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

In the Matter of	)	
Leased Commercial Access	)	MB Docket No. 07-42
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY COMMENTS OF
CROWN MEDIA HOLDINGS, INC.

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SUMMARY

To remedy the ever-increasing imbalance in negotiating power between independent programmers and vertically-integrated multichannel video programming distributors ("MVPDs") and create an environment in which these parties can engage in fair, marketplace-oriented negotiations, the Hallmark Channel urges the Commission to adopt a broadly available "baseball-style" arbitration procedure, modeled on the arbitration procedure in its *Adelphia* merger order, to resolve program carriage disputes.

Under this procedure, both the programmer and the MVPD would submit "final offers" in the form of completed contracts, and the arbitrator would select the proposed agreement that most closely approximates the fair market value of the programming service. This approach permits the Commission to shift the focus of its program carriage rules away from assigning responsibility for failed negotiations – for example, seeking to determine whether the MVPD has misused its market power – and toward the goal of reaching fair results that promote competition and diversity in the video programming market. The Commission's findings in various contexts render it clear that the structure of the industry makes negotiations between vertically integrated MVPDs and independent programmers unequal and disadvantageous to the programmer; therefore, it should be unnecessary to prove in every such case in which a negotiation has failed that the MVPD has engaged in anticompetitive behavior.

Baseball-style arbitration is a particularly appropriate procedure for program carriage disputes of this kind because it encourages the parties to

bargain in good faith and, if arbitration is initiated, to make reasonable final offers. It also avoids the need for the decision-maker to fashion detailed remedies concerning specific compensation rates and terms of carriage.

These Reply Comments discuss in detail ways to safeguard the process to ensure that only *bona fide* negotiation disputes are dealt with, to ensure that results are achieved promptly, and to protect confidentiality while permitting necessary discovery. The Hallmark Channel also proposes that, in the broader context to which these rules will apply, the Commission adopt a realistic, market-based standard for measuring whether an MVPD has an interest in a programming service competing with an independent programmer, which is a necessary prerequisite to the proposed arbitration remedy. Specifically, it urges the Commission to recognize that program services, even those with significantly dissimilar content, compete over demographically defined key audiences, and that competition among services should be defined accordingly.

Finally, given the important government interests furthered by program carriage rules, the Hallmark Channel explains why the relief proposed in these Reply Comments is, in contrast to an argument by Time Warner that has already been rejected by the courts, fully consistent with the First Amendment.

TABLE OF CONTENTS

SUMMARY i

TABLE OF CONTENTS iii

INTRODUCTION 1

I. THE HALLMARK CHANNEL IS A PROGRAMMING AND RATINGS LEADER AMONG CABLE NETWORKS WITH A SUBSTANTIAL INTEREST IN IMPROVING THE COMPETITIVE RELATIONSHIP BETWEEN MVPDS AND INDEPENDENT PROGRAMMERS..... 2

II. THE COMMISSION SHOULD ADOPT A BASEBALL-STYLE ARBITRATION PROCEDURE THAT PROMOTES EFFICIENT AND EQUITABLE RESOLUTION OF CARRIAGE DISPUTES. 6

A. *Adelphia*-Style Arbitration Would Best Promote the Commission's Goals..... 7

B. Reasonable Threshold Limitations and Broad Availability Will Ensure the Effectiveness of the Procedure. 11

C. The Commission Should Articulate a Workable Definition of Competition Between and Among Program Services. 13

D. The Commission Should Adopt a Streamlined Arbitration Timeline. 15

E. The Commission Should Adopt Meaningful Discovery Procedures Similar to the Approach Used in its Program Access Order. 19

III. PROGRAM CARRIAGE DISPUTE RESOLUTION PROCEDURES ARE CONSTITUTIONAL. 22

A. *Turner Broadcasting Systems* 22

B. *Time Warner Entertainment* 23

C. Program Carriage Regulation..... 24

CONCLUSION 27

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INTRODUCTION

Crown Media Holdings, Inc. and its principal program service, the Hallmark Channel, support the Commission's efforts to strengthen its program carriage procedures to prevent discrimination and to protect independent programming services in their dealings with vertically-integrated multichannel video programming distributors ("MVPDs").[1] The increasing vertical integration of MVPDs and video programming services makes it critical that the Commission's rules create an environment in which independent programmers can engage in fair, marketplace-oriented negotiations with MVPDs and, if necessary, can avail themselves of a procedure that will produce fair and prompt resolution of disputes.

[1] *Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, MB Docket No. 07-42, FCC 07-18 (rel. Jun. 15, 2007) ("NPRM").

I. THE HALLMARK CHANNEL IS A PROGRAMMING AND RATINGS LEADER AMONG CABLE NETWORKS WITH A SUBSTANTIAL INTEREST IN IMPROVING THE COMPETITIVE RELATIONSHIP BETWEEN MVPDS AND INDEPENDENT PROGRAMMERS.

Since its launch in 2001, the Hallmark Channel has brought its viewers a 24-hour schedule of wholesome and pro-social programming, including made-for-TV movies that tell stories relevant to the lives of its viewers. The Channel is, among other things, distinguished by the fact that it offers on a full-time basis content free of explicit sexual or violent content or offensive language.[2] Indeed, the Hallmark Channel offers a family-friendly viewing experience throughout the entirety of its programming schedule.

The Hallmark Channel's efforts to provide its viewers with high-quality, socially acceptable content have been met with broad approval among viewers. The Channel is currently ranked as the eighth highest-rated advertiser-supported cable network for prime time viewing among television households and the tenth highest-rated network in total day viewing.[3] According to Nielsen Media Research, the Hallmark Channel premiered more hours of

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[2] Consistent with its ongoing commitment to social responsibility, for example, the Hallmark Channel has recently committed to eliminate depictions of cigarette smoking in its original movies. John Eggerton, "Hallmark Channel to Eliminate Smoking in Original Films," *Broadcasting & Cable* (Jul. 26, 2007), *available at* http://www.broadcastingcable.com/article/CA6463545.html. In addition, Hallmark has implemented a "Watch With Me" initiative aimed at encouraging families to watch appropriate content on television together.

[3] Nielsen Media Research (Sep. 30, 2007).

original movies than any other ad-supported cable network during the first and second quarters of 2007.[4]

For historical reasons, the license fees paid to the Hallmark Channel by certain large MVPDs are not consistent with its current status as a top-ten network with strong appeal among MVPD subscribers. Specifically, industry data indicate that the Hallmark Channel's average per-subscriber compensation is far below the compensation several large MVPDs pay to their own affiliated services, even though the Hallmark Channel's ratings are dramatically higher than the ratings of many affiliated channels.[5] Overall, the Hallmark Channel's compensation levels, coupled with the over half-billion dollars in launch fees it has been forced to pay to MVPDs for distribution, have prevented the network from breaking even during the years since its inception and threaten its ability to continue investing in the type of high-quality content demanded by its viewers and its ratings successes.

The Hallmark Channel is currently engaged in several concurrent negotiations with MVPDs for renewal of its carriage agreements. The network believes that its ongoing negotiations should correct the imbalance between its compensation and its contribution to MVPDs' program offerings. The carriage agreements it is now negotiating should thus provide it with compensation consistent with the license fees that large MVPDs pay to their own affiliated services. Indeed, the Hallmark Channel's experience in negotiating fair

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[4] Nielsen Media Research, Original Movies and Mini-Series Premieres (1st Qtr. 2007 & 2d Qtr. 2007).

[5] *See* Exhibit A, "Discriminatory Pricing of Independent Programming Services."

compensation over the next few months will provide useful information to inform the Commission's understanding of MVPDs' willingness to treat independent services fairly.

As several commenting parties responding to the *NPRM* have observed, fair compensation is not the only way to measure discrimination against independent programmers by MVPDs.[6] NFL Enterprises noted, for example, that MVPDs may act to limit a programmer's reach – and, therefore, its ability to retain subscribers and advertising revenues – by repositioning it from a system's basic tier to its digital tier or a premium tier.[7] Because viewership and ratings determine a programming service's viability, adverse treatment in tiering or channel placement is just as damaging as adverse treatment in compensation. The Hallmark Channel does not argue that MVPDs should be denied the right and opportunity to design services and packages that are broadly attractive to viewers; indeed, MVPDs' transition to digital offers a major enhancement to the quality of television available to the American audience. However, MVPDs unfairly place most or all of the burden of the initial stages of that transition on the shoulders of independent programmers. As a general rule, in the Hallmark Channel's experience, MVPDs' affiliated services are being kept on basic tiers until the digital audience becomes comparable in size to the current analog audience, while independent programming services are being relocated to digital immediately, resulting in substantial subscriber

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[6] *See, e.g.*, America Channel Comments at 1-2, 6-7; NFL Enterprises Comments at 3-6; National Alliance for Media Arts and Culture Comments at 2-3, 10 (leased access); StogMedia Comments at 3-5 (leased access).

[7] NFL Enterprises Comments at 3-4.

and revenue losses to these independents.[8] These retiering practices must be viewed as evidence of discriminatory power by MVPDs that are seeking to secure a competitive advantage and to provide protection for their own services at the expense of independents in the programming marketplace.[9]

As an independent programmer, the Hallmark Channel encourages the Commission to adopt program carriage rules that promote equitable and

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[8] Dustin Dow, "Big Ten Network debuts – for some," *Chillicothe (Ohio) Gazette* (Aug. 30, 2007), *available at* http://www.chillicothegazette.com/apps/pbcs.dll/article?AID=/20070830/NEWS01/708300325 ("[C]able operators appear to believe that . . . programming should be on widely distributed packages if they own all or a piece of a cable network, but tiered . . . if they are owned by third parties. . . .").

See also NFL Enterprises Comments 4-6 (surveying disparity between Comcast's carriage of affiliated and unaffiliated networks on its Washington, D.C. system); Brian Hedger, "BTN-Comcast feud leaves IU fans in dark," *[Gary, Indiana] Post-Tribune* (Oct. 11, 2007), *available at* http://www.post-trib.com/sports/598557,IU.article ("Comcast and Time Warner are both intent on holding fast to the requirement that Big Ten Network be placed on a digital sports tier – which would require Comcast's expanded basic subscribers to pay roughly $30 more per month to get (about $25 to upgrade to digital cable and about $5 for the sports package).").

[9] These Reply Comments primarily address situations in which there is a failure of an MVPD and an independent programmer to reach agreement on the terms of a new carriage agreement or an extension of an expiring agreement. For the reasons discussed below, the Hallmark Channel urges the Commission to adopt a plan to permit marketplace-oriented arbitration without regard to whether – and without a prerequisite finding that – an MVPD is engaged in the kind of anticompetitive behavior that is the core reason for the Commission's program discrimination rules. As this retiering discussion makes clear, however, there are circumstances in which an MVPD takes specific adverse action against an independent programmer outside of such a negotiation that is clearly discriminatory and unfairly advantageous to the MVPD's affiliated services. For these cases, the Hallmark Channel believes that the Commission must maintain the traditional enforcement mechanism embodied in Section 76.1302 of its rules, perhaps augmented by a specific arbitration procedure, by which a programmer can obtain relief if it can demonstrate discrimination on the part of the MVPD. The following discussion does not focus on this question.

efficient negotiations between independent programmers and MVPDs and that avoid discrimination of these kinds in terms or conditions of carriage.

II. THE COMMISSION SHOULD ADOPT A BASEBALL-STYLE ARBITRATION PROCEDURE THAT PROMOTES EFFICIENT AND EQUITABLE RESOLUTION OF CARRIAGE DISPUTES.

With respect to rules governing the circumstances in which an independent programmer is unable to complete negotiations with an MVPD for a new or extended affiliation contract, the Hallmark Channel urges the Commission to create an arbitration approach that provides programmers with meaningful discovery opportunities, promotes good faith negotiations, and facilitates the prompt resolution of disputes. Specifically, the Hallmark Channel proposes that the Commission adopt a "baseball-style" arbitration approach based on the procedure adopted in its *Adelphia* merger order and applied in the recent *America Channel* decision to address disputes over negotiations between independent programmers and vertically-integrated MVPDs.[10] Under this approach, each party would be required to submit a "final offer" to a neutral arbitrator in the form of a complete carriage affiliation agreement, and the arbitrator would be required to decide which of the two "final offers" contains

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[10] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Comm. Corp., Assignors to Time Warner Cable, Inc., et al.*, Memorandum Opinion and Order, MB Docket No. 05-192, 21 FCC Rcd. 8203, 8287 at ¶ 190-91, Appendices B & C (rel. July 21, 2006) ("Adelphia"); *Comcast Corporation, Petition for Declaratory Ruling that The America Channel is Not a Regional Sports Network*, Order, FCC 07-172, at ¶ 1 (rel. Sep. 25, 2007) ("America Channel").

terms that most closely approximate the competitive fair market value of the program service at issue.[11]

A. *Adelphia*-Style Arbitration Would Best Promote the Commission's Goals.

The Commission adopted a baseball-style arbitration process to resolve affiliation disputes in *Adelphia* because it recognized that vertically-integrated MVPDs inherently possess both the power and the incentive to discriminate against a certain class of independent programming services, and to favor competitive programming services in which they hold financial interests.[12] That structural deficiency, the Commission found, undermines competition in the video programming marketplace and has the potential to deprive viewers of access to diverse sources of video programming.[13]

Significantly, the Commission established a baseball-style arbitration procedure in that case without making any specific findings that either of the MVPDs involved in the proceeding – Comcast and Time Warner – had exercised that power in a predatory fashion in a particular situation.

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[11] *Adelphia* at Apx. B.

[12] *Adelphia* at ¶ 189 ("[W]e find that the transactions will increase the incentive and ability of Comcast and Time Warner to deny carriage to RSNs that are not affiliated with them. . . . [P]ost-transaction Time Warner and Comcast will have an increased incentive to deny carriage to rival unaffiliated RSNs with the intent of forcing the RSNs out of business or discouraging potential rivals from entering the market, thereby allowing Comcast or Time Warner to obtain the valuable programming for its affiliated RSNs. [O]nce this occurs, Comcast and Time Warner would have the incentive to raise its rival MVPDs' costs . . . or engage in other anticompetitive strategies. . . .").

[13] *Id.* ("As a result [of anticompetitive behavior by one of the MVPDs], consumers could be unable to view the RSN's programming or could have to pay higher costs for the programming.").

Rather, having identified both their core ability to discriminate and their necessary incentive to protect their affiliated services, the Commission designed a remedy that can in fact be used to redress the negotiating imbalance in any affiliation case involving a vertically-integrated MVPD and an independent programmer – whether or not specific evidence of discrimination, predatory practices, or favoritism is adduced.[14]

While the *Adelphia* arbitration procedure focused on two dominant cable operators – Comcast and Time Warner – and on a specific type of programming, the rationale underlying the *Adelphia* approach applies more generally. As the Commission recently acknowledged in its Report and Order dealing with the related issues surrounding its program access rules, for example, vertically-integrated MVPDs today broadly enjoy disproportionate power in negotiations for carriage of their affiliated channels by MVPDs that are not vertically-integrated and, when an MVPD holds a financial interest in a program service, that vertically-integrated MVPD has a clear economic incentive to disadvantage another MVPD with which it competes.[15] The same holds true in this context, where the only difference is that the protected entity is not the MVPD's distribution arm, but rather its affiliated programmer.[16]

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[14] *Id.* at ¶ 191 ("[W]e seek to alleviate the potential harms to viewers who are denied access to valuable RSN programming during protracted carriage disputes.").

[15] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 07-29, FCC 07-169, ¶¶ 29, 37 (rel. Oct. 1, 2007) ("Program Access Order").

[16] In one important respect, an MVPD's incentive to discriminate against its competitor MVPDs is reduced. Specifically, an MVPD can have an incentive to advantage the affiliated services of other vertically-integrated MVPDs, over

The Hallmark Channel believes, in sum, that the Commission should acknowledge that negotiations in the circumstances addressed in this proceeding are inherently unbalanced, and that the failure of parties to reach agreement necessitates regulatory intervention to compensate for the imbalance. And, as these Reply Comments suggest, the Hallmark Channel agrees with those who have concluded that an arbitration procedure is the ideal way for the Commission to restore balance in the negotiating process, thereby protecting competition in the video programming market generally and to ensure that consumers will retain access to diverse video programming options.[17]

Among the many advantages of baseball-style arbitration, we identify two: First, it necessarily encourages parties to continue to try to resolve their differences privately, and in any event to submit realistic and reasonable alternative "final offers" in an effort to reduce the likelihood of an adverse arbitration result. Second, the requirement that each party submit its best and final offer to the arbitrator, who must accept one package or the other, avoids the need for the decision-maker to fashion detailed remedies concerning specific compensation rates and terms of carriage of the programming service. This approach would promote more efficient administration than is permitted by the existing rule.

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independent services, in exchange for favorable treatment when the first MVPD seeks to obtain carriage of its own affiliated services by the second MVPD. Like an MVPD's incentive to favor its own affiliated services, this behavior has a dramatic and anticompetitive impact on independent programmers' ability to bargain for fair carriage terms.

[17] *See, e.g.*, BTNC Comments at 5-6; NFL Enterprises Comments at 7-8; America Channel Comments at 11.

Moreover, the plan proposed here focuses on the appropriate question: what terms are reasonable for the carriage of a particular program service by a particular MVPD, not whether an MVPD should be blamed for the failure of a negotiation. The Commission's salutary efforts in *Adelphia* were intended to correct a secular failure in the marketplace that has the potential to harm competition and diversity, not to discipline MVPDs for specific misconduct. The Commission's program carriage rules should similarly focus on ensuring fair negotiations between programmers and vertically-integrated MVPDs under circumstances in which an imbalance necessarily exists, not on proving an MVPD's improper motives. Indeed, discrimination is often subtle, and the evidence of its existence is likely outside the control of an independent programmer. A program carriage regime that focuses on proof of malfeasance will not satisfy the Commission's goals because it would be impracticable in all but the most egregious cases for a programmer to independently prove intentional discrimination.

This critical problem is illustrated by the failure of the Commission's existing program carriage rules to generate more than two complaints during their history or to lead to the resolution of any complaint on its merits.[18] The Commission has repeatedly acknowledged that vertically-integrated MVPDs have both the ability and incentive to discriminate against

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[18] *See TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, 21 FCC Rcd. 8989 (2006); *Classic Sports Network, Inc. v. Cablevision Systems Corp.*, 12 FCC Rcd. 22,100 (1997).

unaffiliated entities;[19] it simply is not the case that only two programmers have experienced discrimination during the time the rules have been in effect. The reality is that programmers do not bring complaints under the existing rules because of their high burden of proof with respect to predatory practices, the difficulty of fashioning meaningful resolutions, and the fear of retribution, not because discrimination does not, in fact, occur. The Commission's own experience (or lack thereof) with the rule, therefore, counsels strongly in favor of a decision to strengthen its program carriage procedures by creating a marketplace-oriented mechanism that functions without regard to fault.

B. Reasonable Threshold Limitations and Broad Availability Will Ensure the Effectiveness of the Procedure.

As these Reply Comments indicate, the Hallmark Channel believes that, in order to provide meaningful relief, arbitration must be broadly available to independent programmers. Because an anti-competitive power imbalance inherently exists between an independent programmer and an MVPD with a

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[19] *The Commission's Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd. 9374, ¶ 136 (2005) ("We find that cable operators potentially have an incentive to engage in vertical foreclosure, and that [there remains a] possibility that a cable operator of larger size could . . . have the incentive and ability to discriminate against or foreclose an unaffiliated network."); *General Motors Corp.*, Mem. Op. & Order,19 FCC Rcd. 473, ¶ 107 ("News Corp. Order") (acknowledging commenters' concerns that DirecTV would have the capacity to discriminate against unaffiliated providers, and conditioning grant of the parties' application on DirecTV's commitment not "discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage," and implementing enforcement mechanisms for violation of that commitment). *See also Program Access Order*, Stmt. of Cmr. Copps ("Cable operators still have the incentive and ability to discriminate against their competitors regarding access to affiliated programming. Access to cable-affiliated programming was – and continues to be – vital for the growth of a competitive marketplace.").

financial interest in a competing service, a complicated threshold test or an obligation to provide specific evidence proving discrimination would undermine the Commission's effort in this proceeding to protect competition and diversity by dissuading programmers from undertaking the risk of initiating arbitration. And they are inconsistent with the Commission's core finding in other proceedings that this imbalance and incentive for discrimination are inherent in the relationship between independent programmers and MVPDs.[20] The Hallmark Channel therefore encourages the Commission to make arbitration available whenever an agreement cannot be reached by an independent programmer and a vertically-integrated MVPD with an affiliated competing service.

This approach need not lead to situations in which independent programmers use arbitration to seek an advantage to which they are not entitled. Inherent in the use of baseball-style arbitration is an incentive for each party to offer reasonable proposals, both to each other and ultimately in the arbitration. In addition, the Hallmark Channel supports a requirement that would impose on the losing party the obligation to pay the victorious party's reasonable costs. This approach increases the incentive for parties to take the arbitration seriously and to make reasonable offers, and discourages programmers from initiating arbitrations in which they have little chance for success.

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[20] *See* n.19, *supra*.

Finally, the Commission should make arbitration available only in situations that raise *bona fide* issues of imbalanced bargaining power. It has been suggested in this proceeding that an independent programmer initiating arbitration be required to make a threshold showing in this regard.[21] The Hallmark Channel suggests that such a programmer be required to demonstrate that (1) the program service at issue is already carried by at least one MVPD system serving 20,000 or more subscribers, and (2) the MVPD against which the arbitration is brought holds a financial interest in a programming service that competes against the independent programming service and that is distributed to at least 200,000 subscribers. The Hallmark Channel believes that such a threshold showing should allay further concerns that this procedure – which would already be risky and expensive for those with weak or spurious claims – would be misused.

C. The Commission Should Articulate a Workable Definition of Competition Between and Among Program Services.

A further safeguard built into the procedures proposed here is a requirement that a complaint may only be filed by an independent programmer against an MVPD holding an interest in a service with which it competes. Such a standard is not unfair – so long as the Commission uses this opportunity to refine its definition of "competition" for this purpose. In some instances, of course, it is easy to identify competition because two services being compared provide substantially comparable programming – for example, news or sports coverage. But that test is not easily applied across the board. The Hallmark

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[21] *See* America Channel Comments at 9-10.

Channel's original and syndicated programming competes with portions of the schedules of any number of integrated programming services – including, for example, TNT, style., TBS, Turner Classic Movies, and E! Entertainment Television. Indeed, many programmers rely upon and offer off-network syndicated series that are similarly themed and similarly aimed at portions of the audience.

At bottom, however, programming services compete with each other for viewers, and they are measured by Nielsen Media Research – and compensated by advertisers – based on their ability to attract audiences characterized by specific demographics. The Hallmark Channel, for example, primarily targets women 25-54, among other groups of viewers, and tends generally to reach older demographic groups. Thus, because a 35-year-old woman may choose from among all types of programming options that appeal to her – in other words, watches multiple types of programming, not just movie channels or entertainment genres – channels that target her demographic may be said to compete directly against one another, whether or not their content is comparable through all dayparts.

As a practical matter, for example, the Hallmark Channel competes against E! Entertainment Television, a network owned by Comcast, and TBS, a Time Warner-affiliated network, in its effort to maximize the portion of the television viewing hours of viewers in its target demographic. Similarly, the Hallmark Channel and Time Warner-affiliated CNN compete directly for the same viewers even though their overall programming schedules are dissimilar.

An MVPD with a financial interest in a network that competes with the Hallmark Channel in that demographic has a clear incentive to steer women 25-54 to its own channel and away from the Hallmark Channel. In defining competition for the purpose of its program carriage rules, the Commission should acknowledge this market reality, permitting programmers seeking to invoke the arbitration process to meet a relatively low threshold requirement that the MVPD has an interest in services that compete, in whole or in part, with respect to programming or over particular measured demographic groups.

D. The Commission Should Adopt a Streamlined Arbitration Timeline.

Given the time-sensitivity of program carriage negotiations and the critical role carriage plays in an independent programmer's business, straightforward access to arbitration and the protection of anti-retribution provisions are important steps to ensure that the relief the Commission adopts in this proceeding will be meaningful. At the same time, moreover, time limits on the initiation of the dispute resolution mechanism consistent with the *Adelphia* arbitration procedure will reduce the burden of arbitration on MVPDs and on the Commission. The Hallmark Channel therefore supports the *Adelphia* arbitration procedure, with appropriate modifications that recognize their somewhat broader application:

- <u>Programmers should notify MVPDs promptly of their decision to invoke arbitration.</u>[22] The Hallmark Channel believes that programmers should be permitted to initiate arbitration during the

[22] *See Adelphia* at Apx. B, ¶ B(2)(b).

ninety days (1) following expiration of the most recent carriage agreement; or (2) after a first-time request for carriage, if no agreement has been reached.

- Programmers should formally demand arbitration in no fewer than ten business days and no more than fifteen business days after notice of arbitration is given to the MVPD.[23] The *Adelphia* decision created a ten-day "cooling off" period following the arbitration notice, during which the parties could come to a final private agreement.[24] The Hallmark Channel recommends that, at the end of that period, the programmer be required to particularize the arbitration demand by setting forth the basis for the programmer's belief that carriage should be required on the MVPD's system or systems and to include the programmer's "final offer" for carriage terms, in the form of a complete contract for carriage of the independent programming service for no fewer than three years.[25]
- Within two business days after notification of the formal demand for arbitration, the MVPD should submit its answer and its own final offer.[26] An MVPD's offer should comply with the same restrictions as the programmer's, but the programmer's offer

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[23] *Id.* at ¶ B(2)(f) (providing for formal demand "no earlier than the fifteenth business day after the expiration of the . . . contract and no later than the end of the twentieth business day following such expiration.").

[24] *Id.* at ¶ B(2)(e).

[25] *See id.* at ¶ B(2)(j).

[26] *Id.* at ¶ B(2)(h).

should not be disclosed to the MVPD until after the MVPD's offer is submitted. The MVPD should be required to indicate in its answer whether its position will be that the program service should not be carried at all, and its basis for so believing. Alternatively, it could submit a carriage proposal providing for no compensation or so-called "negative compensation" – that is, payment by the programmer to the MVPD. If the MVPD wishes to challenge carriage entirely, it may forgo submitting a contract, but it would be required to take the risk of an adverse decision and the arbitrator's adoption of the programmer's proposed terms.

- The arbitrator must issue a decision within 45 days after being appointed.[27] The Hallmark Channel believes that an arbitrator should consider only three questions: (1) whether the threshold requirements for arbitration have been met;[28] (2) if it is a question in dispute, whether the MVPD's rejection of carriage on any terms is reasonable; and (3) which of the parties' final offers most closely approximates the fair market value of the service.
- Either party may petition the Commission for review of the arbitrator's decision within 30 days after the decision is published, and the Commission must act within 60 days unless it extends the

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[27] *Adelphia* at ¶ 190 (providing that "the arbitrator has 45 days to issue a decision," rather than the 30 days applicable to program access disputes). *See also Adelphia* at Apx. C (describing an arbitrator's qualifications).

[28] *See* Part II(B), *supra*.

time for review by an additional 60-day period.[29] If neither party seeks review of the decision within the thirty-day period, the arbitrator's decision should, by rule, become effective.

An important consideration in establishing arbitration rules is the standard of review the Commission should apply. The Hallmark Channel supports the Commission's decision to apply a *de novo* standard of review in *Adelphia*.[30] However, the Commission should specifically articulate what it means by *de novo* review in the context of this proceeding in a manner that is consistent with the Administrative Procedures Act and the Alternative Dispute Resolutions Act.[31] In the Hallmark Channel's view, the Commission should review the arbitration record – but not conduct additional discovery – and independently determine which of the "final offers" presented by the parties most closely approximates the fair market value of the programming service.[32] In that evaluation, the Commission should not be required to give deference to the arbitrator's decision.

Finally, to prevent the possibility of retaliation, the Commission should, consistent with its *Adelphia* procedure, require MVPDs to continue

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[29] *See Adelphia* at Apx. B, ¶ B(4).

[30] The assertion by Comcast that arbitration would be inconsistent with section 575(a)(3) of the Alternative Dispute Resolutions Act ("ADRA") is unfounded. Comcast Comments at 36 n.91. As the Commission found in its recent *America Channel* decision, Congress intended section 575(a)(3) to apply only to *binding* arbitration. Because either party may seek *de novo* review of an arbitrator's decision by the Commission, the arbitration is binding on neither the parties nor the Commission. Instead, the arbitrator's decision goes into effect only if neither party objects. *America Channel* at ¶ 4 n.13.

[31] *See* 5 U.S.C. §§ 551 *et seq.*; 5 U.S.C. §§ 571 *et seq.*

[32] *See Adelphia* at Apx. B, ¶ B(4)(c).

carriage of an independent programming service subject to arbitration, on the same terms as it was previously carried and with the same channel placement and tiering, until the conclusion of an arbitration.[33]

E. The Commission Should Adopt Meaningful Discovery Procedures Similar to the Approach Used in its Program Access Order.

In order to be effective, a dispute resolution mechanism that focuses on ensuring fair and equitable treatment of both parties must permit them to present evidence of a programming service's fair market value in the context of the MVPD's business. The Hallmark Channel emphasizes that the purpose of this discovery is not to establish discriminatory behavior or motive on the part of the MVPD, but rather to aid the arbitrator in ascertaining which proposal approximates a fair, marketplace-driven result.

In this regard, the Hallmark Channel believes that the discovery rules adopted in the Commission's recent Report and Order updating its program access rules, with certain modifications to permit streamlined arbitration, provide an equitable framework for program carriage discovery.[34] Specifically, the Hallmark Channel believes that respondents should be required to attach to their responses "all documents that [they] expressly reference[] or rel[y] upon in defending" a claim.[35] It would be expected, for example, that the independent programmer would, among other matters, designate for discovery

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[33] *Adelphia* at Apx. B, ¶ B(2)(c). MVPDs should not, of course, be required to carry a programming service on any system on which it has not been carried during the six months preceding the notice of arbitration. *Id.* at ¶ B(2)(d).

[34] *Program Access Order* at ¶¶ 91-103.

[35] *Id.* at ¶ 95.

an MVPD's agreements with its own affiliated services, as well as with competitive programming services affiliated with or carried by other MVPDs that may be the beneficiary of a special relationship with the arbitrating MVPD. In addition, both the programmer and the MVPD should be required to produce any records requested by the arbitrator and on which the arbitrator intends to base his or her decision, "provided that such documents are in [the party's] control and relevant to the dispute."[36]

This framework provides a straightforward and largely self-implementing approach to discovery, ensuring that the arbitrator has sufficient basis to understand the course of the negotiations and the fair market value of the programming service, particularly as compared to affiliated programming services. As noted above, the Commission should specifically find that documents reflecting the compensation paid by the MVPD to affiliated programming services are "relevant" to program carriage disputes and should allow arbitrators to rely on them in reaching decisions. Likewise, because of the possibility that large MVPDs could provide preferential treatment to services owned by other large MVPDs in an implicit exchange for preferential treatment for their own services, the Commission should make clear that documents concerning the terms of carriage of other programming services are also "relevant." The programmer's own contracts for carriage may also be relevant to the arbitrator's determination, but only to the extent that those contracts are relatively contemporaneous with the period of the agreement being arbitrated.

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[36] *Id.*

While these documents are clearly necessary for an accurate determination of fair market value, the Hallmark Channel acknowledges that they are competitively sensitive. To prevent these disclosures from competitively disadvantaging programmers and MVPDs in negotiations, the Hallmark Channel supports implementation of the enhanced confidentiality provisions adopted in the program access Report and Order to this proceeding.[37] In particular, the Hallmark Channel supports the Commission's decision in that Report and Order to permit broad discovery but to limit distribution of discovered material only to counsel who are otherwise uninvolved in carriage negotiations and decisions for either of the parties and who agree not to disclose the substance of the disclosed material to individuals with such involvement.[38]

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[37] *See id.* at ¶ 101.

[38] In order to ensure that discovery disputes are handled equitably, the Commission determined in the program access Report and Order:

> The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. . . . Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

Id. The Hallmark Channel agrees with the Commission that, although broad discovery is crucial to effective resolution of disputes, either party should be permitted to object to unreasonable discovery requests. The Hallmark Channel also supports sanctions – in the form of a default judgment or dismissal with prejudice – against parties that refuse to provide complete discovery or abuse the discovery process.

III. PROGRAM CARRIAGE DISPUTE RESOLUTION PROCEDURES ARE CONSTITUTIONAL.

Time Warner claims that the First Amendment precludes the Commission from prohibiting discrimination in program carriage arrangements because such regulation fails under any constitutional standard. This conclusion is simply incorrect.

A. *Turner Broadcasting Systems*

The touchstone of any constitutional analysis of the Commission's regulation of cable carriage is the Supreme Court's *Turner Broadcasting Systems* decisions.[39] In those cases, the Court upheld the mandatory broadcast signal carriage provisions of the Communications Act against a First Amendment challenge by cable operators. In so doing, the Court rejected the cable industry's claim that such regulation was an unacceptable content-based intrusion on their First Amendment rights and should therefore be subject to strict scrutiny – that is, that the regulation should be permitted only if the Commission could demonstrate that it is justified by a compelling governmental interest, is narrowly tailored to serve that interest, and is the least restrictive means for achieving it.[40]

Instead, the Court found that the carriage obligations were subject to the "intermediate scrutiny" review standard established in *United States v. O'Brien*.[41] There, the Court held that so-called intermediate scrutiny applies to

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[39] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("Turner I"); *Turner Broad. Sys, Inc. v. FCC*, 520 U.S. 180 (1997) ("Turner II").

[40] *Turner I*, 512 U.S. at 653.

[41] 391 U.S. 367, 377 (1968).

regulations that impact speech but are unrelated to the content of the speech.[42] Thus, the mandatory carriage rules were sustained because they were found to further "an important, or substantial governmental interest . . . unrelated to the suppression of free expression" and because the incidental restriction on alleged First Amendment interests was no greater than necessary to the furtherance of that interest.[43]

Specifically, in *Turner I*, the Court found that the regulatory goals at issue – "promoting the widespread dissemination of information from a multiplicity of sources" and "promoting fair competition in the market for television programming" – were unrelated to the suppression of free expression or to the content of the speakers' messages.[44] And in *Turner II*, it held that the cable carriage provisions satisfied intermediate scrutiny because they furthered "important" government interests and because the carriage obligation they imposed was no greater than necessary to furtherance of the governmental interest.[45]

B. *Time Warner Entertainment*

Following *Turner I*, the D.C. Circuit rejected a constitutional challenge to Section 612 of the Communications Act of 1934, the leased access provisions also under consideration in this proceeding. In that decision, the Court summarily rejected Time Warner's argument that strict scrutiny should

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42 *O'Brien*, 391 U.S. at 377. *See also Turner I* at 662.

43 *Id.*

44 *Id.* at 662-63.

45 *Turner II*, 520 U.S. at 215.

apply – the same claim it attempts in this proceeding – observing simply that "[t]here is nothing to this" argument.[46] Specifically, the Court found that the leased access provisions "do not favor or disfavor speech on the basis of the ideas contained in the speech or the views expressed."[47] To the contrary, it found that a cable operator's leased access obligations are unrelated to the content of either the channels the cable operator chose to broadcast or the channels seeking leased access: "What programs appear on the operator's . . . channels – that is, what speech the operator is promoting – matters not in the least."[48] Moreover, independent programmers' "qualification to lease time . . . depends not on the content of their speech, but on their lack of affiliation with the operator. . . ."[49]

Accordingly, the D.C. Circuit applied intermediate scrutiny and emphasized that, "[a]fter *Turner*, 'promoting the widespread dissemination of information from a multiplicity of sources' and 'promoting fair competition in the market for television programming' must be treated as important governmental objectives unrelated to the suppression of speech."[50]

C. Program Carriage Regulation

The Commission's program carriage rules, like the leased access rules upheld by the D.C. Circuit in *Time Warner Entertainment*,[51] regulate MVPDs on a content-neutral basis. That is, program carriage regulation "do[es]

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46 *Time Warner Entertainment Co. v. FCC*, 94 F.3d 957, 969 (D.C. Cir. 1996).

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 93 F.3d 957 (D.C. Cir. 1996).

not favor or disfavor speech on the basis of the ideas contained in the speech or the views expressed."[52] Indeed, programmers are entitled to avail themselves of the relief proposed here on the exact basis that the D.C. Circuit upheld – "lack of affiliation with a cable operator" or other MVPD – and not based on any inquiry concerning the substance of their messages. Accordingly, consistent with the Supreme Court's *Turner* decisions and the D.C. Circuit's *Time Warner Entertainment* decision, intermediate scrutiny applies.

The government's interest in adopting program carriage regulation is clearly important or substantial. Congress adopted Section 616 of the Communications Act in response to the increasing vertical integration in the video programming market and the increased incentive and ability of MVPDs to discriminate against unaffiliated programmers.[53] The Commission's rules,

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[52] *Id.* at 969.

[53] *See, e.g.*, H.R. REP. NO. 102-628, at 41 (1992) (indicating responses to concerns about the "explosive growth" of vertical integration in the cable industry). Similarly, a report by the House Committee on Energy and Commerce found that vertical integration would lead some cable operators to favor their own programs and discriminate against unaffiliated programs "with regard to price, channel positioning, and promotion." *Id.*

The Senate also based the need for § 616 on increased vertical integration in the cable industry and discriminatory treatment by cable operators. *See* statements of Sen. Howard Metzenbaum (D-OH), 137 Cong. Rec. S2006-01, at 2012 (daily ed. Feb. 20, 1991); Sen. Patrick Leahy (D-VT), 137 Cong. Rec. S18336-02, at S18378 (daily ed. Nov. 26, 1991); Sen. Claiborne Pell (D-RI), 138 Cong. Rec. S712-01, at 756 (daily ed. Jan. 31, 1992). *See also* Report of the Senate Committee on Commerce, Science, and Transportation, S. REP. NO. 102-92, at 24-29 (1991) (noting that the increased market power and vertical integration of major cable operators were leading operators to discriminate against unaffiliated programs). Notably, the Committee identified at least two negative consequences of vertical integration: (1) operators with a financial interest in programs would have some control over the program's content, potentially dampening creative or diverse programming; and (2) vertical integration would allow cable operators to favor their own programs by granting

adopted at the direction of Congress, aim to protect competition and diversity in the video programming marketplace in an environment in which MVPD discrimination is both real and damaging to the public interest. In *Turner I*, the Supreme Court has found that these are important governmental objectives unrelated to the suppression of speech.[54]

Moreover, the regulatory scheme described in these Reply Comments does not burden substantially more speech than necessary to promote these important governmental objectives. Specifically, the relief proposed here would be available only in circumstances in which there is a reasonable likelihood of discrimination – that is, when an MVPD holds a financial interest in a programming service that is available to at least 200,000 subscribers and that competes against the independent service at issue for substantially similar demographic groups.[55] In addition, during the arbitration the MVPD may adjudicate its desire not to carry the programming service at all.[56]

Although Time Warner urges the application of a heightened standard of review – a standard that the Supreme Court and the D.C. Circuit refused to apply in analogous cases[57] – its only argument that program carriage

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those programs better prices and "more desirable channel position[s]," or by refusing to carry non-affiliated programs. *Id.* at 25.

See also Program Access Order at ¶¶ 29, 37.

[54] *Turner I* at 662-63.

[55] *See* Part II(A), *supra.*

[56] *See* Part II(D), *supra.*

[57] *Turner I*, 512 U.S. at 653; *Time Warner Ent.*, 93 F.3d at 952. Although Time Warner cites language from a few dissenting opinions that argue for "some form of" heightened scrutiny, it cannot identify even one instance in which a

rules fail intermediate scrutiny is that there is no longer a risk "that cable operators might attempt to limit programming" by discriminating against unaffiliated services.[58] Given the Commission's finding earlier this month in the program access context that "vertically integrated programmers continue to have the [incentive and] ability to favor their affiliated cable operators over competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected" without regulation,[59] Time Warner's First Amendment argument is misplaced.

CONCLUSION

In this proceeding, the Commission has undertaken to make important changes to its program carriage rules. These changes are critical to the ongoing viability of independent video programmers and the competition they create in the programming marketplace. In order to protect this competition and ensure that viewers continue to have access to diverse programming options, the Commission should adopt a streamlined baseball-style

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court has applied such a standard to a content-neutral regulation like the approach discussed here. *See* Comments of Time Warner at 10-13.

[58] *See* Comments of Time Warner at 13.

[59] *Program Access Order* at ¶ 29.

The Commission also found that the four largest cable MSOs today hold interests in six of the top 20 satellite-delivered networks by subscribership; seven of the top 20 by prime time ratings; almost half of all RSNs, popular subscription networks such as HBO and Cinemax, and VOD networks such as iN DEMAND; and that the percentage of MVPD subscribers receiving video programming from one of the four largest vertically integrated cable MSOs has increased from 34 percent to between 54 and 56.75 percent since 2002. *Id.* at ¶ 37.

mandatory arbitration procedure with substantial opportunities for meaningful discovery.

Respectfully submitted,

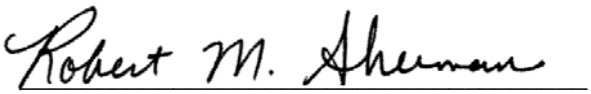

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EXHIBIT A

THE HALLMARK CHANNEL

DISCRIMINATORY PRICING OF INDEPENDENT PROGRAMMING SERVICES[1]

Channel	Affiliation	2006 Average License Fee (Kagan)	Prime Time HH Rating	Total Day HH Rating
TNT	Time Warner	0.89	1.8	1.1
CNN	Time Warner	0.44	0.7	0.5
TBS	Time Warner	0.43	1.3	0.8
Golf Channel	Comcast	0.23	0.2	0.1
E!	Comcast	0.20	0.4	0.3
Cartoon Network	Time Warner	0.15	1.2	1.0
style.	Comcast	0.12	0.2	0.1
Court TV	Time Warner (JV)	0.08	1.0	0.8
G4 videogame tv	Comcast	0.06	0.2	0.1
Hallmark Channel	*Independent*	0.03	1.1	0.8

[1] Source: Nielsen Galaxy, April 1, 2007.