

*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).<sup>279</sup> Instead, EstrellaTV aired a range of lighter fare, nearly all of it unscripted: variety shows, sketch comedy, game shows, and tabloid news.<sup>280</sup> 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.”<sup>281</sup> 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.<sup>282</sup>

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

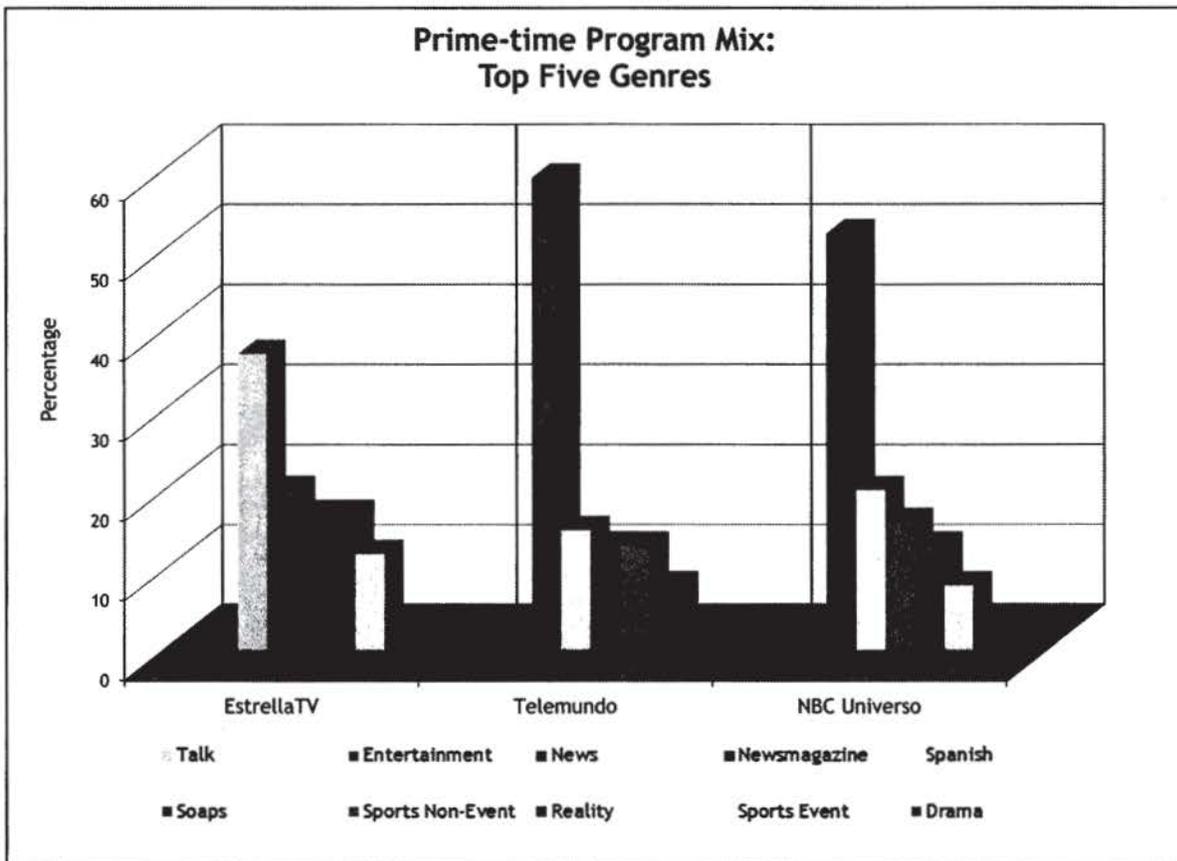
<sup>279</sup> No *telenovelas* appear in the representative EstrellaTV programming grids analyzed by Professor López-Pumarejo. See López-Pumarejo Decl. ¶ 36, Ex. 2. EstrellaTV appears to have begun airing one *telenovela* (*Talisman*) on September 21, 2015, and another (*Rosario*) on February 1, 2016. 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.

<sup>280</sup> 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>.

<sup>281</sup> López-Pumarejo Decl. ¶ 48.

<sup>282</sup> 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.<sup>283</sup> By contrast, 54% of Telemundo’s primetime programming is in “Soaps,” and both Telemundo and NBC Universo rely heavily on the two “Sports” genres.<sup>284</sup> As illustrated in Ms. Flynn’s report<sup>285</sup>:



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.

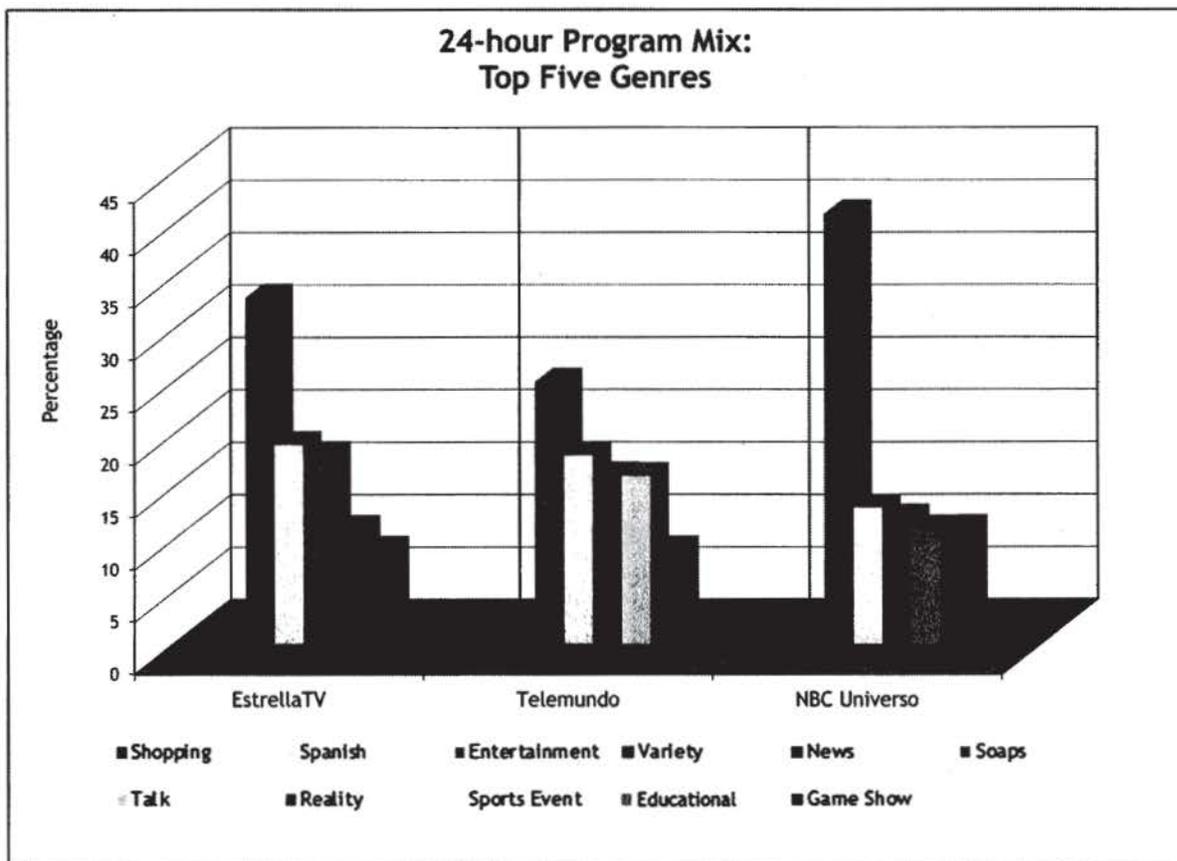
<sup>283</sup> See Flynn Decl. ¶¶ 11–13. The two genres are “Sports event” and “Sports non-event.”

<sup>284</sup> *Id.*

<sup>285</sup> *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.<sup>286</sup>

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%).<sup>287</sup>



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

<sup>286</sup> *Id.* ¶ 13.

<sup>287</sup> *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.<sup>288</sup>

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.<sup>289</sup> In the absence of any competing analysis from LBI (and there is none), they should be dispositive here as well.<sup>290</sup>

**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.<sup>291</sup> 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-

---

<sup>288</sup> *Id.* ¶¶ 25–28.

<sup>289</sup> *WealthTV*, 24 FCC Rcd. at 12977, ¶ 20.

<sup>290</sup> 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.

<sup>291</sup> *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."<sup>292</sup> 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."<sup>293</sup> The network has also adopted a distinctly Mexican sound, featuring Mexican accents and slang throughout its programming.<sup>294</sup> 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."<sup>295</sup>

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.<sup>296</sup> EstrellaTV's core comedy and variety acts derive from Mexican comedic

<sup>292</sup> 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.

<sup>293</sup> López-Pumarejo Decl. ¶ 54.

<sup>294</sup> *Id.* ¶ 55.

<sup>295</sup> *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."

<sup>296</sup> 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.<sup>297</sup>

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.”<sup>298</sup> One of EstrellaTV’s recurring actors is a “Mexican who serves as the ‘Grandpa’ for generations of Mexican-Americans living in the U.S.”<sup>299</sup> 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.<sup>300</sup>

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.<sup>301</sup> Its programming—shows, themes, talent, accents—reflects the diversity of the national Hispanic audience it seeks to

<sup>297</sup> *Id.* ¶ 58.

<sup>298</sup> 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>.

<sup>299</sup> 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](http://www.lbimedia.com/Media/PressReleases/20091214_DonChetoEmmisAustin.pdf).

<sup>300</sup> 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.’”).

<sup>301</sup> López-Pumarejo Decl. ¶¶ 15, 59.

obtain. Likewise, NBC Universo's programming is designed to appeal to broad, young, Hispanic audiences, regardless of background.<sup>302</sup> 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.<sup>303</sup> On Telemundo, some stars even speak in the network's neutral accent, designed to universalize the appeal of its programs.<sup>304</sup> And the networks air quintessentially multinational sports programming, such as World Cup soccer and the Olympics.<sup>305</sup>

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.<sup>306</sup> 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).<sup>307</sup>

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

---

<sup>302</sup> *Id.* ¶¶ 10, 29, 49, 60.

<sup>303</sup> *Id.* ¶¶ 21, 35, 59.

<sup>304</sup> *Id.* ¶ 59.

<sup>305</sup> *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.").

<sup>306</sup> Israel Decl. ¶ 49.

<sup>307</sup> *Id.* These demographic differences are consistent with viewing data from 2014. *Id.*

61% male.<sup>308</sup> In addition, NBC Universo's median viewer age is 35, while EstrellaTV's is 43.<sup>309</sup> 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.<sup>310</sup>

**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.<sup>311</sup> 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]

---

<sup>308</sup> Compl. Ex. 12.

<sup>309</sup> *Id.*

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

<sup>311</sup> 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.

██████} in net advertising revenue in 2015, compared to {██████} million for EstrellaTV.<sup>312</sup>

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.<sup>313</sup> As described above, Dr. Israel conducted a regression analysis of Nielsen ratings in these markets for the period January 2013 to March 2016.<sup>314</sup> 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.<sup>315</sup>

140. Second, Dr. Israel examined programming expenditure on the two networks and concluded that in 2014 Telemundo spent substantially more on programming—██████████}—than did EstrellaTV, which spent only {██████████}.<sup>316</sup> 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.<sup>317</sup>

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

---

<sup>312</sup> See Israel Decl. ¶ 29.

<sup>313</sup> *Id.* ¶ 42.

<sup>314</sup> *Id.* ¶ 43.

<sup>315</sup> *Id.* ¶ 44, Appendix 3 Ex. 6.

<sup>316</sup> *Id.* ¶ 48.

<sup>317</sup> *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}.<sup>318</sup> 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.<sup>319</sup>

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.<sup>320</sup> Nor could LBI prevail on such a claim. In order to sustain a claim

<sup>318</sup> *Id.* ¶ 50.

<sup>319</sup> Compl. Ex. 12; Israel Decl. ¶ 51.

<sup>320</sup> 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.”<sup>321</sup> 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.<sup>322</sup> By comparison, Comcast had only {REDACTED} of the market share in Houston, and {REDACTED} in Salt Lake City (where it trailed DirecTV, standing alone).<sup>323</sup> Even in Denver, the affected market where Comcast had the highest penetration {REDACTED}, it faced robust competition from DirecTV {REDACTED}, and DISH {REDACTED}.<sup>324</sup> 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.<sup>325</sup>

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

---

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.

<sup>321</sup> *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”).

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

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *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<sup>326</sup>—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.<sup>327</sup>

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.<sup>328</sup> They are, therefore, *de facto* content based.<sup>329</sup> 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.<sup>330</sup> 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.”<sup>331</sup>

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

---

<sup>326</sup> See Compl. ¶¶ 83, 89(c).

<sup>327</sup> 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.

<sup>328</sup> Second Report & Order, 26 FCC Rcd. at 11506, ¶ 17.

<sup>329</sup> 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)).

<sup>330</sup> Compl. ¶¶ 48, 58.

<sup>331</sup> *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.<sup>332</sup>

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.”<sup>333</sup> 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.<sup>334</sup>

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.<sup>335</sup> 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.<sup>336</sup> 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.<sup>337</sup> For over a decade, satellite services, which compete aggressively with large traditional cable operators, have been available to subscribers in “every home in the

<sup>332</sup> 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.

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

<sup>334</sup> *Turner Broadcasting Sys.*, 512 U.S. at 662 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>335</sup> *Tennis Channel*, 717 F.3d at 994 (Kavanaugh, J., concurring).

<sup>336</sup> *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 8 (D.C. Cir. 2009).

<sup>337</sup> 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,”<sup>338</sup> and telco cable distributors AT&T and Verizon have increased their share of the market significantly.<sup>339</sup>

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 . . . .”<sup>340</sup>

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.

---

<sup>338</sup> *Time Warner Entm’t Co. v. F.C.C.*, 240 F.3d 1126, 1134 (D.C. Cir. 2001).

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

<sup>340</sup> *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.

**REDACTED – FOR PUBLIC INSPECTION**

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

REDACTED – FOR PUBLIC INSPECTION

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

**REDACTED – FOR PUBLIC INSPECTION**

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.

**REDACTED – FOR PUBLIC INSPECTION**

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.

**REDACTED – FOR PUBLIC INSPECTION**

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.

**REDACTED – FOR PUBLIC INSPECTION**

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.

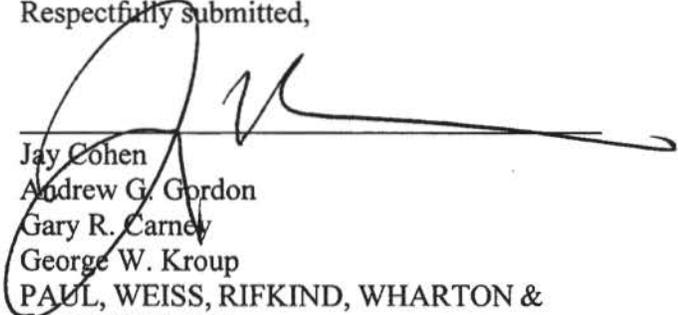
89. Denies paragraph 89.

90. Denies paragraph 90.

CONCLUSION

The Complaint should be dismissed or denied without further proceedings.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to be 'Jay Cohen', is written over a horizontal line. The signature is fluid and extends to the right.

Lynn R. Charytan  
Francis M. Buono  
Julie Laine  
Frank La Fontaine  
COMCAST CORPORATION  
Comcast Center  
1701 JFK Boulevard  
Philadelphia, PA 19103  
(215) 665-1700

Jay Cohen  
Andrew G. Gordon  
Gary R. Carney  
George W. Kroup  
PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064  
(212) 373-3000

Michael D. Hurwitz  
James L. Casserly  
WILLKIE FARR & GALLAGHER LLP  
1875 K Street, N.W.  
Washington, DC 20006-1238  
(202) 303-1000

June 7, 2016

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

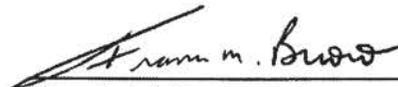
|                             |   |                      |
|-----------------------------|---|----------------------|
| _____                       | ) |                      |
| In the Matter of            | ) |                      |
|                             | ) |                      |
| LIBERMAN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

**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

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

**Accepted / Filed**

**JUN - 7 2016**

Federal Communications Commission  
Office of the Secretary

**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] [REDACTED] [REDACTED] }, and the decision not to resume carriage of EstrellaTV on Comcast’s systems

