 email from M. Nissenblatt).

[34] *Id.*

[35] Compl. Ex. 19 (Nov. 26, 2014 email from J. Martinez).

[36] *Compare* Compl. Ex. 19 (Nov. 26, 2014 email from J. Martinez) *with* Compl. ¶¶ 28–30, 42–43.

[37] *Compare* Compl. Ex. 19 (Nov. 26, 2014 email from J. Martinez) *with* Compl. ¶¶ 57, 83.

fees it demanded of Comcast.[38] LBI provided no such evidence in subsequent communications with Comcast prior to filing its Complaint, and the Complaint itself does not identify a single MVPD that pays fees at all, much less of the magnitude LBI sought from Comcast. Publicly-available information supports the conclusion that {[redacted]} SNL Kagan data, upon which the industry relies, shows that LBI receives {[redacted]}[39]

C. LBI Continues to Demand Retransmission Consent Fees for EstrellaTV

14. The parties continued to negotiate a potential carriage arrangement between December 2014 and February 2015. At every stage, LBI {[redacted] [redacted] [redacted] [redacted] [redacted]} Mr. Nissenblatt and his team continued to examine Nielsen and other viewership data to test LBI's claims about the popularity of EstrellaTV.[42] That data did not convince Comcast that LBI was correct; to the

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38 *Compare* Compl. Ex. 19 (Nov. 26, 2014 email from J. Martinez) ({[redacted]}) *with* Compl. ¶ 55 ("sophisticated MVPDs" such as "Time Warner, Charter, AT&T/DirecTV, DISH, Verizon, [and] Cablevision" carry EstrellaTV).

39 Israel Decl. ¶ 29.

40 *See* Nissenblatt Decl. ¶¶ 18–43, 46–50, Exs. 2, 6; Compl. Ex. 19 (Jan. 2, 2015 email and attachments from J. Martinez; Feb. 1, 2015 email and attachments from J. Martinez).

41 Compl. Ex. 19 (Feb. 1, 2015 email and attachments from J. Martinez); Nissenblatt Decl. ¶ 39, Ex. 5.

42 *See*, *e.g.*, Nissenblatt Decl. ¶¶ 23–27, 33–34, 42, Exs. 1, 4; Compl. Ex. 19 (Feb. 5, 2015 email from M. Nissenblatt).

contrary, it reaffirmed Comcast's view that {[redacted]}[43]

D. LBI Once Again Accuses Comcast of Affiliation-Based Discrimination

15. Through the first part of February 2015, LBI and Comcast agreed to continue EstrellaTV's carriage {[redacted]} under short-term extension agreements while they tried to negotiate a retransmission deal.[44] The parties' back-and-forth did not result in a carriage agreement. On February 13, 2015, Mr. Martinez sent a lengthy email to Mr. Nissenblatt setting forth in detail the reasons why LBI believed Comcast's refusal to agree to the payment of carriage fees to LBI for retransmission of EstrellaTV constituted discrimination on the basis of affiliation.[45]

16. Mr. Martinez first complained that Comcast's most recent carriage offer, on January 23, 2015, {[redacted]} contained a request for royalty-free rights to distribute EstrellaTV's content through digital platforms such as video-on-demand and mobile devices.[46] That was not true. Comcast's original retransmission consent proposal to LBI, sent on November 13, 2014, included the same terms,[47] and LBI itself had indicated less than a week later that it would make these rights available to Comcast "on terms and conditions .

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[43] Nissenblatt Decl. ¶¶ 27–28, 34, 42–43; Compl Ex. 19 (Feb. 5, 2015 email from M. Nissenblatt).

[44] Nissenblatt Decl. ¶¶ 35–36, 38, 41; Compl. Ex. 19 (Dec. 18, 2014 email and attachment from J. Martinez; Jan. 16, 2015 email and attachment from M. Nissenblatt; Jan. 29, 2015 email and attachment from J. Martinez; Feb. 4, 2015 email and attachment from M. Nissenblatt).

[45] Compl. Ex. 19 (Feb. 13, 2015 email from J. Martinez); Nissenblatt Decl. ¶¶ 46–48.

[46] Compl. Ex. 19 (Feb. 13, 2015 email from J. Martinez); Nissenblatt Decl. ¶ 47.

[47] Nissenblatt Decl. ¶ 47. *Compare* Compl. Ex. 19 (Jan. 23, 2015 email and attachment from M. Nissenblatt, {[redacted]}) *with id.* (Nov. 13, 2014 email and attachment from M. Nissenblatt, {[redacted]}).

. . to be negotiated by the parties."[48]

17. LBI next accused Comcast of {[redacted]}[49]

E. Comcast Did Not Discriminate Against EstrellaTV on the Basis of Affiliation

18. The accusations of discrimination Mr. Martinez leveled against Comcast were and are untrue. Comcast made a reasonable business decision not to carry EstrellaTV on the terms LBI demanded. Based on {[redacted]}[50] Throughout the parties' negotiations, LBI never put forward any objective justification for the fees and expanded carriage it was demanding, such as evidence that Comcast would attract new customers if it carried EstrellaTV in new markets, or that Comcast would lose customers who considered EstrellaTV so desirable that they would cancel their service if Comcast did not carry the network.[51]

19. As Mr. Nissenblatt makes clear in his declaration, he and his team always assessed the merits of LBI's carriage proposals on their own terms, and never once considered EstrellaTV's potential impact on Telemundo or NBC Universo in determining the appropriate

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[48] *See* Compl. Ex. 19 (Nov. 18, 2014 email and attachment from J. Martinez).

[49] Compl. Ex. 19 (Feb. 13, 2015 email from J. Martinez); Nissenblatt Decl. ¶ 48.

[50] *See*, *e.g.*, Nissenblatt Decl. ¶¶ 26, 31, 39.

[51] *See id.* ¶¶ 31, 39.

terms and conditions of carriage for EstrellaTV.[52] There is no evidence at all that Comcast made any carriage decision concerning EstrellaTV to "suppress competition" facing Telemundo and NBC Universo. In fact, {[redacted]}[53] And as LBI acknowledges in its Complaint, Comcast distributes dozens of Spanish-language and bilingual networks targeted at Hispanic audiences, and has launched many of these networks in the last several years.[54]

20. Moreover, the allegations of discrimination Mr. Martinez made in his February 13, 2015 email are based on two claims that are equally unsupported by the evidence. First, {[redacted]}[55] But the extensive Nielsen ratings Mr. Nissenblatt reviewed during the parties' negotiations, later confirmed by Comcast's set-top box ("STB") data, showed that Telemundo attracted far more viewers than EstrellaTV. While Telemundo had an audience profile similar to that of Univision or UniMás, with {[redacted]} households tuned in daily over the course of the year, EstrellaTV was in a second tier of Spanish-language networks, attracting only a fraction of the number of viewers.[56] The Nielsen analysis performed by Comcast's economist in this proceeding bears out the work done by Comcast in the course of the LBI negotiation, showing the significant ratings gap between Telemundo and EstrellaTV.[57] This ratings gap corresponds

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52 *Id.* ¶¶ 3, 48.

53 *See*, *e.g.*, Compl. Ex. 19 (Jan. 23, 2015 email and attachment from M. Nissenblatt; Feb. 19, 2015 email and attachment from M. Nissenblatt); Nissenblatt Decl. ¶¶ 32, 37.

54 *See* Compl. ¶ 48, Ex. 10.

55 Compl. Ex. 19 (Feb. 13, 2015 email from J. Martinez).

56 *See* Nissenblatt Decl. ¶¶ 25, 42–43. Exs. 1, 4.

57 Israel Decl. ¶¶ 23–26.

to a significant revenue gap between the two networks, as Telemundo earns {[redacted]} more than EstrellaTV in advertising sales, and {[redacted]} more than EstrellaTV in MVPD carriage fees.[58]

21. Second, Mr. Martinez's claim of affiliation-based discrimination would have to rest on the assumption that EstrellaTV had comparable programming to that of Telemundo. In reality, the programming on the two networks is markedly different. Indeed, LBI had built EstrellaTV on the premise that it would be counter-programmed against the *telenovelas* that dominated the primetime schedules of Telemundo and the most popular Spanish-language network, Univision. {[redacted]}

22. The work performed by Comcast's programming experts bears out these

[58] *Id.*. ¶ 29.

[59] Nissenblatt Decl. Ex. 2.

distinctions. Robin Flynn, the senior SNL Kagan television analyst, has analyzed industry-standard genre classifications for programming on EstrellaTV, Telemundo, and NBC Universo. Her analysis shows significant differences in genres of the predominant programming on the EstrellaTV stations in Houston, Denver, and Salt Lake City as compared to the type of predominant programming aired on Telemundo stations in those cities or on NBC Universo. The differences are striking in primetime, particularly as a result of Telemundo's emphasis on *telenovela*s. She also finds pronounced differences in the broader 24-hour schedule of the networks.[60]

23. Comcast's Spanish-language television expert, Professor López-Pumarejo, confirms Ms. Flynn's conclusions. He has studied Spanish-language programming for decades. As he reports, the backbone of Telemundo's schedule is the Spanish-language mainstay, the *telenovela*—nightly programs that air over the course of several months and that have, at their core, romantic themes.[61] EstrellaTV, {[redacted]}, eschews *telenovelas*, instead choosing to broadcast comedy and variety shows with broad, and often sexualized, themes.[62] Professor López-Pumarejo also notes that differences in programming on the two networks extend beyond genre. Telemundo targets and broadcasts programming, including sporting events with global appeal (the World Cup and the Olympics) and *telenovelas*, which are designed to appeal to a diverse Hispanic audience of persons with backgrounds from all over Latin America.[63] EstrellaTV creates and broadcasts programming focused on the Mexican-American community residing predominantly in the American West and

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[60] Flynn Decl. ¶ 10.

[61] López-Pumarejo Decl. ¶ 9.

[62] *Id.*¶ 11.

[63] *Id.*¶¶ 59–61. Telemundo spends substantial sums—{[redacted]} in 2014—to acquire this programming. Israel Decl. ¶ 48; López-Pumarejo Decl. ¶¶ 20 n.9 (*telenovelas* can cost up to $150,000 per episode to produce).

Southwest.[64]

24. In sum, not only did Comcast make a rational business judgment to deny LBI's proposals based on the lack of benefit EstrellaTV offered to Comcast, but it also would have been irrational for Comcast to constrain EstrellaTV in any way because there is no reason to believe EstrellaTV presented any meaningful competition to Comcast's affiliated Spanish-language networks. Indeed, if Comcast truly intended to suppress competition from EstrellaTV, {[redacted]}[65]

F. LBI Pulls EstrellaTV's Signals from Comcast Systems in Houston, Denver, and Salt Lake City

25. As discussions between Comcast and LBI reached their end, LBI employed a new tactic, launching a public relations campaign against Comcast, including a press release claiming that EstrellaTV would be "forced off the air" by Comcast in Houston, Denver, and Salt Lake City.[66] In fact, {[redacted]

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64 López-Pumarejo Decl. ¶¶ 52–58.

65 *See*, *e.g.*, Compl. Ex. 19 (Nov. 13, 2014 email and attachment from M. Nissenblatt; Jan. 23, 2015 email and attachment from M. Nissenblatt; Feb. 19, 2015 emails from M. Nissenblatt).

66 Nissenblatt Decl. ¶¶ 44–45, Ex. 7. The press release failed to mention that Comcast would continue to carry EstrellaTV in many other markets, serving millions of customers.

[redacted]}[67]

26. On February 19, 2015, the parties {[redacted]}[69] That day, LBI pulled its EstrellaTV signal from Comcast in Houston, Denver, and Salt Lake City.[70]

27. LBI simultaneously redoubled its efforts in its public relations attack on Comcast, urging Comcast customers to cancel their subscriptions in favor of competitors that continued to carry EstrellaTV.[71] In Houston, LBI promoted a phone line it had set up to coach subscribers through their disconnection from Comcast's service.[72] In Denver and Salt Lake City, LBI promised gifts to Comcast customers who canceled their service.[73] To this day, LBI continues to encourage customers to drop their Comcast service through inflammatory ads and video—"Xfinity discriminates against the Latino community"—on its website.[74]

G. Comcast Sees No Meaningful Reaction from Customers in Houston, Denver, and Salt Lake City After LBI Pulls Its Signals from Those Markets

28. Despite LBI's sustained campaign against Comcast, only a tiny fraction of the hundreds of thousands of Hispanic Comcast customers in Houston, Denver, and Salt Lake

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67 Compl. Ex. 19 (Feb. 19, 2015 email from J. Martinez); Nissenblatt Decl. ¶ 49.

68 Compl. Ex. 19 (Feb. 19, 2015 email from M. Nissenblatt); Nissenblatt Decl. ¶ 49.

69 Compl. Ex. 19 (Feb. 19, 2015 email from M. Nissenblatt); Nissenblatt Decl. ¶ 49.

70 Nissenblatt Decl. ¶ 50.

71 *Id.* ¶ 51.

72 *Id.*

73 *Id.*

74 *See* www.estrellatv.com/comcast (last accessed June 1, 2016) ("Xfinity discrimina contra la comunidad latina").

City {[redacted]}[78]

29. Mr. Nissenblatt and others at Comcast continued to monitor customer reaction to losing EstrellaTV in the affected markets throughout the spring of 2015. Comcast continued to see virtually no reaction.[79]

30. The muted response of Comcast's customers to the loss of EstrellaTV reinforced the good faith judgment reached by Comcast that its customers did not place a high value on EstrellaTV.[80] This is fully consistent with LBI's own failure even to attempt to demonstrate empirically that Comcast's carriage of EstrellaTV would result in a benefit to Comcast (in the form of additional customers or few customer cancellations) or otherwise justify how Comcast would recoup the {[redacted]} carriage fees LBI sought.

H. LBI Files a Carriage Discrimination Complaint

31. LBI sent Comcast a notice of its intention to file a Program Carriage

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75 Nissenblatt Decl. ¶¶ 51–53.

76 *Id.* ¶ 52.

77 *Id.*

78 *Id.*

79 *Id.* ¶ 56.

80 *Id.* ¶ 57.

Complaint on February 9, 2016.[81] Comcast replied on February 18, 2016, as required by Commission rules.[82] LBI filed its Complaint on April 8, 2016.

ARGUMENT

32. Section 616 of the Communications Act bars an MVPD, such as Comcast, from discriminating against a cable network in the terms and conditions of carriage based on affiliation or non-affiliation, and from demanding a financial interest in a cable network as a condition of carriage.[83] The conditions appended to the Commission's order approving Comcast's acquisition of NBC Universal contain an anti-discrimination provision that mirrors the one in Section 616.[84] LBI presses claims under both Section 616 and the transaction conditions, but has not made out a *prima facie* case under either.[85]

33. LBI's burden to establish a *prima facie* case is a meaningful one: the Commission's rules make clear that some program carriage complaints will advance to discovery and trial, while others will not.[86] The Media Bureau may dismiss a case if there are "procedural defenses that might warrant dismissal of the case (*e.g.*, arguments pertaining to the statute of limitations)," if the case "can be addressed by the Media Bureau on the merits based on the pleadings," or if there are not "substantial and material questions of fact as to whether the

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81 Compl. Ex. 7.

82 Compl. Ex. 8; 47 C.F.R. § 76.1302(b).

83 47 U.S.C. § 536.

84 Comcast-NBCUniversal Order, 26 FCC Rcd. at 4358.

85 Because the Comcast-NBCUniversal Order adopts the program carriage rules implementing Section 616, *see id.* 26 FCC Rcd. at 4358–59, LBI must make a *prima facie* showing of discrimination whether it brings its claims under the Comcast-NBCUniversal Order, the Commission's rules, or both.

86 *See* 47 C.F.R. § 76.1302; Second Report and Order, 26 FCC Rcd. at 11498, ¶ 6 (noting that "if the Media Bureau determines that the complainant has not made a *prima facie* showing in its complaint of a violation of the program carriage rules, the Media Bureau will dismiss the complaint").

defendant MVPD has engaged in conduct that violates the program carriage rules."[87] If the Complaint makes out a *prima facie* case but the defendant has "provid[ed] legitimate and non-discriminatory business reasons in its answer for its adverse carriage decision, the Media Bureau" may "resolv[e the matter] on the merits based on the pleadings."[88] The rules governing this stage of the proceedings are intended to "dispose promptly of frivolous complaints and to ensure that only legitimate complaints proceed to further evidentiary proceedings."[89]

34. This is a textbook case for dismissal at the pleading stage. To begin, LBI's claims suffer from fatal procedural defects: LBI is not, as it alleges, a "video programming vendor" with standing to bring a program carriage complaint; Comcast did not, as LBI alleges, "demand" a "financial interest" in EstrellaTV "as a condition for carriage;" and LBI did not, as it alleges, file its Complaint within the one-year statute of limitations provided for complaints based on an allegedly discriminatory offer of carriage.

35. Even if the Media Bureau determines, however, that LBI has met its threshold showing that it can file a program carriage complaint, there is no basis to conclude that LBI should benefit from discovery and be allowed to bring its claims to trial. LBI has not presented evidence sufficient to make out a *prima facie* case that Comcast made its carriage decision in a discriminatory manner; to the contrary, the facts show that Comcast had a rational business justification for denying EstrellaTV the payment and carriage it requested. LBI has not alleged, nor could it prove, any facts to establish that the carriage it demanded would yield a "net benefit" to Comcast as articulated in the D.C. Circuit's *Tennis Channel* decision. And LBI has not presented evidence that EstrellaTV is "similarly situated" to either Telemundo or NBC

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87 Second Report and Order, 26 FCC Rcd. at 11506, ¶ 17.

88 *Id.*

89 *Id.* at 11502, ¶ 10.

Universo to meet its *prima facie* burden; to the contrary, the facts show that, based on the networks' programming, audience, and other factors applied by the Commission in program carriage disputes, the networks are quite different.[90] As a result, LBI's Complaint should be dismissed.

I. LBI IS A BROADCASTER THAT CANNOT BRING A SECTION 616 CARRIAGE COMPLAINT

36. LBI alleges that it is a "video programming vendor" ("VPV") with standing to bring a program carriage complaint under Section 616.[91] LBI is wrong. It is a broadcaster that has the right to seek and enforce the must-carry and retransmission consent rules that apply to MVPDs such as Comcast. But it may not also seek relief by bringing a program carriage complaint.

37. The structure and purpose of the Communications Act and more than two decades of Commission precedent and practice demonstrate that the definition of VPV upon which LBI relies for standing does not give LBI the right to file such a complaint. Over the last 23 years, Congress and the Commission have established and implemented separate statutory and regulatory frameworks that define the rights and obligations of, on the one hand, broadcasters and MVPDs, and on the other hand, cable networks and MVPDs. Broadcasters have recourse to Section 614, which provides that a broadcast station may elect must-carry status

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[90] To the extent LBI attempts to cure its pleading failures on reply, it should not be allowed to do so, particularly because it has been on notice of Comcast's position on these issues as detailed in Comcast's February 18, 2016 response to its pre-filing notice. *See* Compl. Ex. 8. Commission rules make clear that reply papers in program carriage disputes "shall not contain new matters." 47 C.F.R. § 76.1302(f). Indeed, when discussing the *prima facie* burden in carriage proceedings, the Commission has "emphasize[d] that complainants should not raise new matters in reply." Second Report & Order, 26 FCC Rcd. at 11508, ¶ 20. The Commission's practice aligns with that of the Federal District Courts, where factual allegations made for the first time in opposition briefs or memoranda may not be considered by a court ruling on the sufficiency of a plaintiff's pleadings. *See Henthorn v. Dept't of Navy*, 29 F.3d 682, 689 (D.C. Cir. 1994); *Carswell v. Air Line Pilots Ass'n Int'l*, 540 F. Supp. 2d 107, 121 (D.D.C. 2008).

[91] *See* Compl. ¶¶ 6–9; 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e).

for its signal, and to Section 325(b), which provides that an MVPD cannot retransmit a broadcast signal without a broadcast station's consent and that both parties negotiating a retransmission agreement must do so in good faith.[92] Cable networks alleging wrongful treatment are afforded a different remedy under Section 616.[93]

38. No reasonable reading of the law and regulations permits a broadcaster such as LBI to do what it has done here: forgo must-carry, elect retransmission consent, take advantage of an MVPD's obligation to negotiate in good faith, and then resort to a Section 616 discrimination claim when those negotiations fail. But that is precisely what LBI is seeking to do here. As a result, LBI's Complaint should be dismissed.[94]

A. The 1992 Cable Act Establishes Separate Regimes for Cable Networks and Broadcasters

39. LBI claims that it is a VPV because it meets the definition set out in Section 616: "a person engaged in the production, creation, or wholesale distribution of video programming for sale."[95] This definition must be read in context.[96] Although the Commission is required to give effect to the plain meaning of the language of the Communications Act, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a

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[92] 47 U.S.C. §§ 325(b) & 534.

[93] 47 U.S.C. § 536.

[94] As detailed above, LBI also demanded that Comcast carry EstrellaTV's satellite feed in white areas where LBI does not own a station or have a broadcast affiliate. That LBI makes EstrellaTV's satellite feed available for purchase as a fill-in service for areas outside of its extensive broadcast distribution footprint does not, however, mean that EstrellaTV is a cable network eligible to file a program carriage complaint. Indeed, in alleging that it provides "value" to MVPDs in its Complaint, LBI trumpets the large number of broadcast affiliates that have chosen to distribute EstrellaTV via their broadcast signals, *see* Compl. at v, ¶ 35, and relies entirely on Nielsen ratings from its O&O broadcast stations. *See, e.g.*, *id.* ¶¶ 28–33.

[95] *See* Compl. ¶¶ 6–9; 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e).

[96] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

whole."[97]

40. In the 1992 Cable Act, Congress established separate statutory schemes governing (1) the relationships between broadcasters and MVPDs; and (2) the relationships between cable networks and MVPDs. The titles of the statutory sections make clear their distinct provinces: "Carriage of local commercial television signals" (Section 614, the must-carry regime) and "Consent to retransmission of broadcasting station signals" (Section 325(b), the retransmission consent regime) both pertain to broadcasting, while "Regulation of carriage agreements" (Section 616, the program carriage regime) applies to cable networks.[98] These separate statutory provisions, in turn, define the actors to which they apply. The program carriage provisions apply to VPVs; the must-carry provisions set out a cable operator's obligations to carry a "local commercial television station," defined as "any full power television broadcast station;"[99] and the retransmission consent provisions set out an cable operator's obligations concerning a "television broadcast station," defined as "an over-the-air commercial or non-commercial television broadcast station licensed by the Commission."[100]

41. The Cable Act also sets out specifically the regulations the Commission must promulgate to implement these distinct regimes. Must-carry and retransmission consent, on the one hand, provide broadcasters with a complete set of rights, including (in the case of must-carry) the opportunity for automatic compelled carriage. The must-carry provision charges the Commission with "issu[ing] regulations implementing the requirements imposed" by Section 614, which include specific signal quality and channel positioning protections and a complaint-

97 *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

98 47 U.S.C. §§ 325(b), 534, 536.

99 47 U.S.C. § 534(h)(1)(A). In certain very limited circumstances, low-power television stations also enjoy must-carry rights. 47 U.S.C. §§ 534(c) & (h)(2).

100 47 U.S.C. § 325(b)(7). These provisions were later extended to other MVPDs.

based remedy for enforcing violations thereof.[101] The retransmission consent provision, as amended in 2004, requires the Commission to make rules prohibiting an MVPD "from failing to negotiate in good faith for retransmission consent" and states that "it shall not be a failure to negotiate in good faith if the [MVPD] enters into *retransmission consent agreements* containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations."[102] A broadcaster that claims an MVPD has violated its must-carry obligations or failed to negotiate in good faith has recourse to the rules devised by the Commission to enforce these provisions.[103]

42. The program carriage provision, on the other hand, requires the Commission to establish "regulations governing *program carriage agreements* and related practices between cable operators or other multichannel video programming distributors and video programming vendors," including rules prohibiting MVPDs from "engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions of carriage."[104] Moreover, the Commission must implement rules that "provide appropriate penalties and remedies for violations of this subsection, including carriage."[105]

43. As a result, a "television broadcast station" has recourse to automatic compelled carriage under the must-carry rules, regardless of whether it is subject to

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[101] 47 U.S.C. §§ 534(d) & (f).

[102] 47 U.S.C. § 325(b)(3)(C)(ii) (emphasis added).

[103] *See* 47 C.F.R. §§ 76.61 (disputes concerning must-carry) & 76.65(c) (disputes concerning retransmission consent).

[104] 47 U.S.C. § 536(a) (emphasis added).

[105] 47 U.S.C. § 536(a)(5).

anticompetitive conduct by an MVPD; a cable network that is a "video programming vendor" for purposes of Section 616 may compel carriage by Commission order if it can show not only that it has been discriminated against on the basis of affiliation, but also that it has been "unreasonably restrained" from competing in the video marketplace. This structure of distinct regimes with distinct remedies makes clear Congress's intention that broadcasters such as LBI be guaranteed fair treatment through the must-carry and retransmission consent regimes, not the program carriage regime.

44. The legislative history and the *Turner* precedent on must-carry strongly support the conclusion that a broadcaster's must-carry rights—the right to compel the widest possible carriage—are such a far-reaching structural protection against potential restraints (unreasonable or otherwise) that it would make no sense to infer that Congress also provided broadcasters individualized protections against unreasonable restraints and rights to compel carriage pursuant to Section 616. In the 1992 Cable Act itself, Congress included what the Supreme Court called "unusually detailed statutory findings" to support the must-carry and retransmission consent regimes for broadcast stations.[106] With respect to must-carry and retransmission consent, Congress adopted no fewer than 14 findings (Nos. 9-21) specifically supporting these twin regimes for carriage of commercial broadcast stations. The volume of relevant findings alone demonstrates that retransmission consent and must-carry were in and of themselves extraordinarily significant requirements, and that the program carriage provision (Section 616) was not intended to be swept in as yet another right extended to broadcast stations. Among these findings, Congress explained:

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[106] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 646 (1994).

> Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise *free* to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such *free television programming*, especially for viewers who are unable to afford other means of receiving programming.[107]
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> * * *
>
> As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of *free* local broadcast television and its ability to originate quality local programming will be seriously jeopardized.[108]

45. With respect to vertical integration in the cable industry more generally, the Conference Committee adopted a single relevant finding:

> The cable industry has become vertically integrated; cable operators and *cable programmers* often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for *noncable-affiliated programmers* to secure carriage on cable systems.[109]

46. The Supreme Court relied on these legislative findings explicitly in upholding the must-carry rules against constitutional challenge, including the findings about vertical integration making it more difficult to secure carriage:

> Congress explained that . . . because cable operators have a vested financial interest in favoring their affiliated programmers over broadcast stations, § 2(a)(5), cable operators have a built-in 'economic incentive . . . to delete, reposition, or not carry local broadcast signals.' § 2(a)(16). Congress concluded that absent a requirement that cable systems carry the signals of local broadcast stations, the continued availability of free local broadcast television would be threatened.[110]

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[107] Cable Television Consumer Protection and Competition Act of 1992 § 2(a)(12), 106 Stat. 1460, 1461 (emphasis added) ("Cable Act").

[108] *Id.* § 2(a)(16), 106 Stat. at 1462 (emphasis added).

[109] *Id.* § 2(a)(5), 106 Stat. at 1460–61 (emphasis added).

[110] *Turner Broad. Sys.*, 512 U.S. at 646–47.

Moreover, the two *Turner* decisions made no mention of program carriage, which would have been highly relevant, especially considering that the structural must-carry regime survived on the narrowest of grounds, including that it was a narrowly-tailored remedy available to solve the problem of harm to broadcasters caused, in part, by vertical integration.[111] In fact, in its brief before the Supreme Court in *Turner II*, the Solicitor General explained precisely why Congress determined the need for a structural must-carry approach:

> [A]ntitrust enforcement and administrative complaint proceedings are inadequate substitutes for must-carry protection. The inordinate time and expense of antitrust litigation, especially for a nascent or financially precarious station seeking cable carriage from a large vertically integrated cable operator-programmer such as Time Warner [Cable], renders such litigation a manifestly less effective alternative to the must-carry approach. An administrative complaint mechanism, requiring the FCC to examine many thousands of cable operators' business decisions to carry or not to carry individual programmers, would be highly cumbersome, and would involve long delays during which broadcast stations would continue to suffer the adverse economic consequences of discriminatory non-carriage.[112]

Of course, the government would not and could not have made this statement had Section 616 already been available to broadcasters. The absence of any administrative complaint mechanism for broadcast stations was of decisional relevance.[113] This leads to only one conclusion:

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[111] *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 215–16 (1997).

[112] Brief for Federal Appellees at 48, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (No. 95-992).

[113] In between the Supreme Court's two *Turner* decisions, there was a remand to a special three-judge panel. *See Turner Broad. Sys., Inc. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995). Again focusing on whether there were reasonable alternatives to must-carry, Judge Sporkin said:

> Plaintiffs suggest that a complaint procedure could be established before the FCC in which the 'FCC . . . would resolve in individual cases, whether noncarriage of a local broadcast station[] reflects a reasonable business decision of the cable operator or one tainted by anti-competitive incentives.' TW Memo. at 81. Such a procedure – regulation by exception – would necessarily create an enormous administrative burden.

Id. at 749 (citations omitted). It is telling that, in the midst of intense litigation—with broadcasters, cable networks, cable operators, and the government all going at it hammer and tong—no one suggested that Congress had already established a complaint procedure that would allow the Commission to decide on a case-by-case basis whether a cable operator's decision not to carry a local broadcast station is the product of a reasonable business decision or of anti-competitive incentives. In contrast, the parties all recognized that leased

Congress enacted the must-carry rules, not Section 616's anti-discrimination provision, to protect broadcast stations from purported mistreatment by vertically-integrated MVPDs.[114]

47. Moreover, when Congress amended the Cable Act in 2004 to include a reciprocal good-faith requirement for MVPDs engaged in retransmission consent negotiations, it said nothing about Section 616.[115] Rather, the sponsoring committee report emphasized that the "MVPD good faith obligations" would "not [] affect the ultimate ability of an MVPD to decide not to enter into a retransmission consent agreement with a broadcaster."[116] This stands in sharp contrast to Section 616, in which Congress explicitly instructed the Commission to promulgate rules that, among other things, could compel carriage on an MVPD found to violate the antidiscrimination rules.[117]

48. The structure and history of the Cable Act make clear that the must-carry and retransmission consent regimes fully occupy the field as to the regulations governing carriage arrangements between broadcasters and MVPDs. LBI should not be allowed to expand the remedies available to broadcasters by invoking the anti-discrimination provisions of Section 616.

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access (under Section 612 of the Communications Act) is an option that is available to broadcasters, but the courts found that an insufficient alternative to effectuate the government interest. *See id.*

[114] The findings themselves state that where "there is an economic incentive for cable systems to *terminate the retransmission* of the broadcast signal," or "refuse to carry new signals," the "reimposition" of a carriage requirement was necessary. Cable Act, § 2(a)(15), 106 Stat. at 1460–62 (emphasis added).

[115] *See* The Satellite Home Viewer Extension and Reauthorization Act (SHVERA) of 2004, Pub. L. No. 108-447, § 207, 118 Stat 2809, 3393 (2004) (codified at 47 U.S.C. § 325); *Implementation of Section 207 of the Satellite Home Viewer Extension & Reauthorization Act of 2004, Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd. 10339 (2005) ("*2005 SHVERA Order*").

[116] H.R. Rep. No. 108-634, at 19 (2004).

[117] 47 U.S.C. § 536(a)(5).

B. The Commission Has Consistently Treated Retransmission Consent and Program Carriage as Mutually Exclusive Regimes

49. Commission rulemaking and practice confirm that Congress did not intend for broadcasters such as LBI to invoke the anti-discrimination provisions of Section 616. In the Commission's first must-carry/retransmission consent rulemaking order, which classifies both must-carry and retransmission consent under the broad "Signal Carriage" category, the Commission established rules for "Signal Carriage Obligations" and "Retransmission Consent Contracts."[118] In the program carriage implementing order, the Commission did not once mention retransmission consent arrangements or carriage of broadcast programming; instead, it focused on "general rules that are consistent with the statute's specific prohibitions regarding actions between distributors and program vendors in forming *program carriage agreements*."[119]

50. A little less than a decade after the 1992 Cable Act, the Commission confronted the question of how to protect broadcasters from potential newfound discrimination that could arise if it jettisoned the older cable-broadcast-cross-ownership rules (the "CBCO

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[118] *See Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, Report and Order, 8 FCC Rcd. 2965, ¶¶ 26–36 (1993) (must-carry); *id.* ¶¶ 172–78 (retransmission consent). In an unrelated footnote, the order observed:

> We are implementing the Cable Act's program access and regulation of carriage agreements sections in a separate proceeding. For purposes of regulating carriage agreements under Section 616, Congress defined the term "video programming vendor" as "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(b). Thus, *it is possible that* Section 616 may apply separately to retransmission consent agreements.

Id. ¶ 179 n.452 (emphasis added). Nowhere else and never since—notably, not in the later program carriage implementation order referenced here—has the Commission elaborated on this supposed possibility. As shown herein, decades of precedent and practice foreclose this hypothetical possibility by establishing a separate and self-contained regime for retransmission consent negotiations. And it would be imprudent, to say the least, for the Media Bureau to give Section 616 a novel interpretation here. The Bureau lacks delegated authority to resolve "novel questions of law, fact, or policy that cannot be resolved under existing precedents and guidelines." 47 C.F.R. § 0.283(c); *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

[119] *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, 2648, ¶ 14 (1993) ("1993 Program Carriage Order") (emphasis added).

rule") that prevented in-market cross-ownership between cable operators and broadcast stations. In justifying its decision to retain the rule, the Commission reasoned that "current carriage and channel position rules prevent some of the discrimination problems [that cable/broadcaster combinations might present], but not all of them."[120] The reference to "carriage and channel position rules" is not to Section 616 but to Section 614 (must-carry). The Commission also noted that commenters emphasized that "cable systems can delete broadcasters from carriage through waiver, and that cable/TV combinations will be unlikely to offer retransmission consent agreements."[121] Once again, program carriage went unmentioned. The D.C. Circuit vacated the CBCO rule in 2002, holding that "the Commission has not shown a substantial enough probability of discrimination to deem reasonable a prophylactic rule as broad as the cross-ownership ban, especially in light of the already extant conduct rules"[122]—again, referring expressly to must-carry, not program carriage. With reference in particular to a must-carry dispute involving Univision, the court went on to hold: "A single incident since the must-carry rules were promulgated—and one that seems to have been dealt with adequately under those rules—is just not enough to suggest an otherwise significant problem held in check only by the CBCO Rule."[123] Just as the *Turner* court affirmed, must-carry is the structural solution chosen by Congress to the problem of cable operators refusing to carry broadcast stations for anticompetitive reasons.

51. The history of retransmission consent is no less compelling on the point

[120] *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, 15 FCC Rcd. 11058, 11115–16, ¶ 104 (2000).

[121] *Id.*

[122] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1051 (2002).

[123] *Id.*

that neither Congress nor the Commission intended program carriage remedies to be available to broadcasters. In its 2005 order implementing the good-faith obligations of MVPDs in retransmission consent negotiations, the Commission explained that "Congress created the mandatory carriage/retransmission consent framework as part of the 1992 Cable Act. Through this framework, a broadcaster has the option to elect mandatory carriage and forgo compensation for carriage of its signal or pursue retransmission consent and risk the failure to agree and non-carriage."[124] Moreover, "[o]ther than mandatory carriage pursuant to Section 614 and satellite carrier service to unserved households, *all other lawful carriage of television broadcast stations is by retransmission consent*."[125] The Commission made no mention of carriage agreements or the program carriage rules, or any remedies that might be available under them.

52. The Commission affirmed that the retransmission consent rules would regulate the negotiations between broadcasters and MVPDs, to the exclusion of all other regulations: "[T]he reciprocal bargaining obligation of Section 325(b)(3)(C) applies to the negotiation of *all retransmission consent*."[126] The Commission submitted an initial Regulatory Flexibility Act analysis for these rules, concluding: "Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals. None."[127] It could not have made that statement if Section 616 could be invoked by broadcasters.

53. Coming to the present day, in two current rulemaking proceedings concerning retransmission consent, the Commission has never mentioned the availability of

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[124] *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd. 10339, 10353–54, ¶ 29 (2005) (footnotes omitted) (emphasis added).

[125] *Id.* ¶ 27 (emphasis added).

[126] *Id.* (emphasis added).

[127] *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act (SHVERA) of 2004, Reciprocal Bargaining Obligations*, Notice of Proposed Rulemaking, Appendix B, 20 FCC Rcd. 5448, 5466 (2005) ("SHVERA NPRM").

Section 616 claims to broadcasters carried under retransmission consent agreements.[128] Rather, the Commission has affirmed that its "'retransmission consent' rules . . . govern carriage negotiations between broadcast television stations and [MVPDs]."[129] And once again, in each of these rulemaking proceedings, the Commission has concluded that its retransmission consent rules are exclusive of other parallel rules: "Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule. None."[130]

54. Finally, in its pending rulemaking proceeding on potential revisions to the program carriage rules, the Commission nowhere suggests that those rules apply to broadcast networks. To the contrary, the Commission has asked commenters whether it should import good-faith negotiation requirements from the retransmission consent "context" into the program carriage "context."[131] Likewise, in asking whether it may lawfully impose monetary damages awards in program carriage cases, the Commission notes that it "has held that Section 325(b)(3)(C) of the Act pertaining to retransmission consent negotiations, which does not contain the same 'appropriate remedies' language, does not authorize the award of damages."[132] Because they provide different standards and different remedies, the Commission clearly regards the retransmission consent "context" and the program carriage "context" as distinct. In two prior

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[128] *See*, *e.g.*, *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, *Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd. 10327, 10344, ¶ 18 (2015) ("*Totality-of-Circumstances NPRM*") (citing the reciprocal good-faith bargaining requirements from SHVERA and asking about potential bad-faith practices engaged in by MVPDs as well as broadcasters); *Amendment of the Commission's Rules Related to Retransmission Consent*, Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, 3386–96, ¶¶ 58–73 (2014) ("*Exclusivity NPRM* ") (asking a number of questions about broadcaster exclusivity and non-duplication rights and MVPD conduct in retransmission consent disputes).

[129] *Amendment of the Commission's Rules Related to Retransmission Consent*, Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, 3352, ¶ 1 (2014).

[130] *Totality-of-Circumstances NPRM*, Appendix A, 30 FCC Rcd. at 10359, ¶ 29; *Exclusivity NPRM*, Appendix C, 29 FCC Rcd. at 3425.

[131] Second Report & Order, 26 FCC Rcd. at 11539–40, ¶ 71 (internal footnote omitted).

[132] *Id.* ¶ 50 n.192.

rulemaking proceedings on the program carriage rules, the Commission has never deviated from its Initial Regulatory Flexibility Analysis conclusion that there are no other rules that "duplicate, overlap, or conflict."[133]

55. Thus, Commission regulation over more than two decades confirms that must-carry and retransmission consent rules and regulations are intended to be the exclusive ones governing broadcaster claims against MVPDs.[134] Indeed, over this entire time period not a single broadcaster has ever filed a complaint under the Commission's program carriage rules. Departing from this established practice and allowing LBI the right to bring a program carriage claim in this proceeding would be not only unlawful but poor policy to boot. Thousands of retransmission consent negotiations occur every election cycle, and as the Commission knows from its pending retransmission consent rulemakings, they are often quite contentious. The prospects for litigation today are held in check by the reciprocal obligations of broadcasters and

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[133] *See id.*, Appendix G, 26 FCC Rcd. at 11606, ¶ 29; *Leased Commercial Access*, Notice of Further Proposed Rulemaking, Appendix F, 23 FCC Rcd. 2929, 2986, ¶ 55 (2008); *Leased Commercial Access*, Notice of Proposed Rulemaking, Appendix, 22 FCC Rcd. 11222, 11240, ¶ 24 (2007).

[134] The fact that these regimes are distinct and mutually exclusive, and that only cable programmers can bring program carriage complaints, is accepted as a matter of course by informed participants in FCC rulemakings. For example, in a rulemaking proceeding on program access, the National Association of Broadcasters (NAB) has stated that:

> A departure from Commission rulings . . . *in the context of broadcast retransmission consent negotiations* would also be inconsistent with the Commission's long-standing rulings in the context of MVPD retransmission of non-affiliated *cable program services*. To make a prima facie case against a MVPD under Section 616, a non-affiliated *cable program complainant* must show more than the mere fact that the MVPD asked for, negotiated for, and obtained alternative forms of consideration.

Comments of NAB, at 14, MB Docket Nos. 07-29 & 07-198 (filed Jan. 4, 2013) (emphasis added). Similarly, in a 2010 report to Congress by the Government Accountability Office (the "GAO"), which was reviewed for accuracy by the Media Bureau, the GAO explained that Section 616 "prevents a video provider from requiring a financial interest in programming or coercing a programmer (i.e., *cable network*) to grant exclusive rights as a condition for carriage, or from discriminating against an independent *cable network* in a way that unreasonably restrains the ability of the network to compete." U.S. Government Accountability Office, GAO 10-369, *Media Programming: Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio*, at 11 (2010) (emphasis added), *online at* http://www.gao.gov/new.items/d10369.pdf; *see also id.* at 10 (describing must-carry and retransmission consent in a separate discussion); *id.* at 44–45 (detailing the Media Bureau's review and technical corrections).

MVPDs to negotiate in good faith. If, even after good-faith negotiations, a broadcaster is given the chance to second-guess an MVPD's carriage decision through program carriage litigation, based solely on the broadcaster's claim that it is "similarly situated" to an MVPD's affiliated programming, it will open the floodgates to program carriage complaints. MVPDs will be subject to overlapping and inconsistent conduct regimes, creating substantial uncertainty about what they are required to do (or cannot do) in a retransmission consent negotiation.

56. Allowing a broadcaster to pursue a remedy under Section 616 would subject not just Comcast to this uncertainty, but any MVPD, including (for discrimination claims) one that has any affiliated programming (broadcast or otherwise). The combined effect will be to increase broadcasters' bargaining leverage while involving the Commission in unmanageable processes. Because the precedent and the longstanding history of the Commission's regulatory scheme are so clear and consistent, the Bureau could not, on delegated authority, conclude that broadcasters may bring program carriage claims. Instead, the Bureau would be required to refer a decision on such a novel issue to the full Commission, which should rightfully consider the matter in an industry-wide proceeding given its widespread and disruptive implications.[135]

C. The Comcast-NBCUniversal Order Does Not Give LBI Standing to Bring a Program Carriage Complaint

57. Finally, LBI claims that the Comcast-NBCUniversal Order provides it with independent grounds to invoke Section 616.[136] It does not. The Comcast-NBCUniversal Order does contain a provision barring discrimination against "video programming vendors" on the basis of affiliation, but the definition of VPV in the order specifically incorporates (and

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[135] *See* n.118, *supra*.

[136] Compl. ¶ 8; Comcast-NBCUniversal Order, 26 FCC Rcd. at 4358.

therefore is identical to) the definition in the Commission's carriage rules (and the U.S. Code), and the definition of "video programming" is identical in all respects relevant here to that in the Commission's regulations (and the U.S. Code).[137] Moreover, the Comcast-NBCUniversal Order specifically directs claimants to bring claims pursuant to the Section 616 carriage complaint process.[138] There is no support in the order for LBI's apparent position that it provides broader rights of standing than the Communications Act itself provides.

58. In fact, the Comcast-NBCUniversal Order reinforces Congress's and the Commission's judgment that retransmission consent negotiations and program carriage disputes are subject to distinct and exclusive regulation. Section III of the Conditions appended to the order sets forth provisions concerning carriage of unaffiliated video programming, including the program carriage non-discrimination provision that LBI invokes.[139] Protections for broadcast station programming are established in a wholly separate section (Section IX, "Broadcast Conditions"), including non-discrimination protection for eligible broadcasters in their retransmission consent negotiations. If the Commission had intended to establish two separate non-discrimination remedies for broadcast stations, it would have done so explicitly.

59. Similarly, the discussion of "Program Carriage Issues" in the Comcast-NBCUniversal Order is totally distinct from the discussion of "Broadcasting Issues," which include a specific section on "Network-Affiliate Relations and Retransmission Consent."[140] Moreover, in that Retransmission Consent section, the Commission expressly rejected a specific proposal to "apply the non-discrimination provisions [established by and applicable to ABC,

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[137] *Compare* Comcast-NBCUniversal Order, 26 FCC Rcd. at 4358 *with* 47 U.S.C. §§ 522(20), 536(b) *and with* 47 C.F.R. §§ 76.5(ff), 76.1300(e).

[138] Comcast-NBCUniversal Order, 26 FCC Rcd. at 4359.

[139] *See id.* at 4358–59.

[140] *Compare id.* at 4282-89, ¶¶ 110–124 *with id.* 4306–12, ¶¶ 163–178.

CBS, and FOX affiliate stations, per an agreement with Comcast] to all unaffiliated broadcast stations," because "[t]he record does not reflect the licensee of any such station requesting such Commission action, and we see no independent need to take such action, absent a demonstrated need for us to do so."[141] Were independent broadcasters already covered under the order's program carriage non-discrimination condition, surely the Commission, in declining to adopt an additional non-discrimination provision, would have noted that specifically as an additional protection that independent broadcasters (and indeed, all broadcasters) already enjoyed. Instead, the notion that broadcasters enjoy standing to invoke the program carriage condition is not mentioned anywhere in the lengthy and heavily-scrutinized order.[142]

II. COMCAST DID NOT DEMAND A FINANCIAL INTEREST IN ESTRELLATV AS A CONDITION OF CARRIAGE

60. LBI also claims that Comcast's request for digital distribution rights to EstrellaTV's programming—{[redacted] comprised an unlawful "demand" for a "financial interest" in EstrellaTV "as a condition of carriage."[143] Although LBI characterizes the claim as an "issue of first impression"

[141] *See id.* at 4308–09, 4311, ¶¶ 167, 176; *see also id.* at ¶ 172 & n.446 ("We also decline to adopt Free Press's proposal that we extend the non-discrimination provision regarding retransmission consent to all broadcast stations unaffiliated with any of the major four broadcast networks. . . . Free Press was alone in urging this extension. Because most independent stations assert must-carry rights, rather than opt for retransmission consent, the record does not establish as great a risk of harm to these stations as to those affiliated with ABC, CBS, Fox or NBC.") (citations omitted).

[142] Further evidence that the Commission did not intend to give broadcasters a program carriage remedy may be found in the case of Allbritton, a commenter in the underlying proceeding cited repeatedly by the Commission in the program carriage discussion in the Comcast-NBCUniversal Order. *See*, *e.g.*, *id.* at nn.255, 261. Allbritton owned both a local broadcast station affiliate and a local cable news channel (NewsChannel 8) in Washington, D.C. Notably, the order's references to Allbritton in the program carriage discussion (and Allbritton's own advocacy for a program carriage condition) are limited to concerns about potential discrimination that would harm its cable channel, not Allbritton's broadcast station. *See id.* ¶¶ 113, 134; *see also* Allbritton Ex Parte, MB Docket No. 10-56, Attachment at 3 (filed Dec. 3, 2010) ("Although Comcast has accepted conditions that temporarily protect the local broadcast station from loss of carriage in favor of the local owned and operated station . . ., conspicuously ***NOT*** addressed in those conditions is anything to protect local/regional nonbroadcast program competitors like NewsChannel 8.") (emphasis in original).

[143] Compl. ¶¶ 84–85.

and a "new cause of action," a more apt label is "frivolous." There is no logical reading of Section 616 or the Commission's rules that would define a "financial interest" to include a grant of non-exclusive "New Media" rights to deliver EstrellaTV content to customers via video-on-demand and other digital platforms. Moreover, Comcast plainly did not "demand" these rights, much less attempt to coerce LBI by making its proposal to acquire them "a condition of carriage," as required by Commission rules.

A. The Digital Distribution Rights Comcast Requested from EstrellaTV Are Not a "Financial Interest" Under Section 616

61. Section 616(a)(1) provides that the FCC shall promulgate regulations "designed to prevent a cable operator or other [MVPD] from requiring a financial interest in a program service as a condition for carriage."[144] The Commission's implementing regulations use almost identical language.[145]

62. As shown below, Section 616(a)(1) on its face applies to improper demands for *ownership* interests in the complainant's programming. For example, just last month, in its most recent Video Competition Report, the Commission stated: "In 1992, a large number of the most popular cable programming networks were owned by cable operators. Congress was concerned that cable operators had the ability and incentive to thwart the competitive development of additional programming networks by refusing to carry unaffiliated networks or by insisting on an *ownership stake* in return for carriage."[146]

63. In all events, whatever the precise contours of ownership interests it

[144] 47 U.S.C. § 536(a)(1).

[145] 47 C.F.R. § 76.1301(a).

[146] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report, -- FCC Rcd. ---- ¶ 21 & n.26 (2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0506/DA-16-510A1.pdf (citing 47 U.S.C. § 536).

captures, the term "financial interest" in the program carriage rules cannot be so broad as to sweep in non-ownership interests, much less non-exclusive distribution rights, which are precisely what Comcast sought: "New Media" rights consisting of [redacted]}[148]

64. LBI takes the position that Comcast requested a "financial interest" in LBI, because EstrellaTV's programming has "real value" to Comcast and "confer[s] [a] financial benefit" on it.[149] But all that Comcast requested here was a right to distribute EstrellaTV programming on digital platforms. LBI's tortured definition of "financial interest" would expand the term to include an MVPD's interest in obtaining a license to distribute programming—which is precisely what occurs in every successful carriage negotiation. Comcast and other MVPDs receive (or at least hope to achieve) an economic benefit every time they reach an agreement to distribute programming, whether through transmission of linear signals to cable customers in their homes, video-on-demand offerings, or TV Everywhere. LBI's reading of the statute would make any request by an MVPD for carriage or additional distribution rights unlawful.[150]

65. The legislative and regulatory history demonstrate that Section 616(a)(1)

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[147] Compl. Ex. 19 (Jan. 23, 2015 email and attachment from M. Nissenblatt, at Retransmission Consent Agreement, Attachment A ¶ 2).

[148] Compl. Ex. 19 (Jan. 23, 2015 email and attachment from M. Nissenblatt, at Retransmission Consent Agreement, Attachment A ¶ 13(d)) (emphasis added).

[149] Compl. ¶ 85.

[150] Note too that Section 616(a)(2) prohibits coercive demands for "exclusive rights" to carry programming against another MVPD, 47 U.S.C. § 536(a)(2), which strongly suggests that Comcast's request for *non-exclusive rights* is by definition permissible. LBI would read Section 616(a)(1) illogically to prohibit an act allowed by Section 616(a)(2).

does not provide recourse to LBI on the facts here. The Senate Report on Section 616 confirms that the "financial interest" provision arose from concerns that, "[a]s a practical matter, it is almost impossible in the present environment to start a new cable system service without *surrendering equity* to the owners of the monopoly cable conduits."[151] The Senate Report concluded that "[a]s a check on the market power of cable operators, the bill . . . bars operators from requiring a financial interest in a programming service as a condition of carriage."[152] Likewise, in its rulemaking proceeding to implement Section 616, the Commission cited the MPAA's comments that "the intent of Section 616 is to ensure that no cable operator or multichannel distributor can demand *ownership interests* or exclusive rights in programming in exchange for carriage."[153] Shortly thereafter, the Commission's Cable Services Bureau described Section 616 as "intended to prevent cable systems and other [MVPDs] from taking undue advantage of programming vendors through various practices, including coercing vendors to grant *ownership interests* . . . in exchange for carriage on their systems."[154] Both Congress and the Commission were concerned about cable operators demanding ownership interest in fledgling networks as a condition of carriage, not cable operators proposing a license arrangement to distribute content.[155]

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151 S. Rep. No. 102-92, at 24 (1991) (quoting testimony of Preston Padden, INTV) (emphasis added).

152 S. Rep. No. 102-92, at 27 (1991).

153 1993 Program Carriage Order, 9 FCC Rcd. at 2645, ¶ 8.

154 *Hutchens Comm'ns, Inc. v. TCI Cablevision of Ga., Inc.*, 9 FCC Rcd. 4849, ¶ 4 (CSB 1994) (emphasis added).

155 Not only does the history and implementation of Section 616(a)(1) confirm its meaning, but the Communications Act itself does as well. The Communications Act uses the term "financial interest" sparingly, and only once elsewhere in Title VI. In particular, Section 652 broadly prohibits cross-ownership interests between cable operators and local exchange carriers. Specifically, it prohibits cable operators and local exchange carriers from "purchas[ing] or otherwise acquir[ing] directly or indirectly *more than a 10 percent financial interest*, or any management interest" in each other. 47 U.S.C. § 572(a) (emphasis added). Modifying "financial interest" with "more than a 10 percent" clearly refers to an equity or ownership interest, the same meaning that is intended in Section 616(a)(1).

B. Comcast Did Not Demand EstrellaTV's Digital Rights as a Condition of Carriage

66. LBI's claim fails for the independent reason that Comcast did not demand EstrellaTV's digital rights as a condition for carriage within the meaning of the rules. Comcast made its proposal for New Media rights one term in negotiations with LBI, nothing more. As the Commission described in its 1993 implementing order, an unlawful demand for a "financial interest" must rise to the level of threats or coercion:

> [I]n the context of good faith, arms-length discussions, multichannel distributors *may negotiate for*, but may not insist upon, such benefits [financial interests or exclusivity rights] *in exchange for carriage on their systems*. We believe that ultimatums, intimidation, conduct that amounts to the exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a vendor who refuses to grant financial interests or exclusivity rights in exchange for carriage, should be considered examples of behavior that violates the prohibitions set forth in Section 616.[156]

67. Comcast did nothing of the sort. LBI does not even attempt to allege that Mr. Nissenblatt or anyone else at Comcast issued an ultimatum, leveled a threat, or exerted undue pressure about any term of carriage, much less specifically about the New Media rights proposal. As Mr. Nissenblatt explains, {[redacted]}[157]

68. Indeed, when Mr. Nissenblatt first made Comcast's "New Media Terms and Conditions" proposal on November 13, 2014, it was appended to a lengthy draft retransmission consent agreement that the parties were to "discuss."[158] Five days later, LBI's own counter-proposal included "Digital distribution rights on terms and conditions (including

[156] 1993 Program Carriage Order, 9 FCC Rcd. at 2649, ¶ 17 (emphasis added).

[157] Nissenblatt Decl. ¶ 29 n.2.

[158] Compl. Ex. 19 (Nov. 13, 2014 email and attachment from M. Nissenblatt)

applicable fees) to be negotiated by the parties."[159] After further discussions, Mr. Nissenblatt again proposed (on January 23, 2015) that LBI license its content to Comcast for digital distribution, based on amendments to the same form retransmission consent agreement.[160] Again, LBI responded with a counter-proposal {[redacted]}[162] At no point did Mr. Martinez accuse or even suggest that Comcast was coercing LBI; LBI was free to reject Comcast's proposal and plainly did so. The parties' discussions broke down because of LBI's unprecedented and unmerited request for retransmission consent fees and increased distribution, not because of anything to do with Comcast's New Media rights request.[163]

III. THE STATUTE OF LIMITATIONS BARS LBI'S CLAIMS

69. LBI's claims should be dismissed for another reason: they are foreclosed by the statute of limitations.

70. Under the Commission's rules, LBI had "one year to seek redress for actions that entail unfair or anticompetitive practices."[164] The one-year limitations period is designed "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed."[165] After this year expires,

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[159] Compl. Ex. 19 (Nov. 18, 2014 email and attachment from J. Martinez).

[160] Compl. Ex. 19 (Jan. 23, 2015 email and attachment from M. Nissenblatt).

[161] Compl. Ex. 19 (Feb. 1, 2015 email and attachment from J. Martinez).

[162] Compl. Ex. 19 (Feb. 13, 2015 email from J. Martinez).

[163] Nissenblatt Decl. ¶ 49.

[164] *Echostar Commc'ns Corp. v. Fox/Liberty Networks LLC*, 14 FCC Rcd. 10480, 10483, ¶ 7 (CSB 1999) (interpreting parallel statute of limitations for program access complaints).

[165] Second Report & Order, 26 FCC Rcd. at 11522, ¶ 38.

"the parties should rely on the marketplace to dictate their business relationship."[166] Three events can trigger the one-year limitations period: (1) entry into a contract that purportedly violates the carriage rules; (2) an offer to carry programming that purportedly violates the rules; or (3) when a party "has notified a [MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the rules . . . ."[167]

71. LBI's claim of discrimination is that Comcast refused to grant LBI "carriage parity" with Telemundo (*i.e.*, equivalent distribution and compensation) on the basis that Telemundo is affiliated with Comcast and EstrellaTV is not.[168] The relief it seeks in this proceeding is, indeed "FCC-mandated Estrella TV carriage parity with Telemundo."[169] LBI's claim that Comcast unlawfully demanded a "financial interest" in EstrellaTV is based on a draft retransmission consent agreement Mr. Nissenblatt sent to LBI, attaching a "New Media Terms and Conditions" rider that provided for {[redacted]} digital rights to EstrellaTV content.[170]

72. LBI alleges that the discrimination claims and the financial interest claims asserted in its April 8, 2016 Complaint were timely filed under 47 C.F.R. § 76.1302(h)(2)—that is, "within one year of the date on which . . . [Comcast] offer[ed] to carry [EstrellaTV's] programming pursuant to terms that [LBI] alleges to violate one or more of the rules contained in

166 *Echostar*, 14 FCC Rcd. at 10483, ¶ 7. The Cable Services Bureau held that this balance of equities between potential complainants and defendants was "consistent with the realities of the marketplace and best achieves the goals of [the Commission's rules]." *Id.*

167 47 C.F.R. §§ 76.1302(h)(1)–(3).

168 *See*, *e.g.*, Compl. ¶¶ 37 ("LBI sought from Comcast distribution and compensation that would parallel Telemundo's"), 40 (defining "Estrella TV's Parity Request" as LBI's "original request for carriage and compensation parity with Telemundo"), 52 (referring to "LBI's request for expanded carriage of and compensation for Estrella TV programming by Comcast (currently embodied in Estrella TV's Parity Request), and whether Comcast's denial of such carriage and compensation constitutes unlawful discrimination"), 56 ("Comcast . . . refuses LBI fair and critically important distribution comparable to that enjoyed by Comcast-owned Telemundo and NBC Universo"), 60 ("Comcast argues that Estrella TV is unworthy of distribution and compensation on par with Comcast-owned Telemundo").

169 Compl. iii; *see also id.* ¶ 83; *id.* 52.

170 Compl. ¶¶ 41, 41 n.71.

this section."[171] But LBI's discrimination claim accrued on November 13, 2014. That was the day that Mr. Nissenblatt sent Mr. Martinez a carriage proposal under which {[redacted]}[172] LBI now alleges that this proposal was and is discriminatory, because it did not provide EstrellaTV "carriage parity" with Telemundo. Thus, Comcast's November 13, 2014 proposal was an "offer to carry [EstrellaTV's] programming pursuant to terms that a party alleges to violate one or more of" the carriage program rules.[173] LBI had one year from the date of Comcast's proposal to file its Complaint, and did not do so.

73. The parties' ensuing negotiations erase any doubt that LBI was on notice of its potential claim. In a November 26, 2014 email, Mr. Martinez openly alleged that Comcast was not giving EstrellaTV a chance to compete fairly with Comcast affiliate Telemundo, {[redacted]}[174] No later than that date, then, LBI understood the core allegations in its present Complaint: that Telemundo was owned by Comcast; that Comcast gave Telemundo more favorable treatment than EstrellaTV; and that Comcast purportedly favored Telemundo on the basis of affiliation. Indeed, in its Complaint, LBI alleges that prior to even entering into negotiations with Comcast in the fall of 2014 it understood that it could request carriage on the same terms as Telemundo "in reliance on the law . . . prohibiting Comcast from

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[171] *See* 47 C.F.R. § 76.1302(h)(2); Compl. ¶ 15 n.24.

[172] *See* ¶ 8, *supra*.

[173] 47 C.F.R. § 76.1302(h)(3).

[174] *See* ¶ 12, *supra*.

offering Estrella TV carriage on 'less favorable' terms than affiliated Telemundo."[175] Once Comcast rejected LBI's carriage parity proposal, made "in reliance on" the program carriage rules, LBI had one year to file a claim.

74. Likewise, LBI's financial interest claim—concerning Comcast's request for digital rights—is also untimely. Mr. Nissenblatt sent LBI a proposed retransmission consent agreement requesting {[redacted]} digital rights to EstrellaTV content on November 13, 2014.[176] This was an "offer to carry" EstrellaTV on terms and conditions that it now alleges violate Section 616.[177] LBI had one year from that date to file its Complaint, but again, did not do so.

75. To support its position that the Complaint is timely, LBI alleges that it was filed within one year of the end of a so-called "Discussion Period" that ended on October 15, 2015.[178] LBI provides no support for its claim that the statute of limitations was tolled during a negotiating period that occurred after Comcast made its allegedly discriminatory offers of carriage. Nor could it. On its face, 47 C.F.R. § 1302(h)(2) requires a plaintiff to file a program carriage complaint within one year of an MVPD's "offer to carry" the plaintiff in violation of the rules. The Comcast offer of carriage LBI cites in its Complaint was made on November 13, 2014, and LBI made it clear within weeks that it believed it had grounds to bring a program carriage complaint. That LBI chose to negotiate with Comcast after its claims had accrued is

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175 Compl. ¶ 36; *see also* Compl. Ex. 7 ("[F]rom the beginning of the LBI/Comcast discussions in 2014 until their conclusion late last year, Comcast refused to provide any significant distribution of Estrella TV programming . . . and Comcast has rejected out-of-hand any type of fair compensation for Estrella TV distribution.").

176 Compl. Ex. 19 (Nov. 13, 2014 email and attachment from M. Nissenblatt, Retransmission Consent Agreement Attachment A).

177 Comcast made an identical offer for digital distribution of EstrellaTV content on January 23, 2015; it is this offer that LBI alleges was Comcast's "Digital Rights Demand" in violation of the program carriage rules. Compl. ¶¶ 41, 41 n.71, 84, Ex. 19 (Feb. 13, 2015 email from J. Martinez). This date, too, falls well outside the one-year period within which LBI could bring its claim.

178 Compl. ¶ 15 n.24.

irrelevant: the Commission's regulations contain no exception to the general rule that a party attempting to negotiate a business resolution of its claims prior to filing a lawsuit is still bound by the statute of limitations.[179]

76. Moreover, the three triggering events in 47 C.F.R. § 1302(h) are discrete; the accrual of a new claim under one provision does not revive a time-barred claim under another. For example, an allegedly discriminatory offer to amend a contract more than a year after its execution does not reopen the limitations period for the original contract.[180] To allow a party to reopen the limitations period for a claim based on a prior offer "simply by making a pretextual demand for broader carriage . . . would [] directly contradict the entire purpose of the statute of limitations."[181] Similarly, the fact that Comcast continued to offer carriage to LBI on terms that LBI alleges reflect affiliation-based discrimination does not change the fact that LBI's Complaint is untimely. LBI is not entitled to "accumulate" discrimination claims and then file its Complaint based on the limitations period applying to the last one.[182]

77. Finally, LBI cannot invoke 47 C.F.R. § 76.1302(h)(3) as a basis for

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[179] *See, e.g.*, *Cristwell v. Veneman*, 224 F. Supp. 2d 54, 61 (D.D.C. 2002) ("To excuse filing obligations on equitable grounds solely because parties were engaged in settlement discussions would virtually eviscerate filing time requirements and throw the orderly and expeditious processing of . . . cases into . . . disarray."); *Cromeartie v. RCM of Wash., Inc.*, 118 F. Supp. 3d 338, 338 n.3 (D.D.C. 2015) (same); *Leiterman v. Johnson*, 60 F. Supp. 3d 166, 189 (D.D.C. 2014) (same).

[180] *Tennis Channel*, 717 F.3d at 999 (Edwards, J., concurring)*; cf. Hutchens Comm'ns*, 9 FCC Rcd. at 4849, ¶ 19 (holding that "[w]e reject Hutchens' argument that the untimely filing of its leased access claim can be cured by including an allegation that TCI engaged in a continuing violation of the Commission's program access rules," because the allegations "are entirely unrelated to the leased access rules, and thus cannot review an otherwise untimely leased access claim").

[181] *Tennis Channel*, 717 F.3d at 996 (Edwards, J., concurring); *accord* Second Report & Order at 11522 ¶¶ 38–39.

[182] *See, e.g.*, *Citta*, 2010 WL 3862561, at *17 ("[W]here a plaintiff knew, or should have known, that each act was discriminatory, plaintiff may not accumulate all the discriminatory acts and bring suit . . . based on the statutory period applicable to the last one.")

claiming that its Complaint is timely.[183] Although the rule, on its face, provides LBI with one year from its pre-filing notice letter to file its Complaint, "the Commission has consistently held that [this] trigger is applicable only in situations when an MVPD denies or refuses to acknowledge a request to negotiate for carriage."[184] LBI does not allege that Comcast refused or ignored any request to negotiate, nor could it: the parties discussed and negotiated EstrellaTV carriage for over a year.[185] As a result, there is no doubt that LBI's Complaint is untimely.

IV. COMCAST MADE A REASONABLE, GOOD FAITH BUSINESS DECISION TO DENY LBI'S CARRIAGE PROPOSALS

78. For the reasons described above, LBI's Complaint is deficient as a matter of law. But even if it were not, LBI would nonetheless be unable to make out a *prima facie* case because it has not shown and cannot show that Comcast made its carriage decisions concerning EstrellaTV on the basis of affiliation. Rather, the facts show that Mr. Nissenblatt and his team came to an informed decision about EstrellaTV's appeal to Comcast customers based on the network's position in the marketplace and available viewing data, and concluded in good faith that the benefits Comcast would obtain from carrying EstrellaTV on the terms LBI proposed could not begin to justify the high price tag that LBI demanded.

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183 "Any complaint . . . must be filed within one year of the date on which . . . (e) A party has notified [an MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section." 47 C.F.R. § 76.1302(h)(3).

184 *Tennis Channel*, 717 F.3d at 1007 (Edwards, J., concurring) (citing *1998 Biennial Regulatory Review—Part 76—Cable Television Service Pleading and Complaint Rules*, Order on Reconsideration, 14 FCC Rcd. 16433, 16435, ¶ 5 (1999)).

185 *See generally* Nissenblatt Decl. Precisely because Comcast was engaged in discussions concerning broadcast retransmission consent with LBI, the good-faith rules that apply in that context could be read to require that Comcast had a continuing duty to engage with LBI's further proposals. *See generally* 47 C.F.R. § 76.65(b). This is yet another reason why it would make no sense to interpret the Communications Act as imposing dual (and inconsistent) retransmission consent and program carriage obligations on an MVPD—the retransmission consent regime's requirement that an MVPD should respond on a continuing basis to retransmission consent proposals would eviscerate the program carriage statute of limitations. Thus, if the Bureau were to conclude that broadcasters have standing to bring program carriage claims, it cannot appropriately hold that Comcast's continued discussions with LBI beyond November 2014 make LBI's complaint timely. Conversely, if only the retransmission consent rules apply, there is no need to consider this program carriage-specific defense.

79. The overwhelming (and indisputable) evidence showing that Comcast made its carriage decision in good faith is, standing alone, yet another basis for dismissing LBI's Complaint. The good faith basis for Comcast's decision is also confirmed by marketplace evidence of how other MVPDs carry EstrellaTV; that evidence shows that no other MVPD carried EstrellaTV on the terms LBI demanded from Comcast. Finally, the evidence shows that Comcast does not favor its affiliated Spanish-language networks, but rather carries a wide variety of Spanish-language networks that are not affiliated. In all, the evidence confirms that Comcast made legitimate and good faith carriage decisions concerning EstrellaTV, "based on a reasonable business purpose," that cannot form the basis for a complaint of discriminatory carriage.[186]

A. Comcast's Contemporaneous Decisionmaking Process Reflects that Its Decision Was Made for Non-Discriminatory Reasons

80. LBI bears the burden of proving that its unaffiliated status "actually motivated" Comcast's decision.[187] Under Commission regulations, it can do so through direct evidence, that is "[d]ocumentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim."[188] LBI has presented no such direct evidence. Nor could it. As Mr. Nissenblatt states, "[n]either EstrellaTV's ownership nor Telemundo and NBC Universo factored into my or my team's decision making concerning the terms and conditions of carriage of EstrellaTV in any way."[189]

81. LBI's burden to make out a circumstantial case is no different: it still

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186 *Tennis Channel*, 717 F.3d at 985.

187 *See Herring Broadcasting Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 24 FCC Rcd. 12967, 12997, ¶ 63 (ALJ 2009) ("*WealthTV*").

188 47 C.F.R. § 76.1302(d)(3)(iii)(B). *See also* Second Report & Order, 26 FCC Rcd. at 11503, ¶ 12.

189 Nissenblatt Decl. ¶ 3.

must show that EstrellaTV's affiliation "actually motivated" Comcast's decision.[190] Therefore, if Comcast had "legitimate reasons for" its carriage decision, "borne out by the record and not based on the programmer's affiliation or nonaffiliation," LBI's claim of discrimination must fail.[191] Examples of legitimate business reasons for an adverse carriage decision include a lack of subscriber demand and interest, the cost of carriage, unfavorable terms and conditions of carriage, the carriage decisions of other cable operators, and bandwidth constraints.[192]

82. Comcast had legitimate business reasons to reject LBI's requests for carriage. LBI demanded carriage and fees that bore no relationship to EstrellaTV's popularity among Hispanic audiences, both nationally and in relevant local markets. LBI sought {[redacted]} fees without even offering a hint to Comcast as to how they would be recovered. EstrellaTV would have occupied valuable bandwidth on Comcast systems. And when LBI pulled its EstrellaTV signal from Comcast subscribers in the Houston, Denver, and Salt Lake City markets, Comcast saw essentially no adverse reaction from subscribers, confirming its good faith judgment that the limited appeal of EstrellaTV to Comcast's customers did not justify the level of fees demanded by LBI.

83. From the parties' first meeting to discuss EstrellaTV carriage, on October 14, 2014, Mr. Nissenblatt and his team understood that EstrellaTV {[redacted]

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[190] *See WealthTV*, 24 FCC Rcd. at 12997–98, ¶ 63.

[191] *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099, 18105, ¶ 11 (2010) ("*MASN*").

[192] *See MASN*, FCC Rcd. at 18106–15, ¶¶ 13–20 (holding that subscriber demand, costs of carriage, bandwidth constraints, and carriage decisions of other cable operators are legitimate reasons to deny carriage); *WealthTV*, 24 FCC Rcd. at 12985–86, ¶ 39 (noting bandwidth constraints, subscriber interest and demand, carriage on other MVPDs, and "brand recognition" as legitimate considerations).

[redacted]}[193] Their view was confirmed by examining EstrellaTV's voluntary carriage on other MVPDs—there was very little—and reviewing Nielsen ratings reflecting EstrellaTV's audience—it was very small.[194] The national Nielsen data they reviewed also showed that in 2013 and 2014 EstrellaTV delivered only a fraction of the audience of market leaders Univision, Telemundo, and UniMás.[195] EstrellaTV's audience was much more similar in size to that of two less-popular Spanish-language networks, MundoMax and Azteca.[196] Local Nielsen ratings in Hispanic households in major markets—Los Angeles, New York, Houston, and Chicago—told the same story. EstrellaTV consistently rated far below Univision, Telemundo, and UniMás, and often lower than the major English-language broadcasters in those markets.[197] For example, as seen in this excerpt from the analysis Comcast conducted, EstrellaTV had low ratings in New York, Chicago, and even Houston (a large Hispanic market in which LBI has a full-power station)[198]: {

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[193] Nissenblatt Decl. ¶ 23–28.

[194] *Id.* ¶ 21–22.

[195] *See*, *e.g.*, *id.* Ex. 1 (showing that in 2014 EstrellaTV delivered an average total-day audience of {[redacted]} households, UniMás {[redacted]} households, Telemundo {[redacted]} households, and Univision {[redacted]} households; in primetime, EstrellaTV delivered {[redacted]} households, UniMás {[redacted]}, Telemundo {[redacted]}, and Univision {[redacted]}).

[196] *Id.*

[197] *Id.*

[198] *Id.*

[redacted] }

84. Based on their assessment of EstrellaTV's position in the market, Mr. Nissenblatt and Comcast rejected LBI's November 2014 proposal, {[redacted]}[199] In order to manage its programming budget in the face of mounting costs, {[redacted]}[201] In its proposal, LBI sought {[redacted]} These facts can lead to only one conclusion: that Comcast had legitimate and non-discriminatory reasons for rejecting LBI's

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[199] *Id.* Ex. 3.

[200] *Id.* ¶¶ 12–13.

[201] *Id.* ¶ 15.

demands.

85. During the months of negotiations that followed, Mr. Nissenblatt and his team continued to review EstrellaTV's Nielsen ratings. Year-to-date national ratings through November 2014 showed EstrellaTV delivering only {[redacted]} of UniMás's audience, {[redacted]} of Telemundo's, and {[redacted]} of Univision's.[202] Ratings in the Los Angeles market, EstrellaTV's strongest, were similarly weak.[203] Moreover, Comcast reviewed set-top box data showing that EstrellaTV was not heavily viewed among Comcast customers, further demonstrating that the limited appeal of the network and the limited benefits to Comcast of carrying it.[204]

86. Thus, beginning in November 2014, and throughout the parties' negotiations, Comcast consistently {[redacted][redacted] [redacted][redacted] [redacted]

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[202] *Id.* Ex. 4.

[203] *Id.* ¶ 54.

[204] Compl. Ex. 19 (Feb. 5, 2015 email from M. Nissenblatt); Nissenblatt Decl. ¶ 42.

[205] Compl. Ex. 19 (Feb. 5, 2015 email from M. Nissenblatt); Nissenblatt Decl. ¶¶ 32, 39–43, 49.

[206] Compl. Ex. 19 (Feb. 5, 2015 email from M. Nissenblatt); Nissenblatt Decl. ¶¶ 39–43, 49.

[redacted]}[207]

87. The absence of meaningful customer reaction after LBI pulled the EstrellaTV signal in Houston, Denver, and Salt Lake City provides further proof that Comcast's carriage decision reflected valid business considerations. Despite a sustained public relations campaign by LBI, in which it alleged (falsely) that EstrellaTV would be "forced off the air" by Comcast, and in which it promised gifts to customers who disconnected their service in protest, only a small number of customers left Comcast.[208] In the two months that followed LBI's decision to pull its signals in Houston, Denver, and Salt Lake City, fewer than {{[redacted]}} (of hundreds of thousands of Hispanic customers in those markets) identified the loss of EstrellaTV as their reason for canceling.[209] The revenue Comcast lost from these customers pales in comparison to the {[redacted]} LBI had demanded.[210] Comcast continued to monitor customer disconnects through the spring of 2015, and saw no meaningful fallout from losing EstrellaTV.[211] This not only reaffirmed Mr. Nissenblatt's initial decision{[redacted]}[212]

88. Comcast's considered judgments are precisely the types of business

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[207] *See*, *e.g.*, Nissenblatt Decl. ¶¶ 43, 49.

[208] *Id.* ¶¶ 44–45, 51–53.

[209] *Id.* ¶ 52. {[redacted]} *Id.*

[210] *Id.* ¶ 53.

[211] *Id.* ¶¶ 56–57.

[212] *Id.* ¶ 57.

justifications for carriage decisions that have been found to be legitimate in past cases. Comcast determined that EstrellaTV "had failed to provide . . . ratings data or other form of empirical proof of customer interest,"[213] and that EstrellaTV's limited distribution on other MVPDs and "high cost of carriage" were reasons not to carry it.[214] Moreover, by expressing its interest in {[redacted]}, Comcast showed "a willingness to carry within business limitations or at least to consider carriage of [EstrellaTV] when it would be in the company's best interest."[215] Indeed, the idea that Comcast was seeking to benefit Telemundo and NBC Universo makes no sense, considering that, beginning in October 2014 and throughout the parties' negotiations, {[redacted]}[216] If Comcast had intended to divert viewers or advertising dollars away from EstrellaTV and towards its affiliated networks, it would make little sense to {[redacted]}

89. As for Comcast's eventual decision not to put EstrellaTV back on the air in the affected markets, it arose from a "natural experiment" in which customers failed to react in any meaningful way when they were deprived of EstrellaTV, thereby demonstrating that the network had no significant appeal.[217] In the end, because of bandwidth constraints, Comcast "lacks capacity to carry all the networks that seek affiliation and must decide what networks are in its best interest to carry" and "concluded that [EstrellaTV] had not shown that its carriage

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213 *WealthTV*, 24 FCC Rcd. at 12985, ¶ 38.

214 *See MASN*, 25 FCC Rcd. at 18111–12, ¶¶ 18–19.

215 *See WealthTV*, 24 FCC Rcd. at 12986, ¶39.

216 *See generally* Compl. Ex. 19; Nissenblatt Decl. ¶¶ 29, 32, 43, 49.

217 *See Tennis Channel*, 717 F.3d at 986 ("Perhaps more telling is the natural experiment conducted in Comcast's southern division . . .When Comcast repositioned Tennis to the sports tier . . . thereby making it available to Comcast's general subscribers only for an additional fee, not one customer complained about the change.").

would assist [Comcast] to attract or maintain subscribers" in those markets.[218] Comcast's actions reflect rational, thoughtful, business decisions, not discriminatory intent. Absent evidence that Comcast's decision was actually borne of a discriminatory impulse, there is no reason to interfere with or question Comcast's decision to deny the aggressive carriage demands LBI made.[219]

90. LBI has alleged no such facts. Instead, LBI makes a number of allegations that are irrelevant or simply untrue.

91. First, LBI suggests that Comcast relied solely on STB data in making its carriage decision, instead of "industry-standard" Nielsen ratings.[220] This is wrong. In addition to other material they examined (such as EstrellaTV carriage on other MVPDs), Mr. Nissenblatt's team reviewed a substantial amount of Nielsen ratings during the parties' negotiations, and came to the conclusion that EstrellaTV was not a popular network.[221] The data they reviewed reflected long time periods (several months, at least), across broad dayparts (total day or primetime for the entire week), and for all viewers.[222] The Comcast team had every reason to reject the Nielsen ratings presented by LBI, which reflected {[redacted]}[223]

92. Second, LBI suggests that Comcast relied solely on national Nielsen

[218] *See WealthTV*, 24 FCC Rcd. at 12986, ¶ 39; *see also MASN*, 25 FCC Rcd. at 18113, ¶ 20 (finding "channel capacity" a legitimate reason to refuse a carriage proposal).

[219] *See WealthTV*, 24 FCC Rcd. at 12997–99, ¶¶ 63, 67.

[220] Compl. ¶ 66.

[221] Nissenblatt Decl. ¶¶ 23–27, 40, Exs. 1, 4.

[222] *See id.* ¶¶ 23–27, 40, Exs. 1, 4.

[223] *See id.* ¶ 27, Exs. 2, 6.

ratings to make its decision.[224] This, too, is untrue. Mr. Nissenblatt and his team reviewed Nielsen data for major Hispanic markets, including New York, Chicago, Houston, and EstrellaTV's home market, Los Angeles.[225] These ratings, like EstrellaTV's national ratings, showed that it was a weak network.[226]

93. The national and local Nielsen ratings examined by Comcast's economist, Dr. Israel, confirm Mr. Nissenblatt's contemporaneous conclusion concerning the limited popularity of EstrellaTV. For example, Dr. Israel concludes that Telemundo attracted {[redacted]} times the national audience that EstrellaTV did in 2014.[227] As for individual markets, Telemundo's audience in New York City, the nation's second-largest Hispanic market, was {[redacted]} than EstrellaTV's that same year.[228] The ratings in the markets at issue in this case—Houston, Denver, and Salt Lake City—show EstrellaTV consistently trailing Telemundo, Univision, and, with the exception of Salt Lake City, UniMás.[229] LBI's claim that EstrellaTV is as popular as Telemundo is simply not borne out by the facts.

94. Moreover, an additional Nielsen analysis conducted by Dr. Israel—one not even attempted by LBI's expert—shows that Comcast would not have been acting rationally by targeting EstrellaTV in order to favor its affiliated Spanish-language networks. Dr. Israel conducted a regression analysis of Nielsen ratings over the period January 2013 through March 2016 in Houston, Denver, and Salt Lake City, to determine whether Telemundo and NBC Universo viewership in those markets increased as a result of LBI's decision to pull EstrellaTV's

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[224] Compl. ¶ 67.

[225] *See* Nissenblatt Decl. ¶¶ 24–25, 54, Ex. 1.

[226] Nissenblatt Decl. ¶¶ 24–25, 54.

[227] Israel Decl. ¶ 24.

[228] *Id.* ¶ 25.

[229] *Id.* ¶ 23, Appendix 2 Exs. 2–4.

signal from Comcast, after accounting for other factors that explain Telemundo's and NBC Universo's viewership in those DMAs.[230] Dr. Israel found no statistically significant relationship between the loss of EstrellaTV and any change in the ratings of either Telemundo or NBC Universo.[231] Although no MVPD is required to conduct this type of analysis, or anything like it, when reaching a carriage decision, Dr. Israel's *ex post* confirmation that there is no meaningful competition between EstrellaTV and Comcast's affiliated networks is compelling additional supporting evidence that Comcast had nothing to gain by treating EstrellaTV unfavorably. The demonstrated lack of competition for viewers confirms that Comcast's decision not to accept LBI's proposed carriage terms was a legitimate business judgment, not affiliation-based discrimination.

95. Third, LBI suggests that Comcast suffered customer loss as a result of LBI pulling its signals in the affected markets.[232] The only evidence LBI puts forth is a purported increase in phone calls made to LBI after LBI pulled its signal in Houston, Denver, and Salt Lake City.[233] LBI does not allege that any of these customers ever called Comcast to complain, much less canceled their service. And in fact, as noted, Comcast's records show that fewer than {{[redacted]}} of the hundreds of thousands of Hispanic customers in those markets canceled their service after LBI pulled its signals.[234]

B. Carriage of EstrellaTV and Telemundo by Other MVPDs Further Supports Comcast's Good Faith Carriage Decision

96. LBI also alleges that a "plethora of sophisticated MVPDs" distribute

[230] *Id.* ¶¶ 42–44, Appendix 3 Ex. 6.

[231] *Id.*

[232] Compl. ¶ 71.

[233] *Id.*

[234] Nissenblatt Decl. ¶ 52.

EstrellaTV, but that Comcast has denied LBI's carriage requests.[235] LBI then asserts that these alleged differences in carriage must be attributable to the fact that Comcast favors Telemundo at EstrellaTV's expense.[236] The inference LBI seeks to draw from this allegation is, to be clear, a circumstantial one. The Media Bureau has never found disparate carriage among MVPDs, standing alone, sufficient to make out a *prima facie* case of discrimination. In any case, the Bureau need not do so here. LBI has failed to identify a single MVPD that has agreed to the terms LBI sought from Comcast, and indeed, publicly-available data show that LBI's allegations about EstrellaTV carriage are unsupported in fact.[237]

97. For example, LBI alleges that EstrellaTV is carried by both DirecTV and DISH,[238] which together have over 30 million subscribers nationwide. Although these DBS providers may carry EstrellaTV in some areas where LBI operates broadcast stations or has affiliate stations, neither of them makes EstrellaTV available for purchase on their broadly-distributed Spanish-language programming packages.[239] In contrast, both DISH and DirecTV provide Telemundo and NBC Universo to Spanish-speaking customers nationwide.[240]

98. Moreover, although LBI demanded that Comcast carry EstrellaTV in {[redacted]

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[235] Compl. ¶¶ 55–56. Notably, LBI has failed to identify a single MVPD that agreed to the terms LBI sought from Comcast. Having failed to come forward with such evidence in the Complaint, it would be inappropriate for LBI to so on reply. *See* n.89, *supra*.

[236] *Id.* ¶ 56.

[237] *Id.* ¶¶ 55–56.

[238] *Id.* ¶ 55.

[239] Israel Decl. ¶ 32.

[240] *Id.*

[redacted]}[241] Thus, LBI asked Comcast to carry EstrellaTV on a level of distribution—both nationally and in specific markets—that other major MVPDs do not appear to provide.

99. Publicly-available data also demonstrate that LBI demanded fees from Comcast that no other MVPDs pay. According to the SNL Kagan data examined by Dr. Israel, EstrellaTV earned only {[redacted]} in "network compensation" revenue in 2015, and only {[redacted]} in non-advertising revenue.[242] This indicates that, although LBI was demanding {[redacted]} from Comcast in 2015 in exchange for retransmission consent and carriage rights, other MVPDs paid {[redacted]} for those same rights.[243]

100. By LBI's own admission, none of the other MVPDs in the marketplace—{[redacted]}—have made their carriage decisions based on affiliation.[244] There is no reason to infer that Comcast has done so either.

C. Comcast's Carriage of Spanish-Language Networks Reflects an Absence of Affiliation-Based Discrimination

101. As LBI concedes in its Complaint, in addition to the popular broadcast networks Univision and UniMás, Comcast distributes programming from dozens of non-affiliated Spanish-language and Hispanic-targeted networks. These include broadcast networks, such as Azteca and LATV, and cable-only networks such as Galavision, Discovery en Español, and beIN Sport en Español.[245] Moreover, Comcast has launched many of these networks since

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241 *Id.* ¶ 33.

242 *Id.* ¶ 29.

243 *Id.*

244 Compl. ¶ 55 ("Such companies share a common characteristic – none holds an ownership interest in a programming channel or network that competes with EstrellaTV.")

245 *See* Compl. Ex. 10.

acquiring an interest in Telemundo and NBC Universo in 2011.[246] Comcast's continued support of these networks is entirely inconsistent with LBI's allegation that Comcast is trying to "protect" Telemundo and NBC Universo from competition.

102. Finally, Comcast's carriage of its affiliated Spanish-language networks over time shows that its current carriage is not driven by favoritism. Comcast has carried Telemundo at a broad rate of penetration for many years, via both broadcast signal and satellite transmission, and has carried NBC Universo (and its predecessor, mun2) broadly for many years as well; Comcast's distribution of these networks {[redacted]} since Comcast acquired an ownership interest in them.[247] This strongly suggests that Comcast's continued broad carriage is based on justifiable business considerations, and not discrimination.

V. LBI CANNOT MAKE OUT A CLAIM THAT BROADER CARRIAGE ON COMCAST WOULD PROVIDE COMCAST WITH A "NET BENEFIT"

103. In the face of this evidence of Comcast's good faith decision not to accede to LBI's unprecedented demands to pay {[redacted]}, LBI is required, under D.C. Circuit and Commission precedent, to come forward with evidence that "broader carriage would have yielded net benefits" to Comcast.[248] But LBI has not alleged, much less provided evidence, that Comcast would realize benefits from carrying EstrellaTV on the terms demanded that would outweigh the additional costs that Comcast would incur.

104. For one thing, LBI's Complaint does not discuss any of the costs Comcast would bear from granting EstrellaTV the "carriage parity" with Telemundo that LBI requested.

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[246] *See* Compl. ¶ 48.

[247] Israel Decl. ¶ 34.

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

Those costs are, however, well-documented: under the proposal LBI made in November 2014, and repeated in January 2015, {[redacted]}[249] LBI's next proposal, {[redacted]}[250] LBI's demand for carriage in the Complaint—that Comcast carry EstrellaTV "wherever" and "however" it carries Telemundo, and compensate LBI "to the extent it compensates Telemundo"[251]—would cost Comcast just as much, or more.

105. Moreover, nowhere does LBI allege any facts showing how Comcast would generate additional revenue by carrying LBI more broadly, much less additional revenue sufficient to offset the {[redacted]} fees it demanded from Comcast. Specifically, LBI has not alleged that any subscribers "would switch to Comcast if it carried [EstrellaTV] more broadly," or that any subscribers "would leave Comcast in the absence of broader carriage" of EstrellaTV.[252] Without such evidence—or even, apparently, a good-faith basis to make such allegations—LBI's carriage discrimination claim must be dismissed.

106. LBI attempts to overcome this pleading failure by relying on its expert, Dr. Furchtgott-Roth, to argue that EstrellaTV has "value" to Comcast. The support LBI musters consists of its expert's discussion of EstrellaTV's Nielsen ratings and LBI's own allegations concerning EstrellaTV carriage by other MVPDs. As for Nielsen ratings, LBI alleges that EstrellaTV is valuable to Comcast because it garners Nielsen ratings above 0.1 in certain markets

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[249] Nissenblatt Decl. ¶ 31, Ex. 3.

[250] *Id.* ¶ 39, Ex. 5.

[251] Compl. ¶ 83.

[252] *Tennis Channel*, 717 F.3d at 986.

and is the fourth-ranked Spanish-language broadcast network.[253] What LBI does not allege, however, is that those ratings bear any relationship to the fees it demanded from Comcast, or how those ratings would translate into increased subscribership (and in turn, revenue) for Comcast to offset those fees. As Comcast's expert economist, Dr. Israel, explains, from an economic perspective, the question Comcast must answer when choosing to carry a network is not whether it has "positive ratings" (as many networks do), but rather whether the value of the network exceeds the costs Comcast will incur by carrying it.[254] Neither LBI nor its expert poses that question, much less answers it.

107. Indeed, even if LBI had alleged that it provides high ratings at a low cost—and this seems doubtful, given the high cost of LBI's proposals—this would not show a "net benefit" to Comcast because the data are not "correlated with changes in revenues to offset the proposed cost increase" incurred by broader distribution.[255] Thus, even if EstrellaTV's ratings give it some "value," standing alone they do not satisfy the "net benefit" showing that LBI must make to sustain a claim of carriage discrimination.

108. As for EstrellaTV's carriage by MVPDs and broadcast affiliates, LBI alleges that, because they carry the network, they "value" EstrellaTV.[256] But as Dr. Israel explains, the relevant question is not whether other MVPDs carry EstrellaTV, but whether those MVPDs carry the network on the terms LBI demanded from Comcast.[257] LBI alleges nothing about the value these market participants actually place on EstrellaTV: nothing about the level of

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[253] Compl. ¶¶ 45–46.

[254] Israel Decl. ¶ 16.

[255] *Tennis Channel*, 717 F.3d at 986.

[256] *See, e.g.*, Compl. ¶¶ 5, 54–57, 63.

[257] Israel Decl. ¶¶ 27–28.

carriage they give EstrellaTV, nothing about the fees they pay, and nothing else that would allow the Commission to determine that Comcast would derive a "net benefit" from carrying EstrellaTV on the terms LBI demanded from Comcast in 2014 and demands in this proceeding now. Their expert similarly sheds no light on these questions. Without more, LBI's allegations that it brings "value" to MVPDs are "mere handwaving."[258]

109. Although LBI has failed to come forward with any evidence of the fees it purportedly receives for carriage, publicly-available data from SNL Kagan show that in 2015 EstrellaTV earned only {[redacted]} in "network compensation" and only {[redacted]} in total non-advertising revenue.[259] This indicates that MVPDs pay LBI {[redacted]}[260] By contrast, LBI demanded {[redacted]} from Comcast. This marketplace evidence further demonstrates that Comcast could not receive a net benefit from carrying EstrellaTV on the terms LBI demanded.

110. Because LBI has not alleged any facts which, if proved, would establish that Comcast would receive a net benefit from EstrellaTV carriage, its claims of discrimination should be dismissed under the clear standard the D.C. Circuit just recently reaffirmed.

VI. ESTRELLATV IS NOT SIMILARLY SITUATED TO TELEMUNDO OR NBC UNIVERSO

111. LBI also fails to make out a circumstantial *prima facie* case of discrimination because it has not demonstrated that EstrellaTV is "similarly situated" to a Comcast-affiliated network.[261] LBI alleges that EstrellaTV is similarly situated to not just one,

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[258] *See Tennis Channel*, 717 F.3d at 985.

[259] Israel Decl. ¶ 29.

[260] *Id.* By comparison, SNL Kagan data show that in 2015 Telemundo earned over {[redacted]} in non-advertising revenue, indicating that MVPDs pay Telemundo far higher license fees than they pay LBI. *Id.*

[261] Second Report & Order, 26 FCC Rcd. at 11503–05, ¶¶ 13-14.

but two Comcast-affiliated networks, Telemundo and NBC Universo, and goes so far as to make the argument that it has "presented a stronger case on the merits than was made in prior Bureau-designated program carriage complaint cases (*e.g.*, *Tennis Channel* and *Game Show Network*)."[262] But *ipse dixit* assertions are not a substitute for evidence, and the scant evidence upon which LBI relies falls far short of the similarly situated analysis that is required to make out a *prima facie* case of discrimination

112. LBI's claim rests on the mistaken assumption that, because Telemundo, NBC Universo, and EstrellaTV all target Hispanic audiences, they must be similar to one another. The Commission does not share LBI's view of how to make out a *prima facie* case. Under the program carriage rules, LBI must show that EstrellaTV is similarly situated to Telemundo and NBC Universo based on "a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors."[263]

113. LBI has made no such showing, nor could it. Telemundo, NBC Universo, and EstrellaTV target and air different programming; indeed, LBI has admitted time and again that its strategy is for EstrellaTV to be "unique" in the Spanish-language television marketplace, and to explicitly counterprogram against established market leaders Univision and Telemundo. This means that the networks acquire, develop, and air dramatically different programming.

114. With their distinct programming, Telemundo, NBC Universo, and EstrellaTV target and capture different audiences; Telemundo targets a nationwide group of Spanish-speakers from all ethnic backgrounds, and delivers them in huge numbers, while EstrellaTV targets and attracts a heavily Mexican-American audience centered in the American

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[262] Compl. vii (referring to *Tennis Channel Inc. v. Comcast Cable Comm'ns, LLC*, 25 FCC Rcd. 14149 (MB 2010) and *Game Show Network, LLC v. Cablevision Sys. Corp.*, 27 FCC Rcd. 5133 (MB 2012)).

[263] Second Report and Order, 26 FCC Rcd. at 11504, ¶ 14.

West and Southwest. And while LBI has made broad claims about the comparable viewership of EstrellaTV and Telemundo, a comprehensive review of the Nielsen data show that Telemundo is far more popular, both nationally and in the relevant local markets.

115. Finally, Telemundo, NBC Universo, and EstrellaTV do not compete with one another in any economically meaningful way, including for programming, advertising, or viewership. The lack of significant competition between EstrellaTV and the Comcast-affiliated networks compels the conclusion that the networks are not similarly situated.

A. EstrellaTV Targets and Broadcasts Different Programming than Telemundo and NBC Universo

116. EstrellaTV's programming is not similar to Telemundo's or NBC Universo's. The very allegations in LBI's Complaint make this clear: EstrellaTV offers a "unique aggregation of Spanish language programming;" EstrellaTV consists of "unique programming;" EstrellaTV is defined by "unique original content." [264] LBI's allegations that EstrellaTV is "unique" are borne out not only by its repeated public statements to that effect, but by EstrellaTV's actual programming mix, which shows that the genre and look and feel of its programming is quite different than that of NBC Universo and Telemundo.

1. LBI Admits that EstrellaTV Is Different than Telemundo

117. Since it founded EstrellaTV, LBI has repeatedly emphasized that the network is different and "unique." Indeed, EstrellaTV has built its brand identity on "counter-programming" against Telemundo, a network that, as described in the expert report of Professor López-Pumarejo, was built on the mainstay of traditional Spanish-language television, the *telenovela*.[265] As Professor López-Pumarejo explains in detail, the *telenovela* is a distinct genre

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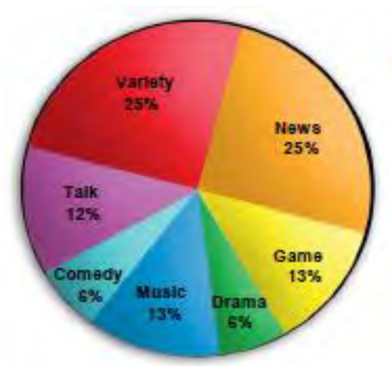
[264] Compl. ¶¶ 4, 39 n.89; Compl. Appendix ¶ 24.

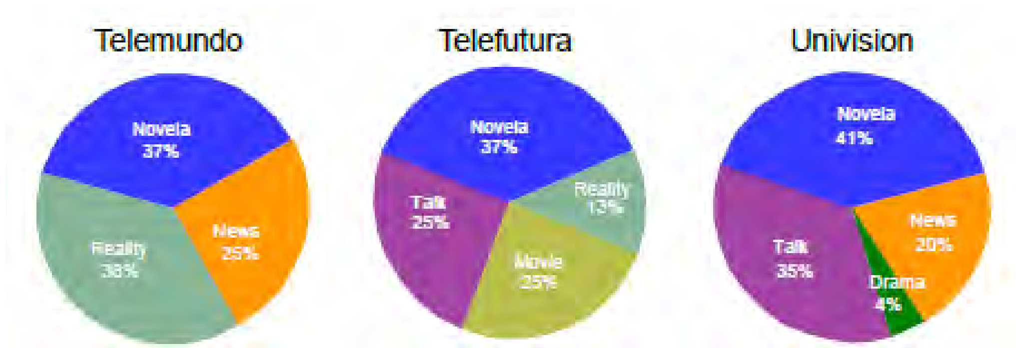
[265] López-Pumarejo Decl. ¶ 29.

of scripted fiction with a romantic storyline at the core and a recognizable broadcast structure.[266] *Telenovelas* attract large and devoted followings amongst Spanish-speaking audiences.

118. LBI made a conscious decision to make EstrellaTV's programming different. In a slide deck prepared for the network's 2009 upfront presentation for advertisers—a key forum for networks to brand themselves—EstrellaTV presented the following pie chart to describe the types of programming it was going to show:



and the following pie charts to describe the programming on leading Spanish-language networks, including Telemundo:[267]



119. At the time, LBI described its decision to offer a different programming genre mix as a strategic choice to "counter program existing Hispanic networks."[268] LBI's COO,

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266 Unlike many English-language genres, *telenovelas* air each weeknight for one hour for several months, and then conclude. *Id.* ¶ 20.

267 *Id.* Ex. 3 at 29.

268 *Id.* at 8; *see also id.* at 50 (highlighting EstrellaTV's "Successful Counter Programming").

Winter Horton, explained that EstrellaTV intended to "counterprogra[m]" by offering "talk shows, . . .variety shows, music shows, drama, [and] game shows."[269] LBI's CEO, Mr. Liberman, said that it did not "make [] sense to fight against" *telenovelas*; the "way of winning" was to "offer[] alternative programming."[270] "Univision and secondarily Telemundo[] air novellas [*telenovelas*] in primetime," but "[w]e don't air any novellas . . . .we provide an alternative—musical variety and comedy, scripted drama, comedy sketch shows. So it's just different from a novella in every way."[271]

120. In the years since 2009, *telenovelas* have continued to be the core of Telemundo's primetime programming; EstrellaTV's core programming continues to be anything but. In 2012, Mr. Horton characterized the Spanish-language television market as "oversaturated" with *telenovelas*, and said that LBI would offer different programming: "If you've got five restaurants in a neighborhood that only serve burgers and you open one that serves chicken, you're going to get some business. Not everybody wants to eat a burger every night."[272] To this day, in marketing individual shows, EstrellaTV promises viewers

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[269] New Network Star Set To Launch, *Radio and Television Business Report* (Jan. 26, 2009), *available at* http://rbr.com/new-network-star-set-to-launch/. Mr. Horton further said that "The only thing you're not going to see is a *novella*, because that's what we're programming against." *Id.*

[270] Laura Martinez, Q&A: Liberman Media's Lenard Liberman, *Multichannel News* (Feb. 18, 2009), *available at* http://www.lbimedia.com/Media/PressReleases/20090218.pdf.

[271] Executive Session with Lenard Liberman: Now's The Time For Next Hispanic Network, *TV News Check* (Mar. 17, 2009), *available at* http://www.tvnewscheck.com/article/30437/nows-the-time-for-next-hispanic-network. *See also* Declaration of Blima Tuller, at ¶ 10, *Televisa, S.A. v. Liberman Broadcasting, Inc.*, No. 12-cv-09344 (C.D. Cal. 2012) (noting that "Our EstrellaTV programming consists primarily of internally produced programs such as, among other things, comedy programs, news, musical variety shows, a talent show, a celebrity dance competition, a celebrity gossip show, and a talk show, as well as purchased programs including Spanish-language movies.").

[272] Adam Benzine, The Other America, *C21 Media* (Nov. 19, 2012), *available at* http://www.c21media.net/the-other-america/?print=1.

programming "no other network is providing"[273] and content "unlike anything you've ever seen on Spanish-language television."[274]

121. LBI described its programming in the same manner when it commenced retransmission consent negotiations with Comcast in the fall of 2014. During its initial October 14, 2014 meeting with Comcast, LBI {[redacted]}[276] As discussions continued throughout the fall of 2014, LBI {[redacted]}[277]

2. EstrellaTV In Fact Programs In Different Genres than Telemundo and NBC Universo

122. Comcast's experts, Robin Flynn of SNL Kagan and Professor López-Pumarejo, confirm that EstrellaTV has consistently executed its counter-programming strategy by showing different genres of programming than Telemundo and NBC Universo.[278]

123. The differences between EstrellaTV and Telemundo programming are stark. While Telemundo has for years focused its primetime lineup on a single genre, the

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[273] Adam Jacobson, Strong Ratings for Estrella TV in Los Angeles, *Multichannel News* (Dec. 16, 2014), *available at* http://www.multichannel.com/strong-ratings-estrella-tv-los-angeles/386347.

[274] *Rica Famosa Latina Promo Video*, *available at* http://videos.estrellatv.com/video/rica-famosa-latina-promo.

[275] Nissenblatt Decl. Ex. 2.

[276] *See* ¶ 21, *supra*; Nissenblatt Decl. Ex. 2.

[277] Compl. Ex. 19 (Nov. 26, 2014 email from J. Martinez).

[278] *See generally* López-Pumarejo Decl.; Flynn Decl.

telenovela, EstrellaTV did not air *telenovelas* at any point before the end of 2015 (well after Comcast made its decision to deny EstrellaTV fees and broader carriage).[279] Instead, EstrellaTV aired a range of lighter fare, nearly all of it unscripted: variety shows, sketch comedy, game shows, and tabloid news.[280] Thus, according to Professor López-Pumarejo, "Telemundo laser-focuses on *telenovela* programming appealing to a broad, multi-cultural Spanish-speaking audience," while "EstrellaTV intentionally produces and airs non-*telenovela* programming that provides lighter and less sophisticated entertainment to the Mexican-based audience that is its base."[281] NBC Universo, for its part, airs large blocks of national and international sports programming, dark and edgy scripted and unscripted programming, and celebrity reality shows.

124. As Comcast's expert, Ms. Flynn, demonstrates, the amount of airtime each network devotes to particular genres and the overall genre "mix" on each network reveal significant programming differences. Ms. Flynn's report uses publicly-available television programming data that categorizes, by genre, every program aired on EstrellaTV stations, Telemundo stations, and NBC Universo during the relevant period.[282]

125. Whether compared in primetime hours or total day, the data show that

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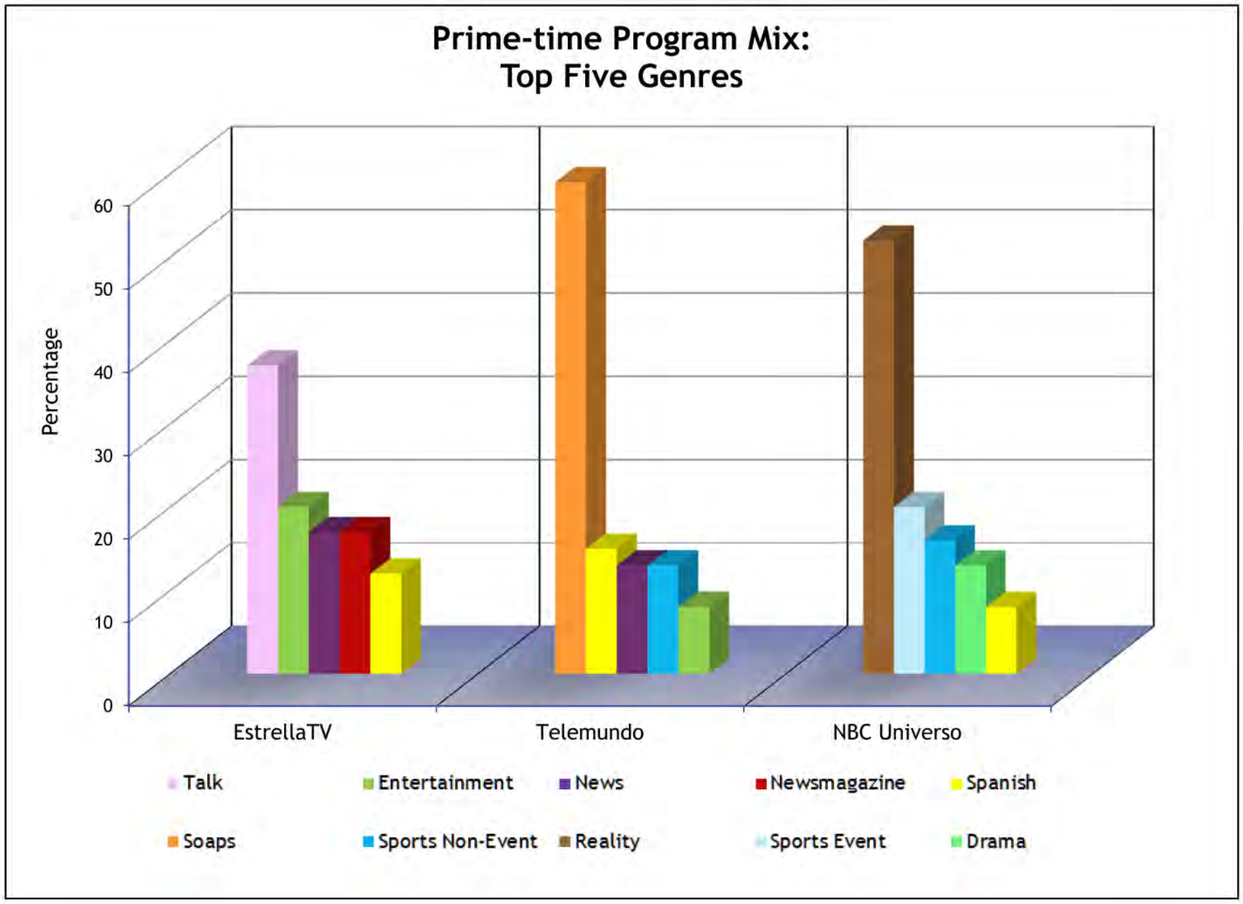
[279] No *telenovelas* appear in the representative EstrellaTV programming grids analyzed by Professor López-Pumarejo. *See* López-Pumarejo Decl. ¶ 36, Ex. 2. EstrellaTV appears to have begun airing one *telenovela* (*Talisman*) on September 21, 2015, and another (*Rosario*) on February 1, 2016. *See* El Talisman Comienza Mañana (Sept. 20, 2015), *available at* https://twitter.com/estrellatv/status/645731670780432384; U.S. Premiere of the Telenovela "Rosario" on Estrella TV, *Aaron Diaz World*, *available at* http://aarondiazworld.com/2016/01/u-s-premiere-of-the-telenovela-rosario-on-estrella-tv/. Contrary to EstrellaTV's assertion, *see* Compl. Ex. 12, *Secretos* is a show in which television detectives try to trap cheating spouses, not a scripted *telenovela*. López-Pumarejo Decl. ¶ 47.

[280] López-Pumarejo Decl. ¶ 36; Joe Flint, Spanish Network EstrellaTV Launches, But Will Its Star Shine or Fade?, *L.A. Times Blog* (Sept. 14, 2009), *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2009/09/spanish-network-estrellatv-launches-but-will-its-star-shine-or-fade.html.

[281] López-Pumarejo Decl. ¶ 48.

[282] Ms. Flynn conducted a detailed expert analysis comparing the programming EstrellaTV airs on the three stations at issue here—Houston, Denver, and Salt Lake City—to programming on Telemundo and NBC Universo for the period from July 1, 2014 and March 31, 2016, a range encompassing the period relevant to this dispute. For a detailed description of Ms. Flynn's methodology, see Flynn Decl. ¶¶ 6–10.

EstrellaTV's programming mix and predominant genres are not similar to the programming mix and predominant genres on either Telemundo or NBC Universo. For example, in primetime, 32% of EstrellaTV's programming falls within the "Talk" genre, with only 2% in the two "Sports" genres and no programming at all in the "Soaps" (*telenovela*) genre.[283] By contrast, 54% of Telemundo's primetime programming is in "Soaps," and both Telemundo and NBC Universo rely heavily on the two "Sports" genres.[284] As illustrated in Ms. Flynn's report[285]:



126. Moreover, EstrellaTV devotes almost half of its primetime programming to "Talk" and "Entertainment," which make up only 4-13% of Telemundo's primetime slate.

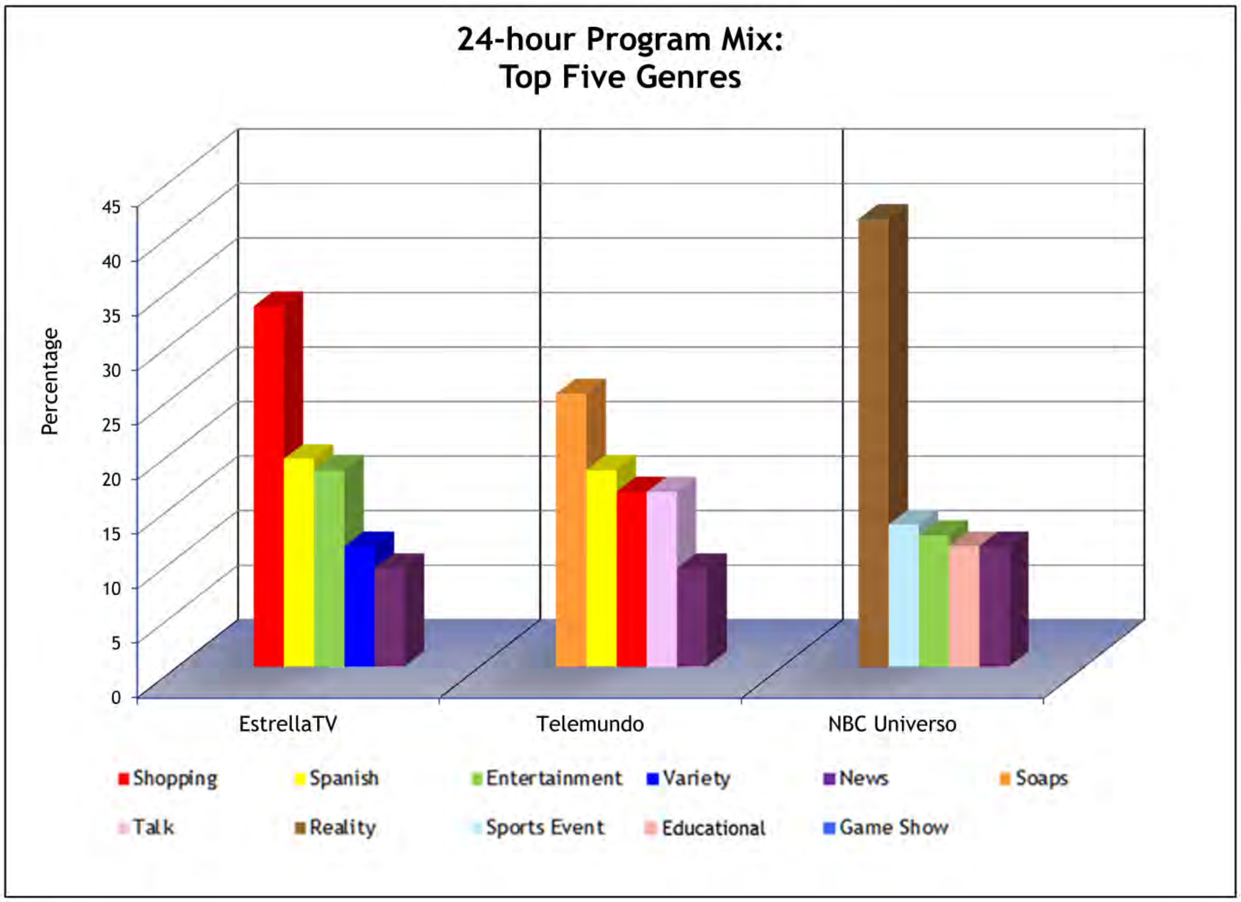
283 *See* Flynn Decl. ¶¶ 11–13. The two genres are "Sports event" and "Sports non-event."

284 *Id.*

285 *Id.* ¶ 12.

NBC Universo shows entirely different programming from EstrellaTV or Telemundo, and broadcasts "Reality" and the two "Sports" genres for 72% of its primetime schedule.[286]

127. On a total day (24 hour) basis, EstrellaTV's predominant programming category is "Shopping" (infomercials and paid programming) (29-31%), Telemundo's is "Soaps" (22%) (demonstrating, once again, the importance of that genre to the network), and NBC Universo's is "Reality" (38%).[287]



128. The networks also vary widely in terms of programming mix, meaning the percentage of broadcast hours devoted to particular genres. Overall, the five genres comprising

[286] *Id.* ¶ 13.

[287] *Id.* ¶ 14.

76% of EstrellaTV's programming make up only 32-41% of the programming on Telemundo and 14% of the programming on NBC Universo.[288]

129. Ms. Flynn's analysis makes clear that EstrellaTV airs significantly different content than either Telemundo or NBC Universo. The genre and programming mix differences highlighted in Ms. Flynn's analysis are precisely the distinctions that have been dispositive in past program carriage cases.[289] In the absence of any competing analysis from LBI (and there is none), they should be dispositive here as well.[290]

B. EstrellaTV Targets and Attracts a Different Audience than Telemundo and NBC Universo

130. Just as two networks that show different programming are dissimilar, two networks with different audience profiles are unlikely to be similarly situated under the Commission's rules.[291] In addition to programming in different genres, EstrellaTV, Telemundo, and NBC Universo target and attract different audiences within the Hispanic community. While Telemundo and NBC Universo target nationwide Hispanic viewers of all ethnicities, EstrellaTV looks to satisfy its core Mexican-American audience, located primarily in the West and Southwest.

131. The relevant analysis is set out in the declaration of Professor López-

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288 *Id.* ¶¶ 25–28.

289 *WealthTV*, 24 FCC Rcd. at 12977, ¶ 20.

290 Ms. Flynn's quantitative analysis is confirmed by the more qualitative review of programming on EstrellaTV, NBC Universo, and Telemundo conducted by Professor López-Pumarejo, who explains that the networks have a different "look and feel." *See* López-Pumarejo Decl. ¶ 66. EstrellaTV is generally lighthearted, in content and look and feel, and features festive music, clowns, sketch comedy, circus games, sets in pastels and crayon colors, double entendre and slang, and unscripted formats across day parts. By contrast, Telemundo and NBC Universo programming is often dramatic or edgy, with dark lighting and tones that amplify themes of crime, revenge, corruption, and drama. These characteristics, which describe the personality of the networks in terms of "visuals, the speech and dress of its hosts, music, subject matter, graphics, and other factors," have been credited in past carriage discrimination cases to find that two networks were not similarly situated. *Wealth TV*, 24 FCC Rcd. at 12976, 12977–80, ¶¶ 20–26, 23 n.78.

291 *WealthTV*, 24 FCC Rcd. at 12976, 12980–83, ¶¶ 27–34.

Pumarejo, who watched representative examples of the programming on each of the three networks. He observes that EstrellaTV's programming relies predominantly on Mexican talent, Mexican accents, and Mexican slang. Before moving to EstrellaTV, most of the network's stars gained prominence on the Mexican television network Televisa, which, as LBI acknowledges, produces shows "primarily for Mexican audiences."[292] EstrellaTV promotes its roster as "Mexican," promising shows featuring "a collection of Mexico's most famous comedic actors," a variety show hosted by "top Mexican actresses," and programming that "resonates with [its audience] easily, using famous actors from Mexico."[293] The network has also adopted a distinctly Mexican sound, featuring Mexican accents and slang throughout its programming.[294] Indeed, EstrellaTV refused to hire one prominent actress because, in her words, "[t]he owner of the channel and other people were saying that my accent was too Colombian, too prominent, and that it needed to be more neutral, Mexican, and in my last audition, which was more or less with more of a Mexican accent, they selected me."[295]

132. As Professor López-Pumarejo opines, EstrellaTV uses its Mexican actors and actresses to target and develop programming designed to appeal to Mexican-American audiences.[296] EstrellaTV's core comedy and variety acts derive from Mexican comedic

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[292] LBI has acknowledged, in a previous action, that "Televisa is a Mexican company that produces shows in Mexico *primarily for Mexican audiences*[.]" Declaration of Lenard Liberman, at ¶ 17, *Televisa, S.A.* v. *Liberman Broadcasting, Inc.*, No. 12-cv-09344 (C.D. Cal. 2012). *See also* Victor M. Tolosa, Televisoras de Habla Hispana En EU, *Excelsior* (Aug. 20, 2014), *available at* http://www.excelsior.com.mx/opinion/victor-m-tolosa/2014/08/20/977118 (noting that most stars on EstrellaTV are "Mexican artists who had jobs in Mexico on Televisa and found refuge in this chain."); López-Pumarejo Decl. ¶¶ 53–58.

[293] López-Pumarejo Decl. ¶ 54.

[294] *Id.* ¶ 55.

[295] *Id.* ¶¶ 55–58; Myriam Silva-Warren, Una 'Caleña' en Estrella TV, *CENTRO Tampa* (May 14, 2013), *available at* http://www.centrotampa.com/news/noticias/2011/may/05/una-cale-en-estrella-tv-ar-337692/. *Caleña* means "a woman from Cali, in Colombia."

[296] López-Pumarejo Decl. ¶¶ 56–57.

characters, the network hosts "the only award show spotlighting Mexican music," and even now, as it begins to expand into sports programming, it is focused on Mexican soccer matches.[297]

133. Finally, LBI management has acknowledged that it is targeting a primarily Mexican audience. Mr. Liberman explained that he was "branding [EstrellaTV with] big name actors, theatrical stars, and the best comedians from Mexico," because "[p]eople know these stars and follow them on our network when they cross the border."[298] One of EstrellaTV's recurring actors is a "Mexican who serves as the 'Grandpa' for generations of Mexican-Americans living in the U.S."[299] LBI has acknowledged that because of its regional Mexican focus, EstrellaTV would have to change its network personality were it to expand eastward from its Los Angeles base, in which the Hispanic population is predominantly of Mexican origin.[300]

134. EstrellaTV's focus on a Mexican-American audience stands in sharp contrast to Telemundo and NBC Universo's efforts to attract all Hispanic viewers, regardless of their background. As Professor López-Pumarejo explains, Telemundo's focus and appeal go back to its origins. Unlike EstrellaTV, which is a product of the Mexican-oriented Spanish-language television industry in the West, Telemundo is a dynamic network with roots in the hybrid Caribbean and South American media culture of Miami.[301] Its programming—shows, themes, talent, accents—reflects the diversity of the national Hispanic audience it seeks to

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[297] *Id.* ¶ 58.

[298] Jose Liberman's Dream: Make Big Money Quietly With Spanish TV, *Video Age Int'l* (Jan. 2010), http://www.videoageinternational.com/articles/2010/01/liberman.html.

[299] LBI Press Release, *LBI's 'El Show de Don Cheto' Becomes Anchor Program on Emmis Austin Radio's KLZT-FM* (Dec. 12, 2009), *available at* http://www.lbimedia.com/Media/PressReleases/20091214_DonChetoEmmisAustin.pdf.

[300] *See, e.g.*, Ayala Ben-Yehuda, A New Wave of Spanish-Language TV Networks Wants to Steal the Remote, *Billboard* (Oct. 24, 2009) (quoting Mr. Horton as saying that "as the network expands east, 'we'll continue with the regional acts but you'll see more pop acts.'").

[301] López-Pumarejo Decl. ¶¶ 15, 59.

obtain. Likewise, NBC Universo's programming is designed to appeal to broad, young, Hispanic audiences, regardless of background.[302] Both networks air programs set and/or produced in diverse locations such as Miami, Houston, Brazil, Mexico, Las Vegas, Colombia, and Manhattan, and the talent on the networks hails from all over Latin America.[303] On Telemundo, some stars even speak in the network's neutral accent, designed to universalize the appeal of its programs.[304] And the networks air quintessentially multinational sports programming, such as World Cup soccer and the Olympics.[305]

135. Indeed, demographic viewing data bear out the networks' differing audience targets. Nationwide, approximately {[redacted]} of the U.S. Hispanic viewing population is of Mexican descent.[306] Nielsen data for 2015 show that, consistent with its focus on a Mexican audience, EstrellaTV attracted an audience that was {[redacted]} of Mexican origin; by contrast, the applicable percentages on NBC Universo and Telemundo were {[redacted]} and {[redacted]} (reflecting Telemundo's efforts to reflect a broader Spanish-speaking audience).[307]

136. In addition, the demographic data that LBI has attached to its Complaint demonstrate further audience distinctions between EstrellaTV, on the one hand, and Telemundo and NBC Universo, on the other. According to LBI, EstrellaTV has an equal number of male and female viewers; Telemundo's audience, however, is 59% female and NBC Universo's is

302 *Id.* ¶¶ 10, 29, 49, 60.

303 *Id.* ¶¶ 21, 35, 59.

304 *Id.* ¶ 59.

305 *See, e.g.*, http://www.nbcuniversal.com/business/NBCUniverso (describing the network as offering sports programming "including FIFA World Cup™, NASCAR Mexico Series, NFL, Premier League and the 2016 Olympic Summer Games in Rio.").

306 Israel Decl. ¶ 49.

307 *Id.* These demographic differences are consistent with viewing data from 2014. *Id.*

61% male.[308] In addition, NBC Universo's median viewer age is 35, while EstrellaTV's is 43.[309] The Commission has previously recognized that demographic differences in the viewership of two networks are relevant to the question of whether the networks are similarly situated.[310]

C. EstrellaTV Does Not Compete with Telemundo or NBC Universo in Any Meaningful Way

137. The conclusions reached by Ms. Flynn and Professor López-Pumarejo are confirmed by the economic analyses performed by Comcast's economist, Dr. Israel, who concludes that the economic evidence does not provide a basis for concluding there is significant competition between EstrellaTV and Telemundo or NBC Universo. Put another way, there is no economic basis on which to conclude that EstrellaTV is similarly situated to either of the Comcast-affiliated networks.

138. First, ratings data show Telemundo to be a much more popular network than EstrellaTV, both on a national basis and in local markets. In contrast to the narrow review engaged in by LBI's expert, Dr. Israel examined national ratings and local ratings in all of the markets where EstrellaTV ceased retransmission, across primetime and total-day dayparts, and in both households and the key demographic of persons 18 to 49. These ratings show that EstrellaTV's ratings are only a fraction of Telemundo's on a national level and in two of the three local markets.[311] Because Telemundo is much more popular with viewers, it earns far more than EstrellaTV from advertising sales. According to SNL Kagan data, Telemundo had {[redacted]

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308 Compl. Ex. 12.

309 *Id.*

310 *See WealthTV*, 24 FCC Rcd. at 12980–82, ¶¶ 27–34.

311 Israel Decl. ¶¶ 21–26, Appendix 2 Exs. 2–4. Although EstrellaTV's ratings are either comparable to or, in some instances higher than, those of NBC Universo, that fact in and of itself does not provide an economic basis to conclude that the networks are significant competitors or similarly situated.

[redacted]} in net advertising revenue in 2015, compared to {[redacted]} million for EstrellaTV.[312]

139. As Dr. Israel notes, comparable ratings do not in and of themselves demonstrate competition, so he has devised a more direct test: whether a statistically significant number of EstrellaTV viewers migrated to either Telemundo or NBC Universo after LBI pulled the EstrellaTV signals in Houston, Denver, and Salt Lake City.[313] As described above, Dr. Israel conducted a regression analysis of Nielsen ratings in these markets for the period January 2013 to March 2016.[314] Dr. Israel found no statistically significant relationship between the reduction in EstrellaTV's viewership in Houston, Denver, and Salt Lake City and any change in the ratings of either Telemundo or NBC Universo, leading him to conclude that there was no significant competition between the networks in those markets.[315]

140. Second, Dr. Israel examined programming expenditure on the two networks and concluded that in 2014 Telemundo spent substantially more on programming—[redacted]}—than did EstrellaTV, which spent only {[redacted]}.[316] Because basic economic principles suggest that networks are willing to spend more on their programming when they perceive a higher demand for it, this dramatic difference in spending indicates the higher demand for Telemundo than EstrellaTV.[317]

141. Third, Dr. Israel reviewed Nielsen data to test LBI's claim that EstrellaTV's overlap in advertisers with Telemundo and NBC Universo suggests that the networks compete. He concludes that no such conclusion can be drawn from the available

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312 *See* Israel Decl. ¶ 29.

313 *Id.*¶ 42.

314 *Id.* ¶ 43.

315 *Id.* ¶ 44, Appendix 3 Ex. 6.

316 *Id.*¶ 48.

317 *Id.*

evidence, for at least two reasons. First, the mere existence of common advertisers on the networks does not prove competition between those networks for advertising dollars. Many of the advertisers cited by LBI are large advertisers that advertise on a broad array of broadcast and cable networks. For example, Ford spent more than $2.5 billion in advertising in 2014; it spent only small drops of its advertising budget on Telemundo {[redacted]}, EstrellaTV {[redacted]}, and NBC Universo {[redacted]}.[318] The mere fact that Ford advertises on all three networks reveals nothing about the degree of competition between them. Second, the fact of advertiser overlap is meaningless without examining the amount of advertising expenditures on each. The Complaint lists Clorox as an advertiser common to EstrellaTV and Telemundo, but in 2014, Clorox spent {[redacted]} advertising on Telemundo and only {[redacted]} on EstrellaTV.[319]

142. For all of the foregoing reasons, LBI cannot make out a *prima facie* case that EstrellaTV is similarly situated to Telemundo and NBC Universo. The networks have different programming. They have different and differently-sized audiences. And there is no economic evidence to show significant competition between them.

VII. LBI HAS NOT BEEN UNREASONABLY RESTRAINED IN ITS ABILITY TO COMPETE

143. LBI has not alleged any specific facts showing that Comcast's carriage decision unreasonably restrained LBI's ability to compete fairly, as required by Section 616 and the Commission's rules.[320] Nor could LBI prevail on such a claim. In order to sustain a claim

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[318] *Id.*¶ 50.

[319] Compl. Ex. 12; Israel Decl. ¶ 51.

[320] 47 C.F.R. § 76.1301(c). Count I of the Complaint clearly asks the Commission to find that Comcast violated Section 616 and 47 C.F.R. § 1301(c), which require LBI to plead and prove that it has been unreasonably

that it has been "unreasonably restrained" by Comcast, LBI must show that Comcast "has market power in the relevant market."[321] But the {[redacted]} potential viewers LBI lost as a result of pulling its signal in Houston, Denver, and Salt Lake City are a small fraction—less than 2%—of television viewers nationwide. Moreover, focusing only on those three markets, there are ample alternatives for EstrellaTV to reach viewers, including directly through its over-the-air signal. According to SNL Kagan data, as of the first quarter of 2015, DBS and Telco providers captured {[redacted]} of the market share among MVPD subscribers in Houston and {[redacted]} of the market share in Salt Lake City.[322] By comparison, Comcast had only {[redacted]} of the market share in Houston, and {[redacted]} in Salt Lake City (where it trailed DirecTV, standing alone).[323] Even in Denver, the affected market where Comcast had the highest penetration {[redacted]}, it faced robust competition from DirecTV {[redacted]}, and DISH {[redacted]}.[324] If Comcast customers are unhappy at not receiving EstrellaTV they can simply watch over the air or switch providers, as LBI has repeatedly encouraged them to do.

VIII. THE RELIEF SOUGHT BY LBI VIOLATES THE FIRST AMENDMENT

144. The First Amendment forbids the Commission from compelling speech.[325] A Commission order requiring Comcast to carry EstrellaTV under the terms and conditions it demands in its Complaint—on a nationwide basis, in multiple formats, and for fees that no other

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restrained in its ability to compete. Other than a few unsubstantiated general allegations in a footnote, LBI makes no effort to bear its burden. *See* Compl. ¶ 63 n.89.

321 *Tennis Channel*, 717 F.3d at 991 (Kavanaugh, J., concurring); *see also Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 165–66 (2d Cir. 2013) (twice stating that "we expect that the FCC will consider market power in evaluating the vast majority of future § 616(a)(3) complaints").

322 SNL Kagan, *U.S. Multichannel Operator Comparison by Market*, *available at* https://www.snl.com/interactivex/OperatorComparisonByMarket.aspx.

323 *Id.*

324 *Id.*

325 *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that "the right of freedom of thought protected by the First Amendment . . . includes . . . the right to refrain from speaking at all.").

MVPD pays[326]—would force Comcast to distribute the network to customers when it otherwise would choose not to do so, in violation of Comcast's First Amendment rights.[327]

145. The remedy sought by LBI merits strict scrutiny. Although the Commission's program carriage rules under which LBI seeks relief do not explicitly mention programming content, they allow the Commission to order Comcast to carry EstrellaTV based on considerations of genre, target programming, and target audience—all factors that necessarily implicate EstrellaTV's content.[328] They are, therefore, *de facto* content based.[329] This is especially true as applied to LBI's claim, which relies on allegations concerning its "Prime Time News" programming and denigrates as "window dressing" the other Spanish-language and Hispanic-focused programming Comcast has chosen to carry.[330] While the Commission "may think it preferable simply as a matter of communications policy to equalize or enhance the voices of various. . . networks"—like one that has a primetime news hour—"the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[331]

146. Nevertheless, ordering the relief LBI seeks would do just that, by forcing

326 *See* Compl. ¶¶ 83, 89(c).

327 Cable distributors such as Comcast unquestionably "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting Sys.,* 512 U.S. at 636.

328 Second Report & Order, 26 FCC Rcd. at 11506, ¶ 17.

329 *See, e.g., Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) ("Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."); *see also id.* at 2228 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." (internal quotation marks omitted)).

330 Compl. ¶¶ 48, 58.

331 *Tennis Channel*, 717 F.3d at 994 (Kavanaugh, J., concurring) (internal quotation omitted).

Comcast to carry EstrellaTV, perhaps at the expense of some other network it would rather carry (including the ones LBI labels "window dressing"). This is content-based regulation, in violation of the First Amendment, and it cannot survive strict scrutiny.[332]

147. LBI's requested relief does not survive intermediate scrutiny either. In order to do so, LBI must show that Comcast has "market power" in the relevant markets sufficient to "unreasonably restrain [EstrellaTV's] ability to compete fairly."[333] Otherwise, application of the program carriage regime to Comcast does not establish an "important or substantial government interest" necessary to enforce a content-neutral regulation of Comcast's speech.[334]

148. Comcast does not, however, have market power in the "national video programming distribution market" in which, as a self-described "national network," EstrellaTV competes.[335] This is because "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992" when it put the program carriage regime in place.[336] For example, in 2013, the most recent year for which the Commission has reported data, ninety-nine percent of homes had access to at least three MVPDs, and over a third had access to at least four.[337] For over a decade, satellite services, which compete aggressively with large traditional cable operators, have been available to subscribers in "every home in the

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[332] *See*, *e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). Neither LBI nor the Commission could show that ordering LBI's requested relief would be narrowly tailored to serve a compelling state interest.

[333] *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 165 (2d Cir. 2013) (internal quotation and citation omitted).

[334] *Turner Broadcasting Sys.*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[335] *Tennis Channel*, 717 F.3d at 994 (Kavanaugh, J., concurring).

[336] *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 8 (D.C. Cir. 2009).

[337] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Annual Report, 30 FCC Rcd. 3253, ¶ 31 (2015) ("*Sixteenth Video Competition Report*").

country,"[338] and telco cable distributors AT&T and Verizon have increased their share of the market significantly.[339]

149. Because Comcast does not have market power in the national programming distribution market, ordering it to carry EstrellaTV in this proceeding would not serve an important government interest, and would therefore contravene the First Amendment: without a showing of market power, "the FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon or Politics and Prose or Barnes and Noble what books to sell . . . ."[340]

150. The remedy LBI seeks in this proceeding is, therefore, impermissible, and its request for relief should be dismissed.

RESPONSE TO NUMBERED PARAGRAPHS

Comcast responds to the numbered paragraphs in the Complaint as follows:

1. Denies paragraph 1.

2. Denies paragraph 2, except states that the Commission's order and the statute referenced therein speak for themselves.

3. Denies paragraph 3.

4. Denies paragraph 4, except lacks knowledge or information sufficient to admit or deny the ownership of EstrellaTV and the allegations in the third and fourth sentences of the paragraph, and admits that LBI is unique.

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[338] *Time Warner Entm't Co. v. F.C.C.*, 240 F.3d 1126, 1134 (D.C. Cir. 2001).

[339] *See Sixteenth Video Competition Report*, 30 FCC Rcd. at ¶¶ 26–27; *see also Tennis Channel*, 717 F.3d at 993–94 (Kavanaugh, J., concurring).

[340] *Tennis Channel*, 717 F.3d at 994 (Kavanaugh, J., concurring). To the extent Comcast's market power in Houston, Denver, and Salt Lake City is at all relevant, LBI cannot make a showing that Comcast has power in any of those markets sufficient to unreasonably restrain LBI. *See Time Warner Cable*, 729 F.3d at 164–65. Comcast faces fierce competition from DBS and telco providers in each of those markets, and does not have "bottleneck" control of cable distribution in any of them.

5. Denies paragraph 5.

6. Denies paragraph 6.

7. Denies paragraph 7, except states that the statute and rules referenced therein speak for themselves.

8. Denies paragraph 8, except states that the Commission's order and rules referenced therein speak for themselves.

9. Denies paragraph 9, except states that the appellate brief referenced therein speaks for itself.

10. Lacks knowledge or information sufficient to admit or deny the allegations in paragraph 10, except admits that EstrellaTV is not affiliated with Comcast, and admits LBI's address and telephone number.

11. Denies paragraph 11, except admits that Comcast is the largest cable-only MVPD in the United States, admits that Comcast operates as an MVPD in 69 markets or more, admits that Comcast's 2015 consolidated revenue was $74.5 billion, admits that Comcast has an ownership interest in the networks referenced in the fourth sentence of the paragraph, admits that Comcast acquired and distributes Telemundo and NBC Universo, and admits that Comcast announced the rebranding of NBC Universo on February 1, 2015.

12. Denies paragraph 12.

13. Admits paragraph 13.

14. Denies paragraph 14, except admits that the Commission has jurisdiction over program carriage disputes pursuant to Section 616.

15. Admits paragraph 15.

16. Denies paragraph 16, except admits that declarations referenced therein

are attached to the Complaint, and states that these declarations speak for themselves.

17. Denies paragraph 17, except states that the statute, regulations, and Congressional testimony referenced therein speak for themselves.

18. Admits paragraph 18.

19. Admits paragraph 19.

20. Denies paragraph 20, except states that the Commission implementation order referenced therein speaks for itself.

21. Denies paragraph 21, except states that the Commission's order and the letter referenced therein speak for themselves.

22. Denies paragraph 22, except states that the memorandum of understanding referenced therein speaks for itself.

23. Denies paragraph 23, except states that the Commission's order referenced in paragraph 23 speaks for itself.

24. Denies paragraph 24, except admits that Spanish-language viewers are a rapidly growing segment of the United States video marketplace, and states that the Commission's order referenced therein speaks for itself.

25. Denies paragraph 25.

26. Denies paragraph 26, except admits that broadcasters are typically distributed over-the-air through primary channels or secondary multicast channels, and supplemented by MVPD distribution of these primary or secondary channels.

27. Denies paragraph 27.

28. Denies paragraph 28, except admits that Los Angeles is the largest Hispanic DMA in the United States, lacks knowledge or information sufficient to admit or deny

the allegations concerning MVPD carriage of EstrellaTV or other networks in the Los Angeles DMA, and states that Nielsen data concerning the number of Hispanic homes in particular DMAs speak for themselves.

29. Denies paragraph 29.

30. Denies paragraph 30, except admits that Dallas-Fort Worth is the fifth-largest Hispanic DMA in the United States, lacks knowledge or information sufficient to admit or deny the allegations concerning MVPD carriage of EstrellaTV or other networks in the Dallas-Fort Worth DMA, and states that Nielsen data concerning the number of Hispanic homes in a particular DMA speak for themselves

31. Denies paragraph 31, except states that the Commission's order referenced therein speaks for itself.

32. Denies paragraph 32, except admits that Estrella TV counterprograms against Univision and Telemundo's *telenovela* programming.

33. Denies paragraph 33.

34. Denies paragraph 34.

35. Denies paragraph 35, except lacks knowledge or information sufficient to admit or deny the allegations concerning MVPD and broadcast affiliate distribution of EstrellaTV.

36. Denies paragraph 36, except admits that LBI elected must-carry status for EstrellaTV's broadcast stations in Houston, Denver, and Salt Lake City for the election cycle that ended December 31, 2014, admits that LBI elected retransmission consent for EstrellaTV in these markets for the cycle beginning January 1, 2015, admits that LBI demanded increased distribution and compensation for carriage from Comcast, and lacks knowledge or information

sufficient to admit or deny LBI's must-carry/retransmission consent elections in other DMAs.

37. Denies paragraph 37, except admits that LBI sought increased distribution and compensation for carriage from Comcast.

38. Denies paragraph 38, except states that the correspondence referenced therein speaks for itself.

39. Denies paragraph 39, except admits that Comcast and LBI engaged in multiple email exchanges and face-to-face meetings.

40. Denies paragraph 40, except states that the correspondence referenced therein speaks for itself.

41. Denies paragraph 41, except states that the correspondence referenced therein speaks for itself.

42. Denies paragraph 42.

43. Denies paragraph 43.

44. Denies paragraph 44.

45. Denies paragraph 45, except admits that Harold W. Furchtgott-Roth's report is attached to the Complaint.

46. Denies paragraph 46.

47. Denies paragraph 47.

48. Denies paragraph 48, except states that Comcast carries a substantial amount of unaffiliated programming targeted to the Hispanic community, has increased such carriage since Comcast's acquisition of NBCUniversal, and the press releases referenced therein speak for themselves.

49. Denies paragraph 49.

50. Denies paragraph 50.

51. Denies paragraph 51.

52. Denies paragraph 52.

53. Denies paragraph 53.

54. Denies paragraph 54.

55. Denies paragraph 55, except lacks knowledge or information sufficient to admit or deny the allegations concerning MVPD and broadcast affiliate distribution of EstrellaTV, the value those distributors place on EstrellaTV, and the ownership interest those distributors have in programming channels or networks.

56. Denies paragraph 56.

57. Denies paragraph 57, except lacks knowledge or information sufficient to admit or deny the allegations concerning MVPD and broadcast affiliate distribution of EstrellaTV, the value those distributors place on EstrellaTV, and the ownership interest those distributors have in programming channels or networks.

58. Denies paragraph 58.

59. Denies paragraph 59.

60. Denies paragraph 60, except states that the memorandum of understanding referenced therein speaks for itself.

61. Denies paragraph 61.

62. Denies paragraph 62.

63. Denies paragraph 63, except lacks knowledge or information sufficient to admit or deny the allegations concerning MVPD and broadcast affiliate distribution of EstrellaTV.

64. Denies paragraph 64, except states that the letter referenced therein speaks for itself.

65. Denies paragraph 65, except states that the correspondence and statement referenced therein speak for themselves.

66. Denies paragraph 66, except lacks knowledge or information sufficient to admit or deny the allegations concerning the ownership of Azteca, MundoMax, and EstrellaTV, and states that the documents referenced in paragraph 66 speak for themselves.

67. Denies paragraph 67.

68. Denies paragraph 68, except states that the correspondence referenced therein speaks for itself.

69. Denies paragraph 69, except admits that Comcast continues to retransmit EstrellaTV's low-power stations in New York and Chicago, and states that the correspondence referenced in paragraph 69 speaks for itself.

70. Denies paragraph 70, except admits that Comcast continues to retransmit broadcast stations with which EstrellaTV has signed affiliate agreements in multiple markets.

71. Denies paragraph 71, except states that the correspondence referenced therein speaks for itself.

72. Denies paragraph 72, except states that the correspondence referenced therein speaks for itself.

73. Denies paragraph 73.

74. Denies paragraph 74.

75. Denies paragraph 75.

76. Denies paragraph 76.

77. Denies paragraph 77, except states that the Hearing Designation Order referenced therein speaks for itself.

78. Denies paragraph 78, except states that the Hearing Designation Order referenced therein speaks for itself.

79. Denies paragraph 79.

80. Denies paragraph 80.

81. Denies paragraph 81.

82. Denies paragraph 82.

83. Denies paragraph 83.

84. Denies paragraph 84.

85. Denies paragraph 85, except states that the correspondence referenced therein speaks for itself.

86. In response to paragraph 86, incorporates Comcast's responses to paragraphs 1 through 85 of the Complaint.

87. Denies paragraph 87.

88. In response to paragraph 88, incorporates Comcast's responses to paragraphs 1 through 85 of the Complaint.

89. Denies paragraph 89.

90. Denies paragraph 90.

CONCLUSION

The Complaint should be dismissed or denied without further proceedings.

Respectfully submitted,

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June 7, 2016

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

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

DECLARATION OF FRANCIS M. BUONO

1. My name is Francis M. Buono. I am Senior Vice President, Legal Regulatory Affairs, and Senior Deputy General Counsel for Comcast Corporation (collectively, with Comcast Cable Communications, LLC, "Comcast").

2. I have read Comcast's Answer and to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and it is not interposed for any improper purpose.

Dated: Philadelphia, Pennsylvania
June 6, 2016

Francis M. Buono
Francis M. Buono

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

DECLARATION OF MICHAEL NISSENBLATT

1. My name is Michael Nissenblatt. I am Senior Vice President, Content Acquisition for Comcast Cable ("Comcast").

2. I have worked at Comcast since 2001, and have been in my current role since 2012. Within Comcast's larger Content Acquisition group, I oversee a team responsible for negotiating agreements with broadcast stations and broadcast networks seeking carriage on Comcast cable systems. I served as the lead negotiator in Comcast's discussions with Liberman Broadcasting, Inc. (referred to here as either "LBI" or "EstrellaTV") in 2014 and 2015 concerning Comcast's carriage of EstrellaTV, a Spanish-language broadcast network owned by LBI. Working with my team in the Content Acquisition group and other senior executives, I made the decision to reject EstrellaTV's demand that Comcast **{**[redacted]**}**, and the decision not to resume carriage of EstrellaTV on Comcast's systems

in Houston, Denver, and Salt Lake City after EstrellaTV decided to pull its signal for retransmission to Comcast customers in those markets in February 2015.

3. I understand that LBI has filed a carriage complaint alleging that Comcast's decision not to pay retransmission consent fees to LBI in return for carriage in these three markets, and its refusal to increase EstrellaTV's distribution on other Comcast systems (for which LBI also sought fees), is driven by the fact that EstrellaTV is not affiliated with Comcast. I further understand that LBI claims that Comcast refused to pay fees and restricted EstrellaTV's distribution in order to benefit Comcast's affiliated Spanish-language networks, Telemundo and NBC Universo. Neither claim is true. Neither EstrellaTV's ownership nor Telemundo and NBC Universo factored into my or my team's decision making concerning the terms and conditions of carriage of EstrellaTV in any way. To the contrary, I made the decision to reject EstrellaTV's request based on my understanding of, and an evaluation of, the demand for the network among Comcast's customers and whether that demand supported the expansion of carriage and the **{**[redacted]**}** in carriage fees sought by EstrellaTV. For me, the available information led to only one decision: Comcast should continue to carry EstrellaTV in the markets where Comcast had historically carried the network (and potentially provide more distribution in other markets), provided that EstrellaTV continue to deliver its programming without charge. That is the arrangement that Comcast previously had with EstrellaTV, **{**[redacted]**}**. This is what I consistently offered EstrellaTV in response to its request for retransmission fees. But EstrellaTV refused to accept our good faith offers, choosing instead to pursue a heavy-handed negotiating strategy that culminated in its voluntary decision to pull its signal in Houston, Denver, and Salt Lake City. After EstrellaTV pulled its

signal we saw no meaningful demand for the network among Comcast customers in these markets. After our repeated offers to relaunch and carry the EstrellaTV stations were rejected by LBI, we then decided that it would be better to dedicate our scarce bandwidth to other uses, and determined that it was not worth it to our customers to pursue voluntary carriage of EstrellaTV in these markets any further.

4. Before I turn to the negotiations with EstrellaTV, I will first address relevant background concerning the relationship between cable operators such as Comcast and broadcast networks generally, Comcast's carriage of Spanish language broadcast networks, and Comcast's historical carriage of EstrellaTV. This discussion provides important context for showing the unreasonableness of EstrellaTV's carriage demand, and why LBI's allegations that Comcast acted to protect Telemundo and NBC Universo are not only untrue, but also illogical. I then turn to the details of the negotiations between Comcast and EstrellaTV in 2014 and 2015, including our reasons for rejecting EstrellaTV's various unprecedented proposals for **{**[redacted]} license fees. I then review the paucity of customer complaints that were raised when EstrellaTV pulled its signals in Houston, Denver, and Salt Lake City, notwithstanding a sustained anti-Comcast public relations campaign waged by EstrellaTV in an effort to persuade Comcast customers to disconnect their service. Finally, I explain why EstrellaTV's efforts to connect its complaint to Comcast's carriage of NBC Universo are without merit.

The Relationship between Broadcast Networks and Cable Operators

5. Broadcast networks, including the English-language "Big Four" (NBC, CBS, ABC, and Fox), the Spanish-language "Big Three" (Univision, Telemundo, and UniMás), and dozens of less-popular English and Spanish-language broadcast networks, transmit their programming over the air in television markets across the country through owned and operated

("O&O") broadcast stations and independently-owned broadcast stations ("affiliates"). Since 2011, Comcast has owned both the NBC and Telemundo broadcast networks and, in certain markets, O&O stations that transmit their programming.

6. Under the FCC's regulatory regime, broadcast networks obtain carriage on the systems of cable operators such as Comcast in two principal ways. First, any broadcaster that operates a "full-power" station, that is, one that transmits a full-power digital signal in a particular market, may opt for "must-carry" status, in which case all cable operators in that market must distribute the station's signal to their customers. Must-carry guarantees carriage but provides no compensation for a broadcaster. Alternatively, a broadcaster may seek to be carried by a cable operator through a negotiated "retransmission consent" agreement that may include compensation and other terms. Broadcast stations must elect either must-carry or retransmission consent status every three years.

7. Whereas cable operators are required to carry the signals of broadcast stations that elect must-carry, they are not obligated to carry the signals of broadcast stations that elect retransmission consent. Rather, those stations are carried only if the broadcaster and cable operator agree on the terms and conditions of carriage, which can vary based on the market, the appeal of the programming, and numerous other factors. {[redacted]}

8. A "low-power" broadcast station (or "LPTV")—that is, one that transmits a low-power signal in a particular market—generally is not entitled to insist on mandatory must-carry carriage (although certain LPTVs can). Many low-power stations nonetheless obtain carriage on cable systems by entering into voluntary carriage agreements with cable operators such as Comcast. {[redacted]}

9. Finally, broadcasters can and often do obtain distribution of their network programming on a cable operator's systems by negotiating for placement of the programming with a local television station owner in a particular market, instead of arranging for carriage directly through the cable operator. In these cases, the local station typically has a retransmission consent agreement with a cable operator that requires carriage of both the station's "primary" signal and additional "multicast" signals. The station can put the network programming on either the primary or multicast signal. More valuable programming, (*e.g.*, a Big 4 English-language network or Big Three Spanish-language network) is typically placed on the primary signal of the local broadcast station, which becomes an "affiliate" of the broadcast network. Less valuable programming is typically placed on the station's multicast signal.[1]

Comcast's Carriage of Broadcast Networks

10. Comcast's principal objective is to provide attractive programming to its customers at a price that provides them with a good value proposition. Comcast faces intense competition for video customers from DBS operators such as DirecTV and DISH, as well as wireline competitors such as Verizon FIOS and AT&T U-verse, and overbuilders such as RCN

[1] Although broadcast networks largely rely on TV antennas (and retransmission by cable operators) for their distribution, some broadcast networks also make a satellite feed of their signal available to cable operators. If a cable operator elects to transmit the satellite signal, it can then distribute the network to customers in so-called "white areas" where the network does not have a broadcast antenna.

and WOW! (all multichannel video programming distributors or "MVPDs"). Increasingly, Comcast also faces competition from online video distributors, which now provide both live linear and on-demand programming to viewers.

11. In this intensely competitive environment, cable operators such as Comcast must constantly assess how to provide compelling programming that customers crave at a price and in packages that those customers will find affordable and attractive. Cable operators are also capacity-constrained: there are simply many more cable and broadcast programmers seeking carriage on our cable systems than our bandwidth allows. Increasing demand for bandwidth-intensive high-definition channels is also putting pressure on Comcast's available network capacity.

12. Similarly, cable operators such as Comcast have been under increasing cost pressure in recent years as content acquisition costs have skyrocketed. **{**[redacted]**}** As a result, Comcast is always seeking to strike a balance between content acquisition costs and providing programming that its customers demand. That is as true for our carriage of Spanish-language programming as it is for English-language programming.

13. **{**[redacted]

[redacted]}.

14. {[redacted]} {[redacted]} notwithstanding the fact that it is and was consistently the second-highest rated Spanish language broadcast network, both nationally and in most local markets. {[redacted]**}**

15. **{**[redacted]**}**

<u>Comcast's Carriage of EstrellaTV</u>

16. Comcast was EstrellaTV's largest distributor, until February 2015, when EstrellaTV pulled its signals from Comcast in Houston, Denver, and Salt Lake City. Comcast distributed EstrellaTV's O&O stations in these three markets to {[redacted]} customers under must-carry elections. Comcast also carried, and continues to carry, a full-power EstrellaTV affiliate in San Francisco (reaching over {[redacted]} current customers) as a must-carry station. **{**[redacted]**}**

17. Comcast has also entered into voluntary agreements for carriage of EstrellaTV's O&O low-power stations in New York and Chicago (serving, together, {[redacted]} customers). **{**[redacted]**}** Finally, Comcast distributed EstrellaTV to {[redacted]} customers in various other markets, including large Hispanic markets such as Albuquerque and Miami, through agreements with EstrellaTV broadcast affiliates that transmit EstrellaTV on their multicast signals. **{**[redacted]**}**

Initial Discussions with EstrellaTV Regarding Retransmission Consent

18. In September 2014, I learned that EstrellaTV intended to opt out of must-carry carriage in Houston, Denver, and Salt Lake City, and seek a retransmission consent agreement for the three-year term beginning January 1, 2015. Michael Ruggiero from ATV Broadcast, a consulting company that assists broadcasters in their negotiations with cable providers, reached out to me on behalf of EstrellaTV. Mr. Ruggiero also told me {[redacted]} that he would be working with John Heffron, LBI's Executive Vice President, Network and Digital Content.

19. {[redacted]

[redacted]} As mentioned above, even EstrellaTV's third-party owned full-power affiliate in San Francisco is, and has historically been, carried pursuant to must-carry. **{**[redacted]**}**

20. I nonetheless embarked upon a good-faith negotiation with EstrellaTV. Mr. Ruggiero specifically noted in an email dated September 8, 2014 that **{**[redacted]**}** which was certainly true. On October 14, 2014, certain of my colleagues and I met with Mr. Ruggiero, Lenard Liberman (CEO of LBI), John Heffron (Executive Vice President, Network and Digital Content for LBI), Blima Tuller (CFO of LBI) and Rocky Delgadillo (an LBI board member).

21. When embarking on a carriage negotiation, it is my ordinary practice to understand a station's or network's position and appeal in the marketplace by reviewing ratings, the network's distribution platform (*e.g.*, affiliated full-power stations, LPTVs, multicast signals), as well as the level and breadth of carriage of the network by Comcast's competitors. Accordingly, prior to the October 14, 2014 meeting, my team assembled and reviewed EstrellaTV's carriage on Comcast systems in the top 40 Hispanic markets, as well as noting its carriage by Time Warner Cable ("TWC") (as Comcast then had an agreement to merge with TWC, which was called off in April of 2015). Our analysis showed that, as of October 2014, Comcast distributed EstrellaTV to approximately {[redacted]} customers through a combination of must-carry and other arrangements. {[redacted]} *See* Exhibit 1 at 2.

22. I also looked at the carriage of EstrellaTV in markets in which the network does not have a signal eligible for must-carry status, to see whether competitors were granting EstrellaTV carriage beyond their obligations under FCC rules. For example, I found that in markets such as New York and Chicago, where EstrellaTV does not have a right to carriage under the must-carry rules, Comcast carried EstrellaTV but some of our competitors in those areas such as DISH and DirecTV did not. In addition to not carrying EstrellaTV's LPTVs, I found that both DBS operators did not carry EstrellaTV's multicast signals or satellite feed. This reinforced my view that EstrellaTV's request of Comcast for even more distribution was out of step with the marketplace assessment of the demand for the network.

23. We also reviewed Nielsen ratings data to compare EstrellaTV's national viewership to that of other Spanish-language broadcast networks (Univision, Telemundo, UniMás, MundoFox/MundoMax, and TV Azteca). We examined local Nielsen ratings for Hispanic households in large Hispanic markets to compare EstrellaTV's viewership to all broadcast networks (both Spanish and English-language) in those markets. The information that we compiled is attached as Exhibit 1.

24. Our ratings analysis similarly confirmed what I had believed: it showed that EstrellaTV was not particularly popular among Hispanic audiences in the major Hispanic markets served by Comcast. In Houston, the largest and most heavily Hispanic-penetrated Comcast market among the three markets, EstrellaTV lagged well behind Univision, Telemundo, and UniMás among Hispanic households. EstrellaTV's ratings were better in the primetime hours, but it still fared worse than Univision, Telemundo, and UniMás. EstrellaTV enjoyed even less popularity among Hispanic viewers in New York and Chicago, which are both markets where the network owns low-power stations that are carried by the major cable operators (TWC,

Cablevision and Verizon in New York, Comcast in Chicago). In those two cities, EstrellaTV had ratings lower than every other Spanish and English-language broadcast network on a total-day basis, and lower than all but one network (TV Azteca, in Chicago) in primetime.

25. The story was the same when we reviewed EstrellaTV's popularity on a national basis. We examined national audiences for EstrellaTV and other Hispanic broadcast networks for the first three quarters of 2013 and the first three quarters of 2014. In 2014, EstrellaTV had a total-day average audience of **{**[redacted]**}** households, compared to **{**[redacted]**}** for UniMás, **{**[redacted]**}** for Telemundo, and **{**[redacted]**}** for Univision. EstrellaTV had a Monday to Sunday primetime audience of **{**[redacted]**}**, compared to **{**[redacted]**}** for UniMás, **{**[redacted]**}** for Telemundo, and **{**[redacted]**}** for Univision. Although EstrellaTV has attempted to portray itself as a close competitor of Univision, Telemundo and UniMás in terms of ratings, the facts are to the contrary.

26. **{**[redacted]**}**

27. The EstrellaTV team made a detailed presentation to us at the October 14, 2014 meeting, and left behind a presentation deck, a copy of which is attached as Exhibit 2. **{**[redacted]

[redacted]**}**

28. **{**[redacted]**}**

Exchange of Retransmission Consent Proposals in November 2014

29. I had my next communications with EstrellaTV in November 2014. On November 12, 2014 I received an email from Jake Martinez, with whom I had previous

professional dealings, informing me that he had just been hired by EstrellaTV and would be taking over the retransmission consent negotiations with Comcast going forward. On Thursday, November 13, 2014 I sent Mr. Martinez a standard form draft retransmission consent agreement {[redacted]} The draft agreement also included a proposal granting Comcast certain digital rights, {[redacted]}

30. On November 18, 2014 Mr. Martinez sent me a term sheet attaching EstrellaTV's proposed terms for a deal. The proposal bore little resemblance to the draft I had sent him or the position that I had articulated at the October 14, 2014 meeting. {[redacted]

[2] {[redacted]}

[redacted]}

31. After receiving the proposal, my team and I did an evaluation of the total cost to Comcast of Mr. Martinez's November 18, 2014 proposal. That analysis is attached as Exhibit 3. {[redacted]}

32. On November 23, 2014 I responded to Mr. Martinez, {[redacted]

[redacted]}

33. Mr. Martinez responded on November 26, 2014, {[redacted]}

34. {[redacted]

[redacted]**}**

<u>Negotiations with EstrellaTV in December 2014 and January 2015</u>

35. With the January 1, 2015 date for a retransmission consent agreement looming, the parties agreed, on December 18, 2014, to maintain EstrellaTV's carriage in Salt Lake City, Houston, and Denver through January 22, 2015, {[redacted]**}**

36. On January 2, 2015, Mr. Martinez sent me another proposal **{**[redacted]**}** Mr. Martinez and I continued to talk throughout January, although we made no real progress. We scheduled a meeting between EstrellaTV executives and my team in Philadelphia for February 2, 2015. On January 16, 2015, Comcast and EstrellaTV signed another extension agreement, in which we agreed to maintain EstrellaTV's carriage {[redacted]} through February 5, 2015.

37. On January 23, 2015, in anticipation of the upcoming Philadelphia meeting, I responded in writing to Mr. Martinez's January 2, 2015 proposal. **{**[redacted]

[redacted]}

38. On January 29, 2015, Comcast and EstrellaTV signed another extension agreement, in which we agreed to maintain EstrellaTV's carriage {[redacted]} through February 12, 2015 while we continued to negotiate.

<u>EstrellaTV's February 1, 2015 Proposal</u>

39. On February 1, 2015, the day before our scheduled meeting in Philadelphia, Mr. Martinez sent me a revised proposal that sought {[redacted]}

40. I met with Mr. Martinez, Lenard Liberman, and Jose Liberman (Chairman of LBI's board), among others, at Comcast's offices on February 2, 2015. {[redacted]

[redacted]**}**

41. On February 4, 2015, Comcast and EstrellaTV signed another extension agreement, in which we agreed to maintain EstrellaTV's carriage {[redacted]} through February 19, 2015.

42. The next day, February 5, 2015, I responded formally to EstrellaTV's February 1, 2015 proposal and to the points made by EstrellaTV at the February 2, 2015 meeting. **{**[redacted]

[redacted]}

43. {[redacted]}

<u>EstrellaTV's Public-Relations Campaign Against Comcast</u>

44. {[redacted]} EstrellaTV launched a public relations campaign against Comcast, apparently designed to force us to accede to EstrellaTV's demand that we {[redacted]}. On February 6, 2015, EstrellaTV issued a press release (attached as Exhibit 7) that contained a number of inaccurate statements. Among other things, EstrellaTV claimed that the network would be "forced off the air" by Comcast in Houston, Denver, and Salt Lake City on February 19, 2015. That was patently untrue, {[redacted]} The

press release included a link to a website—www.nopierdasestrellatv.com—that Comcast customers in those cities could use to register complaints.

45. I can only speculate as to why EstrellaTV decided to take its case public, but it appeared to us that EstrellaTV thought that we might waiver and accept its unreasonable demands in order to avoid a public carriage dispute, given our ongoing effort to obtain regulatory approval for the TWC merger. However, Comcast remained convinced that it was not defensible to incur {[redacted]} expense for a network that had only limited appeal to our customers.

<u>EstrellaTV Pulls Its Signal from Comcast</u>

46. Against this background, on February 13, 2015, Mr. Martinez sent me a lengthy response to my February 5, 2015 email. **{**[redacted]**}**

47. **{**[redacted]**}**

48. {[redacted]} I have already said this but it bears repeating: throughout this entire process my team and I never once considered EstrellaTV's potential impact on Telemundo or NBC Universo in determining the appropriate terms and conditions of carriage for EstrellaTV.

49. I had further telephone conversations with Mr. Martinez between February 13 and February 19, 2015, the day that EstrellaTV and Comcast's most recent extension agreement {[redacted]} expired. {[redacted]}

50. At midnight on February 20, 2015, EstrellaTV pulled its stations' signals from Comcast systems in Salt Lake City, Houston, and Denver. As far as I am aware, it was the first time that any broadcaster had ever pulled its signals from Comcast.

Minimal Customer Reaction to EstrellaTV's Decision to Pull Its Signal

51. After taking its network away from our customers in these three cities, EstrellaTV intensified its negative media campaign, blaming Comcast for the loss of the network and urging Comcast customers to drop their service. EstrellaTV ran ads on You Tube, Facebook, Instagram,

and Twitter, falsely claiming that Comcast discriminated against Hispanics. In Houston, EstrellaTV heavily promoted the phone line it had set up to coach customers through their disconnection from Comcast's service. In Denver, EstrellaTV hosted a concert, giving free admission to Comcast customers who cancelled their service. And in Salt Lake City, EstrellaTV offered $100 gift cards in return for proof of cancellation of Comcast service.

52. Notwithstanding EstrellaTV's sustained efforts, a tiny fraction of the hundreds of thousands of Hispanic customers who lost access to EstrellaTV called to complain or disconnect their service as a result. {[redacted]}

53. {[redacted]}

<u>Subsequent Discussions with EstrellaTV</u>

54. Notwithstanding the minimal impact on Comcast from EstrellaTV's decision to pull its signals, and in spite of the vigorous public relations war waged by EstrellaTV, we still

pursued negotiations to end the dispute. On March 23, 2015, I had a meeting in Philadelphia with representatives from EstrellaTV, including Mr. Martinez and Winter Horton, COO of LBI. {[redacted]} As a result, in preparation for that meeting, I reviewed {[redacted]} When, for example, I reviewed ratings for all of 2014, I found EstrellaTV ratings to be well below those of Univision and Telemundo. {[redacted]}

55. The March 23, 2015 meeting did not produce a deal. {[redacted]}

56. Throughout the spring of 2015, Comcast continued to monitor customer reaction to EstrellaTV's signal pull in Salt Lake City, Houston, and Denver. {[redacted]}

57. As 2015 rolled on, we saw increasingly little reason to continue any discussions with EstrellaTV. {[redacted]

[redacted]}

58. On August 12, 2015, I spoke to Mr. Horton on the telephone. {[redacted]}

59. I received a letter from Mr. Horton on September 30, 2015, urging me to resume negotiations with EstrellaTV. {[redacted]

[redacted]**}**

60. In late 2015, EstrellaTV hired another new head of distribution, Cathy Lewis. In late January 2016, Ms. Lewis contacted me to set up a meeting to discuss carriage in Houston, Denver, and Salt Lake City. Notwithstanding all of the unsuccessful discussions with EstrellaTV, I agreed to meet with her on February 5, 2016. Ms. Lewis cancelled the meeting.

NBC Universo

61. Although I understand that EstrellaTV seeks, through this proceeding, carriage parity with Telemundo, I also understand that it has alleged that Comcast discriminated against EstrellaTV in order to also benefit NBC Universo, a Comcast-owned cable network formerly known as mun2 and rebranded as NBC Universo in February 2015.

62. EstrellaTV's claim is wrong. Put simply, NBC Universo played no role at all in Comcast's decision-making process concerning EstrellaTV. Moreover, EstrellaTV's allegations that Comcast treats NBC Universo more favorably than EstrellaTV are without merit.

63. In the first place, it makes no sense to compare carriage of a cable network such as NBC Universo with carriage of a broadcast network such as EstrellaTV. **{**[redacted]

[redacted]}

64. {[redacted]} {{[redacted]} {[redacted]} {{[redacted]}}

65. In any event, the notion that the EstrellaTV negotiations had anything at all to do with NBC Universo is simply untrue. 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.

66. I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: Philadelphia, Pennsylvania
June 7, 2016

Michael Nissenblatt

EXHIBIT 1

Confidential Document Withheld

EXHIBIT 2

Confidential Document Withheld

EXHIBIT 3

Confidential Document Withheld

EXHIBIT 4

Confidential Document Withheld

EXHIBIT 5

Confidential Document Withheld

EXHIBIT 6

Confidential Document Withheld

EXHIBIT 7

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PRINT THIS

Comcast Forcing Estrella TV -- No. 3 Spanish Broadcaster in the U.S. -- Off the Air Feb. 19

Minority-Owned Estrella TV to Launch Massive Education Campaign Today with Top Hispanic Entertainment Stars to Give Voice to Consumers Furious Over Comcast's Bullying Tactics

Feb 06, 2015, 07:00 ET from Estrella TV (http://www.prnewswire.com/news/estrella+tv)

English

LOS ANGELES, Feb. 6, 2015 /PRNewswire-USNewswire/ -- Despite earning sky-high ratings that surpass competitors Telemundo, Univision, UniMas, and nearly all others in the Spanish-language television space, minority-owned Estrella TV will be forced off the air by cable industry giant Comcast in three major U.S. cities effective Feb. 19.

Comcast's decision to force Estrella TV off the air in its Houston, Denver, and Salt Lake City systems comes as Comcast's own Spanish-language network, Telemundo, has seen a growing percentage of its viewership change the channel in favor of Estrella TV. In the media markets where Comcast is forcing the network off its systems, Estrella TV ranks as the number one Spanish network in Salt Lake City beating Univision; number two in Denver beating Telemundo; and number three in Houston beating UniMas. In the Los Angeles media market, Estrella TV is outpacing giant rivals Telemundo and UniMas combined viewership and beats Univision in primetime hours.

"This has been a real-life David versus Goliath battle, with our minority-owned company fighting one of the largest companies in America, and armed with a simple message: let the people watch what they want to watch," said Estrella TV Founder and Chairman Jose Liberman. "With Estrella TV now surpassing Telemundo in the Los Angeles market and elsewhere, it is troubling to see Comcast act irresponsibly by putting its own self-serving business interests ahead of a small minority-owned company, and ahead of Comcast's Hispanic customers."

In response to Comcast's actions, Estrella TV has launched a campaign to educate its supporters about the loss of programming choice for Spanish-speaking viewers, and the real reasons behind Comcast's decision to force Estrella TV off its systems. Estrella TV's campaign will reach hundreds of thousands of Hispanic viewers in Denver and Salt Lake City, and more than two million Hispanic viewers in the greater Houston area through its sister Spanish-language radio stations in those markets. The campaign is also utilizing social media channels to reach Hispanic audiences, encouraging them to contact Comcast to demand that Estrella TV remain on its cable line-up in Houston, Denver, and Salt Lake City.

Notable Hispanic entertainment stars have rallied to support Estrella TV in its efforts to put pressure on Comcast to extend the network's carriage, and are participating in the massive education campaign. Popular personalities including Don Cheto, Noel Torres, Tucanes de Tijuana, Arrolladora Banda El Limon, Luis Coronel, Enrique Gratas, Myrka Dellanos, Julion Alvarez, Banda los Recoditos, and Kevin Ortiz have all joined the education campaign, "No Pierdas Estrella TV," to rally to keep Estrella TV on air.

"I'm calling on Estrella TV viewers across the country to join us in demanding that Comcast carry our network to give Hispanics what they want, which is to keep the programming they love on the air, and that means keeping Estrella TV on air," said Enrique Gratas, award-winning journalist and host of 'Noticiero con Enrique Gratas' on Estrella TV. "Hispanic viewers that love the popular programming Estrella TV provides should join me in contacting Comcast to demand that they keep Estrella TV on the air. Let's ensure that Comcast, which has an unfortunate reputation with customer service as demonstrated in recent news headlines, hears us loud and clear."

In addition to eliminating choice for Hispanic viewers, Comcast's forcing Estrella TV off its systems will negatively impact the Hispanic-owned company and Hispanic communities across the country through the potential loss of middle class jobs (more than 90 percent of Estrella TV's 1,000 employees in production are Hispanic). Estrella TV has attempted to negotiate with Comcast for a long-term carriage deal that would give it the financial stability to retain these middle class jobs as well as to ensure that Spanish-language broadcast viewers have a choice in programming so that the market isn't dominated by foreign- and non-Hispanic-owned giant corporate entities like Telemundo and Univision. Estrella TV, owned by Mexican-Americans, has been a trusted and recognized name in Latino communities, and, through its original progamming, has launched the careers of many popular Spanish-language musicians topping the charts.

Estrella TV is a division of the privately owned Liberman Broadcasting, the country's largest minority-owned Spanish-language broadcaster. The company owns stations in Los Angeles, San Diego, Phoenix, Dallas, Houston, Salt Lake City, Denver, Chicago, New York, and Miami. Estrella TV will continue to attempt to negotiate an agreement with Comcast to keep the network on the air in Houston, Denver, and Salt Lake City beyond Feb. 19. For more information on the campaign to get Estrella TV back on air, visit www.nopierdasestrellatv.com and follow the conversation on social media using #NoQuieroPerderEstrellaTV.

About Estrella TV

Since its 2009 launch, Estrella TV has established itself as a top U.S. Hispanic television network across demos and time periods. The broadcast network has achieved its fast-track success by programming high-quality all-original programs produced in-house featuring well-known stars and popular personalities from the U.S. and Latin America. Estrella TV has built a catalog of more than 7,500 hours of programming now being distributed by the company to broadcasters worldwide. Estrella TV is owned and operated by Liberman Broadcasting, Inc., a leading Spanish-language, minority-owned entertainment company and one of the largest Spanish-language radio and television broadcasters in the U.S., based on both revenues and number of stations. More can be learned about Estrella TV at www.estrellatv.com.

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

EXPERT DECLARATION OF MARK A. ISRAEL

Table of Contents

I. QUALIFICATIONS

1. I am one of four Senior Managing Directors of Compass Lexecon, an economic consulting firm where I have worked since 2006. From August 2000 to June 2006, I served as a full-time member of the faculty at Kellogg School of Management, Northwestern University. I received my Ph.D. in economics from Stanford University in 2001.

2. I specialize in the economics of industrial organization—which is the study of competition in imperfectly competitive markets, including the study of antitrust and regulatory issues—as well as applied econometrics. At Kellogg and Stanford, I taught graduate-level courses covering topics including business strategy, industrial organization economics, and econometrics. My research on these topics has been published in leading economics journals including the *American Economic Review*, the *Rand Journal of Economics*, the *Review of Industrial Organization*, *Information Economics and Policy*, and *Antitrust Source.*

3. My academic and consulting work has involved a range of industries, including broadcast and cable television, wired and wireless telecommunications, broadband services, airlines, railroads, consumer beverages, financial markets, insurance, pharmaceuticals, and publishing. I have authored expert reports, declarations, and affidavits that have been submitted to and cited by government agencies and federal courts on behalf of various clients. Among these, I have submitted declarations to the Federal Communications Commission ("Commission" or "FCC") regarding competitive issues in broadband, video distribution, programming, and telecommunications and the Commission has cited to these declarations. I have also co-authored a peer-reviewed paper analyzing the evolution of peering and other Internet interconnection agreements.

4. I have testified in U.S. Federal Court and in many regulatory and arbitration

proceedings in the U.S. and around the world, and submitted expert reports, declarations, and affidavits to government agencies and federal courts on behalf of a wide range of clients. Recently, I served as a testifying expert in U.S. Federal Court on behalf of the Plaintiff U.S. Federal Trade Commission (FTC) in the proposed *Sysco/US Foods* merger: The court relied heavily on my report and testimony in deciding to grant an injunction.

5. My full *curriculum vitae*, including prior testimony, is included as Appendix 1. The hourly rate charged by Compass Lexecon for my work on this matter is $1000 per hour. I have no financial interest in the outcome of this case.

II. ASSIGNMENT AND SUMMARY OF CONCLUSIONS

6. I have been asked by counsel for Comcast Corporation on behalf of its subsidiary, Comcast Cable Communications, LLC (together with Comcast Corporation, "Comcast") to assess, from an economic perspective, the claim by Liberman Broadcasting, Inc. and LBI Media, Inc. ("LBI") that Comcast has "discriminated against LBI in the selection, terms, and conditions of carriage of LBI's Spanish language programming network Estrella TV on the basis of affiliation, to the unlawful benefit of Comcast-owned competing Spanish language networks Telemundo and NBC Universo."[1] As part of this analysis, I have been asked to assess whether the report by Dr. Harold Furchtgott-Roth,[2] LBI's economic expert, provides credible economic support for LBI's claims.

7. I focus my analysis on two questions: whether LBI, including the Furchtgott-Roth Report, has established either (1) any inconsistency between Comcast's decision to reject the

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[1] Program Carriage Complaint, Before the Federal Communications Commission, *In the Matter of The Liberman Broadcasting, Inc. and LBI Media v. Comcast Corporation and Comcast Cable Communications, LLC* File No. CSR-8922-P, April 8, 2016 ("*Carriage Complaint*").

[2] Expert Report of Harold W. Furchtgott-Roth, April 7, 2016, Appendix to the *Carriage Complaint* ("Furchtgott-Roth Report").

terms sought by LBI for carriage of EstrellaTV and rational business conduct or (2) any significant competition between EstrellaTV and Telemundo or NBC Universo.

8. With respect to issue (1), I analyze whether LBI has presented any evidence that, under the terms sought by LBI, the benefits to Comcast of carrying EstrellaTV are greater than the additional costs to Comcast.[3] Absent such economic evidence demonstrating that the value of EstrellaTV carriage on the proposed terms exceeded the cost to Comcast, the Commission would have no basis to conclude that Comcast acted in a discriminatory fashion; rather the evidence would be consistent with Comcast making a reasonable, good faith business decision in refusing the terms of carriage proposed by LBI for EstrellaTV.

9. With respect to issue (2) above (whether there is significant competition between EstrellaTV and Telemundo or NBC Universo), I analyze the question directly by examining whether the discontinuation of EstrellaTV carriage in the Houston, Denver, and Salt Lake City DMAs had a strong enough effect on Telemundo's or NBC Universo's viewership to be statistically detectable in the Nielsen data on which the industry relies. In addition, I consider whether the differences and similarities between EstrellaTV and Telemundo as well as between EstrellaTV and NBC Universo point to any significant competition between the networks.[4] LBI's claim of discrimination by Comcast requires it to show significant competition between EstrellaTV and Telemundo or NBC Universo; hence, the absence of evidence for such competition argues strongly against this claim.

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[3] *See Comcast v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013) ("*Tennis Channel*") In that case, the DC Circuit Court concluded that: "Without showing any benefit for Comcast from incurring the additional fees for assigning Tennis a more advantageous tier, the Commission has not provided evidence that Comcast discriminated against Tennis on the basis of affiliation." *Id*. at 986.

[4] This analysis helps to inform an economic assessment of whether EstrellaTV and Telemundo or NBC Universo are "similarly situated" from the perspective of viewers and advertisers in light of FCC Rule 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2).

10. I have reached the following conclusions:

- Available evidence supports a conclusion that Comcast's decision to reject the terms sought by LBI for EstrellaTV is based on rational business conduct, apart from any consideration of the effects of EstrellaTV's carriage on Comcast's affiliated networks Telemundo and NBC Universo. Notably, LBI offers no empirical support that the benefits to Comcast of carrying EstrellaTV outweighed the additional costs Comcast would have had to incur if it paid LBI the fees it sought for carriage of EstrellaTV. Dr. Furchtgott-Roth provides a range of statistics and calculations, none of which bear on the central net benefit issue. Nor does LBI offer any other evidence that Comcast would have benefitted from carriage of EstrellaTV on the terms specified by LBI. To the contrary, the available evidence suggests that {[redacted]} further supporting my conclusion that Comcast made a rational business decision that the cost of carriage of EstrellaTV outweighed its benefits.

- LBI and its expert, Dr. Furchtgott-Roth, also fail to provide any credible economic evidence of material competition between EstrellaTV and either Telemundo or NBC Universo to support LBI's allegation that the networks are similarly situated. To the contrary, the economic evidence indicates that Telemundo and NBC Universo would be unlikely to obtain material benefit from Comcast's limiting EstrellaTV's carriage, which implies that Comcast has no incentive to do so. My analysis of Nielsen data shows that there was no statistically measurable effect on Telemundo's and NBC Universo's Nielsen ratings in the Houston, Denver, and Salt Lake City DMAs as a result of Comcast's discontinuation of carriage of EstrellaTV in the DMAs. Other available evidence also fails to show any significant competition between EstrellaTV and either Telemundo or NBC Universo.

11. In the remainder of my declaration, I discuss the bases for my conclusions. My work on this matter is ongoing, and I retain the right to supplement my opinions, based on further analyses of data and documents.

III. THE ECONOMIC EVIDENCE IS CONSISTENT WITH A RATIONAL BUSINESS JUDGMENT BY COMCAST

12. A central issue that I address in this declaration is whether or not LBI's economic expert, Dr. Furchtgott-Roth, has provided any economic evidence to support a claim that Comcast did not make a rational, good faith business judgment (meaning a judgment based on factors other than discrimination against EstrellaTV designed to benefit Telemundo or NBC Universo) in deciding not to carry EstrellaTV on the terms demanded by LBI. I conclude that Dr. Furchtgott-Roth has offered no economic evidence to show that Comcast's decision to reject LBI's terms is inconsistent with reasonable business conduct, based on the costs and benefits to Comcast, absent any consideration of effects on Telemundo or NBC Universo.

13. In negotiating carriage agreements with networks, it is economically rational for MVPDs, including Comcast and other MVPDs, to evaluate both the costs and the benefits of carrying the networks under the proposed terms. A rational MVPD should reject any carriage proposals that fail to benefit the MVPD to an extent that more than covers the cost of carriage, with no need to turn to discriminatory explanations for this behavior. That is, if the price demanded by the network exceeds the benefits to the MVPD, then economics predicts that the MVPD will not carry the network, with no need to turn to motivations based on effects on other

networks owned by the MVPD to explain the decision or, more generally, no need to turn to discriminatory intent. Comcast needed to do such a cost/benefit analysis for EstrellaTV in the fall of 2014, when EstrellaTV elected "retransmission consent" status for three O&O stations in Denver, Houston, and Salt Lake City that had previously been carried on a must carry basis, sought broader carriage for EstrellaTV (including carriage in "white areas" where EstrellaTV was not available over-the-air), and sought financial consideration from Comcast for carriage of EstrellaTV starting in 2015.[5]

14. Dr. Furchtgott-Roth has failed to even analyze the most basic economic questions at issue, whether the value to Comcast of carrying EstrellaTV exceeds the price demanded by LBI. That is a central question under the FCC's program carriage rules and relevant court precedent such as the *Tennis Channel* case.[6] As such, he can offer no informed opinion on whether Comcast made a reasonable business decision when it rejected the terms demanded by LBI from Comcast for carriage of EstrellaTV and has provided no economic basis to conclude that Comcast's decision was motivated by the potential benefit to Comcast's affiliated networks from reduced carriage of EstrellaTV. Below I provide specific criticisms of Dr. Furchtgott-Roth's conclusions and analyses.[7]

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[5] *Carriage Complaint* ¶ 36. Moreover, I understand that EstrellaTV continues to seek financial consideration and broad carriage from Comcast in the current proceeding, where it has demanded that Comcast be ordered to carry EstrellaTV "wherever (i.e., in all DMAs served by Comcast) and however (e.g., standard definition/high definition/carriage in a particular neighborhood, etc.) Comcast carries Telemundo," and that "Comcast should be ordered to compensate Estrella TV to the extent it compensates Telemundo (e.g., Comcast shall pay the same per subscriber amounts to Estrella TV as it pays Telemundo on a market-by-market basis each year)." *Id.* ¶ 83.

[6] See *supra* note 3.

[7] Previous carriage discrimination cases (*e.g.*, *NFL Network v. Comcast*, *TCR Sports Broadcasting Holding, L.L.P. (DBA MASN) v. Comcast*, *The Tennis Channel v. Comcast*, *Herring Broadcasting, Inc. (DBA Wealth TV) v. Bright House Networks et al*, and *GSN v. Cablevision*) benefited from extensive economic analysis provided by economic experts like my colleagues Jonathan Orszag and Janusz

A. Dr. Furchtgott-Roth's Claim That "Estrella TV is available in valuable television markets, particularly with respect to Spanish-language households" is Irrelevant.

15. Dr. Furchtgott-Roth concludes that: "Estrella TV is available in valuable television markets, particularly with respect to Spanish-language households."[8] Hundreds of networks are available in those television markets, yet this does not necessarily mean that they are worth a particular price to Comcast or that Comcast would have an incentive to discriminate against them. Instead, the relevant questions concern the value of EstrellaTV to Comcast within each market (regardless of the universe of markets in which EstrellaTV is available) and the evidence for competition with Telemundo or NBC Universo in that market. Claims that EstrellaTV "is available" in particular markets speak to neither of these issues.

B. Dr. Furchtgott-Roth's Claim That "[p]rogramming with positive ratings is valuable to a cable operator such as Comcast" Provides No Support for LBI's Discrimination Claims.

16. Dr. Furchtgott-Roth similarly claims that "[p]rogramming with positive ratings is valuable to a cable operator such as Comcast."[9] Although it is no doubt true that a network with positive ratings is more valuable than one that has no viewers, this sheds no light on the reasonableness of Comcast's decision to reject LBI's terms. The relevant question in this case is not whether EstrellaTV has any positive value, but whether EstrellaTV provides a net benefit and thus is valuable enough to Comcast to justify the price demanded by LBI. Dr. Furchtgott-Roth does not even attempt to answer that question.

Ordover. The economic analyses played an important role in the Commission's review of these cases. Dr. Furchtgott-Roth's Report does not provide any proper economic analyses of the type provided by experts in previous carriage discrimination cases.

[8] Furchtgott-Roth Report ¶ 12.

[9] Furchtgott-Roth Report ¶ 12.

17. Dr. Furchtgott-Roth further claims that MVPDs {[redacted]} MVPDs such as Comcast place value on networks to the extent to which those networks enable them to attract, retain, and sell services to their customers. Ratings are but one factor in making these assessments, and, standing alone, do not capture the extent to which a given network helps the MVPDs attract, retain, and sell services to their customers. A simple example illustrates the point: Although in 2014 Cartoon Network had slightly {[redacted]} average 24-hour ratings than ESPN, ESPN's average license fee was about {[redacted]} than that of Cartoon Network.[11]

18. In his consideration of ratings, Dr. Furchtgott-Roth appears to find it noteworthy that EstrellaTV has {[redacted]} He cites no support for the proposition that {[redacted]} are a benchmark of value in the television industry, and I am aware of none. In any case, EstrellaTV's ratings are frequently *below* {[redacted]} in various local markets and various categories of ratings.[13]

19. Most importantly, Dr. Furchtgott-Roth does not tie EstrellaTV's ratings to the value to Comcast of carrying EstrellaTV. He provides no economic analysis to determine whether the price of EstrellaTV carriage sought from Comcast by LBI exceeded the value of EstrellaTV carriage to Comcast or any other MVPD. This omission renders his opinion

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[10] Furchtgott-Roth Report ¶¶ 16-17 (footnote omitted).

[11] SNL Kagan, TV Network Summary.

[12] Furchtgott-Roth Report ¶ 20 (footnote omitted).

[13] See *infra* ¶¶ 23-26.

meaningless from an economic perspective and under the Commission's rules and relevant precedent.[14]

20. Finally, one question that ratings data can answer is whether discontinuing EstrellaTV carriage in three DMAs had a large enough effect on Telemundo's or NBC Universo's viewership to be detectable in the ratings data on which advertisers rely. Below I show that it did not. Although these data only became available after the discontinuation of EstrellaTV carriage in the pertinent DMAs, the analysis of the data serves as powerful economic evidence that reinforces my conclusion that Comcast did not reject EstrellaTV's demand in order to favor either Telemundo or NBC Universo.

C. Dr. Furchtgott-Roth's Claim That "Estrella TV is one of the most popular Spanish-language TV networks" is Misleading.

21. Putting aside the fundamental flaw in Dr. Furchtgott-Roth's argument that the ratings of programming determine the value to MVPDs of carrying the programming, there are additional critical flaws in Dr. Furchtgott-Roth's Nielsen-based analysis of the ratings of EstrellaTV relative to other Spanish language networks.

22. First, Dr. Furchtgott-Roth appears to have cherry-picked the Nielsen data to make the comparison more favorable to EstrellaTV. For example, Dr. Furchtgott-Roth performs a quantitative ratings comparison on primetime and primetime sweeps period ratings, but does not perform the comparison of total-day ratings, where EstrellaTV performs less well. He offers no explanation for ignoring the larger period. Dr. Furchtgott-Roth also considers EstrellaTV's ratings in the DMAs where EstrellaTV is broadcast over the air but ignores EstrellaTV's

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[14] See *supra* note 3.

popularity (or lack thereof) in national ratings, which incorporate EstrellaTV viewership outside of these DMAs.

23. I present more comprehensive ratings comparisons between EstrellaTV and other Spanish language networks in Exhibits 1-5, which are attached as Appendix 2. The exhibits provide ratings comparisons across primetime and total-day ratings as well as across household and persons 18 to 49 ratings.[15] I also examine national ratings, ratings for the three DMAs that are at issue in this case, and New York DMA ratings. My ratings analysis shows that EstrellaTV's ratings significantly lag behind ratings of the other Spanish language broadcast networks, including Telemundo on both a national and local level.[16]

24. Exhibit 1 shows the national total-day ratings for EstrellaTV and other Spanish language broadcast networks that Dr. Furchtgott-Roth references in the tables to his Report—{[redacted]} Exhibit 1 demonstrates that in 2014 Telemundo's ratings were {[redacted]} than those achieved by EstrellaTV on a national Total Day basis {[redacted]}

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[15] Nielsen ratings data are based on a survey of U.S. households that record their viewership of networks. My Nielsen data analysis is based on the Nielsen ratings data that have been provided to me by Comcast. The data measure ratings for Spanish language networks on a monthly basis at both the DMA level and the national level. I calculate annual average Nielsen ratings for a network by taking an average of the monthly Nielsen ratings for the network. My annual average ratings calculations require that at least 10 months of monthly ratings for the network are available in the year.

[16] My analysis of Nielsen ratings in the Houston, Denver, and Salt Lake City DMAs shows that viewership of Spanish language networks [redacted] This result may be explained by the relatively large percentage of over-the-air TV broadcast viewership in the three DMAs and a disproportionally high viewership of over-the-air broadcasts by Hispanic households. (*See* http://www.nab.org/mpres/BroadcastTVandRadio-HispanicCommunities_NAB.pdf, accessed on May 27, 2016.) According to SNL Kagan U.S. Multichannel Market List data, as of Q1 2015, households that viewed TV via over-the-air broadcasts accounted for {[redacted]} percent of TV households in the Houston DMA, {[redacted]} percent of TV households in the Denver DMA, {[redacted]} percent of TV households in the Salt Lake City DMA, and {[redacted]} percent of TV households in the New York DMA. EstrellaTV over-the-air full power broadcasts are available in the Houston, Denver, and Salt Lake City DMAs. Thus, over-the-air broadcasts in the three DMAs provide another option for households wishing to view EstrellaTV.

Even limiting attention to primetime, Telemundo attracts {[redacted]} the audience of EstrellaTV in that time period {[redacted]}

25. EstrellaTV's Nielsen ratings are relatively weak even in major DMAs where Comcast carries the network. Exhibit 5 shows the 2014 average Nielsen ratings in the New York DMA, which has approximately {[redacted]} Hispanic households and is ranked second in terms of the number of Hispanic households behind only the Los Angeles DMA.[18] In the New York DMA in 2014, Telemundo's Nielsen ratings were {[redacted]} than those of EstrellaTV (*e.g.*, Total Day ratings: {[redacted]}

26. The ratings in the three DMAs at issue in this proceeding tell a similar story. Telemundo's viewership in Houston in 2014 was {[redacted]} EstrellaTV's (in Comcast subscribers), whether measured on a primetime {[redacted]} In Salt Lake City in 2014, Telemundo's viewership was {[redacted]} EstrellaTV's on a Total Day basis {[redacted]} as well as surpassing EstrellaTV's viewership on a primetime basis {[redacted]} In Denver in 2014, Telemundo's viewership

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[17] It is important to note that the relative weakness in the nation-wide demand for EstrellaTV's programming cannot be attributed to Comcast's carriage of the network as Comcast's subscribers account for a relatively small share of the nation-wide Spanish language TV audience. For example, in 2014 Comcast subscribers accounted for about {[redacted]}of Telemundo's national viewership. (Based on Telemundo viewership as measured by Nielsen ratings (household, total day, live + same day viewing) for Comcast households as a percentage of Telemundo viewership by all U.S. TV households.) It should also be noted that Hispanic households rely disproportionally in comparison to other U.S. households on over-the-air signals for television viewership (thereby bypassing MVPDs). (*See* http://www.nab.org/mpres/BroadcastTVandRadio-HispanicCommunities_NAB.pdf, accessed on May 27, 2016.)

[18] *See* http://www.tvb.org/Portals/0/media/file/DMA/2015-2016-dma-ranks-hispanic.pdf (accessed on May 21, 2016).

[19] *See* Exhibit 2.

[20] *See* Exhibit 4.

surpassed EstrellaTV's on a Total Day basis {[redacted]} although EstrellaTV performed better than Telemundo during the narrower primetime period {[redacted]}

D. LBI Offers No Marketplace Evidence Demonstrating That Comcast Should Have Known of EstrellaTV's Value.

27. LBI's Complaint alleges that the evidence of Comcast's discrimination against EstrellaTV is apparent in the difference between Comcast's carriage of EstrellaTV and that of other MVPDs that do not own "competing Spanish language channels."[22] In particular, the Complaint alleges that: "[t]here can be only one rational explanation for this demonstrable gulf between Comcast's unique assessment that Estrella TV *lacks* value and the directly contrary judgment of so many non-conflicted companies that Estrella TV *provides* value: Comcast owns competing services Telemundo and NBC Universo, whereas the many MVPDs and broadcasters which have freely and consistently decided to distribute Estrella TV own no competing Spanish language channels."[23]

28. This argument is incomplete and invalid as a matter of economics. Not only does LBI fail to show that Comcast ignored a net benefit from carrying EstrellaTV, but it also does not demonstrate that there was marketplace evidence that should have caused Comcast to reach a different conclusion. LBI does not assert or show that any other MVPD has chosen to carry EstrellaTV on the same terms that LBI demanded from Comcast.

29. I have seen no evidence that any other MVPD pays prices comparable to those sought from Comcast by LBI for carriage of EstrellaTV. Data from SNL Kagan (a data source

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[21] *See* Exhibit 3.

[22] *Carriage Complaint* ¶ 57.

[23] *Carriage Complaint* ¶ 57 (emphasis in original).

that Dr. Furchtgott-Roth relies on for his analysis) {[redacted]} SNL Kagan estimates that in 2015 EstrellaTV received {[redacted]} in "network compensation" (or about {[redacted]} per month). SNL Kagan also estimates that in 2015 EstrellaTV had about {[redacted]} in net advertising revenue out of about {[redacted]} in total net operating revenue, leaving only about {[redacted]} in non-advertising revenue in 2015. Such an amount implies only *de minimis* payments by MVPDs for carriage of EstrellaTV. By contrast, the evidence indicates that MVPDs pay significantly more in fees for Telemundo. SNL Kagan estimates that in 2015 Telemundo had about {[redacted]} in net advertising revenue out of about {[redacted]} in total net operating revenue, which imply about {[redacted]} in non-advertising revenue in 2015.

30. By contrast, under LBI's November 18, 2014 proposal, starting in 2015 Comcast would have had to pay {[redacted]} Under LBI's subsequent February 19, 2015 proposal (made immediately before LBI pulled Estrella TV's signals from the Houston, Denver, and Salt Lake City DMAs), Comcast

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[24] *See* email from Jake Martinez of LBI to Michael Nissenblatt of Comcast on November 18, 2014 (*Carriage Complaint* Exhibit 19).

would have had to incur a cost of about {[redacted]} per year to carry EstrellaTV in the affected DMAs.[25]

31. {[redacted]} As such, the available evidence reinforces my conclusion above that there was no discrimination by Comcast in refusing LBI's terms for carriage of EstrellaTV, and it supports a finding that Comcast's decision not to pay LBI for EstrellaTV was reasonable and justified by business considerations independent of Telemundo and NBC Universo.

32. Similarly, marketplace evidence shows that other MVPDs do not distribute EstrellaTV at the level LBI demanded from Comcast. For example, although the satellite providers DIRECTV and Dish, similar to Comcast, carry local broadcasts of EstrellaTV in many DMAs, DIRECTV's and Dish's channel lineups indicate that they do not carry EstrellaTV in their national Spanish language tiers.[26] By contrast, both DIRECTV's and Dish's national Spanish language tiers include Telemundo and NBC Universo.[27] Thus, even though LBI demanded that Comcast give EstrellaTV {[redacted]} LBI has not

[25] See email from Jake Martinez of LBI to Michael Nissenblatt of Comcast on February 19, 2015. (*Carriage Complaint* Exhibit 19).

[26] See http://www.dishlatino.com/comparar-canales/; http://directvenespanol.com/vendor/pdf/optimo_mas.pdf; http://directvenespanol.com/vendor/pdf/mas_ultra.pdf, http://directvenespanol.com/vendor/pdf/lo_maximo.pdf (downloaded on May 30, 2016)

[27] See http://www.dishlatino.com/comparar-canales/; http://directvenespanol.com/vendor/pdf/optimo_mas.pdf; http://directvenespanol.com/vendor/pdf/mas_ultra.pdf, http://directvenespanol.com/vendor/pdf/lo_maximo.pdf (downloaded on May 30, 2016)

received anything like that from these two other large MVPDs, neither of which owns a Spanish-language network.[28]

33. Moreover, under LBI's February 19, 2015 proposal, Comcast would have had to {[redacted]}[30] Thus, the available evidence shows neither significant carriage of EstrellaTV by other MVPDs {[redacted]} nor significant consumer demand for the network in those markets.[31]

34. Further evidence of Comcast's non-discrimination with respect to carriage of Spanish language networks may be seen from the fact that Comcast's carriage of Telemundo and NBC Universo (or its predecessor, Mun2) has {[redacted]} after the 2011

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[28] *Carriage Complaint* ¶ 37.

[29] *See* email from Jake Martinez of LBI to Michael Nissenblatt of Comcast on February 19, 2015. (*Carriage Complaint* Exhibit 19). *See also* Declaration of Michael Nissenblatt Exhibit 1.

[30] My review of Nielsen ratings data for the [redacted] DMAs for the period from January 2013 to March 2016 reveals no discernable viewership of EstrellaTV in these DMAs. I understand that the Nielsen ratings data for the {[redacted]} DMA capture only limited viewership data in the DMAs.

[31] The absence of evidence of any significant viewership of EstrellaTV by subscribers of other MVPDs in the {[redacted]} DMAs is also at odds with LBI's claim that other MVPDs afford more favorable carriage to Estrella TV than does Comcast. It is worth noting that LBI's claim of EstrellaTV carriage by Time Warner Cable in {[redacted]} (*Carriage Complaint* Exhibit 4), {[redacted]} is contradicted by Time Warner Cable's channel lineup in {[redacted]} *See* Time Warner Cable's April 2016 channel lineup in [redacted]} Note that Time Warner Cable's channel lineup indicates carriage of both Telemundo and NBC Universo.

acquisition by Comcast of a majority stake in NBC Universal (which owned Telemundo and Mun2).[32]

35. In sum, the available economic evidence supports the absence of any discriminatory conduct by Comcast in rejecting the terms demanded by LBI for carriage of EstrellaTV.[33] LBI has not demonstrated that Comcast knew or should have known of any net benefit to paying for EstrellaTV but ignored such benefits to bolster Telemundo or NBC Universo.

IV. LBI HAS NOT PROVIDED ANY ECONOMIC EVIDENCE THAT THERE WAS MATERIAL COMPETITION BETWEEN ESTRELLATV AND EITHER TELEMUNDO OR NBC UNIVERSO

A. Telemundo and NBC Universo Are Unlikely to Obtain Material Benefit From Comcast's Limiting Carriage of EstrellaTV.

36. As a matter of economics, Comcast could only have an incentive to discriminate against EstrellaTV in favor of its affiliated networks, Telemundo and NBC Universo, if Telemundo and NBC Universo faced significant competition from EstrellaTV.[34]

37. If there were significant competition for viewers and advertisers between EstrellaTV and Telemundo or between EstrellaTV and NBC Universo, limiting EstrellaTV's

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[32] *See* {[redacted]}

[33] LBI's Complaint also alleges that Comcast made a "demand that Estrella TV surrender its digital rights in Estrella TV programming in return for Comcast carriage of that programming" and that the "demand" violates rules that prohibit the acquisition of a "financial interest" as a condition of carriage. Carriage Complaint ¶¶ 41, 84. I understand that the alleged "demand" by Comcast was actually a request by Comcast for *non-exclusive* rights to EstrellaTV digital content. From an economic perspective, granting such non-exclusive digital content rights is equivalent to granting a license (rather than selling a financial interest in an asset), similar to the type of license that EstrellaTV grants to MVPDs for the right to distribute its programming. Comcast's request for such rights in a carriage negotiation is thus consistent with reasonable business judgment.

[34] Dennis Carlton, "A General Analysis of Exclusionary Conduct and Refusal to Deal--Why Aspen and Kodak Are Misguided," *Antitrust Law Journal* 68, pp. 659-683, 2001; and Michael Whinston, "Tying, Foreclosure, and Exclusion," *American Economic Review* 80, pp. 837-859, 1990.

distribution may benefit Telemundo or NBC Universo by: (1) increasing Telemundo's or NBC Universo's viewership; or (2) weakening the constraints on prices that Telemundo or NBC Universo charge advertisers. Conversely, the absence of significant competition between EstrellaTV and Telemundo or NBC Universo means that limiting EstrellaTV's distribution does not materially benefit Telemundo and NBC Universo, and thus Comcast would have no economic incentive to limit EstrellaTV's distribution to benefit its affiliated networks. My analysis shows that Comcast's affiliated networks are unlikely to reap material benefits from a reduction in EstrellaTV carriage by Comcast, thus contradicting claims of discriminatory motives for Comcast's carriage decisions with regard to EstrellaTV.

B. Dr. Furchtgott-Roth Provides No Valid Evidence For His Claim That [redacted]}

38. Most fundamentally, Dr. Furchtgott-Roth provides no evidence demonstrating significant competition between EstrellaTV and Comcast's affiliated networks Telemundo or NBC Universo. He has not performed any economic analysis to determine whether Comcast has any economic incentives to engage in carriage discrimination against EstrellaTV, nor has he analyzed whether Telemundo and NBC Universo have benefited in any material way from the alleged discrimination.

39. Dr. Furchtgott-Roth claims that {[redacted]} That is hardly surprising as there appears to be no dispute that Comcast no longer carries EstrellaTV in those DMAs. It is also irrelevant to the questions at hand. As noted above, a relevant question here is not whether this decision had any

[35] Furchtgott-Roth Report ¶ 12.

effect on EstrellaTV viewership—as it surely did—but whether there is economic evidence to support any inference that the reason Comcast made its decision was to favor Telemundo or NBC Universo. Dr. Furchtgott-Roth's observation says nothing about the competition between the networks.

40. Dr. Furchtgott-Roth further claims that {[redacted]} Here, too, the evidence he provides actually supports the conclusion that there is no direct effect on Telemundo ratings of the discontinuation of EstrellaTV carriage. In particular, he concludes that the {[redacted]} If EstrellaTV were an important competitor for Telemundo, such that its removal would have a strong effect on Telemundo ratings, then one should expect to see this pattern consistently. Hence, {[redacted]} refutes the claim of significant competition between the networks. Instead, given that the changes in Telemundo's ratings {[redacted]} between Houston and Denver, one should look for explanations that correspondingly {[redacted]} between the two cities, rather than somehow connecting these {[redacted]} patterns to an event (removal of EstrellaTV from Comcast) that was common across the cities. Dr. Furchtgott-Roth's inference is simply not reliable economic analysis.

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[36] Furchtgott-Roth Report ¶ 12.

[37] Furchtgott-Roth Report ¶ 67.

[38] Dr. Furchtgott-Roth does not even attempt to analyze any effects on Telemundo in Salt Lake City, claiming that he was unable to obtain Salt Lake City ratings, even though such ratings data are readily available. Furchtgott-Roth Report fn. 24.

41. Indeed, it is noteworthy that Dr. Furchtgott-Roth's report does not show any regression analyses to determine whether {[redacted]} An appropriately conducted regression analysis can be a reliable statistical test for identifying a relationship between two or more events, and Dr. Furchtgott-Roth presents a number of such analyses in his Report, albeit not on this issue.[39] One can perform a regression analysis of the effects of EstrellaTV carriage on Telemundo's or NBC Universo's viewership, as I demonstrate in the next section. What my regression analyses show is that there is no statistically significant increase in either Telemundo's or NBC Universo's Nielsen ratings as a result of Comcast's discontinuation of EstrellaTV carriage in the Houston, Denver, and Salt Lake City DMAs.

C. A Direct Test of Competition Indicates That Telemundo and NBC Universo Did Not Discernibly Benefit From Comcast's Discontinuation of EstrellaTV Carriage in Houston, Denver, and Salt Lake City.

42. In contrast to Dr. Furchtgott-Roth, I test the extent of competition between EstrellaTV and Telemundo and between EstrellaTV and NBC Universo by analyzing how EstrellaTV's withdrawal of retransmission consent for carriage by Comcast in the Houston, Denver, and Salt Lake City DMAs affected the Nielsen ratings of Telemundo and NBC Universo. Under this test, there would be evidence of significant substitution and competition between EstrellaTV and Telemundo (or NBC Universo) if EstrellaTV's reduced distribution in the three affected DMAs significantly increased Telemundo's (or NBC Universo's) ratings among Comcast's cable subscribers in those DMAs, after accounting for all other factors that explain Telemundo's and NBC Universo's viewership in those DMAs.

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[39] Furchtgott-Roth Report, Tables 18-26

43. I perform this test using monthly Nielsen ratings data for the three affected DMAs for the period from January 2013 through March 2016. The Nielsen ratings data measure Telemundo and NBC Universo viewership for Comcast subscribers in a DMA and also separately for TV households in the DMA for subscribers of other MVPDs. Hence, the non-Comcast households, which were not affected by Comcast's carriage decisions, provide a control group, with the pattern of ratings over time for this group indicating what would have happened to Telemundo and NBC Universo ratings *absent* Comcast's carriage decisions in the affected DMAs. I implement a regression analysis that compares the pattern of ratings for Comcast households (the "treatment" group) to the pattern for this control group, before and after Comcast stopped carrying EstrellaTV in the affected DMAs on February 19, 2015, thus isolating the effect of Comcast's discontinuation of EstrellaTV carriage.[40] I perform this test using regression analysis for both Telemundo and NBC Universo ratings. I provide the technical details of the regression analysis in Appendix 3.

44. As seen in Exhibit 6 (shown in Appendix 3), the results of my regression analysis indicate that there was no statistically significant increase in Telemundo and NBC Universo Nielsen ratings in the affected DMAs as a result of the discontinuation of Comcast's carriage of EstrellaTV in the affected DMAs. Hence, the analysis implies that there was no statistically detectable effect on Telemundo or NBC Universo ratings from the discontinuation of Comcast's carriage of EstrellaTV in the affected DMAs. This finding is particularly telling here: As discussed above, advertisers rely on Nielsen data to purchase advertising on networks, and advertising revenues for the networks are a function of their Nielsen ratings, so the absence of a

[40] This type of analysis is standard in economics literature. It is commonly referred to as a "difference in differences" regression. *See*, *e.g.*, Cameron, A. Colin; Trivedi, Pravin K. (2005). *Microeconometrics: Methods and Applications*. Cambridge University Press, Chapter 22.

statistically detectable effect in Nielsen data refutes any claim that Telemundo or NBC Universo benefited from the discontinuation of Comcast's carriage of EstrellaTV in the affected DMAs. Therefore, my analysis of Nielsen ratings data indicates an absence of any significant competition between EstrellaTV and Comcast's affiliated networks Telemundo and NBC Universo.

D. Significant Differences Between EstrellaTV and Telemundo and NBC Universo Further Point to a Lack of Significant Competition Between the Networks.

45. Other significant differences between EstrellaTV and Telemundo and NBC Universo provide further evidence that there is no significant competition between the networks. In this section, I provide some important examples of those differences.

46. The fact that EstrellaTV, Telemundo, and NBC Universo are all Spanish language networks does not necessarily mean that the networks have similar appeal, content, and viewer audience. In fact, Comcast carries more than 50 different Spanish language cable and broadcast networks.[41] Individual Spanish language networks may be competing for different sets of viewers and may have viewer audiences that differ in their demographics. It is therefore useful, as corroboration of my competition analysis based on Nielsen data, to examine whether the differences (and similarities) between EstrellaTV, Telemundo and NBC Universo provide further support for the view that there is an absence of significant competition between the networks. I find that there are significant differences between EstrellaTV and Telemundo and between EstrellaTV and NBC Universo and that these differences are consistent with an absence of significant competition between the networks.

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[41] *See* {[redacted]

47. Initially, my analysis of ratings, presented above, shows that the Nielsen ratings for Telemundo are substantially higher than those of EstrellaTV both on the national and local DMA level. Ratings for NBC Universo are generally lower than both Telemundo and EstrellaTV.

48. Another relevant measure that distinguishes TV networks is programming expenditure or the amount that networks spend to acquire or produce programming content. As a matter of economics, networks are willing to spend more on programming when they anticipate higher demand for their programming as a result. All else being equal, greater programming expenditures imply more valuable programming content for a network. According to SNL Kagan data, in 2014 EstrellaTV's programming expenditures were about {[redacted]} and Telemundo's programming expenditures were about {[redacted]} including for expensive sports rights (such as World Cup games) and telenovelas. This is a material difference in programming expenditure. NBC Universo's programming expenditures were about {[redacted]} also higher than EstrellaTV's {[redacted]} in programming expenditures for 2014.

49. I understand that there is also testimony that EstrellaTV offers programming that has greater appeal for Hispanic households of Mexican descent than for other Hispanic households. I have been asked by counsel to review Nielsen data regarding the ethnic composition of viewer audience for EstrellaTV and Telemundo.[42] The data show that in 2014 Mexican Hispanic households accounted for {[redacted]} of EstrellaTV's total viewership and for {[redacted]} of Telemundo's total viewership. The data also show that in 2015 Mexican Hispanic households accounted for {[redacted]} of EstrellaTV's total viewership, for {[redacted]} of Telemundo's

[42] My analysis is based on Nielsen data that measure annual national viewership of EstrellaTV, Telemundo, and NBC Universo by Hispanic households and by Hispanic households of Mexican descent. The Nielsen viewership data are based on total-day viewership and live viewing + viewing within seven days.

total viewership, and for {[redacted]} of NBC Universo's total viewership (the first year data was available). The Nielsen data also show that as of 2014 and 2015, individuals of Mexican descent accounted for approximately {[redacted]} of Hispanic TV households.

50. LBI's assertions about overlapping advertisers across the networks do not, in fact, demonstrate significant competition between EstrellaTV and Telemundo or NBC Universo. LBI's Complaint alleges that EstrellaTV's programming, Telemundo's programming, and NBC Universo's programming compete by "targeting" the same advertisers,[43] listing 16 advertisers, including Ford, AT&T, Anheuser Busch, and others, that the Complaint alleges are shared by the three networks.[44] However, the existence of common advertisers among networks does not prove competition by the networks for the advertisers. Just because Ford purchases advertising on both EstrellaTV and Telemundo does not mean that Ford is choosing between EstrellaTV and Telemundo in purchases of advertising on TV networks. Nor does it mean that EstrellaTV and Telemundo are competing for Ford advertising or that EstrellaTV and Telemundo "target" Ford as an advertiser. Ford also advertises on major broadcast networks such as CBS, obviously not a Spanish language network; thus, the presence of large national advertisers on any one network is not informative. Indeed, the types of advertisers that the Complaint alleges are shared among the three networks tend to have very large advertising budgets for many different products and advertise extensively on numerous cable networks, broadcast networks, and other advertising media. For example, Ford's advertising expenditure in 2014 was approximately $2.5 billion.[45]

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[43] *Carriage Complaint* ¶ 24.

[44] *Carriage Complaint* Exhibit 12. The list of "share[d]" advertisers in Exhibit 12 of the *Carriage Complaint* includes: MetroPCS, Ford, Mars, AT&T, Anheuser Busch, Colgate, Clorox, Constellation Brands, Dish, L'Oreal, GM, P&G, Miller Coors, Samsung, State Farm, and Wendy's.

[45] *See* http://adage.com/article/advertising/big-spenders-facts-stats-top-200-u-s-advertisers/299270/ (accessed on May 26, 2016).

According to Nielsen Ad Intel data, in 2014, Ford spent {[redacted]} in advertising on Telemundo, {[redacted]} in advertising on EstrellaTV, and {[redacted]} in advertising on NBC Universo. Thus, Ford's advertising expenditures for the three networks in 2014 accounted for {[redacted]} (Telemundo), {[redacted]} (EstrellaTV), and {[redacted]} (NBC Universo) of Ford's 2014 total advertising expenditures. The notion that advertisers such as Ford are choosing solely (or even primarily) between Telemundo and EstrellaTV or between NBC Universo and EstrellaTV for their advertisements is without basis.

51. I should also note that the mere fact that an advertiser is common between two networks is not indicative of the amount of the advertiser's expenditures on the two networks or whether a common advertiser contributes a significant amount to overall advertising expenditures on the networks. For example, the Complaint lists Clorox as an advertiser shared by Telemundo and EstrellaTV.[46] However, in 2014, according to Nielsen Ad Intel data, Clorox purchased {[redacted]} in advertising on Telemundo (accounting for about {[redacted]} of Telemundo's advertising sales) and only about {[redacted]} in advertising on EstrellaTV (accounting for about {[redacted]} of Estrella TV's advertising sales). Thus, the Complaint's list of "large advertisers" that EstrellaTV shares with Telemundo and NBC Universo is incomplete because it does not account for differing levels of advertising expenditures among the networks.

52. The Complaint's list of shared "large advertisers" also ignores the differences in the proportionality of the advertisers' expenditures across networks (meaning their share of the overall advertising expenditures on the network). For example, in 2014, the advertising expenditures by Wendy's (one of the shared "large advertisers" listed by the Complaint) accounted for about {[redacted]} of total advertising expenditures on Telemundo and about {[redacted]} of

[46] *Carriage Complaint* Exhibit 12.

total advertising expenditures on EstrellaTV.[47] Likewise in 2014, the advertising expenditures by State Farm (another of the shared "large advertisers" listed by the Complaint) accounted for about {[redacted]} of total advertising expenditures on Telemundo and about {[redacted]} of total advertising expenditures on EstrellaTV.[48] The differences in the proportionality of purchases for these advertisers across Telemundo and EstrellaTV argue against a claim that Telemundo and EstrellaTV both "target" Wendy's and State Farm.

V. CONCLUSION

53. Based upon my analysis set forth above, I conclude that LBI and its expert have not offered economic evidence to show that Comcast's decision to reject the terms sought by LBI for carriage of EstrellaTV was based on anything other than rational business judgment. LBI does not provide any empirical support that the benefits to Comcast from the carriage of EstrellaTV on the terms sought outweighed the costs Comcast would have to incur in license fees. If anything, the available evidence suggests that the price of carriage demanded by LBI exceeded the prices paid by other MVPDs, further supporting a conclusion that Comcast made a rational business decision. I also conclude that LBI and its expert has failed to offer any credible economic evidence of competition between EstrellaTV and either Telemundo or NBC Universo. The evidence instead suggests only that Telemundo or NBC Universo would be unlikely to gain any significant benefit from Comcast's limiting EstrellaTV carriage in the three DMAs at issue, and this implies that Comcast would have no discriminatory incentive to restrict EstrellaTV's carriage.

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[47] Source: Nielsen Ad Intel data.

[48] Source: Nielsen Ad Intel data.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5 th day of June. 2016.

Mark A. Israel

APPENDIX 1

Mark A. Israel May 2016
Senior Managing Director
Compass Lexecon

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SUMMARY OF PROFESSIONAL EXPERIENCE

- Served as an expert for both the Federal Government and private parties in cases involving industries including fixed and mobile telecommunications, cable television, broadband internet service, other high technology industries, airlines, railroads, shipping, financial markets, credit cards, beverages, consumer retail, and many others.
- Testified in Federal Court and appeared in front of government agencies including DOJ, FTC, and FCC, and state agencies on behalf of numerous clients.
- Submitted expert reports in Federal Court, as well affidavits, declarations, and white papers to agencies including DOJ, FTC, FCC, DOT, and state agencies.
- Written numerous academic articles on topics including competition economics, merger policy, telecommunications, airlines, insurance markets, and labor markets. Research published in leading scholarly and applied journals including The American Economic Review, The Rand Journal of Economics, The Review of Industrial Organization, Antitrust Source, and the Global Competition Review, and presented to business, government, and academic audiences around the world.

AREAS OF EXPERTISE

- Antitrust and competition economics; industrial organization economics
- Applied econometrics
- Economic and econometric analysis of horizontal and vertical mergers
- Economic and econometric analysis of antitrust litigation topics, including: Class certification, damages, and liability issues in cases involving price fixing, exclusive dealing, monopolization, bundling, price discrimination, and exclusionary practices

EDUCATION

- Ph.D., Economics, STANFORD UNIVERSITY, June 2001.
- M.S., Economics, UNIVERSITY OF WISCONSIN-MADISON, August 1992.
- B.A., Economics, ILLINOIS WESLEYAN UNIVERSITY, Summa Cum Laude, May 1991.

EMPLOYMENT HISTORY

Compass Lexecon: *Senior Managing Director*, January 2016 – Present.

(Previously: *Executive Vice President*, April 2013-January 2016; *Senior Vice President*, January 2009 – March 2013; *Vice President*, January 2008 – December 2008; *Economist*, January 2006 – December 2007.)

Kellogg School of Management, Northwestern University: *Assistant Professor of Management and Strategy*, 2000 – 2006; *Associate Professor of Management and Strategy*, 2007 – 2008.

State Farm Insurance: *Research Administrator*, 1992 – 1995.

RECENT PROFESSIONAL RECOGNITIONS

American Antitrust Institute 2015 Antitrust Enforcement Awards, *Outstanding Antitrust Litigation Achievement in Economics* Finalist.

Global Competition Review Who's Who Legal: Competition 2016, leading Economist.

Global Arbitration Review's 2016 International Who's Who of Commercial Arbitration, leading Expert Witness.

LIVE TESTIMONIAL EXPERIENCE

Testimony in Commercial Arbitration on Issues Related to Mobile Wireless Competition; New York, NY; April 12, 2016

Testimony as Economic Expert on behalf of Regal Entertainment Group, In the Matter of iPic – Gold Class Entertainment, LLC, et al., v. Regal Entertainment Group, AMC Entertainment Holdings, Inc., et al., In the District Court of Harris County, Texas, 234th Judicial District, No. 2015-68745. Deposition: January 12, 2016. Live Trial Testimony: January 21, 2016.

Testimony as Economic Expert on behalf of Federal Trade Commission in Re: Federal Trade Commission et al. v. Sysco Corporation and USF Holding Corp., Civil Action No. 15-cv-00256 (APM). Deposition: April 28, 2015. Live Trial Testimony: May 7, May 8, May 14, 2015.

Appearances in Federal Communications Commission, Economists Panels:

- Comcast/Time Warner, January 2015
- AT&T/T-Mobile, July 2011
- Comcast/NBCUniversal, August 2010

Appearance before California Public Utility Commission, Public Hearings on Comcast/Time Warner Merger, Los Angeles, April 2015.

Appearance as Economic Testifying Expert in front of Department of Justice, Federal Trade Commission, Federal Communications Commission, and State Regulatory Agencies in many additional transactions, including: Danaher/NetScout, AT&T/Leap Wireless, T-Mobile/MetroPCS, American Airlines/US Airways, SpectrumCo/Cox/Verizon Wireless, oneworld antitrust immunity application, PepsiCo/bottlers, Houghton Mifflin/Harcourt, Chicago Mercantile Exchange/Chicago Board of Trade.

EXPERT REPORTS, AFFIDAVITS, AND DECLARATIONS

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Second Supplemental Declaration of Mark Israel, Daniel Rubinfeld, and Glenn Woroch, "In the Matter of Special Access for Price Cap Local Exchange Carriers", Federal Communications Commission, WC Docket No. 05-25, April 20, 2016.

Supplemental Declaration of Mark Israel, Daniel Rubinfeld, and Glenn Woroch, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, Federal Communications Commission, WC Docket No. 05-25, March 24, 2016.

Declaration of Mark Israel, Daniel Rubinfeld, and Glenn Woroch, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, Federal Communications Commission, WC Docket No. 05-25, February 19, 2016.

Declaration of Mark Israel, Daniel Rubinfeld, and Glenn Woroch, "Competitive Analysis of the FCC's Special Access Data Collection" Federal Communications Commission, WC Docket No. 05-25, January 26, 2016.

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Declaration of Dennis Carlton, Mark Israel, Allan Shampine & Hal Sider, "Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans," Federal Communications Commission, WC Docket 15-247, January 7, 2016.

Declaration of Mark A. Israel, Attached to "Response of AT&T Mobility LLC to Notice of Apparent Liability for Forfeiture," Federal Communications Commission, File No. EB-IHD-14-00017504, July 17, 2015.

Reports in Re: Federal Trade Commission et al. v. Sysco Corporation and USF Holding Corp., Civil Action No. 15-cv-00256 (APM). Declaration: February 18, 2015. Report: April 14, 2015. Rebuttal Report: April 21, 2015.

Declaration of Mark A. Israel, Bryan G. M. Keating, and David Weiskopf, "Economic Analysis of the Effect of the Comcast-TWC Transaction on Voice and Broadband Services in California," December 3, 2014.

Expert Report of Mark A. Israel, "Economic Analysis of the Effect of the Comcast-TWC Transaction on Broadband: Reply to Commenters," Federal Communications Commission, MB Docket 14-57, September 22, 2014.

Supplemental Declaration of Mark Israel and Allan Shampine, In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent, Appendix A to "Reply Comments of the National Association of Broadcasters," Federal Communications Commission, MB Docket 10-71, July 24, 2014.

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Expert Report of Mark A. Israel, "Implications of the Comcast/Time Warner Cable Transaction for Broadband Competition," Federal Communications Commission, MB Docket 14-57, April 8, 2014.

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Supplemental Reply Declaration of Michael L. Katz, Philip A. Haile, Mark A. Israel, and Andres V. Lerner, "Comments on Appropriate Spectrum Aggregation Policy with Application to the Upcoming 600 MHz Auction," Federal Communications Commission, WT Docket 12-269, June 13, 2013.

Reply Declaration of Michael L. Katz, Philip A. Haile, Mark A. Israel, and Andres V. Lerner, "Comment on the Submission of the U.S. Department of Justice Regarding Auction Participation Restrictions," Federal Communications Commission, WT Docket 12-269, June 13, 2013.

Reply Declaration of Michael L. Katz, Philip A. Haile, Mark A. Israel, and Andres V. Lerner, "Spectrum Aggregation Policy, Spectrum-Holdings-Based Bidding Credits, and Unlicensed Spectrum," Federal Communications Commission, GN Docket 12-268, March 12, 2013.

Declaration of Igal Hendel and Mark A. Israel, "Econometric Principles That Should Guide the Commission's Analysis of Competition for Special Access Service," Federal Communications Commission, WC Docket 05-25, February 11, 2013.

Reply Declaration of Mark A. Israel and Michael L. Katz, "Economic Analysis of Public Policy Regarding Mobile Spectrum Holdings," Federal Communications Commission, WT Docket 12-269, January 7, 2013.

Declaration of Mark A. Israel and Michael L. Katz, "Economic Analysis of Public Policy Regarding Mobile Spectrum Holdings," Federal Communications Commission, WT Docket 12-269, November 28, 2012.

Declaration of Mark Israel, "An Economic Assessment of the Prohibition on Exclusive Contracts for Satellite-Delivered, Cable-Affiliated Networks," Federal Communications Commission, MB Docket Nos. 12-68, 07-18, & 05-192, September 6, 2012.

Expert Report of Mark Israel, "Implications of the Verizon Wireless & SpectrumCo/Cox Commercial Agreements for Backhaul and Wi-Fi Services Competition," Federal Communications Commission, WT Docket 12-4, August 1, 2012.

Expert Report of Mark A. Israel, Michael L. Katz, and Allan L. Shampine, "Promoting Interoperability in the 700 MHz Commercial Spectrum," Federal Communications Commission, WT Docket 12-69, July 16, 2012.

Affidavits of Dr. Mark A. Israel in Re: Bloomberg L.P. V. Comcast Cable Communications, LLC, Federal Communications Commission, MB Docket 11-104, June 21, 2012 (Declaration), June 8, 2012 (Declaration), September 27, 2011 (Supplemental Declaration), July 27, 2011 (Declaration).

Expert Report of Robert Willig, Mark Israel, Bryan Keating, and Jonathan Orszag, "Response to Supplementary Comments of Hubert Horan," Docket DOT-OST-2009-1055, October 22, 2010.

Expert Report of Robert Willig, Mark Israel, Bryan Keating, and Jonathan Orszag, "Measuring Consumer Benefits from Antitrust Immunity for Delta Air Lines and Virgin Blue Carriers," Docket DOT-OST-2009-1055, October 13, 2010.

Expert Report of Mark Israel and Michael L. Katz, "Economic Analysis of the Proposed Comcast-NBCU-GE Transaction," Federal Communications Commission, MB Docket 10-56, July 20, 2010.

Expert Report of Mark Israel and Michael L. Katz, "The Comcast/NBCU Transaction and Online Video Distribution," Federal Communications Commission, MB Docket 10-56, May 4, 2010.

Expert Report of Mark Israel and Michael L. Katz, "Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction," Federal Communications Commission, MB Docket 10-56, February 26, 2010.

Expert Report of Robert Willig, Mark Israel, and Bryan Keating, "Competitive Effects of Airline Antitrust Immunity: Response of Robert Willig, Mark Israel, and Bryan Keating" in Docket DOT-OST-2008-0252, January 11, 2010.

Affidavit of Dr. Mark A. Israel on Class Certification in Re: Puerto Rican Cabotage Antitrust Litigation, in the United States District Court for the District of Puerto Rico, MDL Docket No. 3:08-md-1960 (DRD), December 10, 2009.

Expert Report of Robert Willig, Mark Israel, and Bryan Keating, "Competitive Effects of Airline Antitrust Immunity" in Docket DOT-OST-2008-0252, September 8, 2009.

Expert Report and Supplemental Expert Report of Dennis W. Carlton and Mark Israel in Re: Toys "R" Us-Delaware, Inc., and Geoffrey Inc. v. Chase Bank USA N.A. in American Arbitration Association New York, New York, Commercial Arbitrations No. 13-148-02432-08, February 27, 2009 (Expert Report), March 20, 2009 (Supplemental Expert Report).

Expert Reports of James Levinsohn and Mark Israel in Re: 2006 NPM Adjustment Proceeding pursuant to Master Settlement Agreement, October 6, 2008 (Expert Report), January 16, 2009 (Expert Report), March 10, 2009 (Expert Report).

EXPERT WORK IN REVIEW OF MERGERS/TRANSACTIONS

Successful Acquisition of Schurz Communications' Broadcast Stations by Gray Television. 2015. Lead economic expert for Gray. Made presentations to DOJ demonstrating output expanding effects of proposed transaction in light of the scale economies in television production and advertising and the small size of the DMAs affected by the transaction.

Successful Acquisition of the Communications Business of Danaher Corporation by NetScout Systems. 2015. Lead economic expert for NetScout. Made presentations to DOJ describing proper economic framework for analysis of competition and potential merger harms, and demonstrated that the presence of multiple viable competitors and numerous other credible threats to be used by powerful buyers in a dynamic industry made theories of anti-competitive harm from the merger implausible.

Successful Acquisition of Windmill Distribution Co. by Manhattan Beer Distributors. 2015. Lead economic expert for Manhattan Beer Distributors. Submitted White Paper to DOJ demonstrating, based on margin data, that the merger would be highly unlikely to lead to anti-competitive effects. Transaction was granted early termination from the Hart Scott Rodino process by the DOJ.

Proposed Acquisition of Time Warner Cable by Comcast Corporation. 2014-2015. Served as lead economic expert on broadband issues on behalf of Comcast Corporation. Submitted multiple Declarations and made multiple presentations to DOJ and FCC, explaining lack of horizontal, bargaining, or vertical/foreclosure concerns with regard to broadband competition as a result of the transaction.

Successful acquisition of Leap Wireless by AT&T. 2014. Lead economic expert for AT&T. Submitted multiple Declarations to FCC and made presentation to DOJ, demonstrating the transaction would generate substantial consumer benefits, while generating at most minimal upward pricing pressure in a properly defined mobile wireless services market and no issues related to spectrum concentration or other competitive concerns.

Successful merger of American Airline and US Airways. 2013. Lead consulting expert, managing Compass Lexecon team of over 25 economists supporting multiple experts. Made multiple presentations to DOJ, worked on expert reports in litigation, and assisted counsel with the analysis leading to settlement of litigation, permitting transaction to close.

Successful merger of T-Mobile USA and MetroPCS. 2013. Lead economic expert for T-Mobile USA. Conducted economic analyses of competitive effects of the transaction, as well as consumer benefits from reduced costs and increased network quality. Presented analyses to both DOJ and FCC.

FTC Investigation of Acquisition of Dollar Thrifty Automotive Group by Hertz, 2012. Served as a lead economic expert for FTC and prepared to serve as FTC's testifying expert against the merger, prior to case settlement. Conducted empirical analyses based on previous rental car mergers demonstrating likely price increases from the transaction.

Decision by Federal Communications Commission not to extend the ban on exclusive contracts for satellite-delivered, cable-affiliated networks. 2012. Lead economic expert for National Cable and Telecommunications Association. Submitted economic analysis demonstrating that the ban on exclusive distribution of satellite-delivered, cable affiliated networks is no longer warranted given increased marketplace competition. FCC made decision to allow the ban to sunset.

Successful sale of wireless spectrum by SpectrumCo and Cox ("Cable Companies") to Verizon Wireless and successful completion of related commercial agreements. 2012. On behalf of the Cable Companies, performed economic analyses demonstrating lack of competitive harm from the transaction on markets for backhaul and Wi-Fi services. Presented analyses to FCC.

Successful acquisition by LIN Media of broadcast television stations from NVTV. 2012. Lead economic expert for LIN Media. Prepared economic analysis demonstrating lack of competitive concern over potential issues related to Shared Service and Joint Sale Arrangements.

Proposed acquisition of T-Mobile USA by AT&T. 2011. Served as one of the lead economists, initially for T-Mobile (along with Michael Katz) and ultimately for both parties (along with Michael Katz and Dennis Carlton). Made multiple presentations to DOJ and FCC. Appeared in FCC Workshop, ex parte meeting.

S*uccessful application for antitrust immunity by Delta and Virgin Blue*. 2010. Together with Robert Willig, Bryan Keating, and Jon Orszag, prepared economic analyses demonstrating substantial net consumer benefits from antitrust immunity. Submitted results in expert reports to Department of Transportation.

Successful joint venture between Comcast and NBC Universal (and ultimate full acquisition of NBC Universal by Comcast). 2010. Served as one of the lead economists (along with Michael Katz) on behalf of the merging parties. Wrote multiple reports submitted to FCC (with Michael Katz) demonstrating lack of significant competitive concerns from the transaction. Made multiple presentations to DOJ and FCC. Appeared in FCC Workshop of economists, ex parte meeting.

Successful application for antitrust immunity for oneworld alliance and associated joint venture of American Airlines, British Airways, and Iberia Airlines. 2009-2010. Together with Robert Willig and Bryan Keating, prepared economic analyses demonstrating substantial net consumer benefits associated with antitrust immunity for the joint venture. Submitted results in expert reports to Department of Transportation.

Successful acquisition by PepsiCo of bottlers, PBG and PAS. 2009. Performed econometric and simulation analyses demonstrating pro-competitive effect of merger on PepsiCo's own brands, other brands distributed by PBG and PAS, and overall marketplace. Presented results to FTC (together with Dennis Carlton).

Successful merger of Delta Airlines and Northwest Airlines. 2008. In support of Dennis Carlton, developed empirical and theoretical analyses to demonstrate merger's pro-competitive nature. Work focused on (ultimately settled) private litigation opposing the merger.

Successful acquisition of Harcourt Education by Houghton Mifflin. 2007. Along with Daniel Rubinfeld and Frederick Flyer, developed econometric analyses demonstrating lack of competitive harm from proposed merger. Presented results to DOJ.

Successful acquisition of Chicago Board of Trade by Chicago Mercantile Exchange. 2007. Along with Robert Willig and Hal Sider, developed and presented multiple empirical analyses demonstrating lack of competitive harm from merger. Submitted multiple white papers and made multiple presentations to DOJ.

<u>SELECTED OTHER EXPERT/CONSULTING WORK</u>

Led team supporting Dennis Carlton's testimony in Toshiba/Hannstar TFT-LCD Antitrust litigation vs. Plaintiff Best Buy, 2013.

Led team supporting Dennis Carlton's testimony in Toshiba's TFT-LCD Class Action Antitrust litigation. Named Litigation Matter of the Year for 2012 by *Global Competition Review*, 2012.

As economic expert for US Airways, developed econometric analysis of air traffic at major US airports, presented to Philadelphia Airport management team, 2011.

Prepared analysis of the competitive impact of low-cost-carrier competition in Washington, DC and New York airports. Filed with DOT, 2011.

On behalf of major pharmaceutical firm, developed econometric model to forecast pharmaceutical expenditures, 2009.

Developed econometric model to measure of the importance of network effects in credit cards in the context of measuring damages incurred by a major credit card issuer, 2007-2008.

<u>SELECTED RECENT PRESENTATIONS</u>

American Bar Association Section of Antitrust Law, "Economic Issues Raised In The Comcast – Time Warner Cable Merger," Panelist, February 2016.

Fordham Competition Law Institute, 42nd Annual Conference on International Antitrust Law and Policy, Panel: Antitrust in a Mobile World, Panelist, October 2015.

American Bar Association Section of Antitrust Law, "Merger Practice Workshop," Faculty Member, October 2015.

Searle Center Conference on Antitrust Economics and Competition Policy, Panel on Recent Transactions in the Telecom Industry, Panelist, September 2015.

National Bureau of Economic Research, Summer Institute 2015, Industrial Organization Meetings, "Panel Discussion of the Comcast-Time Warner Merger," Panelist, July 2015.

Federal Communications Bar Association, "How the Antitrust Agencies and the FCC are Likely to Analyze Vertical Mergers," Panelist, November 2014.

The Coca Cola Company Global Antitrust Forum, "Round Table Discussion on Use of Economics and Economists," Panel Chair, November 2014.

Compass Lexecon Competition Policy Forum, Lake Como Italy, "Consolidation of the Telecoms Industry in the EU and the US," Panelist, October 2014.

The IATA Legal Symposium 2014, Aviation Law: Upfront and Center, "Merger Analysis – A sudden shift in approach by DOJ in the American Airlines and US Airways merger," Panelist, February 2014.

Georgetown Law 7th Annual Global Antitrust Enforcement Symposium, "Merger Enforcement and Policy," Panelist, September 2013.

American Bar Association Section of Antitrust Law, "Airline Mergers: First Class Results or Middle-Seat Misery?" Panelist, May 2013.

American Bar Association Section of Antitrust Law, "Go Low or Go Home! Monopsony a Problem?" Panelist, March 2012.

Federal Communications Bar Association Transactional Committee CLE Seminar, "The FCC's Approach to Analyzing Vertical Mergers," Panelist, October 2011.

The Technology Policy Institute Aspen Forum, "Watching the Future: The Economic Implications of Online Video," Panelist, August 2011.

American Bar Association Forum on Air & Space Law, 2011 Update Conference, "Antitrust Issues: What's on the Horizon for the Industry," Panelist, February 2011.

American Bar Association Section of Antitrust Law, "Antitrust in the Airline Industry," Panelist, September 2010.

PUBLICATIONS

"Buyer Power in Merger Review," (with Dennis W. Carlton and Mary Coleman), Chapter 22 of *The Oxford Handbook of International Antitrust Economics*, Volume 1, Roger D. Blair and D. Daniel Sokol, eds, Oxford University Press, 2015.

"The Evolution of Internet Interconnection from Hierarchy to 'Mesh': Implications for Government Regulation," (with Stanley M. Besen), *Information Economics and Policy*, December 2013.

"Airline Network Effects and Consumer Welfare," (with Bryan Keating, Dan Rubinfeld, and Robert Willig), *Review of Network Economics*, November 2013.

"The Delta-Northwest Merger: Consumer Benefits from Airline Network Effects (2008)," (with Bryan Keating, Daniel L. Rubinfeld, and Robert D. Willig), *The Antitrust Revolution*, Sixth Edition, Edited by John E. Kwoka, Jr. and Lawrence J. White, Oxford University Press, New York, July 2013.

"Proper Treatment of Buyer Power in Merger Review," (with Dennis W. Carlton), *Review of Industrial Organization*, July 2011.

"Response to Gopal Das Varma's Market Definition, Upward Pricing Pressure, and the Role of the Courts: A Response to Carlton and Israel," (with Dennis W. Carlton), *The Antitrust Source*, December 2010.

"Will the New Guidelines Clarify or Obscure Antitrust Policy?" (with Dennis W. Carlton), *The Antitrust Source*, October 2010.

"Should Competition Policy Prohibit Price Discrimination?" (with Dennis W. Carlton), *Global Competition Review*, 2009.

"The Empirical Effects of Collegiate Athletics: An Update Based on 2004-2007 Data," (with Jonathan Orszag), Paper commissioned by National Collegiate Athletic Association, available *at* *http://www.epi.soe.vt.edu/perspectives/policy_news/pdf/NCAASpending.pdf*, February 2009.

"Services as Experience Goods: An Empirical Examination of Consumer Learning in Automobile Insurance," *The American Economic Review*, December 2005.

"Tenure Dependence in Consumer-Firm Relationships: An Empirical Analysis of Consumer Departures from Automobile Insurance Firms," *The Rand Journal of Economics*, Spring 2005.

"The Impact of Youth Characteristics and Experiences on Transitions Out of Poverty," (with Michael Seeborg), *The Journal of Socio-Economics*, 1998.

"Racial Differences in Adult Labor Force Transition Trends," (with Michael Seeborg), *The Journal of Economics*, 1994.

FORTHCOMING AND UNDER-REVIEW PUBLICATIONS

"The Economics of Cartel Cases and Use of Experts," (with Gustavo Bamberger and Dennis W. Carlton), forthcoming in *Manual on Cartel Enforcement*, November 2015.

Update to ABA Treatise, Proving Antitrust Damages: Legal and Economic Issues, Chapter 6: "Econometrics and Regression Analysis," (with Chris Cavanagh and Bryan Keating), July 2015.

GRANTS AND HONORS

Searle Fund for Policy Research Grant, 2004-2006, for "An Empirical Examination of Asymmetric Information in Insurance Markets."

Kellogg School of Management Chairs' Core Course Teaching Award, 2003 & 2005.

Bradley Dissertation Fellowship, Stanford University, 1999-2000.

Stanford University, Outstanding Second Year Paper Prize, 1997.

SELECTED ACADEMIC SEMINARS

Yale University
University of Arizona
Washington University, St. Louis
University of Pennsylvania
University of Toronto
UCLA
University of Wisconsin-Madison
Massachusetts Institute of Technology
Harvard University
University of Chicago
Columbia University
University of Texas
Carnegie Mellon University
University of California, Irvine
University of California, San Diego

REFEREE FOR ACADEMIC JOURNALS

American Economic Review
The Journal of Industrial Economics
The Rand Journal of Economics
Journal of the European Economic Association
The Review of Economic Studies
The Review of Economics and Statistics
Journal of Risk and Insurance

APPENDIX 2

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[redacted]

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APPENDIX 3

1. In this appendix I present details of the statistical test of whether EstrellaTV and Telemundo or EstrellaTV and NBC Universo compete for viewers, as summarized in Section IV above. This test makes use of standard econometrics tools and monthly Nielsen ratings data to determine whether the discontinuation of Comcast's carriage of EstrellaTV has resulted in a statistically detectable increase in Telemundo's or NBC Universo's viewership by households that are Comcast's subscribers in the three affected DMAs.

2. Because a household's viewing decision can change over time due to factors unrelated to whether EstrellaTV is available, simply comparing Telemundo's or NBC Universo's viewership by Comcast's subscribers before and after the discontinuation of Comcast's carriage of EstrellaTV can be misleading. For example, the viewership of Telemundo might have increased due to the increase in the quality of Telemundo's content over time.

3. To control for these factors unrelated to whether EstrellaTV is available to Comcast's subscribers, I use a standard econometric technique known as "difference-in-differences" to estimate the effect of Comcast's discontinuation of EstrellaTV carriage on Telemundo's and NBC Universo's viewership in the affected DMAs.[1] A difference-in-differences analysis compares the changes in viewership for households that have been affected by Comcast's non-carriage of EstrellaTV – the treatment group – to the changes in viewership for households that have not been affected by the non-carriage of EstrellaTV – the control group. By comparing the changes in viewership between the treatment and control groups, common factors that affect viewership for both groups but are unrelated to non-carriage of Estrella TV can be controlled for, allowing the effects of non-carriage of EstrellaTV on Telemundo's and NBC Universo's viewership to be estimated.

[1] See *supra* note 40.

4. I performed this test using Nielsen ratings data, which provide a monthly measure of Telemundo and NBC Universo viewership in each of the affected DMAs for the period from January 2013 through March 2016. The data include TV households that are Comcast subscribers (who stopped receiving EstrellaTV through Comcast on February 19, 2015) as well as those that are not Comcast subscribers (who continued to receiving EstrellaTV through other MVPDs). In what follows, I will refer to the twenty-five months from January 2013 through January 2015 as the "pre-period" and the thirteen months from March 2015 through March 2016 as the "post-period".[2]

5. To implement the difference-in-differences analysis, I estimated the following regression model using the Nielsen ratings for Telemundo and NBC Universo, separately, in the three affected DMAs:

$$\begin{aligned}\text{Log}(\text{Rating}_{\text{imt}}) = \beta_0 + \beta_1 \cdot \text{Post}_t \times \text{Comcast}_i + \text{Year-Month Fixed Effects} \\ +\text{DMA-MVPD Fixed Effects} + \epsilon_{imt}\end{aligned}$$

where *i* is the index for MVPD, *m* is the index for DMA, and *t* is the index for calendar month.[3]

6. The inclusion of year-month fixed effects in the regression model controls for factors that affect Telemundo's or NBC Universo's ratings for both treatment and control groups over time. The inclusion of DMA-MVPD fixed effects controls for DMA and MVPD-specific factors affecting Telemundo's or NBC Universo's ratings that are time-invariant. Post_t is a

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[2] Because EstrellaTV pulled its signals from Comcast systems in the middle of February 2015 and the data are only available on a monthly basis, I excluded the month of February 2015 from my analysis.

[3] The regressions are weighted by "intab", which represents the sample size used by Nielsen to construct the corresponding rating observation, giving more weight to ratings that are more accurately measured. I excluded from my estimation sample outlier observations that can potentially bias the results. Outliers are identified as rating observations that are smaller than the 5^{th}- percentile, greater than the 95^{th}- percentile, or more than 5 times larger than the median rating of the network in the particular DMA-MVPD combination.

variable that equals 1 for months in the post-period and 0 otherwise; Comcast_i is a variable that equals 1 if the MVPD is Comcast and 0 otherwise. The coefficient β_1 therefore measures the effect of Comcast's discontinuation of EstrellaTV carriage on Telemundo's and NBC Universo's viewership for Comcast's subscriber households. {

[redacted]

[4] To ensure the robustness of my regression analysis, I repeated the same difference-in-differences analysis but with also including ratings data from other DMAs, applying alternative methodologies for outlier observations, and applying alternative weighting methodologies. The robustness checks of my regression results confirm my finding of no statistically significant effects of Comcast's discontinuation of EstrellaTV carriage in the affected DMAs on Telemundo's or NBC Universo's viewership.

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

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

EXPERT DECLARATION OF ROBIN FLYNN

I. INTRODUCTION

1. I am Director of Research for SNL Kagan, a leading source of media & telecommunications data and financial analysis. SNL Kagan ("Kagan"), an offering of S&P Global Market Intelligence, offers an online interactive database and market intelligence tool, which provides data and intelligence in the areas of cable television, broadcast TV, broadcast and online radio, cable and broadcast TV networks, DBS, online video, Internet media, motion picture and wireless/mobile media and telecommunications in the United States and internationally. In addition to the online database, with thousands of articles and interactive data sets, Kagan publishes five newsletters and over three dozen annual reports. Additionally, Kagan's senior analysts bring together key players in the media and communications sectors in

industry seminars. Kagan senior analysts also provide strategic corporate consulting, fair-market value appraisals and other consulting services in all the media areas in which we operate. Our perspective and historical databases are regularly used by senior executives in the fields of media operations and finance to plan and execute their businesses.

2. I have been retained by counsel for Comcast Corporation to compare the programming on the EstrellaTV and Telemundo stations in Denver, Houston and Salt Lake City, and also to compare the programming on those EstrellaTV stations with that of the cable network NBC Universo.

II. QUALIFICATIONS

3. I graduated from Duke University with a Bachelor's degree in 1983. I hold an MBA from the Monterey Institute of International Studies. I joined Kagan in 1988.

4. I have more than 28 years of experience in the cable television and broadcasting fields, not only as an analyst but also as an appraiser of media properties. As Director of Research, I head up a team that is responsible for the company's monthly newsletters, annual reports, and online articles devoted to covering the cable television and broadcast industries, as well as overseeing other media teams. This research is largely dedicated to analyzing the economics of cable television, TV and radio stations and providing timely and data-rich reports on trends in these industries. In addition, I am responsible for the company's appraisal and databook publishing activities in the area of cable television and broadcast stations, and have personally appraised and/or determined the value of more than $20 billion of cable and broadcast properties under contract assignment over the last 10 years.

5. In addition, Kagan's senior analysts bring together key players in the media and communications sectors for annual seminars. As a senior analyst, I also provide strategic corporate consulting, appraisals and expert opinions in all media areas in which Kagan

operates. I have been retained and testified as an expert in matters concerning the broadcast, cable television and DBS (direct broadcast satellite) industries. My CV, including past expert assignments, can be found in Exhibit A. The hourly rate charged by SNL Kagan for my work on this matter is {[redacted]} per hour. I have no financial interest in the outcome of this case.

III. SCOPE OF ASSIGNMENT AND SUMMARY OF CONCLUSIONS

6. Counsel for Comcast Corporation retained me to provide a comparison between the programming aired by EstrellaTV and Telemundo stations in Denver, Houston and Salt Lake City, as well as to compare the programming broadcast on those EstrellaTV stations with that of the cable network, NBC Universo.[1] I have done so over the period July 1, 2014 to March 31, 2016, both because it encompasses what I understand to be the relevant time period for the events underlying this dispute (which generally runs from late 2014, when EstrellaTV sought to elect retransmission consent, to late 2015 when EstrellaTV and Comcast ended negotiations), and because it provides me with a slightly larger sample size in which to do a quantitative comparison of the programming on EstrellaTV, Telemundo and NBC Universo.

7. I performed my analysis utilizing data provided by Gracenote (formerly known as Tribune Media Services), the leading supplier of TV programming data for broadcast stations, broadcast and cable networks and MVPDs. The Gracenote data encompasses TV schedules and synopses for practically every TV program and channel transmitted in the United States. Most importantly for my work, Gracenote classifies television programming into specific categories and genres that are utilized by television viewers to help them select the programming

[1] The EstrellaTV stations in my analysis are KETD in Denver, Colorado; KZJL in Houston, Texas; and KPNZ in Salt Lake City, Utah. The Telemundo stations in my analysis are KDEN in Denver, Colorado; KTMD in Houston, Texas; KULX-CD in Salt Lake City, Utah.

they intend to watch.[2] The Gracenote data includes daily programming schedules, show titles, title descriptions, duration (in minutes), source, type and genre classifications.[3]

8. In all, the data I examined for the period July 1, 2014 to March 31, 2016 covers 640 days or 15,360 hours of programming made up of 1,267 unique titles and divided into 50 genres across the EstrellaTV, Telemundo and NBC Universo schedules. I analyzed that programming over the well-accepted prime-time period (Eastern/Pacific 8PM-11PM; Central/Mountain 7PM-10PM) in which broadcasters and cable networks generally air their most popular programming, and over the networks' respective 24-hour schedules (both inclusive and exclusive of the "Shopping" genre comprising paid programming and infomercials). Gracenote has complete information for the EstrellaTV, Telemundo and NBC Universo programming in the relevant time period.

9. I relied on Gracenote for program categories and genres both because it is widely used in the television industry and because its preexisting system of categorization has been developed for purposes entirely unrelated to this litigation. My opinion draws entirely on the Gracenote data. I have not independently verified the genre for each program. I understand that counsel for Comcast has asked another expert to draw programming comparisons based on viewing the programming on EstrellaTV, Telemundo and NBC Universo; I have not engaged in that analysis.

10. My analysis of the Gracenote data for the July 2014 through March 2016 time period shows significant differences in the mix of predominant programming on the

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2 For further information on Gracenote, see http://www.gracenote.com/on-entertainment-tv-listings-product-page/.

3 For purposes of this analysis, I used the "Genre 1" programming categories identified by Gracenote. I understand that Gracenote considers Genre 1 to best reflect the proper classification of any one television program. Gracenote also may identify subsidiary Genre 2 or Genre 3 classifications in some cases where a program has attributes that also place it within another category. Because Genre 1 represents the most relevant classification according to Gracenote, I have limited my analysis to that level.

EstrellaTV stations in Houston, Denver and Salt Lake City as compared to the mix of predominant programming aired on Telemundo stations in those cities or to that of NBC Universo. The differences between EstrellaTV on the one hand, and Telemundo and NBC Universo on the other, are also striking when I examine the prime-time schedule of the networks, particularly as a result of Telemundo's emphasis on *telenovela* programming, which is absent from EstrellaTV during this time frame. I also see consistently pronounced differences when I examine the broader 24-hour schedule of the networks, both with and exclusive of "Shopping"/infomercial programming. In the balance of this declaration, I spell out these differences in more detail.

ANALYSIS

A. Summary of Conclusions

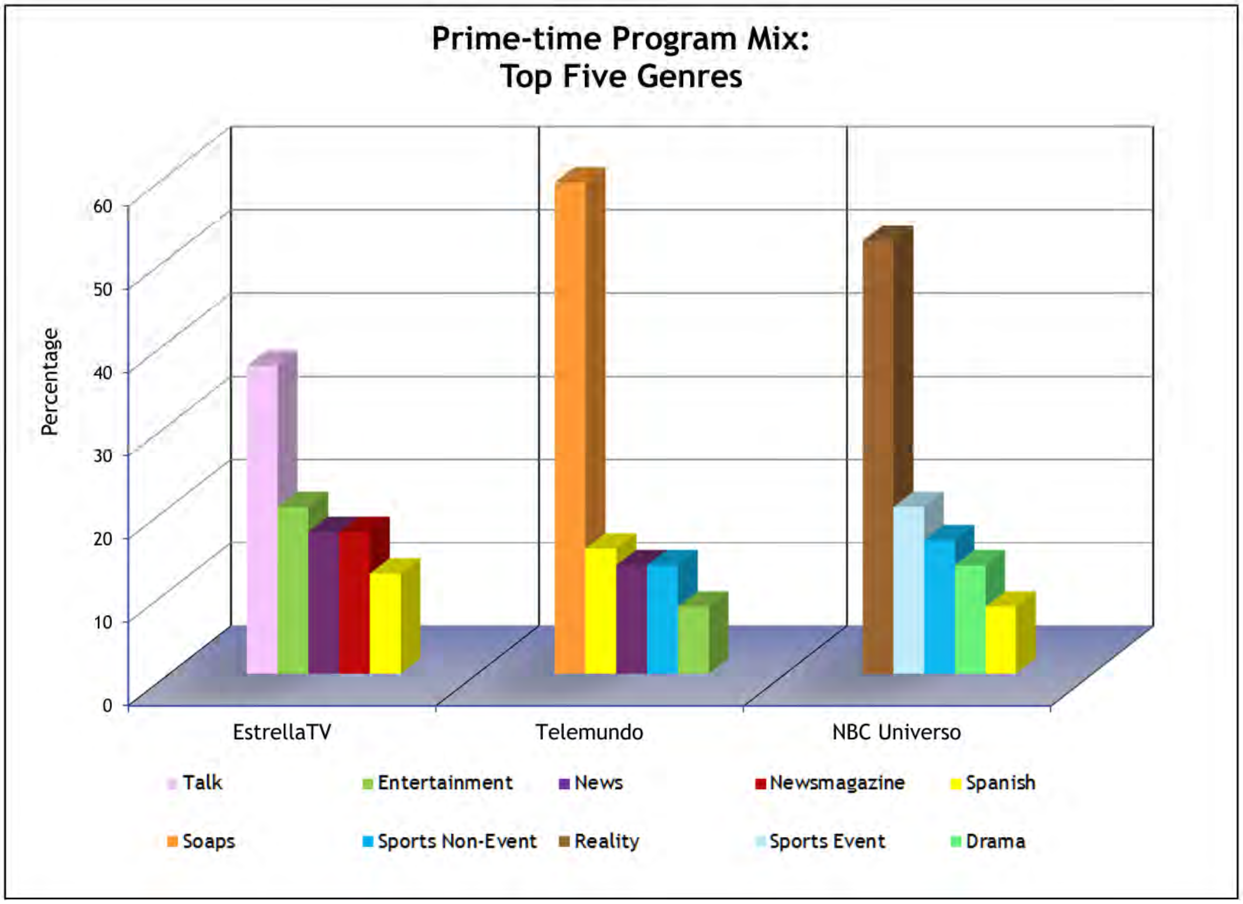
11. My analyses of the Gracenote data show that EstrellaTV's programming mix and predominant programming aired in Houston, Denver and Salt Lake City is not similar in type or genre to the programming mix or predominant programming on either Telemundo (in the same three cities) or NBC Universo. The predominant categories of programming aired by EstrellaTV during prime time are "Talk" (32%), "Entertainment" (15%), "News" (12%), "Newsmagazine" (12%) and "Spanish" (7%) (including movies).[4] The overwhelmingly predominant category on Telemundo in prime time is "Soaps" (54%) (which in Spanish-language television are "telenovelas"), followed by "Spanish" (10–11%)[5], "Sports Non-Event" (7–8%), "News" (1–13%) and "Entertainment" (3–6%). NBC Universo's predominant prime-

[4] I understand from Gracenote that the "Spanish" category encompasses any and all movies that are shown in the Spanish language.

[5] Whenever a percentage range is shown, it reflects the differences among the three stations. The bar charts included herein reflect the average of any range, where appropriate.

time programming included "Reality" (47%), "Sports Event" (15%), "Sports Non-Event" (11%), "Drama" (8%) and "Spanish" (5%).

12. These category differences are graphically represented in the following bar chart:

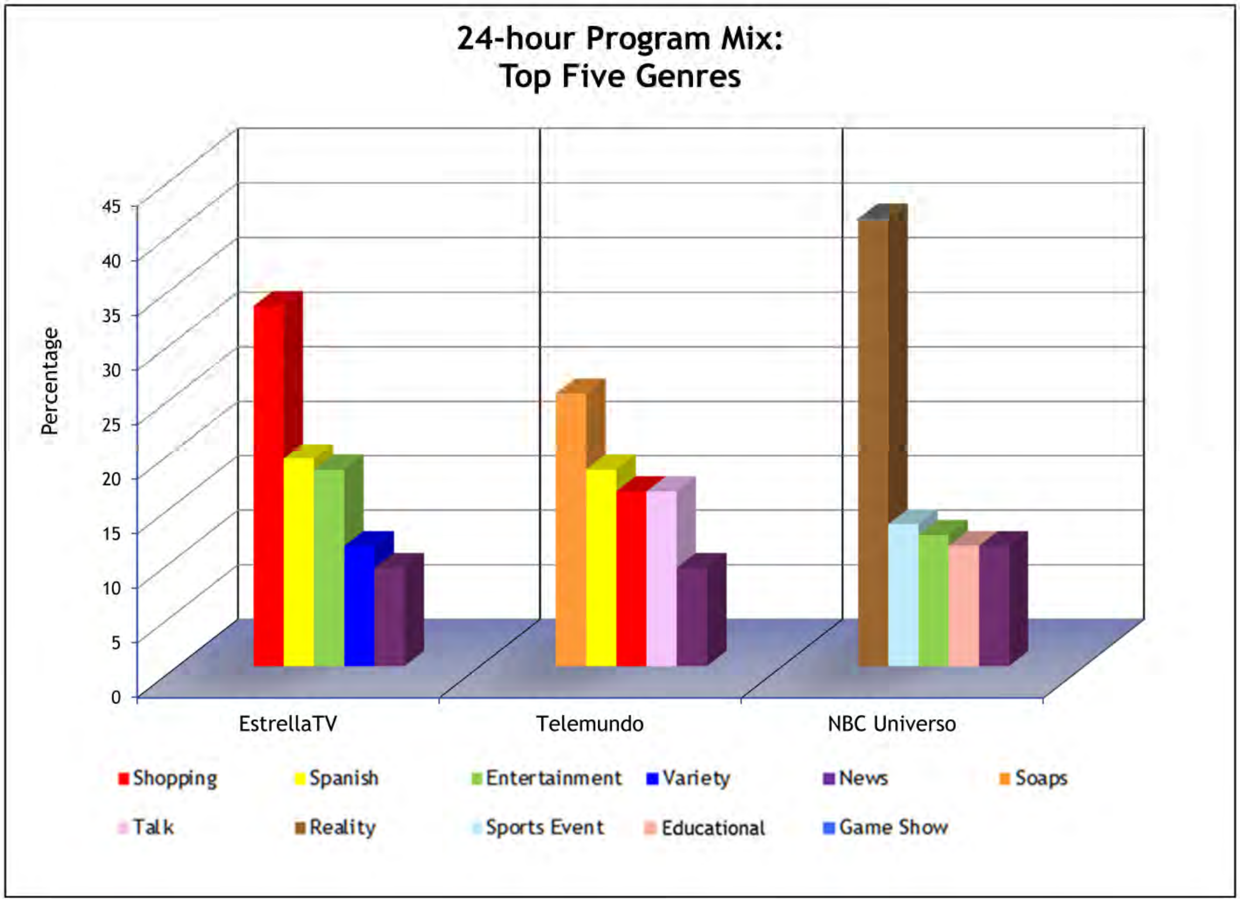


13. The differences in prime-time programming are particularly striking because both broadcast and cable networks transmit their signature programming in that time period, which typically attracts the most viewers and advertisers. Telemundo devotes more than half of its prime-time schedule to telenovelas; EstrellaTV, by contrast, airs no telenovelas in prime time. EstrellaTV, in turn, devotes almost half of its prime-time programming to "Talk" and "Entertainment" shows, which comprised only 4–13% of Telemundo's programming in the same time block. NBC Universo showed entirely different programming, broadcasting "Reality"

and Sports-related programming for about 72% of its prime-time schedule. Indeed, both Telemundo (approximately 12%) and NBC Universo (25%) rely on "Sports Event" and "Sports Non-Event" programming to a significant degree in prime time, while EstrellaTV shows only about 2% of these categories in prime time.

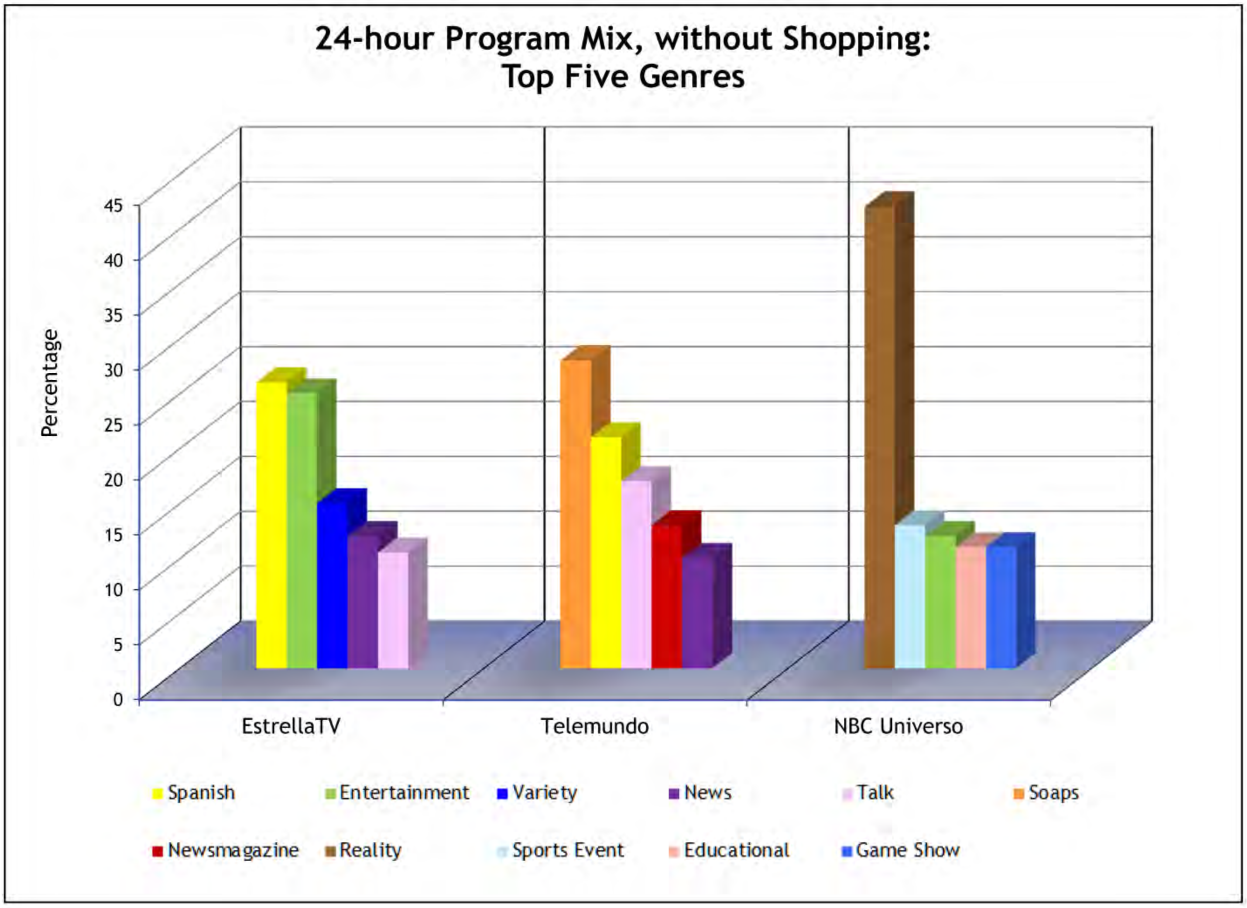
14. Assessed on a 24-hour basis, the predominant categories of programming on the EstrellaTV stations are "Shopping" (29–31%), "Spanish" (16%), "Entertainment" (15%), "Variety" (8%) and "News" (6%). In contrast, the predominant categories of programming on the Telemundo stations are "Soaps" (22%), "Spanish" (15–16%), "Shopping" (12–13%), "Talk" (12–13%) and "News" (2–8%). The predominant categories on NBC Universo are "Reality" (38%), "Sports Event" (10%), "Entertainment" (9%), "Educational" (8%) and "Game Show" (8%).

15. These category differences are graphically represented in the following bar chart:



16. The predominant categories of programming on the EstrellaTV stations, when assessed on a 24-hour basis and excluding the "Shopping" (infomercials and paid programming) category are "Spanish" (22–23%), "Entertainment" (21–22%), "Variety" (11–12%), "News" (8–9%) and "Talk" (7%). In contrast, the predominant categories of programming on the Telemundo stations are "Soaps" (25–26%), "Spanish" (17–18%), "Talk" (13–15%), "News" (8–10%) and "Newsmagazine" (5–7%). The predominant categories on NBC Universo are "Reality" (39%), "Sports Event" (10%), "Entertainment" (9%), "Educational" (8%) and "Game Show" (8%).

17. These category differences are graphically represented in the following bar chart:



18. In short, I compared the categories of programming across these three bases (prime time, 24-hour and 24-hour exclusive of "Shopping"/infomercials), and conclude that there are substantial differences in the programming mix aired by these three networks during the time period examined. I detail my analysis below.

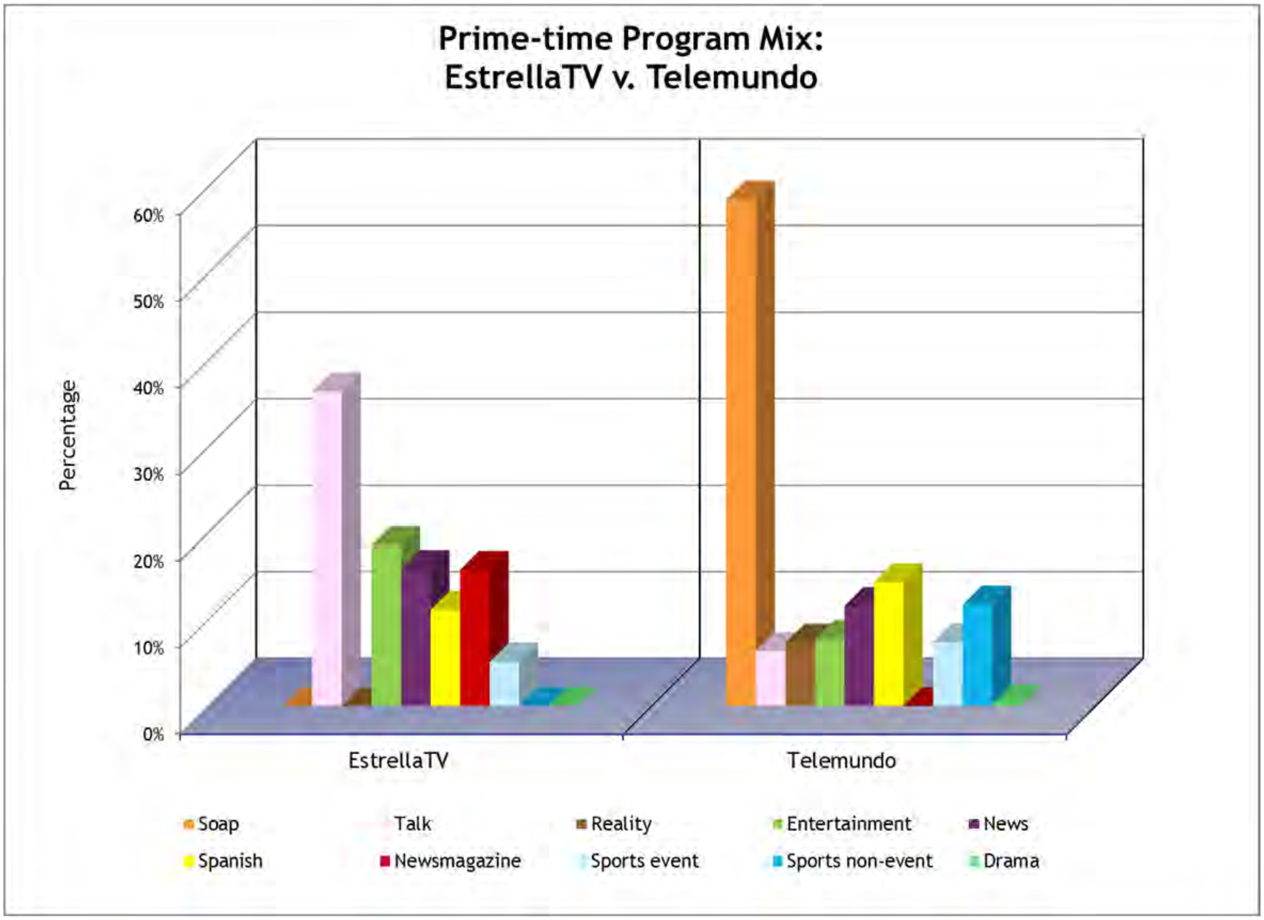
B. Prime-time Analysis

19. The contrast in prime-time programming for EstrellaTV, Telemundo and NBC Universo is stark. The predominant type of prime-time programming on EstrellaTV is "Talk," making up approximately 32% of the prime-time hours. Second is "Entertainment" at approximately 15%, followed by "News" and "Newsmagazine" programming (the latter of

which includes such shows as "Alarma TV" and "Noticiero Con Enrique Gratas"), both of which register just under 12% each of EstrellaTV's prime-time programming hours. The fifth category is "Spanish," comprising approximately 7% of EstrellaTV's prime-time programming. In all, these top five categories of programming make up approximately 78% of the prime-time programming on the EstrellaTV stations over the relevant time period. The prime-time program analysis of the EstrellaTV stations in Denver, Houston and Salt Lake City; the Telemundo stations in the same market; and the NBC Universo network is shown in Table 1 in Appendix B.

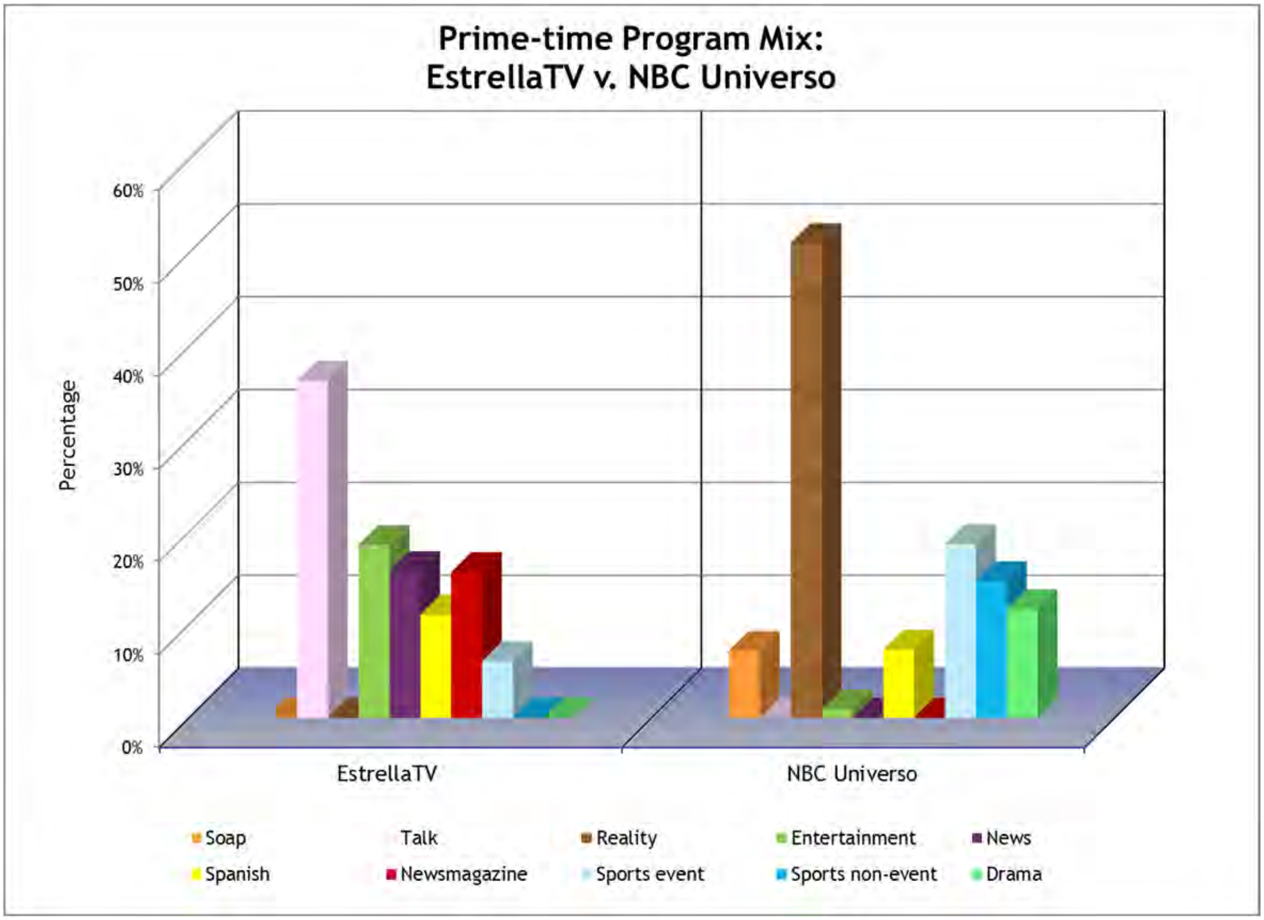
20. Telemundo's prime-time lineup mix is entirely different. Approximately 54.5% of the prime-time programming on the Telemundo stations falls into the category of "Soaps," which includes telenovelas; EstrellaTV, by contrast, broadcasted no such programming in prime time. Turning to the leading EstrellaTV categories, Telemundo stations devoted between 3% and 6% of their prime-time hours to the "Entertainment" category featured on EstrellaTV and only 1–8% of their prime-time hours to the leading category of EstrellaTV programming, "Talk." The three Telemundo stations devoted varying prime-time hours to the next most popular EstrellaTV category, "News," ranging between 1% in Salt Lake City and 13% in Houston. None of the Telemundo stations broadcasted any programming in prime time in the "Newsmagazine" category. And Telemundo broadcasted about 10–11% of its prime-time programming in the "Spanish" category that is the fifth most prevalent on EstrellaTV. In all, Telemundo devoted less than half as much time (38% vs. 78%) to the five most popular categories of prime-time programming on EstrellaTV.

21. These distinctions between EstrellaTV and Telemundo are graphically represented in the following bar charts:



22. The prime-time comparison between NBC Universo and EstrellaTV tells a similar story. NBC Universo transmitted no programming in the leading EstrellaTV category of "Talk." Less than 0.5% of NBC Universo's hours were devoted to "Entertainment" (as opposed to 15% on EstrellaTV). NBC Universo had no "News" or "Newsmagazine" programming in the relevant time period. And NBC Universo only had approximately 5% of its prime-time programming in the "Spanish" category. Conversely, the dominant category of NBC Universo prime-time programming, "Reality"—making up over 47% of NBC Universo's prime-time hours—was not a category of programming reflected for EstrellaTV.

23. These distinctions between EstrellaTV and NBC Universo are graphically represented in the following bar chart:



C. 24-hour Programming Analysis

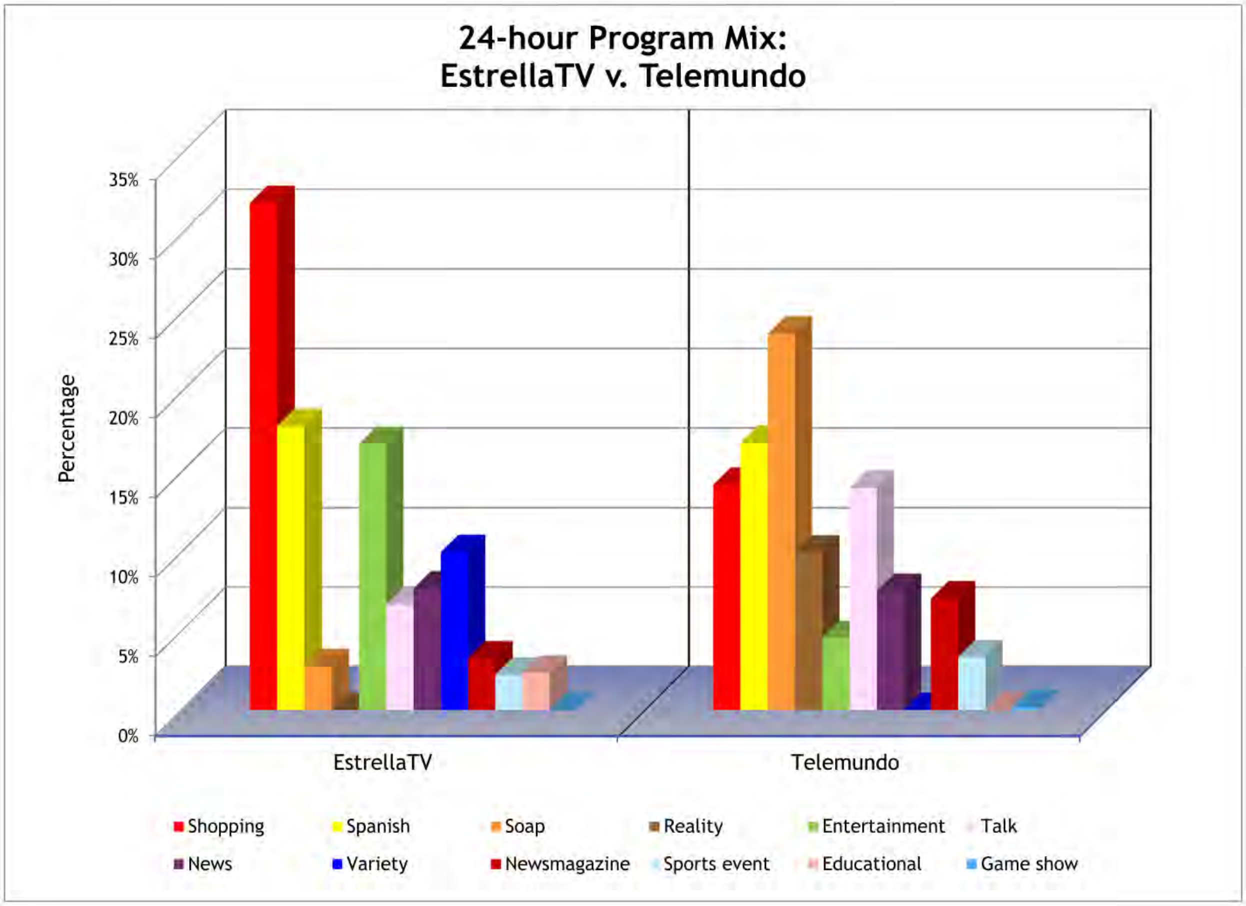
24. The complete analysis of the 24-hour programming days is set out in Table 2 of Exhibit B. It shows that, for EstrellaTV, the top 5 categories are: (1) "Shopping" (including infomercials), which comprises between 29% and 31% of the programming hours on the three EstrellaTV stations; (2) "Spanish," which makes up approximately 16% of the EstrellaTV programming day; (3) "Entertainment," including shows such as "Don Cheto" and "Retofamosos," which comprises another 15%; (4) "Variety," including such shows as "A Que No Puedes VIP" and "Lagrimita y Costel," which is approximately 8% of the programming day; and (5) "News," which comprises 6% of programming. In all, for the three EstrellaTV stations

that I analyzed, these five categories constitute almost 76% of the total programming broadcast over the period.

25. The contrast with Telemundo is clear. “Shopping” makes up only 12–13% of the program day on Telemundo (less than half the percentage on EstrellaTV), including syndicated paid programming for products such as Luminess makeup and Nuwave cooking. “Spanish” is an area of relative overlap between Telemundo and EstrellaTV, with that category comprising approximately 15–16% of the Telemundo broadcast day in the three markets. EstrellaTV’s third most important category of programming, “Entertainment,” makes up only about 3–4% of Telemundo’s programming, in contrast to 15% for EstrellaTV. Telemundo has zero shows reflected in EstrellaTV’s fourth category, “Variety.” Finally, Telemundo does show “News” for 2–8% of the programming, depending on the station. In all, Telemundo devotes half as much time (32–41% vs. 76%) to the predominant categories of programming on EstrellaTV.

26. Another critical difference between the programming is the prominence of telenovelas (classified as “Soaps” by Gracenote) on Telemundo. This includes such shows as “El señor de los cielos” and “Tierra de Reyes.” “Soaps” makes up the largest portion of Telemundo’s programming, comprising 22% of all of Telemundo’s broadcast hours. That is more than 20 times higher than the comparable figure on EstrellaTV, which broadcasts “Soaps” approximately 1% of the time over the relevant period.

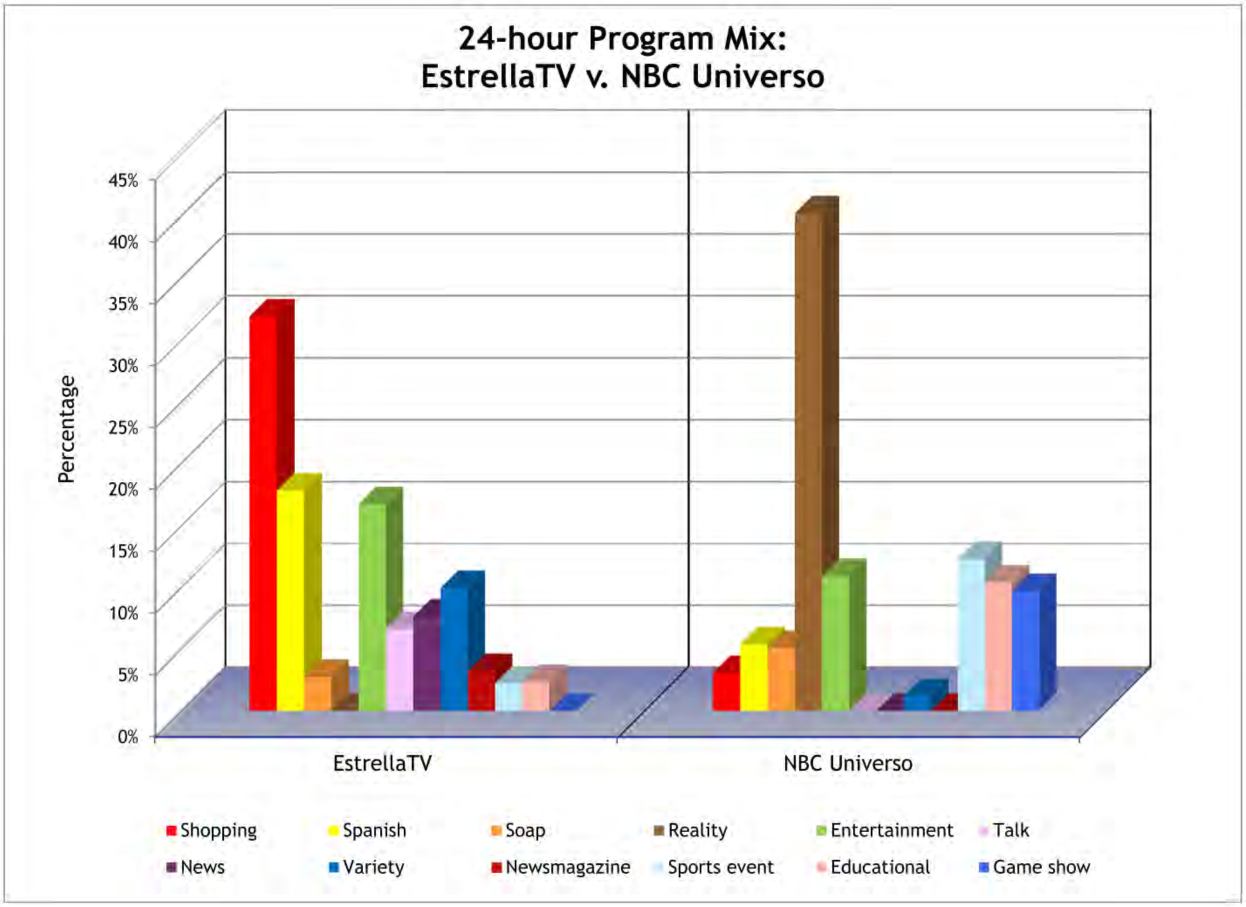
27. These distinctions between EstrellaTV and Telemundo are graphically represented in the following bar chart:



28. The contrast between the programming mix on the three EstrellaTV stations and NBC Universo is stark as well. NBC Universo devotes approximately 1% of its programming to "Shopping," 3% to "Spanish," 9% to "Entertainment," 0.2% to "Variety" and 0% to "News." Overall, the five categories that comprise approximately 76% of EstrellaTV's programming make up only about 14% of the programing on NBC Universo. Notably, the dominant categories of programming on NBC Universo do not register as material categories of programming on EstrellaTV. "Reality" programming makes up 38% of NBC Universo's broadcast hours; that category shows no programming on EstrellaTV. Another 10% of NBC

Universo's programming is devoted to "Sports Events"; by contrast, that programming comprises less than 0.5% of the program hours on EstrellaTV.

29. These distinctions between EstrellaTV and NBC Universo are graphically represented in the following bar chart:



D. 24-hour Programming Excluding "Shopping" Analysis

30. In order to exclude the effects of paid programming, I also conducted an analysis of the programming mix during the period from July 1, 2014 to March 31, 2016 showing the EstrellaTV programming during the 24-hour period excluding "Shopping" (which includes paid programming and infomercials). Based on my analysis of the Gracenote data, the EstrellaTV stations devote the highest proportion of their non-infomercial programming to "Spanish" (23%), "Entertainment" (21–22%), "Variety" (12%), "News" (8–9%) and "Talk"

(7%). In contrast, the Telemundo stations devote the highest percentage of their schedule to "Soaps" (including telenovelas) (25–26%), "Spanish" (17–18%), "Talk" (14–15%), "Reality" (8–12%) and "News" (3–9%). NBC Universo's programming is more heavily weighted towards "Reality" programming (39%), followed by "Sports Event" (10%), "Entertainment" (9%), "Educational" (9%) and "Game Show" (8%). The 24-hour program mix excluding "Shopping" analysis of the EstrellaTV stations in Denver, Houston and Salt Lake City; the Telemundo stations in the same market; and the NBC Universo network is shown in Table 3 in Appendix B.

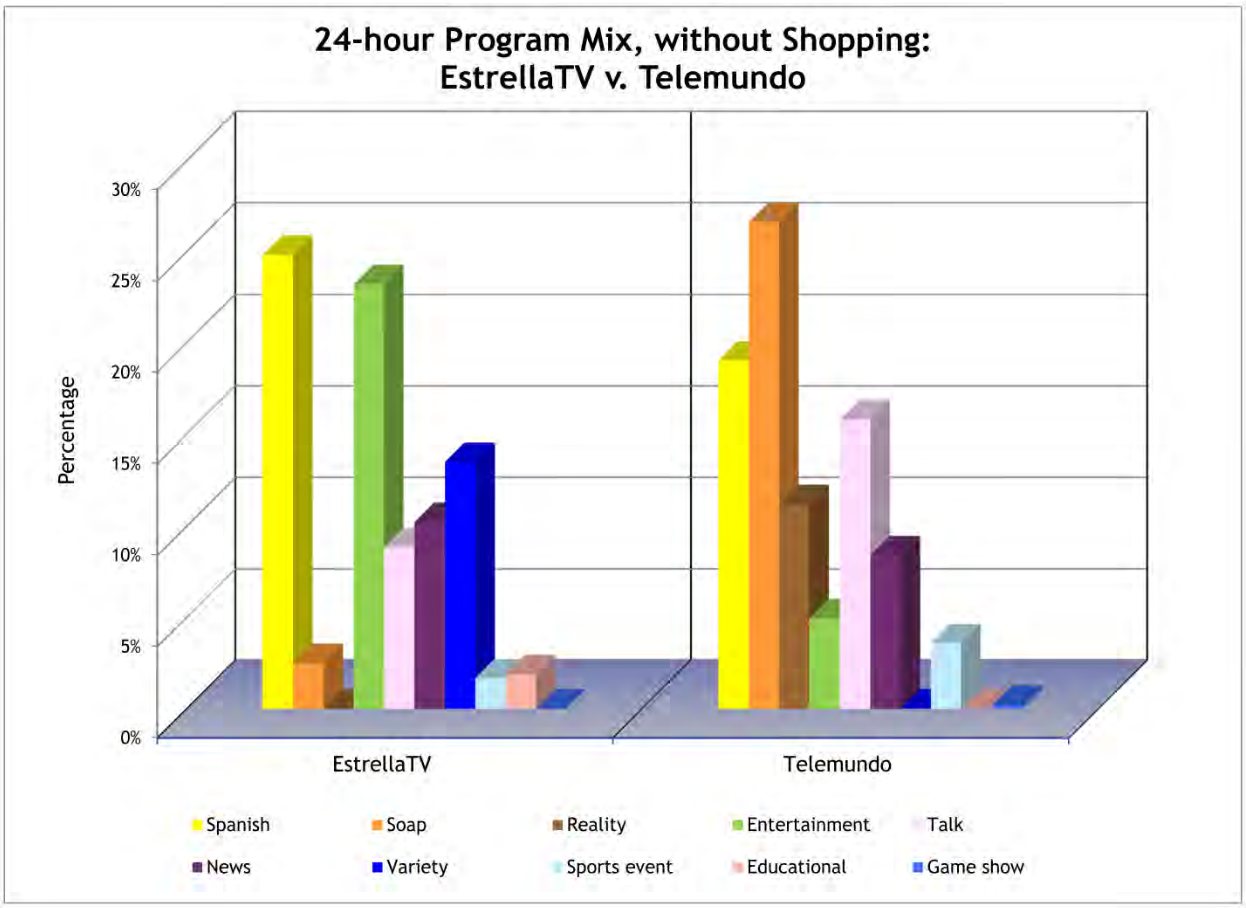
31. As with the prime-time and 24-hour analysis set out above, the 24-hour non-"Shopping" analysis reveals substantial differences in programming. For example, on the three EstrellaTV stations, 23%, or the largest percentage, is classified as the "Spanish" language movies genre vs. 17–18% for the Telemundo stations. The second largest prime-time programming category on the EstrellaTV stations is "Entertainment" at 21–22% compared to 3–4% for the Telemundo stations. EstrellaTV's third and fourth largest program categories are "Variety" at 11–12%, which includes such shows as "Estrellas Hoy" and "A Que No Puedes VIP," and "News" at 8–9%. In contrast, Telemundo stations have no "Variety" programming classified by Gracenote during the 24-hour time period, and on one station a substantially smaller (3%) percentage of "News."

32. The top 24-hour non-"Shopping" programming category for the Telemundo stations is in the "Soaps" genre at 25–26%. That compares to 1% in this category for the EstrellaTV stations. The second-largest category is "Spanish" language movies (17–18%), followed by "Talk" (14–15%), which includes shows such as "Al Rojo Vivo con Maria Celeste" and "Un Nuevo Dia", then "Reality" (8–12%) and "News" (3–9%). That compares to 23% of

"Spanish" programming, 7% of "Talk"-related programming and no "Reality" programs categorized on the EstrellaTV stations.

33. In total, the top five 24-hour non-"Shopping" categories of the Telemundo stations accounted for 73–74% of the Telemundo stations' programming and just 39–41% of EstrellaTV's programming.

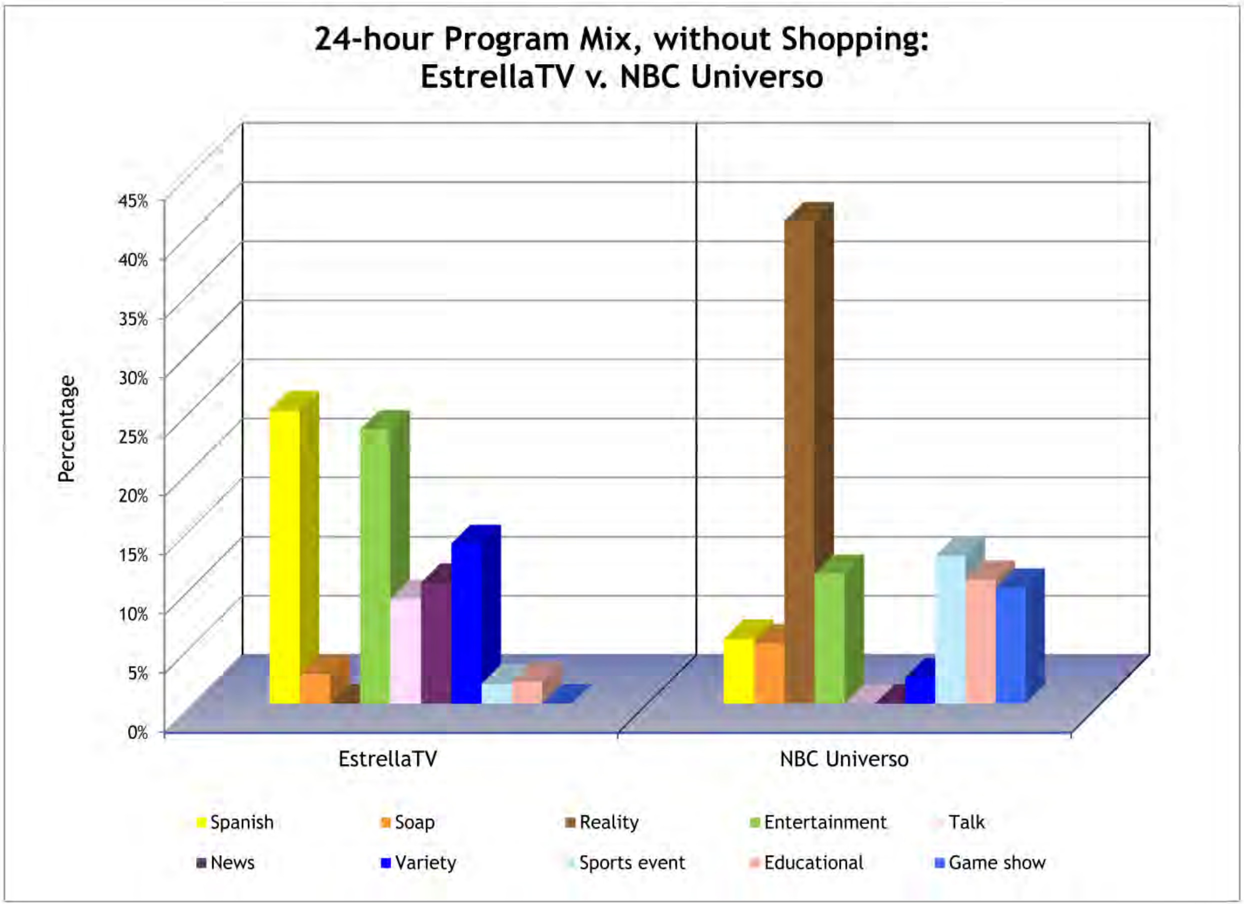
34. These differences in the EstrellaTV and Telemundo categories are graphically represented in the following bar chart:



35. The top categories of NBC Universo's 24-hour non-"Shopping" programming include "Reality" at 39% (0% for the EstrellaTV stations), "Sports Event" (10% for NBC Universo vs. less than 1% for EstrellaTV stations), "Entertainment" at 9% and "Educational" at 9% (vs. less than 1% for EstrellaTV stations) and "Game Show" at 8% (0% for

the EstrellaTV stations). In total, the top five 24-hour non-"Shopping" categories of NBC Universo accounted for 74% of NBC Universo programming and just 23% of EstrellaTV's programming.

36. These differences in the EstellaTV and NBC Universo categories are graphically represented in the following bar chart:



IV. CONCLUSION

37. I conclude that, based on the Gracenote data I analyzed, EstrellaTV's programming mix and predominant programming is not similar to that on Telemundo or NBC Universo, whether on a prime-time or 24-hour basis (inclusive or exclusive of "Shopping" paid programming). The two predominant categories of EstrellaTV's prime-time programming are "Talk" and "Entertainment." This squarely contrasts with the primary categories on Telemundo

in prime time, namely “Soaps” and “Spanish.” NBC Universo also focuses on entirely different prime-time programming, with large percentages devoted to “Reality” and “Sports”-related shows. The programming mix on a 24-hour basis (with or without “Shopping”) is similarly distinct within the predominant categories. Because the categorical overlap among programming on the networks is relatively small, I find that the networks overall are not similarly situated in programming mix and predominant programming genre.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: Monterey, California
June 3, 2016

Robin Flynn

EXHIBITS

EXHIBIT A – CONFIDENTIAL DOCUMENT WITHHELD

EXHIBIT B – CONFIDENTIAL DOCUMENT WITHHELD

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

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

EXPERT DECLARATION OF TOMÁS A. LÓPEZ-PUMAREJO

I. INTRODUCTION

1. My name is Professor Tomás A. López-Pumarejo. I have been asked by counsel for Comcast Corporation and Comcast Cable Communications, LLC (collectively, "Comcast") to assess whether the programming on EstrellaTV is similar to that aired by Telemundo and NBC Universo. As set forth below, I conclude that there are distinct and important differences between the programming on EstrellaTV, on the one hand, and Telemundo and NBC Universo, on the other.

II. QUALIFICATIONS

2. For more than thirty years, my academic work has focused on the Hispanic media and programming landscape as both a literature and business and marketing scholar. I have studied multiple elements of Hispanic television programming, most particularly the behavioral and economic imperatives underlying the *telenovela* genre that comprises the centerpiece of programming on most Hispanic television networks. As a professor of business and marketing, I have studied various aspects of the Hispanic media landscape, including the ways in which television formats are exported and globalized and the roles they play in marketing, politics, and transmitting cultural and linguistic norms. My work is interdisciplinary and multilingual.

3. I hold a Ph.D. in Hispanic and Luso-Brazilian Studies with a focus on Mass Communication from the University of Minnesota. I also hold a doctorate in philology (the study of language) with a focus in film and television from the University of Valencia in Spain, and master's degrees in Hispanic Literature/Sociology from Cornell University and Journalism/Public Communication from the University of Puerto Rico. I

am fluent in Spanish and Portuguese, have lived and worked in four countries, and am familiar with a range of Hispanic cultures and linguistic traditions.

4. I have taught at four colleges affiliated with the City University of New York for more than twenty years, first in media studies at Queens College and the College of Staten Island and then in the business school at Brooklyn College, where I am a full professor of business management, as well as at the School of Professional Studies. I have also been a Fulbright Fellow in Brazil, a fellow at the University of Valencia, in Spain, and a fellow at the University of Wisconsin.

5. Over the past decade I have worked on more than twenty-five (25) academic publications and eighteen (18) conference and seminar presentations on various topics relating to the media, and have served as a marketing consultant specializing in Latin American and U.S. Hispanic business since 1999. I also published the first major academic book on *telenovelas*. Additionally, since 2006, I have represented the United States on international research teams (Ibero-American Television Fiction Observatory ("OBITEL") and "PROFITEL," a media research group affiliated with the University of Barcelona) for the study of television (chiefly *telenovelas)* in the Spanish and Portuguese-speaking world. As part of this work, we studied patterns of production in Ibero-American countries, including by making detailed comparisons of programming.

6. I have attached my CV as Exhibit 1. My hourly rate is $450.00 per hour. I have no financial interest in the outcome of this case.

III. SCOPE OF ASSIGNMENT AND SUMMARY OF CONCLUSIONS

7. I have been asked by Comcast to undertake a comparative analysis of the programming-related elements of three television networks: EstrellaTV,

Telemundo and NBC Universo. I understand that one aspect of this dispute may involve an inquiry by the Commission into whether EstrellaTV provides video programming that is "similarly situated" to video programming provided by Telemundo or NBC Universo based on various factors including target programming and content, target audience and look and feel.[1] This declaration reflects my findings and conclusions.[2]

8. A summary of my conclusions is as follows:

9. First, the networks air dissimilar types and genres of programming. Telemundo devotes its entire weekday ("M-F") prime-time block to the single most important genre of Spanish-language programming, the *telenovela*. Telemundo's *telenovela* programming, moreover, is set in various geographic locations and reflects a substantial mix of Latino ethnic and cultural influences that are designed to appeal to a broad Spanish-language audience. EstrellaTV, in turn, intentionally counter-programs away from the *telenovela*, instead offering a mix of unscripted variety, competition, tabloid, and comedy shows with a heavy Mexican influence that will appeal to a distinct, Mexican-oriented audience. NBC Universo shows different programming altogether, with a heavy emphasis on sports-related programming, including broadcasts of major international sporting events, such as the Olympics, World Cup, and Premier League

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[1] Comparing target programming and content, target audience, and look and feel between networks is central to understanding similarities or differences between networks. I understand that the Commission's "similarly situated" analysis may also examine other comparative factors between networks, such as advertising, ratings and license fees. Other experts and witnesses will address those issues.

[2] While I recognize important differences in the fact that EstrellaTV and Telemundo are broadcast networks, with local broadcast programming in specific markets, and NBC Universo is a national cable network, my comparative study of these networks focuses on their national programming, which is both going to reflect programming shown in local markets and be representative of the programming on each network as a whole. While I do not have access to all EstrellaTV local market programming grids, the two I have seen—from disparate locations—showed the same programming slate, which indicates to me that this programming will be representative. Additionally, I understand that Comcast's other programming expert will undertake a quantitative analysis of all programming aired on EstrellaTV, Telemundo and NBC Universo, across a 24-hour period, during the relevant time period.

soccer,[3] as well as celebrity reality and fast-paced, action-oriented shows. I also reviewed content from many other shows on these networks outside of the M-F prime-time block, and found pronounced distinctions in those time periods as well.

10. Second, there are stark differences between a network targeting a distinct segment of the Spanish-language audience with its programming, and networks with varied programming designed to appeal broadly across Hispanic ethnic and cultural lines. As EstrellaTV expressly acknowledges in its statements and promotional materials, it focuses on programming appealing to a Mexican-American audience. EstrellaTV's programming is almost exclusively Mexican in talent, in narrative, in accent, in music, and in comedic form. Telemundo, in contrast, is a more diverse network with roots in the multinational media culture of Miami, and its programming—themes, casts, accents—represents the multicultural backgrounds of the broader Spanish-language audience it targets. Similarly, NBC Universo's programming is not targeted at discrete ethnic or cultural Hispanic segments, but is designed to appeal to all younger Spanish-speaking audiences with interests in sports, celebrity reality, and edgy programming.

11. Finally, each network has a distinct tone, look, feel, and thematic quality. EstrellaTV provides less-sophisticated entertainment through its comedy and variety shows. The language it uses, and the themes it amplifies—in its comedies and even on its tabloid news magazine offering—is often highly sexualized. Telemundo's focus on *telenovelas* and other scripted shows generates a more serious and dramatic

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[3] *See, e.g.*, http://www.nbcuniversal.com/business/NBCUniverso (describing the network as offering sports programming "including FIFA World Cup™, NASCAR Mexico Series, NFL, Premier League and the 2016 Olympic Summer Games in Rio.").

tone. NBC Universo programming provides excitement and a harder edge. These distinct characteristics are prevalent in the programming I viewed and throughout the networks' schedules.

12. After assessing all of these factors, I conclude that EstrellaTV is not similarly situated to either Telemundo or NBC Universo in target programming or programming content, target audience and look or feel.

IV. ANALYSIS

A. Key Background Elements of Spanish-Language Television

13. Before describing the methodology I used to prepare this analysis, I believe it is important to set out two contextual realities of the Spanish-language television environment in order to frame the discussion that follows: first, a comment on the Spanish-language media landscape, and second, a note on the defining genre of Spanish-language television, the *telenovela*.

1. The Spanish-Language Television Industry in the United States Has Separate Origins on the West and East Coasts

14. The Spanish-language television industry in the United States is diverse. The fact that two networks air programming in Spanish does not alone render them similar, any more than would the fact that two networks broadcast in English. Moreover, although some networks and programming might draw from similar sources—Latin American history or mythology or religion—it would be a mistake to understand Spanish-language programming as monolithic for this reason. Much as *Romeo and Juliet* and *West Side Story* build upon the same core story in creating very different artistic products, different networks within the Spanish-language television landscape attract

substantially different segments of the Spanish-speaking audience because of the ways in which they choose to package and present programming narratives.

15. The Spanish-language television industry in the United States springs from two distinct wells: the Mexican television industry, in the West, and the Cuban expatriate television industry, in Miami. For a long period of time, these two segments of the Latino programming culture remained distinct and isolated from each other. The West Coast industry showcases largely Mexican-oriented content (the Mexican melodramatic acting style, Mexican accents, Mexican music, Mexican celebrities, references to Mexican traditions), and the East Coast industry is built on the Miami sound and feel (a hybrid style, fusing Cuban, Caribbean, Central and South American and Puerto Rican styles, music, and talent) that is designed to appeal to a broad range of Spanish-speaking viewers in the United States regardless of ethnic background or specific cultural influences.[4]

16. Spanish-language audiences in the U.S. appreciate these cultural differences, distinguishing between networks that are heavily Mexican, for example, and those that are multinational or hybrid in form.

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[4] *See, e.g.*, Kenton T. Wilkinson, *Spanish Language Television in the United States*, 22, 30, 34-53, 70, 86 (2016) (describing Mexican origins of Spanish-language television industry in the West, key demographic differences between Spanish-language populations in the West and East, and the migration of Cuban talent to Florida following the Cuban Revolution); John Sinclair, *The Hollywood of Latin America: Miami as Regional Center in Television Trade*, 4 J. Television & New Media 211, 214 (2003) (noting that "[w]hereas Univisión has always had ties to Latin America, particularly to Televisa, and is most popular with Hispanics of Mexican origin, Telemundo was launched with Anglo capital, and has been rather more oriented to the less populous groups from Puerto Rico and Cuba.").

2. The *Telenovela* Is a Distinct Genre

17. It is also critical to understand the *telenovela*, the defining genre of Spanish-language television. It has its roots in the domestic novel,[5] which became popular with women readers in particular during the industrial revolution. Nuclear families separated from extended families, and women who went to work, often as housekeepers, found themselves isolated from friends and family. Media such as women's magazines, which often published domestic novels in serial form, gave these women a sense of connection to others like them. The narratives combined familiar stories with advertising and embedded educational messages about, for example, health and relationships. This model merged fiction, advice, and advertising aimed at women and rendered, with the advent of radio, the soap opera. Later generations of Spanish-speaking women found similar solace first in the *radionovela* and then in the *telenovela*.[6]

18. The *telenovela* is best understood as a form of "domestic fiction," or as classically "female," distinct from "adventure fiction," which is classically "male."[7] Scholars of literature use these labels, broad as they are, to make the following distinction: most action in fiction targeting women takes place in closed spaces (e.g., homes, restaurants, hospitals), and concerns are either romantic or family-related (e.g., falling in love with the wrong person, trouble with children). By contrast, fiction

[5] The "domestic novel" refers to a type of novel popular with women readers in the mid-nineteenth century. The genre is characterized by a heroine's struggles with romance, family, child-rearing and other relationships. The domestic novel was often published in serial form in women's magazines. Academics have identified the domestic novel as the soap opera's literary antecedent. *See, e.g.*, Robert C. Allen, *Speaking of Soap Operas* 130-80 (1985). As the format began to be transformed into radio serial dramas, Procter & Gamble, Lever Brothers and other large multinational commercial advertisers implanted the U.S. serial radio soap opera model in Latin America, paving the way for indigenous broadcasting of the related radionovela and telenovela programming.

[6] Tomás López-Pumarejo, *Radionovela*, Diccionario de Literatura Popular Española 277-78 (Joaquín Alvarez Barrientos ed., 1977); *Telenovela*, *id*. at 310-32.

[7] I use these terms as they are used in literary and media studies, though of course they are overbroad.

targeting men takes place in wide open spaces (e.g., street chases, the outdoors). In "male" fiction, action is more important than consequences; in "female" fiction, consequences are more important than action.

19. These general observations apply to the *telenovela*. As *telenovela* audiences developed, some networks, particularly those in Mexico and Brazil, sought to diversify viewership in various audience niches (e.g, teenagers). Other networks, such as Telemundo in the U.S., began to combine sequences aimed at men and women, such that modern prime-time *telenovelas*, as distinct from the classic English-language soap opera, contain more and more action.[8] By doing so, the network can appeal to a broader and multicultural adult audience. Nonetheless, the *telenovela* genre still is defined by the vertical romantic story at the core. The action sequences are peripheral, meant to spice up the presentation or diversify the audience, but as a genre—adopting the general definitions set out above—the *telenovela* retains its classically "female" form. (Note that even many of the most thrilling or action-oriented sequences in *telenovelas*—a final confrontation with a gun, for example—happen in closed spaces.)

20. *Telenovela* series also have a very recognizable structure. In their classic form, and unlike English-language television series, *telenovelas* air each weeknight for one hour, typically for about three to six months, and then conclude.[9] They generally do not continue across seasons like English language television.

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[8] Another distinction between the English-language soap opera and the Spanish-language *telenovela* is that soap operas have a community of characters, not a protagonist, whereas *telenovelas* have a leading couple and a community of characters around them.

[9] *See, e.g.*, Cynthia Littleton, *How to Build a Better Telenovela*, Variety (Jul. 30, 2013), *available at* http://variety.com/2013/tv/news/how-to-build-a-better-telenovela-1200569561/ (noting that *novelas* run "about 120-160 episodes, at an average cost of about $70,000 per hour, up to about $150,000"). Brazilian *telenovelas* often air for three months.

21. Finally, *telenovelas* can strongly reflect and appeal to distinct segments of the Latino audience. For example, Telemundo's *telenovelas* features casts, plots, and production styles from a range of geographies (Las Vegas, Miami, Brazil, Venezuela, Colombia, Peru, and Mexico), reflecting both the network's origins in the hybrid culture of Miami and its expansion across cultural lines within the entire Spanish-language audience. Other Spanish-language networks show *telenovelas* that are immediately distinguishable from Telemundo's, with, for example, casts that are largely Mexican or trained in the Mexican style, and who speak in recognizably Mexican accents.[10]

22. These distinctions can drive relative appeal amongst Spanish-language viewers. Audiences will be drawn to programming containing elements with which they will be familiar, perhaps because they can draw a connection with their homeland and national identity, appreciate cultural references, or have prior experiences with actors and other network talent. Depending on their target audience, networks will develop or acquire target programming that will appeal to this identified viewer segment.

B. Methodology

23. To prepare this declaration, I reviewed programming for EstrellaTV, Telemundo, and NBC Universo across sample periods in what I understood to be the relevant time frame. For the purposes of comparing specific programming, I focused on late 2014 (when I understand EstrellaTV sought to elect retransmission

[10] Mexican-trained actors often exhibit a melodramatic, national flair in their acting styles. A good example of a Mexican-themed and influenced *telenovela* is *Destilando Amor* (2007), a popular *telenovela* broadcast on Televisa and Univision. This is a remake of a Colombian title by Fernando Gaytán, *Café Con Aroma de Mujer* (1994), which Televisa adapted for Mexican and U.S. audiences. A second example of a Colombian title by the same author, also adapted for Mexican and U.S. audiences, was 1999's *Yo Soy Betty la Fea* (*Ugly Betty*), which Televisa and Univision launched in 2006 as *La Fea Más Bella* (*The Most Beautiful Ugly Woman*).

consent in lieu of "must carry")[11] to late 2015 (the end of negotiations between EstrellaTV and Comcast).[12] In addition, I reviewed programming schedules; show-specific promotional clips; network branding materials, sizzle reels, and websites; advertising presentations; public statements, including via press releases and news clips, regarding programming strategies, target audience, target programming, and production approaches; internal Telemundo and NBC Universo reports, presentations, and analyses; and industry and academic literature regarding the Spanish-language television market in the United States, including drawing on my own work in this area.[13]

24. In order to make a fair comparison of programming across the three networks during the relevant time frame, I examined programming grids for the three networks in the fourth quarter of 2014 and the second quarter of 2015.[14] As I had weekly programming schedules for these periods, I focused on programming for three sample weeks from each quarter: the weeks starting October 6, November 3, and December 1, 2014, and April 6, May 4, and June 1, 2015.

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[11] Complaint at 23.
[12] Complaint at iv.
[13] *See, e.g.*, Ex. 2 (Programming Schedules for EstrellaTV, Telemundo, and NBC Universo for the sample weeks); Ex. 3 (EstrellaTV's Upfront Deck from 2009, *available at* http://www.lbimedia.com/pdf/UpfrontDeck2009.pdf (last accessed June 1, 2016)); Ex. 4 (EstrellaTV's Catalog from 2012, *available at* http://lbimedia.com/pdf/EstrellaCURRENTcatalog.pdf (last accessed June 1, 2016)); Nissenblatt Ex. 2 (presentation delivered by LBI to Comcast on October 14, 2014); sizzle reels, promotional videos, and websites for EstrellaTV, NBC Universo, and Telemundo and their shows available online, as listed (in part) in the footnotes herein and as represented graphically in Ex. 5 (exhibit illustrating programmatic differences across the three networks); a description of NBC Universo from NBC's website, *available at* http://www.nbcuniversal.com/business/NBCUniverso; a significant number of internal presentations and branding materials for Telemundo and NBC Universo, a selection of which I have included here as Ex. 6; and sizzle reels for Telemundo and NBC Universo provided to me by Comcast.
[14] *See* Ex. 2 (Programming Schedules for EstrellaTV, Telemundo, and NBC Universo for the sample weeks). The EstrellaTV grids are the following: EstrellaTV Programming Grid, Fourth Quarter 2014, http://www.mor-tv.com/blob/view/-/26888366/data/2/-/kju1l/-/Estrella-Program-Beginning-July-2014.pdf; Estrella Programming Grid, Second Quarter 2015, http://estrellaamarillo.com/wp-content/uploads/2015/04/Estrella-Amarillo-program-grid.pdf. It appears that the grids are from Tampa/St. Petersburg/Sarasota (2014) and Amarillo (2015).

25. I began with prime time M-F, and watched sample clips—depending on the show, a handful to a dozen—for every show broadcast by EstrellaTV for the sample weeks. I used the grids to determine which shows to compare, and viewed clips of the shows aired during those periods, but not necessarily the episode aired on a particular day. Generally, I reviewed the show's clips then-currently available on EstrellaTV's website; in many instances, it was not clear if the particular episode had been aired during the relevant time period. In one case—a news show that is no longer on the air because the anchor died—I watched a series of clips available on YouTube. In addition to watching clips of the various shows, I also viewed, where available, the "promo reel" for a given show, to understand how the network wished to present the show. I did the same for the sample periods for Telemundo and NBC Universo. (Note that for the first sample quarter, NBC Universo was called "Mun2." I understand that Mun2 was rebranded as NBC Universo in 2015.)

26. I then compared sample programming for other day-parts—daytime M-F and weekends—across all three networks using similar methodology. Other than movies, sports and paid programming, I viewed sample clips of every program aired by EstrellaTV, Telemundo, and NBC Universo in the applicable periods.

27. I also relied on publicly available information from EstrellaTV and information provided by EstrellaTV to Comcast, including marketing material, upfront presentations, and a catalogue of programming. I relied on similar information for Telemundo and NBC Universo.

C. Telemundo, EstrellaTV and NBC Universo Target and Show Distinctly Different Programming

28. My principal conclusion is that each of Telemundo, EstrellaTV and NBC Universo airs distinctly different types of programming. Each network develops, produces, or acquires distinct types of "target programming" that they believe will appeal to the specific audiences they wish to focus upon, and, based upon my sample week review, airs a very dissimilar programming mix.

29. Telemundo centers its important prime-time programming on both traditional and modern *telenovela* programming that will appeal to a broad cross-section of the Spanish-language audience in the U.S., spanning ethnic and cultural backgrounds. Well aware of Telemundo's focus, EstrellaTV expressly and deliberately counter-programs away from the *telenovela*, developing and airing instead a very different mix of light and diverse variety and other entertainment programming designed to focus on a regional audience that is largely Mexican-oriented. In contrast with EstrellaTV, NBC Universo targets and airs a heavy slate of sports-related programming, celebrity reality, and edgy scripted programming designed to appeal to a broad but younger Spanish-language audience.

1. Telemundo's Prime-time Slate

30. In M-F primetime, Telemundo airs *telenovelas* to the exclusion of every other genre of programming. As I noted earlier, the genre is defined in part by the fact that *telenovelas* air each weeknight. True to format, Telemundo airs *telenovelas* each weeknight in three hour-long blocks (8:00 to 9:00, 9:00 to 10:00, and 10:00 to 11:00). Telemundo also rebroadcasts *telenovelas* each day between 10:30 a.m. and 2:00 p.m. and midnight and 2:00 a.m.

31. In the fourth quarter of 2014, Telemundo broadcast four *telenovelas*. ***Reina de Corazones*** ("Queen of Hearts") (M-F 8:00-9:00) is emblematic of the modern *telenovela*. It tells the story of Reina, a seamstress in love with Nicolás, a Las Vegas parking attendant. Nicolás had also been in love with the daughter of Víctor, a wealthy and dangerous trafficker in jewels. After the daughter kills herself, Víctor makes Reina believe that Nicolás is dead, and Reina, who had by then discovered that she was pregnant, agrees to marry Víctor. But Nicolás is alive—Víctor had him imprisoned—and, in revenge, Nicolás joins the Intelligence Service and makes it his mission to infiltrate Víctor's trafficking operation.

32. *Reina* displays all of the key elements of the modern *telenovela*: the vertical love story at the core, romantic plot lines with overtones of crime, power, and vengeance, often in the context of drug dealing or the underworld, and nightly screening, among others.[15]

33. The other Telemundo *telenovelas* are similar hybrids of love and crime, often involving police, detectives, senior politicians, or even heads of state. ***Los Miserables*** (M-F 9:00-10:00 and rebroadcasts) is a *telenovela* centered around a character, Lucía, who is chased by the law but actually innocent. But true to type, the story has romance at its core: Lucía is in love with her pursuer, the chief detective for narcotics.[16] Interestingly, at 10:00 pm, Telemundo shows a harder-edged *telenovela*, which I understand the network has promoted as a "super-series." ***Señora Acero*** ("Woman of Steel") (M-F 10:00-11:00 and rebroadcasts) is a *narconovela*, a subgenre of the *telenovela* with themes of drug trafficking. The heroine, Sara, discovers after her

[15] http://www.telemundo.com/novelas/reina-de-corazones.
[16] http://www.telemundo.com/novelas/los-miserables.

husband is killed by a cartel that he is not the man she thought he was. The *telenovela* follows Sara's journey from housewife to baroness of organized crime, and centers around a love story between Sara and a dashing male suitor and her struggles against powerful male figures, from drug lords to the president.[17] A fourth *telenovela*, ***Tierra de Reyes*** ("Land of Kings"), took the M-F 9:00-10:00 timeslot and bumped ***Los Miserables*** to 8:00-9:00 in the third sample week. That show, like the other three, featured a vertical love story at its core with themes of violence, and centers around the attempts of two brothers to avenge the murder of their sister.[18] It is a remake of the blockbuster show ***Pasión de Gavilanes*** ("Passion of Hawks"), broadcast on NBC Universo in the sample period.

34. In the second quarter of 2015, Telemundo again devoted its prime-time hours to *telenovelas* focused on themes of love, crime, and revenge.[19] ***Avenida Brasil*** ("Brazil Avenue") (M-F 8:00-9:00) was a successful Brazilian *telenovela* with themes of love and revenge produced by the Brazilian powerhouse Globo.[20] Telemundo continued to broadcast ***Tierra de Reyes*** (M-F 9:00-10:00 and rebroadcasts), described above. ***Dueños del Paraiso*** ("Masters of Paradise") (M-F 10:00-11:00) is again a *narconovela*, this time about a woman who becomes queen of the drug traffic in Miami.[21]

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[17] http://www.telemundo.com/novelas/senora-acero.
[18] http://www.telemundo.com/novelas/tierra-de-reyes.
[19] In the third sample week, the network replaced *telenovelas* with the World Cup on one evening and a movie for part of a second evening.
[20] http://www.telemundo.com/novelas/avenida-brasil. *See also* Anderson Antunes, *Brazilian Telenovela 'Avenida Brasil' Makes Billions By Mirroring Its Viewers' Lives*, Forbes (Oct. 19, 2012), *available at* http://www.forbes.com/sites/andersonantunes/2012/10/19/brazilian-telenovela-makes-billions-by-mirroring-its-viewers-lives/ (noting that the show features characters from the "new middle class").
[21] http://www.telemundo.com/novelas/duenos-del-paraiso.

Another *narconovela*, ***El Señor de los Cielos*** ("The Lord of the Skies") (M-F 10:00-11:00 and rebroadcasts), replaced *Dueños* from the second sample week.[22]

35. One noteworthy characteristic of all of these *telenovelas* is that the action is set in, and features characters from, a range of geographies—Las Vegas, Houston, Mexico, Brazil, Miami—reflecting Telemundo's identity as a multinational network and the diversity of Telemundo's audience. Likewise, the *narconovela* often has significant Colombian influences. By developing and/or acquiring *telenovela* programming that is set in different geographic locations and/or reflects different Latino cultures, Telemundo is seeking to appeal to a broad audience with which these varied characteristics in the programming will resonate. I will return to this below.

2. EstrellaTV's Prime-time Slate

36. EstrellaTV's prime-time lineup is markedly different from Telemundo's. In the sample weeks, EstrellaTV did not air a single *telenovela.* EstrellaTV's public statements have made clear that it is pursuing an express strategy of counter-programming against the prime-time *telenovela* approach of Telemundo and Univision by showcasing a range of lighter, often unscripted programming, including variety shows, game and competition shows, and tabloid news and comedy shows.[23]

37. I have reviewed statements of EstrellaTV management confirming this intentional and strategic effort to differentiate EstrellaTV from Telemundo. For example, at the 2009 launch of the network, EstrellaTV's COO, Winter Horton, observed

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[22] http://www.telemundo.com/novelas/el-senor-de-los-cielos.

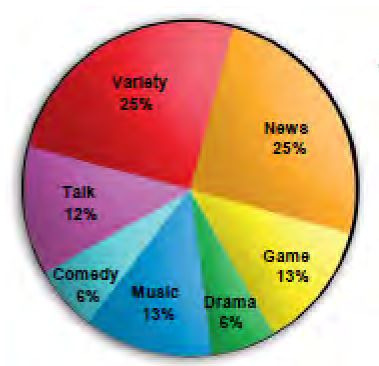
[23] Joe Flint, *Spanish Network Estrella Launches, But Will Its Star Shine or Fade?*, L.A. Times Blog (Sept. 14, 2009), *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2009/09/spanish-network-estrella-launches-but-will-its-star-shine-or-fade.html.

that the market was "oversaturated" with *telenovelas*,[24] and that EstrellaTV was going to "counter progra[m]" by offering "talk shows, . . . variety shows, music shows, drama, game shows."[25]

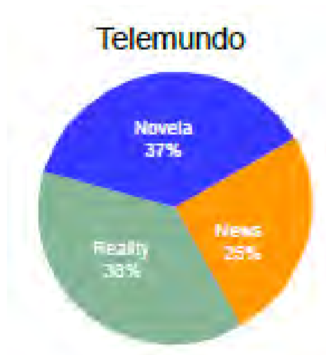
38. EstrellaTV's founder, Lenard Liberman, similarly stated that it didn't "make sense to fight against" *telenovelas*, and that the "way of winning" was to "offer[] alternative programming."[26] In Liberman's words, "Univision and secondarily Telemundo[] air *novelas* in primetime . . . . We don't air any *novelas*. . . . We provide an alternative—musical variety and comedy, scripted drama, comedy sketch shows. *So it's just different from a* novela *in every way*."[27]

39. At the time the network was first launched, an EstrellaTV presentation prepared for the 2009 upfronts confirmed the network's strategy to "Counter Program Existing Hispanic Networks."[28] EstrellaTV graphically depicted the strategy in this pie chart:

[24] Adam Benzine, *The Other America*, C21 Media (Nov. 19, 2012), *available at* http://www.c21media.net/the-other-america/?print=1.
[25] *New Network Star Set To Launch*, Radio and Television Business Report (Jan. 26, 2009), *available at* http://rbr.com/new-network-star-set-to-launch/ (quoting Estrella's COO, Walter Horton).
[26] Laura Martinez, *Q&A: Liberman Media's Lenard Liberman*, Multichannel News (Feb. 18, 2009), *available at* http://www.lbimedia.com/Media/PressReleases/20090218.pdf (last accessed May 17, 2016).
[27] *Executive Session with Lenard Liberman: Now's The Time For Next Hispanic Network*, TV News Check (Mar. 17, 2009), *available at* http://www.tvnewscheck.com/article/30437/nows-the-time-for-next-hispanic-network (emphasis added).
[28] Ex. 3 (*Estrella TV: It's All About The Stars*, LBI Media Upfront Deck 8 (2009), *available at* http://www.lbimedia.com/pdf/UpfrontDeck2009.pdf (last accessed June 1, 2016)).



EstrellaTV drove home the contrast with established Spanish language networks, including Telemundo[29]:



40. EstrellaTV carried forward this differentiated programming strategy into the 2014–15 time period that I examined. In the fall of 2014, EstrellaTV made a written presentation to Comcast {[redacted]} That presentation reflected that {[redacted]}

[29] EstrellaTV prepared similar charts for Spanish-language networks, Univision and Telefutura, each of which showed heavy slates of telenovelas (41% and 37%, respectively). *Id.*

In that presentation, EstrellaTV confirmed for Comcast that {[redacted][30]}

41. My review of EstrellaTV's programming during the sample weeks confirms that the network has consistently and expressly executed this strategy of counter-programming against the *telenovelas* broadcast by Telemundo.

42. From 8:00 p.m. to 9:00 p.m. in the sample weeks, EstrellaTV aired a program called *Tengo Talento Mucho Talento* ("I Have Talent, Lots of Talent"), similar to the English-language *America's Got Talent*. Many of the judges are recognizable stars of Mexican border music, and one judge is a character shown frequently on EstrellaTV, Don Cheto, who is played by the actor as a stereotypical rural Mexican farmer or "ranchero."

43. From 9:00 p.m. to 10:00 p.m., EstrellaTV aired a comedy show called *Noches con Platanito* ("Nights with Little Banana"), which is a "variety show in the style of a talk show but hosted by a 'Mexican clown for adults'" in wig and makeup.[31] Visually, the show looks like an English-language hybrid-format late night show with celebrity interviews and light games. The show features highly sexualized humor and innuendo.

[30] Nissenblatt Ex. 2 (presentation delivered by LBI to Comcast on October 14, 2014) at exhibit pp. 2, 4.
[31] *See, e.g.*, *U.S. Hispanic: Estrella TV Anota Éxito con Noches Con Platanito*, Prensario Internacional (Sept. 11, 2014), *available at* http://www.prensario.net/10363-US-Hispanic-Estrella-TV-anota-exito-con-emNoches-con-Platanitoem.note.aspx ; Victor M. Tolosa, *Televisoras de Habla Hispana en EU*, Excelsior (Aug. 20, 2014), *available at* http://www.excelsior.com.mx/opinion/victor-m-tolosa/2014/08/20/977118 (noting that "the program is mostly vulgar, rely[ing] strongly on dance and interviewing guests using double entendre.").

44. From 10:00 p.m. to 10:30 p.m., EstrellaTV aired a tabloid news show called *Alarma TV*. And from 10:30 p.m. to 11:00 p.m., Estrella aired a more formal news show called *Noticiero con Enrique Gratas*.

3. Prime-time Cushions on Telemundo and Estrella: 6:00 p.m. to 8:00 p.m. and 11:00 p.m. to 1:00 a.m.

45. I find other dissimilarities in programming when I look outside of the core prime-time hours.

46. From 6:00 p.m. to 8:00 p.m., Telemundo broadcast a half-hour scripted drama series, *Decisiones* (centering on problem-solving storylines), or a half-hour video show, *Videos Asombrosos*, often filled with videos of car chases and other action footage; its half-hour nightly newscast, *Noticiero Telemundo*; and an hour-long show called *Caso Cerrado* ("Case Closed"), which could be considered a Hispanic version of *Judge Judy,* and is hosted by a Cuban exile raised in Puerto Rico known for bringing in a range of experts, like social workers, and giving advice about how to overcome difficult problems, often related to family or immigration. (Note that Telemundo airs three hour-long blocks of *Caso Cerrado* each weekday.) In stark contrast, EstrellaTV does not air news or scripted, video-based, or "court" shows; rather, it aired *Retofamosos*, which is a late-night-style game show featuring a range of personalities, many of whom are known from their work on the Mexican broadcast network Televisa, and *Rica Famosa Latina*, which is a *Real Housewives*-style show tracking the inner lives of wealthy Latin American or Latina women.

47. From 11:00 p.m. to 1:00 a.m., Telemundo presented *Al Rojo Vivo*, a news magazine; *Titulares y Más*, a high-production-value late night talk show, visually akin to *The Late Show With David Letterman* or *The Tonight Show*, with major celebrities

and sports stars as guests; and an hour of rebroadcast *telenovelas* (Telemundo also airs rebroadcast *telenovelas* from 1:00 a.m. to 2:00 a.m.). By contrast, EstrellaTV does not air news, talk, or *telenovelas*. Instead, from 11:00 p.m. to 11:30 p.m., EstrellaTV broadcasted *Que Jalada* ("What a Fail!" or "What a Snort!"), which is a blooper reel show like *America's Funniest Home Videos*.[32] From 11:30 p.m. to 12:00 a.m., EstrellaTV aired *Secretos*, which is a show in which people—often jilted lovers—solicit the help of television "detectives" to plant hidden cameras and catch their cheating spouses, or similar.[33] For the remaining hour, EstrellaTV put on paid programming.

48. In sum, as demonstrated above, the programming slates on EstrellaTV and Telemundo vary significantly. During primetime, Telemundo laser-focuses on *telenovela* programming appealing to a broad, multi-cultural Spanish-speaking audience. EstrellaTV intentionally produces and airs non-*telenovela* programming that provides lighter and less-sophisticated entertainment to the Mexican-based audience that is its base. Both networks' programming outside of primetime also is quite distinct in genre and type, and only confirms that the networks' overall mix of target programming and content is not similar.

4. NBC Universo's Prime-time and Prime-time Cushion Slates

49. NBC Universo is a different network altogether. It is heavily focused on sports, and airs large blocks of wrestling (every Friday and Saturday); sports news shows, pre-game shows, and other sports-oriented shows (nightly and on weekends); NASCAR; and major international soccer events (Premier League and the

[32] http://quejalada.estrellatv.com/.

[33] *See, e.g., IMDB: Secretos, available at* http://www.imdb.com/title/tt0449550/ (last accessed May 17, 2016).

men's and women's World Cup series). It highlights celebrity reality shows that follow the everyday lives of celebrities, such as *Larrymania* and *A Toda Gloria*. It also shows fast-paced action-oriented scripted series that would appeal to a younger (18-34) audience.

50. During the period described above for Telemundo and EstrellaTV—the hours between 6:00 p.m. and 1:00 a.m.—NBC Universo (and its predecessor Mun2) typically aired a mix of the following programming: (1) soccer or sports commentary shows; (2) scripted dramas, such as *Decisiones*, and the dubbed English-language science fiction show *Terminator: The Sarah Connor Chronicles;* (3) two action-filled police reality shows, *Operación Repo* and *Fugitivos de la Ley* ("Fugitives from the Law"), which is like *Cops*, but with dark, militaristic themes, like special forces raids and drug- and organ-trafficking; (4) a handful of *telenovelas* like ***Pasión de Gavilanes*** ("Passion of the Hawks") and ***Infiltrados***, a Colombian *narconovela*;[34] and (5) two hour-long, high-production-value shows following the lives of superstars of Latin music, one female and one male. The first, *A Toda Gloria*, promises total access to the family and work life of pop superstar Gloria Trevi,[35] and the second features the singer Larry Hernández and his multigenerational family.[36] The programming is entirely distinct from that aired on EstrellaTV.

51. In sum, I was able to discern strong qualitative differences between the target programming and content on EstrellaTV and NBC Universo.

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[34] These *telenovelas* were shown on Mun2; in the sample weeks I reviewed after the re-branding, NBC Universo no longer showed *telenovelas*.
[35] http://www.nbcuniverso.com/shows/a-toda-gloria.
[36] http://www.nbcuniverso.com/now/larrymania.

D. EstrellaTV's Programming Shows That It Is Targeting A Distinctly Regional, Mexican Audience

52. EstrellaTV's programming, marketing materials, and public statements make quite clear that it is presenting a heavily Mexican-themed network designed to target the overwhelmingly Mexican-American community in the western region of the United States. This is in sharp contrast to Telemundo and NBC Universo, both of which demonstrate through their programming and marketing that they aim to and do appeal to a broader and more varied mix of Spanish-language viewers.

1. EstrellaTV Showcases Mexican Talent and Language

53. EstrellaTV's programming showcases primarily Mexican talent. Most of its stars became famous on the Mexican broadcast network Televisa,[37] and I am familiar with almost all of them. I have also reviewed a slide deck prepared by EstrellaTV that highlighted twenty-five actors who would appear on the network; all but two are Mexican.[38]

54. In its 2009 launch, EstrellaTV promised shows featuring "a collection of Mexico's most famous comedic actors"[39] and a variety show hosted by "top Mexican actresses."[40] The head of the network stated that EstrellaTV's programming

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[37] *See, e.g.*, Victor M. Tolosa, *Televisoras de Habla Hispana En EU*, Excelsior (Aug. 20, 2014), *available at* http://www.excelsior.com.mx/opinion/victor-m-tolosa/2014/08/20/977118 (noting that most stars on Estrella are "Mexican artists who had jobs in Mexico on Televisa and found refuge in this chain [Estrella].").

[38] Ex. 3 (*Estrella TV: It's All About The Stars*, LBI Media Upfront Deck 11-13 (2009), *available at* http://www.lbimedia.com/pdf/UpfrontDeck2009.pdf). I consulted web biographies of the actors to confirm their national origin.

[39] *See, e.g., Chuperamigos*, *available at* http://www.amazon.com/Chuperamigos-Season-Spanish-Language-Subtitles/dp/B01730BRLK (show page billing "Los Chuperamigos" as "un conjunto de actores cómicos más famosos de México.") *See also Jenni Rivera en Chuperamigos*, *available at* https://www.youtube.com/watch?v=jW1mi3Z9QyU (same text).

[40] Ex. 3 (*Estrella TV: It's All About The Stars*, LBI Media Upfront Deck 17 (2009), *available at* http://www.lbimedia.com/pdf/UpfrontDeck2009.pdf).

would "resonate[] with [its audience] easily, using famous actors from Mexico."[41] My review of the programming shows that, in the 2014-15 time period I examined, EstrellaTV made good on its promise.

55. The network has also adopted a distinctly Mexican sound, in that it features Mexican accents and slang throughout its programming. To that end, the actress Lianna Grethel, who is one of the rare non-Mexican talents appearing on EstrellaTV, publicly stated that she was initially not hired by Estrella because "[t] he owner of the channel and other people were saying that my accent was too Colombian, too prominent, and that it needed to be more neutral, Mexican, and in my last audition, which was more or less with more of a Mexican accent, they selected me."[42]

2. EstrellaTV's Shows Have Mexican Themes and Mexican-American Regional Appeal

56. EstrellaTV targets and develops programming that is designed to appeal to Mexican-American audiences. When EstrellaTV launched, press reports noted that the network was "targeting primarily Mexican-Americans."[43] This was echoed in comments of Lenard Liberman, head of LBI, who explained that EstrellaTV was "branding [EstrellaTV with] big name actors, theatrical stars, and the best comedians from Mexico. People know these stars and follow them on our network *when they cross the border*." [44]

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[41] *New Network Star Set To Launch,* Radio and Television Business Report (Jan. 26, 2009), *available at* http://rbr.com/new-network-star-set-to-launch/ (quoting Estrella's COO, Walter Horton).
[42] Myriam Silva-Warren, *Una 'Caleña' en Estrella TV*, CENTRO Tampa (May 14, 2013), *available at* http://www.centrotampa.com/news/noticias/2011/may/05/una-cale-en-estrella-tv-ar-337692/. "*Caleña*" means "a woman from Cali, in Colombia."
[43] Katy Bachman, *Updated: Estrella TV Signs Four Affiliates*, Adweek (Feb. 4, 2009), *available at* http://www.adweek.com/news/television/updated-estrella-tv-signs-four-affiliates-111289.
[44] *Jose Liberman's Dream: Make Big Money Quietly With Spanish TV*, Video Age Int'l (Jan. 2010), http://www.videoageinternational.com/articles/2010/01/lieberman.html.

57. For example, two of EstrellaTV's core comedy and variety acts feature classic and recognizable figures from Mexican comedy, heavy rotations of Mexican music, and comedic content targeted at Mexicans. The first, *Lagrimita y Costel*, is hosted by a pair of Mexican circus clowns whose humor has roots in a Mexican popular-theater comedic genre known as *sainete cómico*, and features, among others, a character derived from Mexico's Charlie Chaplin, *Cantinflas*, people dressed in *charro* (Guadalajara cowboy-musician) outfits, and various kinds of Mexican *banda* (folk) music. The second, *El Show de Don Cheto*, is a variety show hosted by a comic dressed as an old farmer or *ranchero* who speaks in a "rural Michoacán language style," referring to the state in Mexico.[45] Don Cheto appears in costume across the network, including as a judge on EstrellaTV's *America's Got Talent*-style talent competition and in music videos using Mexican slang to parody Donald Trump's plans to build a wall on the Mexican border.[46]

58. The network also hosts "the only award show spotlighting Mexican music,"[47] and at times has aired programs like *Milagros* ("Miracles"), a show boasting "the support of over 75 Catholic churches throughout Mexico."[48] And to the

[45] *See, e.g.*, *Don Cheto Bio & Story: The Man Behind the Character*, LBI (Apr. 18, 2013), at 2, *available at* http://elshowdedoncheto.com/assets/elshowdedoncheto/files/Don-Cheto-Biography-4-18-13.pdf (describing the Don Cheto character as "a 65-year-old character with a great deal of life experience in both Mexico on the United States" who uses a "rural Michoacán language style.")

[46] *Id.*; *Vel El Nuevo Video Musical de Don Cheto y Luis Coronel "Bad Blood Parodia*," Que Buena (Nov. 11, 2015), *available at* http://aquisuena.estrellatv.com/lo-ultimo/ve-el-nuevo-video-musical-de-don-cheto-y-luis-coronel-bad-blood-parodia/.

[47] Estrella TV Sizzle Reel (2016) at minute 2:07, *available at* https://www.youtube.com/watch?v=LPt5BMfyK2g (last accessed May 16, 2016).

[48] Ex. 4 (*Milagros*, EstrellaTV Catalog (2012), *available at* http://lbimedia.com/pdf/EstrellaCURRENTcatalog.pdf) at exhibit p. 10.

extent that EstrellaTV began to show a small percentage of sports programming, it was Mexican league soccer matches.[49]

E. Telemundo's and NBC Universo's Programming Demonstrates That They Target a National, Multiethnic Audience

1. Telemundo and NBC Universo Feature Diverse Talent

59. In stark contrast to EstrellaTV's roster of almost exclusively Mexican talent, Telemundo features talent of a range of Spanish-speaking geographies, reflecting the network's roots in Miami, South and Central America, and the Caribbean. For example, the network's *Caso Cerrado*, the *Judge Judy* analogue described above, is hosted by a Cuban exile raised in Puerto Rico who speaks in a Cuban accent. Its news magazine, *Al Rojo Vivo*, is hosted by a Puerto Rican. *Decisiones* features actors of different nationalities, varied geographic locations, and production styles from multiple countries. And its *telenovelas*, which occupy every single hour of Telemundo's prime-time programming, take place in, and feature characters from, a range of geographies. In the sample period, Telemundo aired *telenovelas* based in Miami, Las Vegas, Houston, Brazil, and Mexico, and Mun2 aired *telenovelas* filmed in Colombia, Brazil, and Manhattan. The networks' characters speak in a range of accents—and in Telemundo's own productions, often speak in a neutral, flat accent—appealing to the networks' diverse target and actual audiences. NBC Universo similarly draws its talent from multiple ethnic and cultural backgrounds, including Latin-American talent on *Operación Repo*.

[49] *See, e.g.*, Nissenblatt Ex. 2 (presentation delivered by LBI to Comcast on October 14, 2014) at exhibit p. 14.

2. Telemundo's and NBC Universo's Shows Target a Diverse Audience

60. Both Telemundo and NBC Universo target programming designed to appeal to viewers from a range of backgrounds. In primetime, for instance, Telemundo broadcasts *telenovelas* from across Latin America—from the Brazilian producer Globo and the Colombian producer Caracol, among others—and in so doing, amplifies the genre's already-wide appeal. NBC Universo prime-time programming targets younger Latino audiences across ethnic and cultural divides. Moreover, and in contrast to EstrellaTV, both Telemundo and NBC Universo air major national and international sporting events like World Cup and Premiere League soccer, both wildly popular amongst Latino audiences of all backgrounds; NASCAR races and WWE wrestling matches; and the Olympics.[50]

61. As noted above, Spanish-language audiences are attuned to and appreciate these geographic and cultural differences in talent, genre, and theme, and Telemundo and NBC Universo know that targeting and airing programming with diverse characteristics can drive viewership among varied segments of the Spanish-language community. EstrellaTV takes a different strategic approach. It infuses its programming with the Mexican talent, themes, and program formats that it knows will be familiar and thus appealing to the more targeted Mexican-oriented, western regional audience that it targets.

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[50] *See, e.g.*, http://www.nbcuniversal.com/business/NBCUniverso (describing the network as offering sports programming "including FIFA World Cup™, NASCAR Mexico Series, NFL, Premier League and the 2016 Olympic Summer Games in Rio.").

F. EstrellaTV's Programming Content Is Distinct From Telemundo's and NBC Universo's In Tone, Theme, Look, and Feel

62. The distinctions between EstrellaTV and Telemundo and NBC Universo extend well beyond differences in target programming and content and target audiences. EstrellaTV offers a style of content—across programming and dayparts—that is starkly different from that aired on the other two networks. EstrellaTV's programming is often less sophisticated, more crass, and more highly sexualized, visually and linguistically, in ways that Telemundo's and NBC Universo's are not.

63. For example, although both EstrellaTV and Telemundo air news magazines, stark differences in tone and point of view illustrate the differences between the networks.

64. EstrellaTV's *Alarma*, hosted by a man and a young woman in a tight dress, features purely tabloid stories: women who are sexually assaulted by predators they met over the Internet; a mafia-style execution in Turkey; a buxom, scantily-clad woman being given a shower of champagne and rose petals to save her from being unsuccessful in love, apparently as a kind of *Santeria* or *magia blanca* ("white magic") ritual; and a story about a town that devised its own form of violent punishment for local prostitutes. *Alarma*'s set is built to look like a game show, and the voiceovers use a kind of urgent or outraged or excited tone to narrate the videos. The language of the show is in its imagery: *Alarma*'s stories involve sex, superstition, and crime, and use the quasi-news format to show nudity and violence on screen.

65. Telemundo's *Al Rojo Vivo* is a news magazine show, hosted by a conservatively-dressed woman, that features a different type of human interest story: a clip about a train driver that saves a passenger from death; another about a group of

young women who marched through the streets to call attention to cat-calling; a clip on the resignation of Dilma Roussef; a clip about the hippopotamus used to film a *telenovela* getting loose and roaming the streets of a Colombian neighborhood; and a clip about a good Samaritan who saved a man whose car was on fire. The language and the content of the show is relatively informal, but more conservative.

66. Much of EstrellaTV's other content is light entertainment, and this is mirrored in the network's "look and feel": sketch comedy, circus games, clowns, festive music, sets in bright colors,[51] often with ribald overtones.[52] By contrast, significant blocks of programming on both Telemundo and NBC Universo are dark and dramatic. Both networks air programming across day parts with themes of drug trafficking, crime, the law, conspiracy, and violent revenge. The networks' sizzle reels—and even the dark lighting and tone of the shows themselves—use action sequences, bold fonts, and pulsing music to amplify the networks' themes.[53] Even NBC Universo's celebrity reality shows have dark undertones: the star of *Larrymania* is associated with *narcocorrido* music, a form of "vivid ballads that chronicle the drug trade with bravado,"[54] and the star of *A Toda Gloria* spent time in prison in Brazil.[55] EstrellaTV

[51] For example, see Estrella's show websites for *Lagrimita y Costel* (the clown variety show) and *Tengo Talento Mucho Talento* (the talent competition), *available at* http://lagrimitaycostel.estrellatv.com/ and http://tengotalento.estrellatv.com/. I have included an exhibit illustrating differences across the networks as Ex. 5.

[52] EstrellaTV's comedic slate is built around sexualized humor. The network's *Noches con Platanito* ("Nights with Little Banana") features interviews with celebrities using double entendres. The clown show *Lagrimita y Costel* features pranks and games with sexualized themes. EstrellaTV's blooper show, *Qué Jalada*, has a mix of general pranks (a fire truck on fire) and sexual humor (a man whose crotch is on fire, a man teasing a policeman with a dildo).

[53] The Telemundo Sizzle Reels I consulted amplify these differences. Telemundo's *telenovelas* often use dark lighting and heavy vignetting to amplify their themes; on this score, they are visually distinguishable from Univision's, which tend to be bright and airy.

[54] *'Larrymania' Reality Star Is Now In Real Trouble—In Small-Town South Carolina*, L.A. Times (Oct. 18, 2015), *available at* http://www.latimes.com/local/california/la-me-larrymania-20151019-story.html.

therefore has a very different tonal and thematic presentation than either Telemundo or NBC Universo, reflective of its effort to attract a different type of audience.

V. CONCLUSION

67. Based on my prior experience in the area of Spanish-language television and my analysis of all of the factors addressed above, in my opinion, EstrellaTV is not "similarly situated" to Telemundo or NBC Universo in target programming or content, target audience, or look and feel. The networks are distinct across key metrics, which is reflected in the actual programming aired, EstrellaTV's marketing materials and public statements acknowledging both its counter-programming strategy and discrete focus on the Mexican or Mexican-American community, and stark contrasts in the tone and theme of the networks.

[55] Justino Aguila, *From Sex Cults to Prison Time, Inside the True-Life Telenovela of Gloria Trevi*, Billboard (Oct. 3, 2014), *available at* http://www.billboard.com/articles/news/6273995/gloria-trevi-interview-on-reality-show-a-toda-gloria-prison.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: New York, New York
June 3, 2016

Professor Tomás A. López-Pumarejo

EXHIBIT 1

May 2016

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University of Minnesota: Ph.D. in Hispanic and Luso-Brazilian Studies/ Mass Communication

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Professional Experience

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10/2011-present *Expert witness-Intellectual Property:* I produced a report and delivered a deposition on an NBC and telenovelas Federal case. RE: Feldman Gale (Miami). http://www.dailyreportingsuite.com/ip/news/telemundo_failed_to_show_that_tv_series_wasn_t_substantially_similar_to_venezuelan_telenovela (Retrieved April 24, 2016.

1/99-12/00 *Marketing Consultant* in the area of Latin American and US Hispanic business for: *Dewars/Bacardi* (Miami), *Dish Satellite* (Denver), *General Motors* (Detroit), *Lowes* (South Carolina), *Corporation for the Integral Development of Ecotourism* (San Juan, Puerto Rico), LopezNegrete (Houston) and *Creative Realities* (Boston).

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1/01-present—Professor of Strategic Management and Global Business, Department of Business Management, Murray Koppelman School of Business, Brooklyn College, *City University of New York*

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1995-2000 Assistant Professor of Media Studies *City University of New York* at Queens College and The College of Staten Island

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Editorial Boards

Reviewer*: Business Society and Government Journal* of the Business, Society and Government Consortium, a Division of the Midwest Business Administration Association (MBAA) International.

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Memberships in Professional Organizations

Association for Environmental Studies and Sciences

Eastern Academy of Management

U.S. Coordinator for the *Ibero-American Television Observatory Project* (PROFITEL) Autonomous University of Barcelona (UAB), Spain

(2006-9) U.S. Coordinator for the *Ibero-American Television Observatory* (OBITEL) Autonomous University of Barcelona (UAB), Spain and University of Sao Paulo, Brazil.

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The Center for the Study of Latino Media and Markets, School of Journalism and Mass Communication, Texas State University, San Marcos.

Publications

Books:

Aproximación a la telenovela (Madrid: Cátedra, 1987)- This was the first academic book published on the *telenovela* industry. Cátedra (a prestigious Spanish literature publisher) distributed the book globally and converted it into a classic.

Refereed publications and book chapters:

(2016) Refereed Proceedings: "Electric Car-Sharing: Is it Possible in New York City?" *29th World Electric Vehicle Symposium and Exhibition* (EVS29) The Palais des congrès de Montréal, Montréal, Québec, Canada: np

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(2007) Panel of Experts Member: *First OBITEL International Course: Production, Reception and Observation of Television Fiction* [*Primer curso internacional de OBITEL: Producción, recepción y observación*],Universidad de Guadalajara, Jalisco, Mexico, September 26-28.

(2007) Keynote Speaker: "The Horse in Puerto Rican Culture: On Communication," ["El caballo en la cultura puertorriqueña como elemento comunicativo”] Opening of lecture series of the art exhibit: *The Horse in Puerto Rican Culture*, Museum of the Americas, Old San Juan, Puerto Rico, February10.

(2006) Panel of Experts Member: OBITEL seminar at *FELAFACS* (*Latin American Federation of Social Communication University Programs Conference*) at Universidad Javeriana, Bogotá, Colombia, September 25-28.

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(2004) Panel of Experts Member: “The Spanish Fiction Industry in the United States,” *Los del Este: Eastenders Installation at the Lawrence O’Hana Gallery of the London Royal College of Art: Discussion on Resonance FM* (a London-based art radio station), broadcast at London, England, October 28.

(2004) Guest Scholar: “The U.S. Spanish Television Networks, Serial Drama and the Hispanic Market,” Department of Modern Languages, Literatures and Cultural Studies, University of Central Oklahoma, Edmond, Oklahoma, June 17.

(2003) Keynote Speaker: “Global Trends in Telenovela Production” [“Tendencias globales en la producción de telenovelas”] at: *Instituto de Investigacion de la Telenovela*, a Guggenhemim Museum Education Division Installation at the 2003 *Havana Art Biennial* (Cuba), November 10.

(2000) Panel Chair for the Philosophy of Communication Division, *Latino/a/ Caribbean Cultural Formations*, *50th International Communication Association Conference*, Acapulco, Mexico, June 2.

Grants and Awards

2013- Best Conceptual Paper: "Webnovelas: A New Economic and Cultural Bridge Between the U.S. and Latin America," *Assessing the State of Spanish-Language and Latino-Oriented Media International Conference*, University of Texas, San Marcos, February 2013.

2012- *The 31th Québec Summer Seminar* (August 6-10) The Center on Québec Studies/Center for the Study of Canada, State University of New York, Plattsburgh: held at Montréal and Québec City ($US/$CAD 1,300.00 subsidy/per participant)

2012- The Ministry of Education of Spain and the Masters in Scriptwriting of the Autonomous University of Barcelona, for delivering a graduate seminar on marketing and the new media, April 17-27. (€2,500)

2012-13- The Telefónica Foundation of Spain and La Universidad Complutense (Madrid), Institute for International Studies, for writing a chapter on the role of media in the preservation of the Spanish Language in the U.S. for a book series on the economic value of the Spanish Language, (€4,000+travel expenses for meetings).

2005-2009. OBITEL (Ibero-American Television Fiction Observatory, I was the U.S. coordinator of this research group based at the University of Barcelona and the University of Sao Paulo, Brazil. OBITEL analyzed the television fiction industry at member countries of the Summit of Chiefs of State of the Ibero-American (travel expenses during tenure: $10,000. Estimated)

2006. CITY University of New York, Faculty Fellowship Publication Program—A course release and bi-monthly meetings with five other CUNY junior faculty and a senior mentor during the spring semester to prepare manuscripts for publication ($2,500.)

2006. Carleton University and MuséeMcCord Museum, Montréal, Speaker Travel Grant to attend the Colloquium: *Trading Places: Commerce and the Evolution of the City*, Canada, November 3, 2006. ($600.)

2006. University of Wisconsin, Milwaukee, Institute for Diversity Education and Leadership (IDEAL), to attend the Seminar "Marketing to the New Majority: How to Reach the Multicultural Consumer" at Milwaukee May 5, 2006 ($600).

2003-2004. City University of New York Diversity Projects Development Grant—to study [along with Prof. Hershey Friedman, Business Division Chair] the viability of a minor in Minority and Female Entrepreneurship at Brooklyn College's Economics Department. ($2,500.)

1998-99. City University of New York Research Foundation Grant —to study the success of Latin American *telenovelas* in Israel. ($6,512.)

1997-98. City University of New York Research Foundation Grant —to compare Brazilian, Mexican and American soap opera in the international television market. ($6,804.)

Full- year Grants:

University of Wisconsin Fellow— for research on marketing and the counterculture at the *Center for Twentieth Century Studies*, University of Wisconsin at Milwaukee.

Fulbright Fellowship— for research on Brazilian television at the *Center for Contemporary Studies*, Federal University of Rio de Janeiro, Brazil, for University of Minnesota doctoral thesis.

University of Valencia Fellow— for research on global television at the *Institute of Radio, Film and Television*, University of València, Spain, for University of Valencia doctoral thesis.

Conference and Seminar Papers

(2016) “Electric Car-Sharing: Is it Possible in New York City?” *29th World Electric Vehicle Symposium and Exhibition* (EVS29) The Palais des congrès de Montréal, Montréal Québec, June 22.
(2016) with Yehuda Klein: “The Urban Sustainability Curriculum within a School of Business,” *Association for Environmental Studies and Sciences Conference*, American University, Washington, D.C., June 9.

(2016) “Private and Public Sector Collaboration: Electric Car Sharing in New York,” Eastern Academy of Management, May 5.

(2015) with William Hampton-Sosa: "A Case Study of the Adoption and Adaptation of the Webnovela Marketing Platform by Telemundo and Univision," 2015 North East Decision Science Institute Conference, Boston, March 22.

(2014) with William Hampton-Sosa, “The *Webnovela* as an Emerging Online Marketing Vehicle” *2014 Northeast Decision Science Institute Conference* (NEDSI), Philadelphia, March 28.

(2013)“U.S. Television: How it Adapts to Change within the U.S. and North America,” *Assessing the State of Spanish-Language and Latino-Oriented Media International Conference*, University of Texas, San Marcos, February 22.

(2013) "Webnovelas: A New Economic and Cultural Bridge Between the U.S. and Latin America," *Assessing the State of Spanish-Language and Latino-Oriented Media International Conference*, University of Texas, San Marcos, February 22.

(2013) with Myles Bassell, "Inventory Accounting on an Egg Farm," *49th* Midwest *Business Administration Association International Conference*, Division: Society for Case Research, Chicago, March 1.

(2013) with Myles Bassell, "Revenue Recognition in the Tourism Industry," *49th* Midwest *Business Administration Association International Conference*, Division: Society for Case Research Chicago, March 1.

(2012) "Brands as Fictional Characters," *2012 Midwest Business Administration Association (MBAA) International Conference*, Division: Business, Society and Government, Chicago, March 30.

(2012) Panel Chair: *Grab Bag*, *2012 Midwest Business Administration Association (MBAA) International Conference*, Division: Business, Society and Government, Chicago, March 30.

(2012) Panel Chair: *Critical Incidents Review*, *2012 Midwest Business Administration Association (MBAA) International Conference*, Division: Society for Case Research, Chicago, March 29.

(2012) with Myles Bassell, "Entrepreneurial Spirit and Accounting Issues," *2012 Midwest Business Administration Association (MBAA) International Conference*, Division: Society for Case Research, Chicago, March 29.

(2012) with Myles Bassell, "The Income Statement in the Tourism Industry," *2012 Midwest Business Administration Association (MBAA) International Conference*, Division: Society for Case Research, Chicago, March 29.

(2011) “From the Radio Days to the Internet: Serial Drama and Immigrants,” *2011 Brooklyn College Faculty* Day, Symposium: *Genre Theory and the New Media*, May 25.

(2011) with Héctor López-Pumarejo, “Exploring the Green Business Models: The Bicycle Rental Programs of Paris, New York, Montreal and San Juan, Puerto Rico,” *2011 Midwest Business Administration Association (MBAA) International Conference*, Division: Business, Society and Government, Panel: *Matters of Sustainability*, Chicago, March 25.

(2011) with Veronica Manlow, “On Cluttered Outdoors Advertising: Making Sense at Time Square,” *2011 Midwest Business Administration Association (MBAA) International Conference*, Division: Business, Society and Government, Panel: *Eclectic Issues*, Chicago, March 25.

(2011) with Myles Bassell- Case: “Inventory Management Accounting for Eggs,” *2011 Midwest Business Administration Association (MBAA) International Conference*, Division: Society for Case Research, Panel*: Critical Incidents and Embryo Review*, Chicago, March 24.

(2011) with Myles Bassell- Case: “Revenue Recognition: A Case Study for General Accepted Accounting Practices (G.A.A.P.),” *2011 Midwest Business Administration Association (MBAA) International Conference*, Division: Society for Case Research, Panel*: Critical Incidents and Embryo Review*, Chicago, March 24.

(2010) "*Webnovelas*: *Telenovelas* for the Internet?" *2010 International Television Festival and Market* (fymti.mdp). Mar del Plata, Argentina, Sept. 14.

(2010) with Hector López-Pumarejo. "Outdoor Advertising and the New Public Bicycle Programs." IX World Media Economics and Management Conference: The Media Under Changing / Challenging Times. Bogota, Colombia, June 5. (accepted)

(2009) "Exploring the Canadian and U.S. Market for the Electric Car," *2009 Midwest Business Administration Association (MBAA) International Conference*, Division: Business, Society and Government, Panel: *International Considerations*, Chicago, March 20.

(2009) Case: "Bike Sharing in Paris," *2009 Midwest Business Administration Association (MBAA) International Conference*, Division: Society for Case Research, Panel: *Embryo Cases*, Chicago, March 19.

(2009) Discussant of the case: "Profit or Product Safety," *2009 Midwest Business Administration Association (MBAA) International Conference*, Division: Society for Case Research, Panel: *Critical Incidents, Ethics*, Chicago, March 18.

(2009) Discussant of the case: "Cancer Water (A/B)," *2009 Midwest Business Administration Association (MBAA) International Conference*, Division: Society for Case Research, Panel: *Critical Incidents, Ethics*, Chicago, March 18.

(2009)"From Telenovelas to Webnovelas: On Cross-Platform Distribution," *Assessing the State of Spanish Language Media Conference*, The Center for the Study of Latino Media and Markets, Texas State University-San Marcos, Track: Television and Entertainment, Panel: *Telenovelas*, February 21.

(scheduled) (2009) "Why Outdoor Advertising Grows" *Faculty Day Symposium*, Panel: *The Growth of Outdoors Advertising: Changes in the Shopping Environment*, Brooklyn College, City University of New York, May 20.

(scheduled) "Telenovelas and the New Media" 2009 Latin American Studies Association Conference, Panel: *Latin Melodrama: Stereotyping and Cultural Affirmation in Television Content Aimed at Latin Americans and Hispanics of the United States*, Rio de Janeiro, Brazil, June 13, 2009.

(2008) "A televisão em espanhol se fortalece, a televisão em inglês se debilita." [In English: "United States: Spanish-Language Television Grows Stronger as Television in English Weakens."] *Ibero-American Television Fiction Observatory (OBITEL) Seminar*, Sponsors: Globo University and University of São Paulo, Rio de Janeiro, Brazil, June 25.

(2008) with Myles Bassel, "How Technology Transforms Outdoor Advertising: Succeeding in a Global Environment," *Midwest Business Administration Association International*, Division: Business, Society and Government Consortium, Chicago, April 4.

(2008) "Case: Cojobas Farm" *Midwest Business Administration Association International*, Division: Society for Case Research, Chicago, April 2.

(2008) "Case: Corporation for the Integral Development of Eco-Tourism in Puerto Rico [CODIETU]" *Midwest Business Administration Association International*, Division: Society for Case Research, Chicago, April 2.

(2007) "Developments in the U.S. Spanish Serial Drama Industry" in: *First OBITEL International Course: Production, Reception and Observation of Television Fiction* ["Cambios en la industria de la ficción en televisión en español en los EEUU"],Universidad de Guadalajara, Jalisco, Mexico, September 27.

(2007) "The Impact on the Upper Manhattan Empowerment Zone (UMEZ) on Retail at Harlem," *Midwest Business Administration Association International*, Division: Business, Society and Government Consortium, Chicago, March 30.

(2006) "Marketing Old San Juan and Old Quebec," Panel: "From Champlain to the Global Market: Business and Perceptions," *Colloquium: Trading Places: Commerce and the Evolution of the City*, Carleton University and MuséeMcCord Museum, Montréal, Canada, November 3.

(2006) "Telenovelas for Americans?" ["¿Telenovelas para los americanos?"] An OBITEL seminar at *FELAFACS* (*Latin American Federation of Social Communication University Programs Conference*) at Universidad Javeriana, Bogotá, Colombia, September 26.

(2006) "Selling Harlem through Outdoor Advertising: The Upper Manhattan Empowerment Zone," Business, Society and Government Consortium, *2006 Midwest Business Administration Association Conference*, Chicago, March 16.

(2005) "On Marketing and Nationalism: The Puerto Rico Art Museum," *2005 Northeast Decision Science Institute Conference*, Pennsylvania: NEDSI/Drexel University, March 29.

(2005) "New Museum Marketing Strategies: The Puerto Rico Art Museum," *2005 Midwest Business Administration Association Conference*, Chicago, March 17.

(2004) "Telenovelas and the U.S. Hispanics," *Second World Summit of the Telenovela and Fiction Industry*, Barcelona, Spain, October 2.

(2004) "Global Marketing and Latin American Television," *Media and Culture in the Americas Conference*, at New York University's King Juan Carlos I Center, New York City, March 26.

(2004) "The Marketing Force of Serial Drama," *Northeast Decision Science Institute Conference*, Atlantic City, New Jersey, March 24.

(2003) "Creation of a Minor in Minority in Urban/Minority Entrepreneurship at (CUNY) Brooklyn College's Business Program," *Decision Sciences Institute Conference*, Washington DC, November 25.

EXHIBIT 2

Confidential Document Withheld

EXHIBIT 3

LBI Media Presents

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It's All About the Stars

[redacted]

About Liberman Broadcasting

LIBERMAN BROADCASTING

- **Largest producer of Spanish television in the U.S.**
  - **56 Hours Per Week**
- **Highly rated programs beat other Hispanic networks.**
- **29 O & O radio and television stations.**
- **Affiliates in 20 additional markets**
- **20 year track record**

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LBI'S 20 YEAR JOURNEY

1987 — **Liberman Broadcasting Founded By Jose and Lenard Liberman**

1988 — Acquired first radio station in Orange County, CA

1990 — Added AM radio station in Los Angeles

1995 — Purchased first FM radio station in Los Angeles

1998 — Acquired KRCA-TV in Los Angeles

1999 — **Began internally-producing TV programming**

2000 — TV station in San Diego

2001 — Entered Houston market with 5 radio stations and a TV station

2004 — Entered Dallas market with TV station and FM radio station

2006 — Acquired additional radio stations in Dallas market

2007 — Acquired TV in Salt Lake City and an FM in Riverside-San Bernardino

2008 — Added television stations in Phoenix & New York

2009 — **Launch Estrella TV Network**

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ESTRELLA TV O&O and Affiliated Stations Reach Over 70% of the U.S. Hispanic Market

Albuquerque / Santa Fe
Austin
Bakersfield
Chicago
Dallas / Ft. Worth
Denver
El Paso
Fresno / Visalia
Harlingen / McAllen
Houston
Las Vegas
Los Angeles
Miami / Ft. Lauderdale
New York
Odessa / Midland
Oklahoma City
Orlando
Phoenix
Portland
Sacramento/ Stockton / Modesto
Salt Lake City
San Antonio
San Diego
San Francisco / Oakland / San Jose
Seattle-Tacoma
Tucson
Tyler / Longview
Waco / Temple / Bryan
Yuma / El Centro

O & O's Affiliates

Estrella TV Brand/Image: Talent

It's All About The Stars

ESTRELLA TV NETWORK

- Estrella TV features top Latin American performers.
- Proven formats created and produced for U.S. Hispanics.
- Counter Program Existing Hispanic Networks.

> *"…..Estrella TV is already a formidable TV competitor to Univision and Telemundo…"*
> *MEDIA LIFE , March 20, 2009*

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Top Latin American Talent


- Estrella TV talent is internationally famous


- Estrella TV talent appear in character

- Estrella TV talent are well know to U.S. Hispanic audiences



Home of the stars

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Maestra Canuta
El Show De Lagrimita y Costel

Chabelita
El Show De Lagrimita y Costel

Sergio Catalan
Estudio 2

Lili Brillanti
Estudio 2

Carlos Eduardo Rico
A Que No Puedes

Luis de Alba
Los Chuperamigos

Huicho Dominguez
Los Chuperamigos

La Chupitos
Los Chuperamigos

It's All About The Stars

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Lagrimita y Costel
El Show De Lagrimita y Costel

Barbara Torres
El Show De Lagrimita y Costel

Vanessa Arias
Estudio 2

Gaby Ramirez
Estudio 2

Pepe Charrascas
Los Chuperamigos

"Burro" Van Rankin
A Que No Puedes

El Norteño
A Que No Puedes

Alejandro Suarez
Los Chuperamigos

It's All About The Stars

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Maribel Fernandez
Los Chuperamigos


Proculo
El Show De Lagrimita y Costel


Don Cheto
El Show de Don Cheto


Jorge Gomez
Trancazo Musical


Lianna Grethel
Alarma TV


Jorge Antolin
Alarma TV


José Luis
José Luis Sin Censura


Jesus Javier
Noticiero STN

It’s All About The Stars

Estrella TV Brand/Image: Formats

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Recipe For Success

Comedy
- Carol Burnett
- SNL
- Friends
- → Los Chuperamigos

Celebrity Competition
- Dancing with the Stars
- Family Feud
- → A Que No Puedes

Musical Variety
- MTV Unplugged
- America's Got Talent
- Sat. Night at Apollo
- → Estudio 2

Estrella TV Features Proven Formats Designed And Produced For U.S. Hispanic Audiences

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Coming This Fall

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MUSICAL VARIETY

Estudio 2

WEEKDAY PRIME: 7:00 PM

<u>HOSTS:</u>

Sergio Catalan

Vanessa Arias

Lilli Brillanti

Gaby Ramirez

<u>"Estudio 2"</u> is a fast-paced hour of music, comedy and entertainment. Each action-packed show features live performances by hit artists, today's most popular comic performers and a search for the hottest new musical talent. Hosted by novela heart throb, Sergio Catalan, top Mexican actresses Vanessa Arias, Lilli Brillanti and Gaby Ramirez, Estudio 2 is an hour of outstanding family entertainment

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CELEBRITY COMPETITION

A Que No Puedes

WEEKDAY PRIME: 8:00 PM

HOSTS:

Carlos Eduardo Rico

Jorge “El Burro” Van Rankin

Edson “El Norteno” Zuniga,

“A Que No Puedes” is an exciting new program where celebrities win big money for their favorite charities. Featuring the comedic talents of Carlos Eduardo Rico and the quick wit of Jorge (“El Burro”) Van Rankin and Edson (“El Norteno”) Zuniga, “A Que No Puedes” is one of LBI’s most successful internally created and produced television shows.

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COMEDY & GAME SHOW

Lagrimita y Costel

DAYTIME: 3:00 PM

CAST:

Lagrimita & Costel

Nora Velazquez, "La Chabelita"

Martha Ofelia Galindo "La Maestra Canuta"

Barbara Torres "La Bruja Carmela"

Luis Queli "Proculo Adame"

"Lagrimita y Costel" are a pair of legendary comedy performers that are now exclusively appearing on Estrella TV each weekday in early fringe. Having recently received a national award in Mexico that recognizes their amazing talent, this famous father & son duo also star in their own comedic television show on Televisa.

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COMEDY

Los Chuperamigos

WEEKDAY PRIME: 9:30 PM

CAST:

Liliana Arriaga, “La Chupitos”

Luis De Alba

Alejandro Suarez

Carlos Bonavides, “Huicho Dominguez”

Maribel Fernandez

Martha Ofelia Galindo

Pepe Suarez

Estrella TV’s newest hit, “**Los Chuperamigos”**, is an ensemble of Latin America’s most famous comedic actors and writers delivering a completely original half-hour sitcom.

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NEWS MAGAZINE

Alarma TV

WEEKDAY PRIME: 10PM

<u>HOSTS:</u>

LIANNA GRETHEL

JORGE ANTOLIN

<u>"Alarma TV"</u> is hosted by novela actress Lianna Grethel and Televisa Soap Opera star Jorge Antolin. Alarma TV delivers compelling stories, investigative reports, original features, and other can't-miss news magazine segments.

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NEWS

Noticiero STN

NATIONAL NEWS: 5:30 PM

<u>ANCHOR:</u>

JESUS JAVIER

"<u>Noticiero STN</u>" is a half-hour national and international news program, presenting breaking news stories and current events from the US and around the world while featuring Mexico, Central America and South America.

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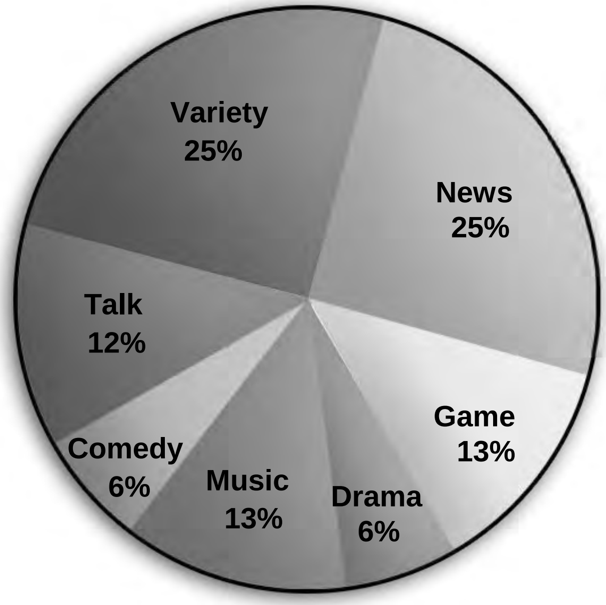
Estrella TV Vision/Strategy:

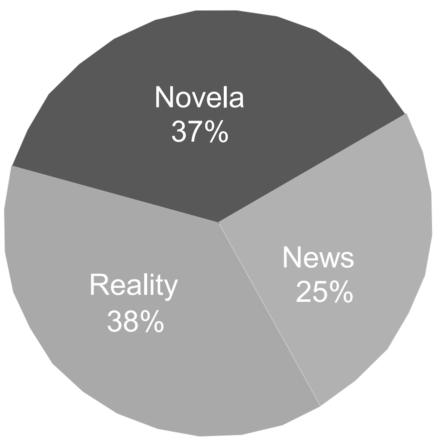
New Network, Fresh Approach

Estrella TV Provides An Alternative

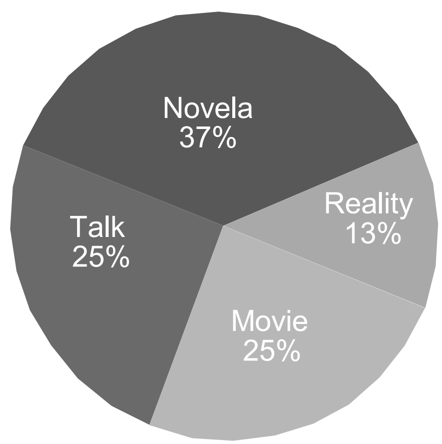


Fresh Formats Counterprogram Novelas and Reality Based Programming.

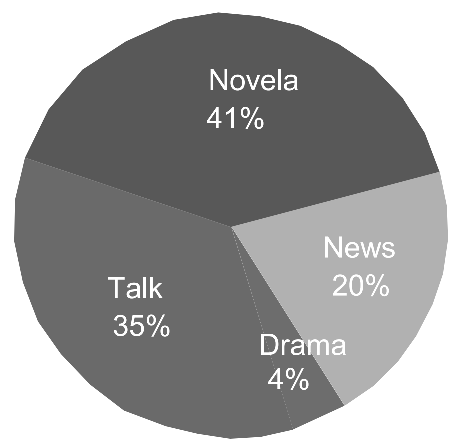
Telemundo



Telefutura



Univision



Comparing M-F 3p-11p programming

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Top Ratings Performance

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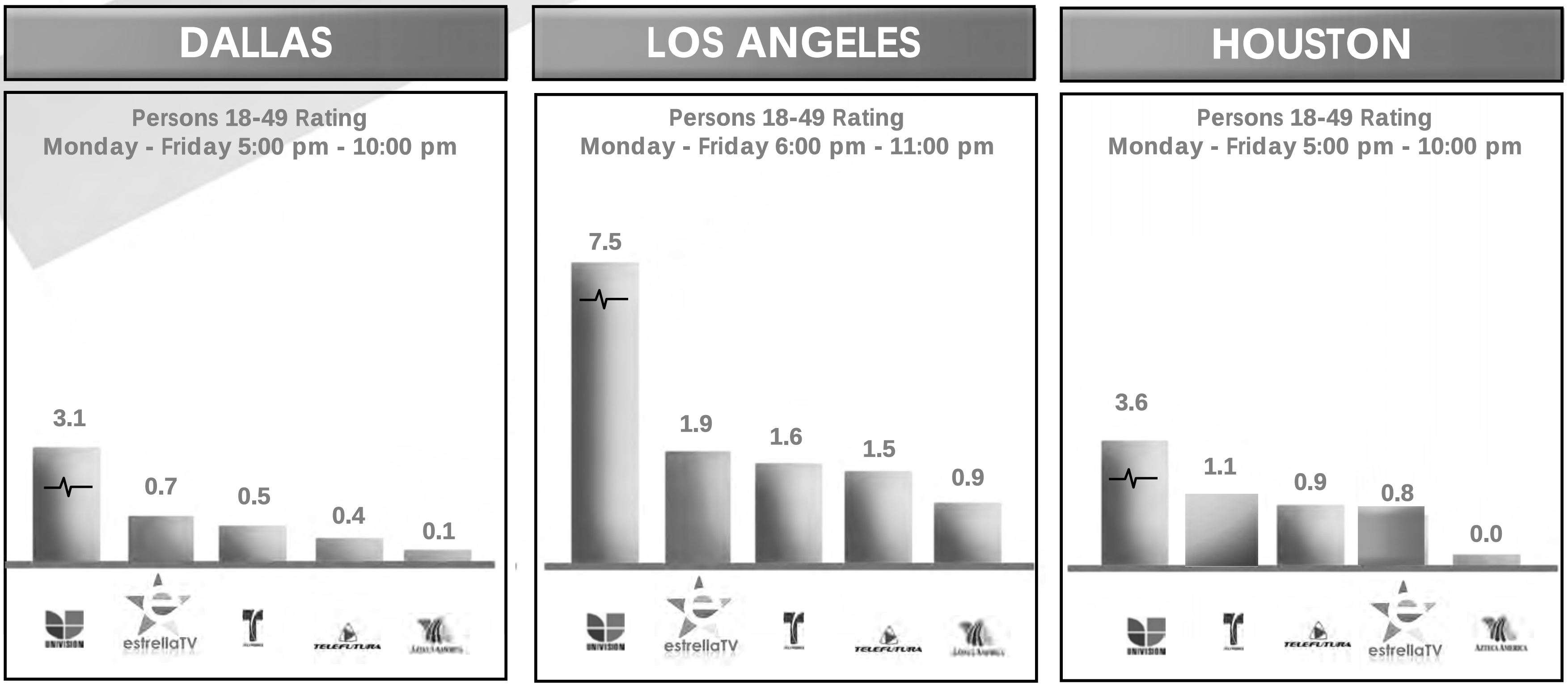
PRIMETIME RATINGS ADULTS 18-49



Source: Nielsen Media Research, Los Angeles NHSI November 08, Dallas NSI March 09, Houston NSI March 09; TP average ratings, excluding soccer & specials

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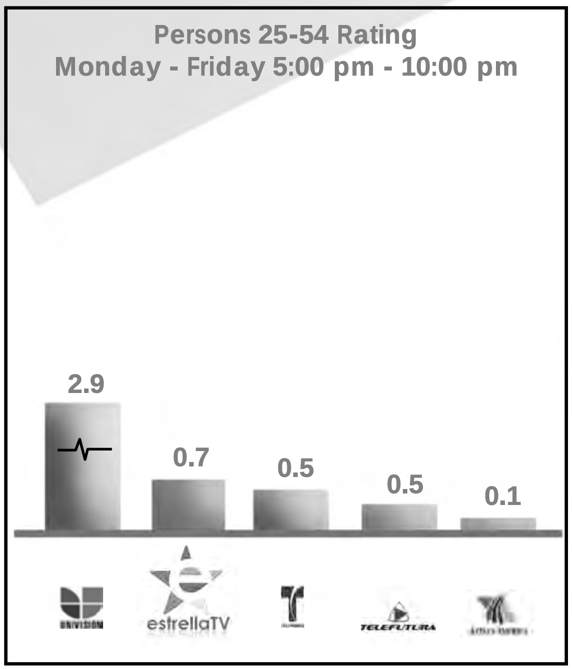
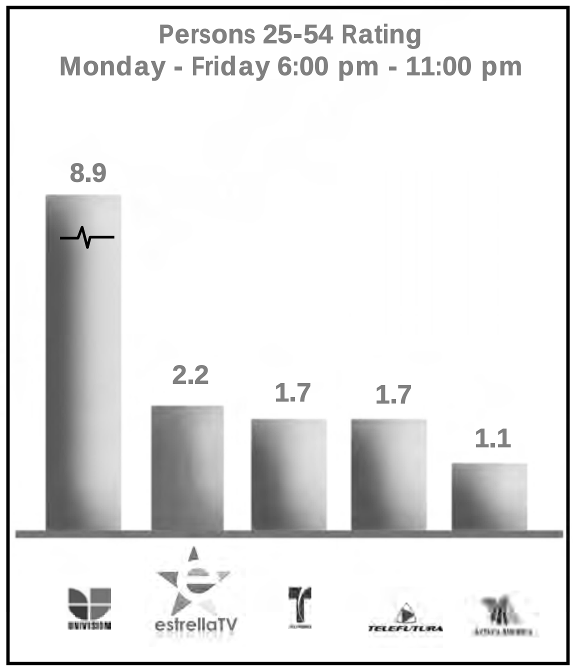
PRIMETIME RATINGS ADULTS 25-54

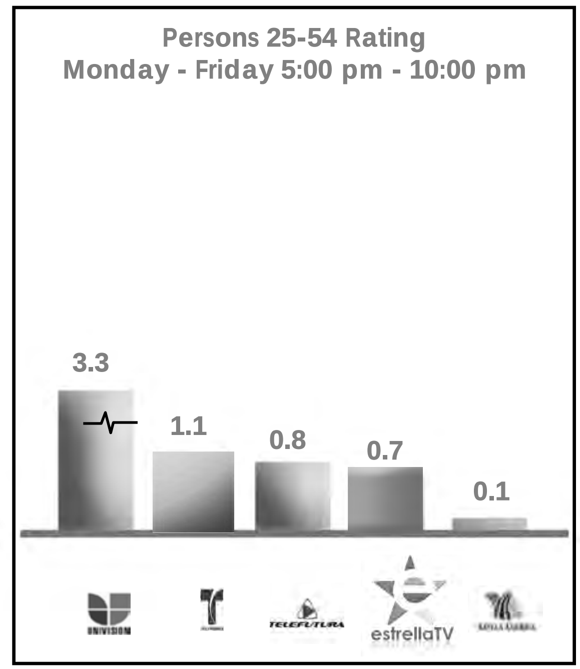
DALLAS



LOS ANGELES



HOUSTON



Source: Nielsen Media Research, Los Angeles NHSI November 08, Dallas NSI March 09, Houston NSI March 09; TP average ratings, excluding soccer & specials

Network Audience Projections

NETWORK AUDIENCE

Projection Rationale

- Actual impressions in existing Estrella TV Markets are summed.
- Existing market Estrella TV rating is calculated by dividing this sum by the universe estimates for existing markets.
- Existing market Estrella TV rating is multiplied by the Estrella TV Network (existing stations plus affiliates) to obtain a network projection.

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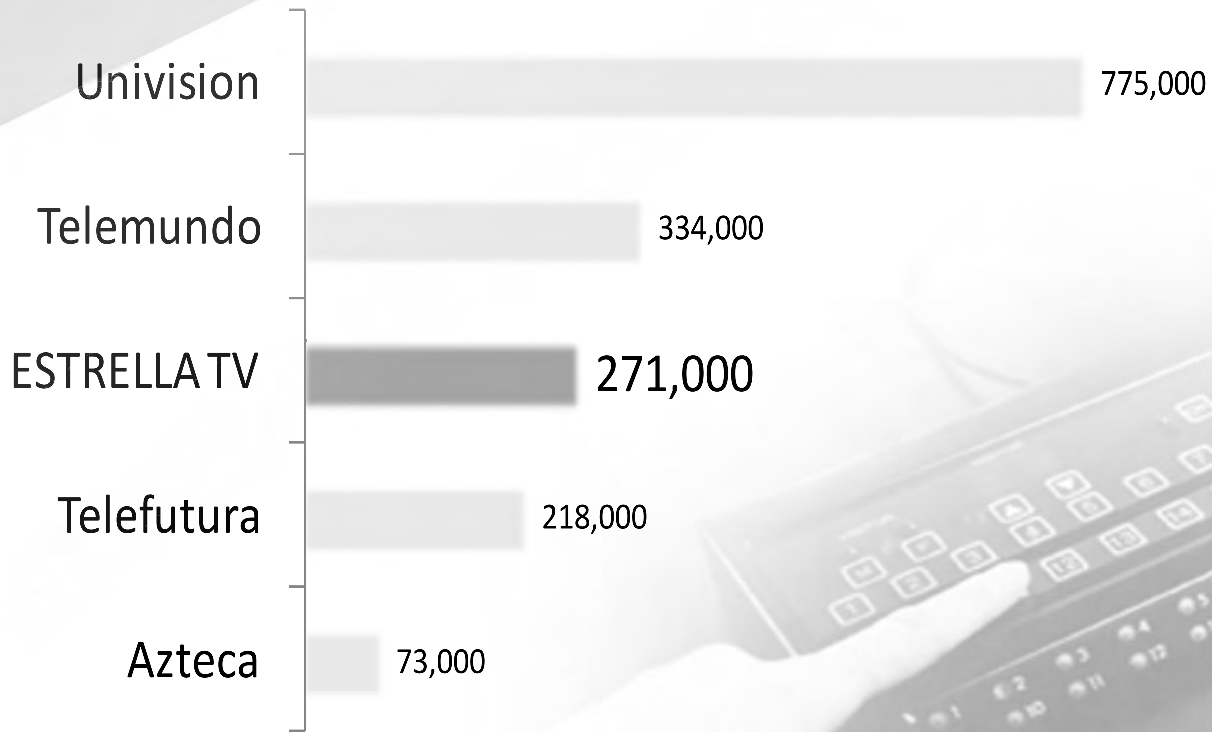
FALL NETWORK AUDIENCE
EARLY FRINGE 18-49 PJ

Early Fringe Projections



Source: Estrella- Projections derived from current markets (NSI/NHSI-H)
Univision, Telemundo, Telefutura, Azteca-NTI-Nielsen MS 3p-7p, Nov 2009, Live.

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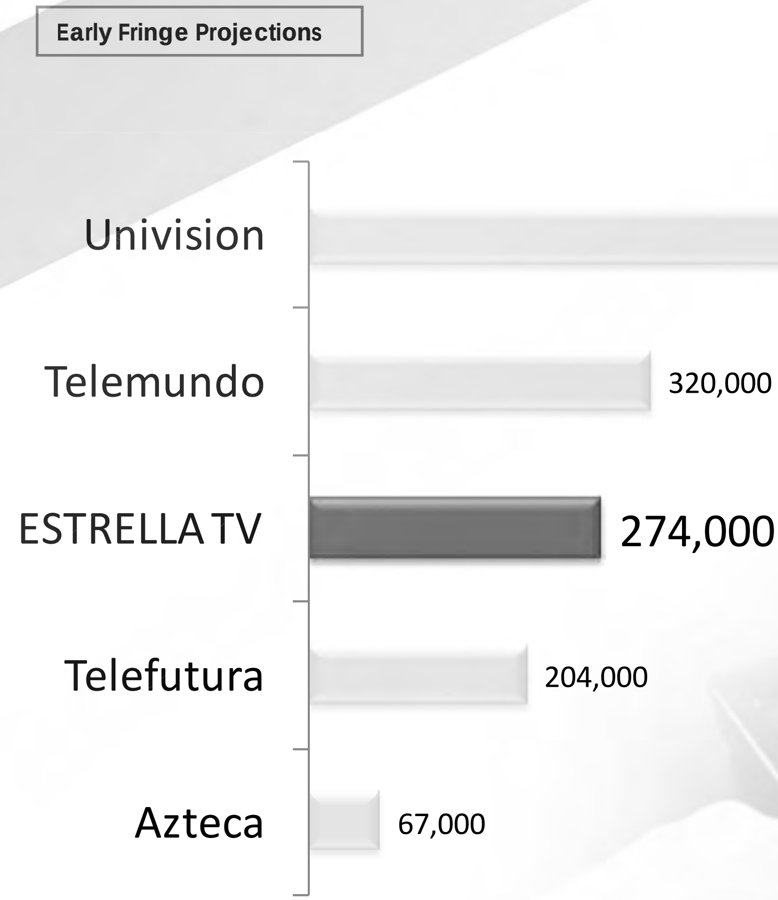
FALL NETWORK AUDIENCE
EARLY FRINGE 25-54 PJ



Source: Estrella- Projections derived from current markets (NSI/NHSI-H)
Univision, Telemundo, Telefutura, Azteca-NTI-Nielsen MS 3p-7p, Nov 2009, Live.

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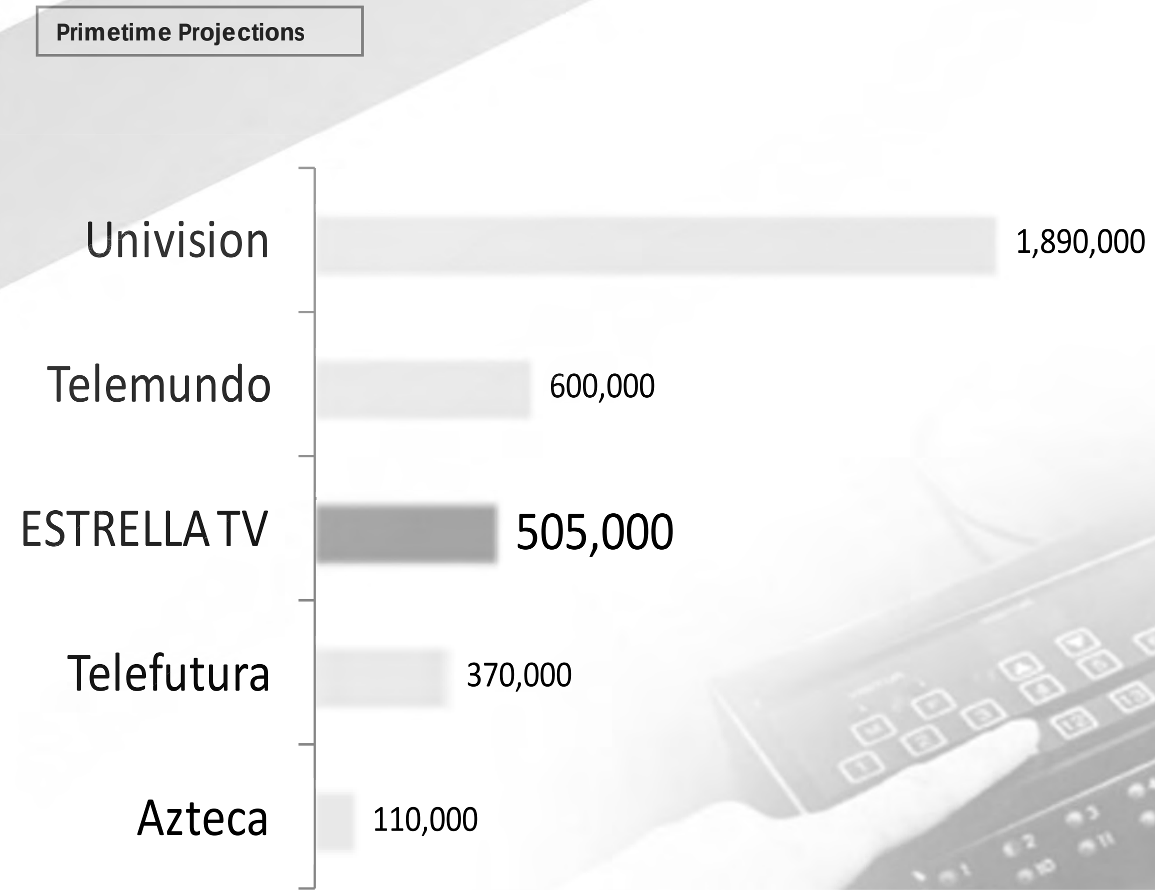
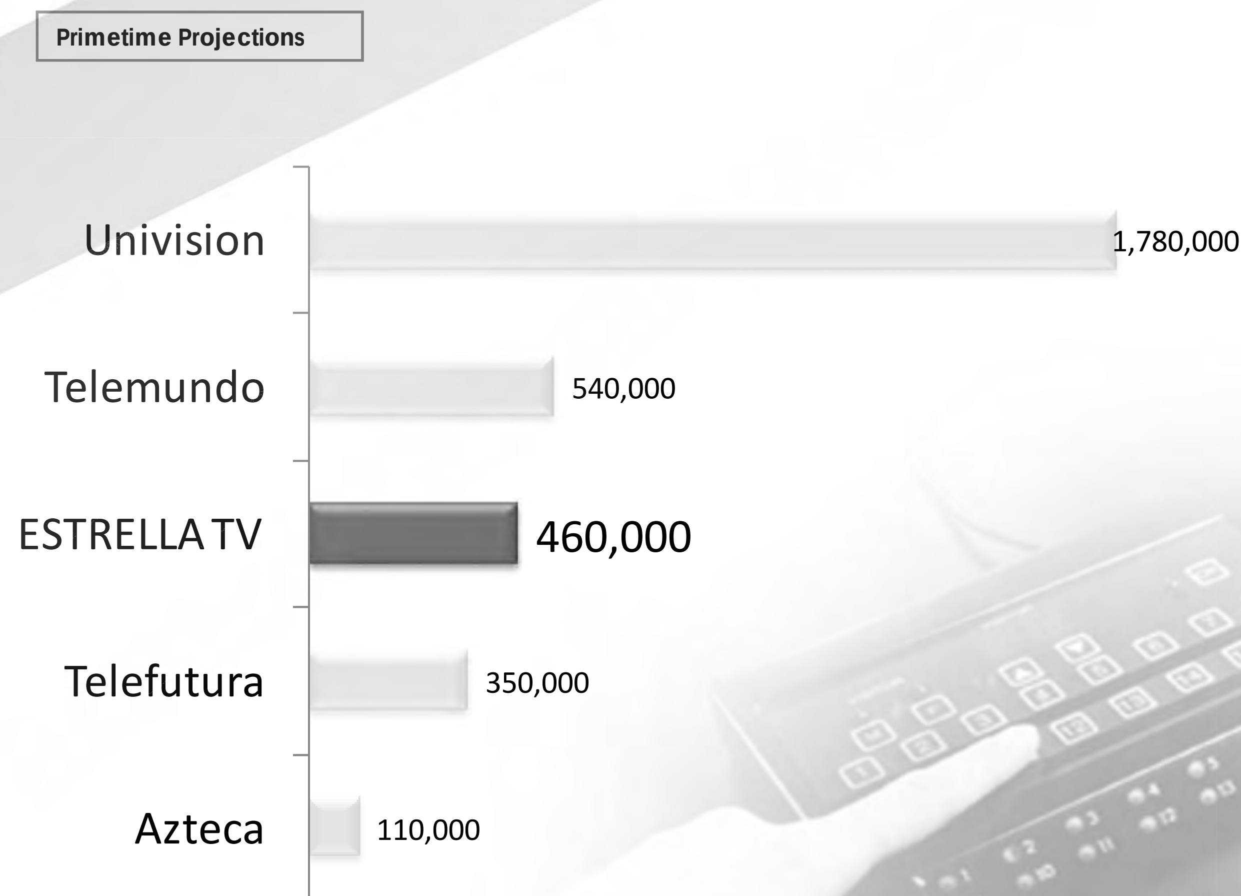
FALL NETWORK AUDIENCE
PRIMETIME 18-49 PJ



Source: Estrella- Projections derived from current markets (NSI/NHSI-H)
Univision, Telemundo, Telefutura, Azteca-NTI-Nielsen Prime averages, week of 11/24/08, Live+SD, from Nielsen web site.

FALL NETWORK AUDIENCE
PRIMETIME 25-54 PJ



Source: Estrella- Projections derived from current markets (NSI/NHSI-H)
Univision, Telemundo, Telefutura, Azteca-NTI-Nielsen Prime averages, week of 11/24/08, Live+SD, from Nielsen web site.

Estrella TV: Creativity

McDonald's

ORGANIC MARKETING SOLUTIONS

- **Experience in designing and executing successful product integrations for over 20 major brands**
- **Talent endorsement opportunities**
- **Integration opportunities**
  - CUSTOM SEGMENTS
  - IN-SHOW MENTIONS
  - ACTIVE USAGE & FEATURE DEMONSTRATIONS
  - STORYLINE INTEGRATIONS
  - LIVE HOST COMMERCIALS
  - SNIPES & ANIMATIONS
- **Specials and event marketing opportunities**

TALENT ENDORSMENT

- **Ability to work with top talent**
- **Connect brand with audience**
- **Positive image for brand**

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[redacted]


MARTIN

EVENT MARKETING

- 20 top rated O&O radio stations in key markets
- Live remotes
- Large community events
- Concert series with top performers
- Signage, sampling, street teams
- Participation in top Hispanic festivals across the US

DIGITAL SPONSORSHIP OPPORTUNITIES

- Online program sponsorships across over 20 sites
- EstrellaTV.com network site
- Streaming Video and Pre-Roll

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ESTRELLA TV SIGNATURE SPECIAL
“PREMIOS DE LA RADIO 10TH ANNIVERSARY”

COMING NOVEMBER 11, 2009

“Premios de la Radio” is recognized as the premiere Mexican music awards event in the country. This event honors the very best musical artists with a coveted golden statue as chosen by the public through weeks of on-line, texting and call-in voting. This three hour primetime event is broadcast live on Estrella TV and delivered the #1 rating position in primetime in 2008.

2009

Premios de la Radio

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ESTRELLA TV #1 PRIME TIME

November Sweeps

Estrella TV's Live Telecast "Premios de la Radio" beats Univision in Primetime!

Source: Nielsen Media Research, Los Angeles NSI-Hispanic; November 19, 2008, 8p-11p A18-34 average ratings

Partnership: Ground Floor Opportunity

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ESTRELLA TV

- Top Latin American Talent
- Innovative Formats
- Successful Counter Programming
- Top Ratings History
- Unrivaled Organic Marketing Solutions
- Ground Floor Opportunity

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Gracias

"...A NEW FORCE IN HISPANIC (NETWORK) TV"

BY KEVIN DOWNEY
MARCH 20, 2009

MEDIA LIFE

Appendix

It’s All About The Stars

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EASTERN/PACIFIC

<table>
<tr><th>TIME</th><th>MONDAY-FRIDAY</th><th>SATURDAY</th><th>SUNDAY</th></tr>
<tr><td>6:00 am - 6:30 am</td><td rowspan="2">El Show de Don Cheto</td><td rowspan="2">El Show de Don Cheto</td><td rowspan="2">El Show de Don Cheto</td></tr>
<tr><td>6:30 am - 7:00 am</td></tr>
<tr><td>7:00 am - 7:30 am</td><td>Mundo Salvaje</td><td>Mundo Salvaje</td><td>Comunidad Latina</td></tr>
<tr><td>7:30 am - 8:00 am</td><td>Fabrica de la Risa</td><td rowspan="3">Paid Programming</td><td rowspan="3">Paid Programming</td></tr>
<tr><td>8:00 am - 8:30 am</td><td>Alarma TV</td></tr>
<tr><td>8:30 am - 9:00 am</td><td>Los Chuperamigos</td></tr>
<tr><td>9:00 am - 9:30 am</td><td rowspan="4">Gran Cine</td><td rowspan="4">Gran Cine</td><td rowspan="4">Gran Cine</td></tr>
<tr><td>9:30 am - 10:00 am</td></tr>
<tr><td>10:00 am - 10:30 am</td></tr>
<tr><td>10:30 am - 11:00 am</td></tr>
<tr><td>11:00 am - 11:30 am</td><td rowspan="2">Jose Luis Sin Censura</td><td rowspan="2">Estrellas En Exclusivo
Fin de Semana</td><td rowspan="2">El Show de
Lagrimita y Costel</td></tr>
<tr><td>11:30 am - 12:00 pm</td></tr>
<tr><td>12:00 pm - 12:30 pm</td><td rowspan="2">A Que No Puedes</td><td rowspan="4">Cine Espectacular</td><td rowspan="4">Cine Espectacular</td></tr>
<tr><td>12:30 pm - 1:00 pm</td></tr>
<tr><td>1:00 pm - 1:30 pm</td><td rowspan="4">Cine De la Tarde</td></tr>
<tr><td>1:30 pm - 2:00 pm</td></tr>
<tr><td>2:00 pm - 2:30 pm</td><td rowspan="2">Trancazo Musical</td><td rowspan="4">Gran Cine</td></tr>
<tr><td>2:30 pm - 3:00 pm</td></tr>
<tr><td>3:00 pm - 3:30 pm</td><td rowspan="2">El Show de
Lagrimita y Costel</td><td rowspan="2">El Show de
Lagrimita y Costel</td></tr>
<tr><td>3:30 pm - 4:00 pm</td></tr>
<tr><td>4:00 pm - 4:30 pm</td><td rowspan="3">Estrellas En Exclusivo</td><td rowspan="2">A Que No Puedes</td><td rowspan="4">Cine Del Domingo</td></tr>
<tr><td>4:30 pm - 5:00 pm</td></tr>
<tr><td>5:00 pm - 5:30 pm</td><td>Secretos</td></tr>
<tr><td>5:30 pm - 6:00 pm</td><td>Los Chuperamigos</td><td>Secretos</td></tr>
<tr><td>6:00 pm - 6:30 pm</td><td rowspan="2">Jose Luis Sin Censura</td><td rowspan="2">Estudio 2</td><td rowspan="2">El Show de Don Cheto</td></tr>
<tr><td>6:30 pm - 7:00 pm</td></tr>
<tr><td>7:00 pm - 7:30 pm</td><td rowspan="2">Estudio 2</td><td>Alarma TV Top 10</td><td rowspan="4">Cine Mexicano</td></tr>
<tr><td>7:30 pm - 8:00 pm</td><td>Los Chuperamigos</td></tr>
<tr><td>8:00 pm - 8:30 pm</td><td rowspan="2">A Que No Puedes</td><td rowspan="2">Sabados en Concierto</td></tr>
<tr><td>8:30 pm - 9:00 pm</td></tr>
<tr><td>9:00 pm - 9:30 pm</td><td>Alarma TV</td><td rowspan="2">Jose Luis en Exclusiva</td><td rowspan="4">Cine Super Accion</td></tr>
<tr><td>9:30 pm - 10:00 pm</td><td>Los Chuperamigos</td></tr>
<tr><td>10:00 pm - 10:30 pm</td><td>Noticiero STN</td><td rowspan="4">Cine De La Noche</td></tr>
<tr><td>10:30 pm - 11:00 pm</td><td>Secretos</td></tr>
<tr><td>11:00 pm - 11:30 pm</td><td rowspan="2">Estrellas En Exclusivo
Edicion Nocturna</td><td>Secretos Houston</td></tr>
<tr><td>11:30 pm - 12:00 am</td><td>Secretos Houston</td></tr>
</table>

06-05-09

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Total Hispanic TV Home Coverage:	73.9%

Hispanic DMA Rank	Designated Market Area	Hispanic Television Households	Hispanic % of US Households	Hispanic Cum. % of US Households
12	Albuquerque-Santa Fe	244,950	1.9%	1.9%
23	Austin	151,690	1.2%	3.1%
29	Bakersfield	87,250	0.7%	3.8%
6	Chicago	485,270	3.8%	7.7%
5	Dallas-Ft. Worth	488,150	3.9%	11.5%
15	Denver	229,960	1.8%	13.3%
16	El Paso (Las Cruces)	220,800	1.7%	15.1%
14	Fresno-Visalia	237,690	1.9%	17.0%
10	Harlingen-Wslco-Brnsvl-McA	291,220	2.3%	19.3%
4	Houston	549,890	4.3%	23.6%
22	Las Vegas	151,870	1.2%	24.8%
1	Los Angeles	1,854,810	14.7%	39.5%
3	Miami-Ft. Lauderdale	658,490	5.2%	44.7%
2	New York	1,242,160	9.8%	54.5%
40	Odessa-Midland	53,590	0.4%	54.9%
52	Oklahoma City	40,240	0.3%	55.2%
17	Orlando-Daytona Bch-Melbrn	201,400	1.6%	56.8%
8	Phoenix (Prescott)	381,180	3.0%	59.8%
31	Portland, OR	83,710	0.7%	60.5%
11	Sacramnto-Stktn-Modesto	259,410	2.0%	62.5%
30	Salt Lake City	84,430	0.7%	63.2%
7	San Antonio	382,990	3.0%	66.2%
13	San Diego	237,690	1.9%	68.1%
9	San Francisco-Oak-San Jose	377,730	3.0%	71.1%
27	Seattle-Tacoma	94,520	0.7%	71.8%
25	Tucson (Sierra Vista)	120,880	1.0%	72.8%
67	Tyler-Longview(Lfkn&Ncgd)	23,820	0.2%	73.0%
45	Waco-Temple-Bryan	50,080	0.4%	73.4%
36	Yuma-El Centro	63,160	0.5%	73.9%

Source: Nielsen Media Research, 2008.

Total Hispanic TV Homes	9,349,030

RATINGS PROJECTIONS EXAMPLE

ESTUDIO 2: 7P-8P

Step 1

	Rating		Universe Estimates		Impressions
L.A.	4.6%	X	1,854,810	=	85,321
DALLAS	0.8%	X	2,489,970	=	19,920
HOUSTON	0.9%	X	2,106,210	=	18,956
			Three market total	**=**	**124,197**

Step 2

We add the NSI Universe Estimates for LA, Houston and Dallas and divide this into the three market total (from Above)

	LA NSI Universe		Dallas NSI Universe		Houston NSI Universe	
124,197 /	5,654,260	+	2,489,970	+	2,106,210	= 124,197 / 10,250,440=1.21%

Step 3

Existing market Estrella rating (from above) is multiplied by the Estrella TV UE (exisiting stations plus affiliates) to obtain a network projection.

Existing Markets Rating		Estrella TV Network UE	
1.21%	x	55,078,940	= 667,350

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EXHIBIT 4

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CONTENTS


TALK
ENTREVISTAS

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JOSÉ LUIS
SIN CENSURA

Host: Jose Luis Gonzalez
Episodes: 1349 x 44’
Year Produced: 2001 - 2011

This #1 rated, highly-charged and confrontational talk show takes viewers on an emotional roller coaster ride as it explores topics on interpersonal relationships, human adversities and real life drama sometimes resulting in unavoidable conflicts between guests.




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Patty

Host: Patty Manterola
Episodes: 63 x 44’
Year Produced: 2011/2012

Patty Manterola, super-star recording artist and star of multiple telenovelas, brings her life experience to Estrella TV through her new, self-titled talk show, “Patty”. In each episode, Patty addresses various social and relationship issues. Patty educates and empowers her studio audience and viewers alike with riveting, frank and emotional talk.

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El show de María Laria

Host: Maria Laria
Episodes: 402 x 44’
Year Produced: 2002 - 2004

In this long-running talk show, Emmy Award-winning Maria Laria, creator of the Hispanic talk show format, brings an innovative element of suspense by surprising viewers with daring topics, bold themes and unique guests.

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EL SHAKA

Starring: Julio Mannino, Eduardo Shacklett, Ruben Zamora, Sergio Reynoso
Episodes: 36 x 44'
Year Produced: 2010/2011

This riveting drama portrays the exciting and dangerous world of a notorious drug lord, El Shaka. El Shaka is a husband, lover, father, brother, friend... and the head of Mexico's most dangerous drug cartel. This actions series will keep viewers at the edge of their seats.

HISTORIAS DELIRANTES

Starring: Silvia Pinal, Julio Aleman, Eduardo Santamarina, Iran Castillo, Mariana Seoane, Julian Gil, Francisco Gattorno, Mali Yanny, Alejandro Avalos

Episodes: 43 x 44'

Year Produced: 2008-2012 (still in production)

Taken from stories of the unexplained, this suspense thriller series combines intrigue with the paranormal. Each episode features a different story -- stories of money, love, mystery, relationships, past lives, passion and most of all justice . Inspired from the pages of the legendary "La Lloronas", Historias Delirantes is compelling and entertaining.

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Starring: Alejandro Avila, Luis Fernando Peña, Marisol Santa Cruz and Arlet Pacheco
Episodes: 11 x 44'
Year produced: 2012

“Milagros” is a one-hour drama that re-enacts the miracles real people experience after praying to a divine God through His saints. Every one of these true stories have been professionally researched and have the support of over 75 Catholic churches throughout Mexico. The series is shot on location all over Mexico and Latin America.

Secretos

Starring: Alfredo Brito, Ricardo Herranz, Iglesias Estafania, Natalia Domestico
Episodes: 623 x 22' **Year Produced: 2004-2009**

In this long-running, popular drama, highly-trained criminal investigators solve mysteries and crimes in a manner never seen before on Spanish television. The exclusive Secretos investigative team is on the side of innocent victims of employment abuse, fraud, cheating spouses and unfaithful friends to help them uncover their "Secretos".

Secretos HOUSTON

Starring: Alfredo Brito, Ricardo Herranz, Iglesias Estafania, Natalia Domestico
Episodes: 231 x 22' **Year Produced:** 2005 - 2006

This spin-off of the successful SECRETOS series is filmed on location in Houston, TX., with a distinctive investigative team located in Texas.

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Starring: Liliana Briaga “La Chupitos”, Huicho Dominguez, Alejandro Suarez, Luis D’Alba, La Pelangocha and Pepe Suarez

Episodes: 100 x 22’
Year Produced: 2011/2012

An ensemble of Latin America’s most famous comedic actors and writers deliver a completely original half-hour of hilarious sketch comedy that leaves the viewer wanting more!

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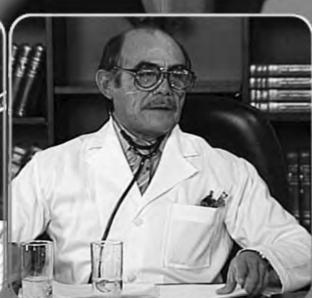
EL HUMOR de Hector Suárez

Starring: Hector Suarez
Episodes: 61 x 44’
Year Produced: 2010 - 2012

Legendary throughout all of Latin America for his prolific acting career and comic versatility, Hector Suarez stars in this sidesplitting, character-driven sketch comedy. Big laughs!


FABRICA DE LA RISA

Episodes: 67 x 22’
Year Produced: 2005

A fast-paced sketch comedy series from the minds and talents of the finest Latin America writers, actors and comedians. Beautiful women, outrageous characters and hilarious circumstances makes for a compelling half-hour of comedy.





TEATRO DE LA RISA

Episodes: 44 x 30'

Year Produced: 2007/2008

Teatro del the Risa delivers the very best in stand-up comedy from the biggest names in the business. Legendary comedians such as Teo Gonzales, Alejandro Suarez, Chabelita, Luis D'Alba all take the stage in front of a live audience and deliver non-stop, side-splitting laughs.

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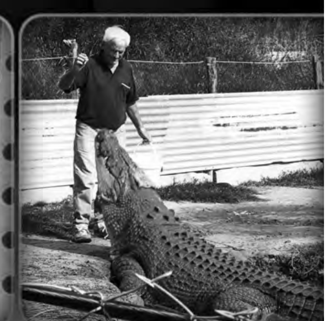
ALARMA TV

Hosts: Lianna Grethel & Jorge Antolin
Episodes: Daily satellite feed, 22’

Hosted by well-known actress Lianna Grethel and Televisa Soap Opera star Jorge Antolin, ***Alarma TV, one of Estrella TV’s highest-rated shows,*** delivers compelling stories, investigative reports, original features, and other can’t-miss segments. With exclusive reporters all over Latin America, this riveting daily television news magazine delivers the stories that will surprise and inform.



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estrellas hoy

Hosts: Diego Schoening & Anais

Episodes: Daily satellite feed, 44’

Hosted by Diego Schoening and Anais, ***Estrellas Hoy*** offers viewers an exclusive and unprecedented look at the world of top Latino celebrities. Featuring interviews with the hottest novela stars, movie stars and musicians, Estrellas Hoy uncovers the most current and exclusive information about their projects, their latest successes, struggles and their scandals!

Hosts: Christian Ramos, La Coqueta
Episodes: Satellite Feed, 22’

A dynamic news magazine show that combines an exciting mix of celebrity interviews, cooking segments, top artists performing their latest hits, and the latest gossip and entertainment news.

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BUSCANDO AMOR

Episodes: 705 x 44’
Year Produced: 2003-2007

In this classic-style dating show, Buscando Amor pairs two willing contestants for a night on the town to see if there is a romantic connection. Sometimes the dates are a perfect match and other times get ready to watch the sparks fly!

SEGUNDA CITA

Episodes: 300 x 22’
Year Produced: 2003-2005

Viewers have often wondered what happens to the couples that have a great first date on Buscando Amor. Segunda Cita answers those questions and more, as the show gives couples the opportunity to meet each other’s family and friends to truly find out if their relationship is a match made in heaven or destined for disaster.

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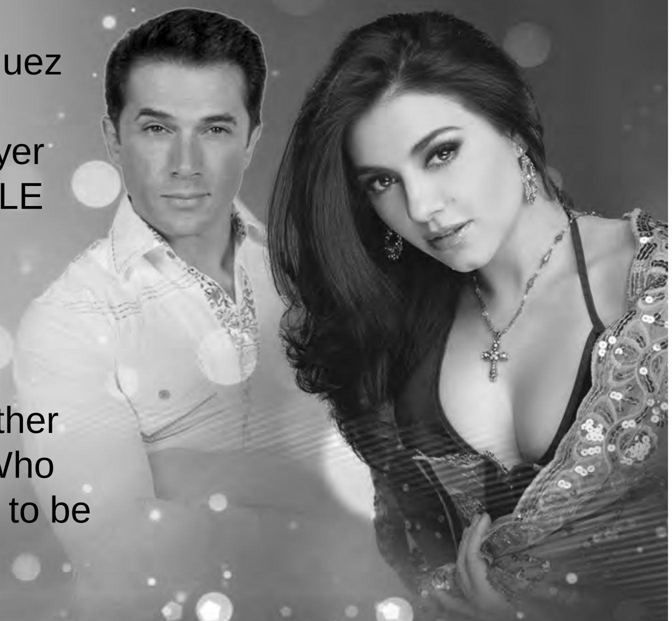
Duetos

Hosts: Carlos Espejel & Tania Vazquez
Judges: Jose Jose, Paty Diaz,
Graciela Beltran, Sergio Mayer
Episodes: 60 x 44' FORMAT AVAILABLE
Year Produced: 2010



Duetos is a high-energy, entertaining, talent competition that each week pairs real life celebrities and up-and-coming amateurs together in singing, dancing and acting competitions. Who will stay, who will go home and who will go on to be crowned the Duetos champion?

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tengo talento, MUCHO talento

Hosts: Sergio Catalán & La Chupitos
Judges: Pepe Garza, Hector Suarez, Ana Barbara
Episodes: Eight Seasons, 6 x 44’, 9 x 88’ per season
FORMAT AVAILABLE

Watch as 3 superstar judges, along with the viewing audience, make one lucky person’s dream come true. Tens of thousands of singers, dancers, musicians, actors, magicians and anyone who thinks they have talent, perform for the Tengo Talento celebrity judge panel as they decide if contestants have what it takes to continue in the competition. If they are talented enough to make it past the audition round, they will face the ultimate judge, a national viewing audience. The lucky and talented winner receives $100,000 and a recording contract.






mi sueño es bailar

Hosts: Felipe Viel, Patty Manterola
Judges: Andres Garcia, Felix Greco, Rebecca de Alba
Episodes: Four Seasons, 6 x 44’, 9 x 88’ per season

FORMAT AVAILABLE

Mi Sueno Es Bailar, “My Dream is to Dance”, features 12 teams of superstar celebrities and their professional dance partners competing weekly to win the approval of the judges, a VIP panel, and the audience. Each participating couple competes in order to grant the dream of a needy viewer from across the country. Audiences are riveted to the beauty of choreographed dancing, mixed with the moving story of real people in need whose dreams come true. Hosted by superstar TV personality Felipe Viel , along with famed actress and singer Patty Manterola, the series features interactive voting and non-stop entertainment!






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DIVORCIO USA

Episodes: 317 x 22’
Year Produced: 2004/2005

Divorcio USA is a courtroom drama based on the successful U.S. Divorce Court franchise. Filmed in front of a live audience, the show features couples making their impassioned case in front of Judge Luis Torres. Watch real life drama unfold as future exes share their most intimate secrets and air their dirty laundry in the courtroom. Whether a battle over child custody, the house, the car, community property or future support, emotions run high on Divorcio USA.

GANA LA VERDE

Episodes: 82 x 44’

Year Produced: 2004/2005

In Gana la Verde, 6 contestants compete in 3 extreme stunts, with the winner receiving the ultimate reward - legal representation by an elite team of lawyers who will help perfect their journey of obtaining their "Green Card”.

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¡A Que No Puedes!

Hosts: Carlos Eduardo Rico
Judges: Alejandra Pinzon, El Costeno, Latin Lover, Rafael Inclan, Malillany Marin
Episodes: 269 x 44’
Year Produced: 2007 - 2012

This non-stop, exciting game show pits two celebrity teams as they attempt to perform the interesting talents and abilities of other famous stars. If the judges agree that the contestant has successfully completed the task, they win cash for charity. Throughout its seasons, A Que No Puedes has composed teams from as cross section of novelas, movies, modeling and sports super-stars.

El Show DON CHETO

Episodes: 353 x 44’
Year Produced: 2005 - 2007

A viewer favorite, El Show de Don Cheto is a fun-filled variety show featuring special guests, skits, comedians, games, music and more. A family-friendly hour, this show appeals to all demographic groups.

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estrellitas del Sábado

Hosts: Season 1 – Itati Cantoral & Sergio Catalan
Season 2 – Yuri & Latin Lover
Season 3 – Andrea Garcia & Sergio Catalan

Episodes: 22 x 88'

Year Produced: 2010 - 2011

Two of the fastest hours in television, Estrellitas del Sábado features a kid's talent competition, sketch comedy with the hottest comedians and some crazy games with incredible prizes for the winners. This action-packed program is perfect for kids and families alike.

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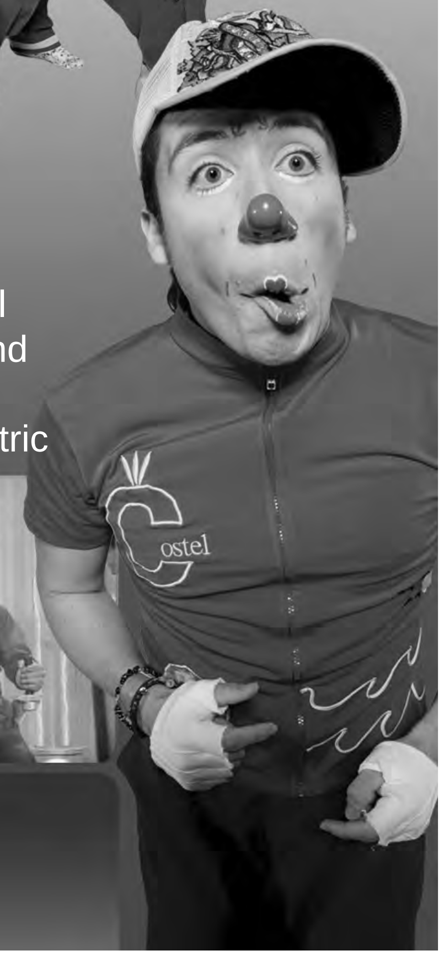
El Show de Lagrimita y Costel

Hosts: Lagrimita (father) and Costel (son)
Episodes: 400 x 44’
Year Produced: 2007-2012

Legendary father/son comedy team Lagrimita and Costel deliver crazy and humorous skits, physical challenges and music in every episode. It’s a non-stop, fun-filled hour of variety featuring everything from amateur singers to electric chairs!



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Premios de la Radio

THE 2011 BROADCAST OF PREMIOS DE LA RADIO RANKED #3 AMONG ALL U.S., SPANISH-LANGUAGE CABLE NETWORKS IN A18-49!

1 x 120’

“Premios de la Radio” is now in its 12th year and is stronger than ever. Recognized as the most prestigious Peoples Choice Award for regional Mexican music, the live Premios award show is destination viewing at its best.


MUSIC

ESTUDIO 2

Hosts: Sergio Catalán, Maribel Guardia and special guest Ninel Condé
Episodes: 8 Seasons, 739 x 44’
Year Produced: 2005 - 2012 (still in production)

Estudio2 is a fast-paced hour of music, comedy and entertainment. This variety program features live music from today’s biggest performers, and special performances from legendary actors and comedians. Hosted by heartthrob Sergio Catalan and beautiful Maribel Guardia and Ninel Conde, Estudio 2 also features an amateur segment in a search for the hottest new musical talent!

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ARTISTAS EN CONCIERTO

Episodes: 43 x 120’

This original concert series features the biggest artists and bands from Latin America in highly-produced, live concert settings.

ARTISTAS EN CONCIERTO

-Invasion del Corrido - 2009 & 2010 & 2011

-La Arrolladora - 2009

-Intocable – 2009 & 2011

-Tierra Callente – 2009

-Espinoza Paz – 2010 & 2011

-Chapo de Sinaloa – 2010

-Paquita la del Barrio – 2010

-El Recodo – 2010

-“El Grito” – 2010

-Final Mundial de Rodeo - 2010

-Jenni Rivera – 2010 & Live from the Staples Center 2012

-Pedro Fernandez – 2010

-Roberto Tapia/Larry Hernandez – 2010

-Ramon Avala – 2010

-Invasion Grupera – 2010

-Graciela Beltran – 2011

-Diego Verdaquer/Amanda Miguel – 2011

-Arrolladora Banda Limon – 2011 & 2012

-Paquita la del Barrio – 2011 & Live from the Nokia Theatre 2012

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ARTISTAS EN CONCIERTO

-Larry Hernandez/RM/Arley – 2011

-Ramon Ayala at the Gibson Theatre – 2011

-Recodo & Recodito at the Nokia Theatre – 2011

-Roberto Tapia & Enigma Norteno at the Nokia Theatre – 2011

-Christian Castro at the Greek Theatre – 2011

-Los Tres Grandes De Sinaloa (Tigrillo Palma, Cayote & Chuy Lizarraga) – 2011

-Concierto Grupero del Recuerdo (Los Yonics, Caminantes, Bryndis & Freddy's) – 2011

-Gerardo Ortiz – 2011

-Tucanes De Tijuana at the Gibson Theatre – 2012

-Movimiento Alterado at the Nokia Theatre – 2012

-Grupo Pesado – 2012

-Vicente Fernandez – 2012

-Corridos at the Gibson Theatre – 2012

Paquita la del Barrio - 2012

Homenaje a Chalino Sanchez - 2012

Julion Alvarez - 2012

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CONTACT:

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AWEIR@LBIMEDIA.COM

TO VIEW SCREENERS OF OUR SHOWS, PLEASE GO TO: www.estrellatv.com/screeners

USERNAME: catalog

PASSWORD: programs

EXHIBIT 5

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Sample Programming Across the Three Networks

ESTRELLATV

TELEMUNDO

NBC UNIVERSO

Source: Websites for EstrellaTV, Telemundo, and NBC Universo and branding materials for Telemundo and NBC Universo.

EXHIBIT 6

EXHIBIT 6A

Highly Confidential Document Withheld

EXHIBIT 6B

Highly Confidential Document Withheld

EXHIBIT 6C

Highly Confidential Document Withheld

CERTIFICATE OF SERVICE

I, Alex J. Moyer, certify that on this 7th day of June 2016, a true and correct copy of the foregoing Answer to Program Carriage Complaint was filed with the Federal Communications Commission and copies were served on the following by hand delivery:

David P. Corbett
LERMAN SENTER PLLC
2001 L Street, NW Suite 400
Washington, DC 20036
(202) 429-9870
Counsel to Liberman Broadcasting, Inc. and LBI Media, Inc.

Alex J. Moyer

June 7, 2016