

**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
NFL ENTERPRISES LLC**

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SUMMARY

In these Reply Comments, NFL Enterprises proposes that the Commission should update its program carriage rules to allow arbitration of disputes using a “baseball style” arbitration system similar to the approach used in the Commission’s *Adelphia* merger order. Such an approach will promote the Commission’s goals of ensuring competition and diversity in the video programming market, both of which ultimately benefit American consumers. To ensure that the relief the Commission imposes is effective, NFL Enterprises urges it to extend a streamlined arbitration system to *all* independent programmers, not just regional sports networks.

In particular, NFL Enterprises proposes a system that focuses on achieving equitable results rather than proving past misconduct. To that end, and to avoid baseless complaints, NFL Enterprises suggests that a neutral arbitrator make two threshold inquiries regarding possible discrimination, and terminate the arbitration and allocate the arbitration costs to any programmer who fails to meet this threshold. For the arbitration itself, NFL Enterprises urges the Commission to adopt time limits to guarantee that program carriage disputes will be resolved quickly and efficiently, and endorses discovery rules with enhanced confidentiality protections to ensure that all parties (including the arbitrator) will fully understand the course of negotiation. Finally, NFL Enterprises notes that programmers are in the best position to understand the national, regional, or local nature of their services, and thus should be permitted to approach MVPDs for carriage accordingly.

NFL Enterprises also refutes Time Warner’s constitutional argument, noting that the government clearly has a substantial and important interest in a content-neutral program carriage system that promotes diversity and competition in the face of increased MVPD vertical integration, and observes that the system it proposes complies with the Alternative Dispute Resolutions Act.

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INTRODUCTION

NFL Enterprises LLC (“NFL Enterprises”), the owner and operator of the NFL Network, commends the Commission’s efforts to update its program carriage rules to ensure the continued availability of diverse video programming to the American public. In its comments on the *NPRM*, NFL Enterprises urged the Commission to revise its program carriage rules to address the growing imbalance of power between cable operators and programming vendors, and supported the adoption of both a good-faith bargaining duty in the context of carriage disputes and an effective arbitration mechanism to provide independent programmers with relief from discrimination by a multichannel video programming provider (“MVPD”) with a competitive affiliated programming service.

Numerous other commenters also suggested that the Commission create an arbitration mechanism for program carriage disputes. Accordingly, in these Reply Comments, NFL Enterprises addresses questions raised by commenters regarding arbitration, makes a number of suggestions for an improved arbitration regime, and proposes specific

dispute resolution procedures that will promote the Commission's goals of ensuring competition and diversity in the video programming market – both of which ultimately benefit American consumers.

I. THE COMMISSION SHOULD ADOPT BASEBALL-STYLE ARBITRATION PROCEDURES FOR PROGRAM CARRIAGE DISPUTES.

In addressing possible rule changes to handle program carriage disputes, several commenters encouraged the Commission to promote streamlined negotiations and facilitate arbitration of disputes. Many comments on the Commission's *NPRM* proposed specific features that will be critical to an effective arbitration procedure. In particular, NFL Enterprises agrees with the America Channel ("TAC") that the application of "baseball-style" mandatory arbitration under the rules of the American Arbitration Association ("AAA"), with modifications described below and consistent with the Commission's *Adelphia* merger order,¹ would best serve the public interest. This approach would efficiently and equitably promote competition and diversity in video programming.

In an *Adelphia*-style arbitration, each party submits a "final offer" to a neutral arbitrator as a complete agreement for carriage of a program service. The arbitrator then decides which of the two "final offers" is closer to the service's fair market value. NFL Enterprises believes that this approach is valuable for two reasons: First, it encourages both parties to submit realistic "final offers" to the arbitrator. Second, it avoids the need for an arbitrator to fashion detailed remedies concerning the specific compensation rates and terms

¹ *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 Order").

of carriage of the programming service. Before turning to specific features of NFL Enterprises' proposed arbitration system, we first address two brief preliminary matters.

A. Scope of Relief

In its recent *America Channel* decision, the Commission concluded that TAC was a regional sports network (“RSN”) as defined in the *Adelphia Order*, agreed that TAC could seek arbitration to resolve its program carriage dispute with Comcast, and ordered Comcast to submit to arbitration pursuant to the program carriage condition adopted in the *Adelphia Order*.² Although NFL Enterprises supports the relief imposed in the *America Channel* decision, it agrees with TAC, the Black Television News Channel (“BTNC”), and others that the Commission should provide protection for *all* independent networks, not just RSNs.

In the *America Channel* decision, the Commission stated that it “intends to adopt a separate order establishing an expedited complaint process . . . [that] would apply to all program carriage complaints, not just those involving RSNs. [T]hese new procedures would replace the arbitration condition for program carriage disputes under the *Adelphia Order*.”³ NFL Enterprises strongly supports the Commission’s decision to apply a streamlined complaint process to all unaffiliated programmers, and urges that, as part of that streamlined process, the Commission not limit the arbitration remedy just to RSNs, but make it available to resolve disputes involving *all* independent programmers.

² *Comcast Corporation, Petition for Declaratory Ruling that The America Channel is Not a Regional Sports Network*, Order, FCC 07-172, 2007 WL 2791077 at ¶ 1 (rel. Sept. 25, 2007) (“*America Channel*”).

³ *America Channel* at ¶ 25.

As trade press news stories this week indicate, in today's market, which is characterized by increasingly concentrated cable ownership and operation, a vast array of independent programmers face obstacles to program carriage by vertically integrated cable operators, leaving many of them to choose between marginal existence and exiting the programming business (in many cases through sale to an integrated media company).⁴ Limiting arbitration procedures solely to disputes involving RSNs would undermine the Commission's goal of ensuring broad diversity in video programming.⁵ In contrast, application of the arbitration system described in these Reply Comments to all independent programmers would protect competition in the video programming market and promote the availability of diverse programming to consumers.

B. Compliance with the Alternative Dispute Resolution Act

In a footnote to its comments, Comcast suggested that using arbitration to provide program carriage relief would violate section 575(a)(3) of the Alternative Dispute Resolution Act ("ADRA").⁶ As the Commission found in *America Channel*, however, *Adelphia*-style arbitration does not violate the ADRA. The Commission rightly has already found that Congress used the term "arbitration" in section 575(a)(3) to mean "binding

⁴ See Ted Hearn, "Hallmark Channel, Schleiff Look For Distribution Leverage At FCC," Multichannel News Online (Oct. 9, 2007) available at <http://www.multichannel.com/article/CA6488437.html> (citing the Hallmark Channel's president as providing data that cable channels affiliated with Comcast and Time Warner had higher license fees but lower prime time ratings than Hallmark); Bill Carter, "NBC Universal Purchases Oxygen Cable TV Network for Women," *New York Times Online* (Oct. 10, 2007), available at <http://www.nytimes.com/2007/10/10/business/media/10oxygen.html> (quoting an investment advisor on the deal as stating "investors ask themselves, '[d]o we take this to the next level or does somebody else?").

⁵ 47 U.S.C. § 536; 47 C.F.R. §§ 76.1001, 76.1301.

⁶ See Comments of Comcast Corp. at 36, n.91. See also Alternative Dispute Resolution Act, 5 U.S.C. § 575(a)(3) (2007).

arbitration,” and the arbitration proposed by NFL Enterprises and other parties in this proceeding is not “binding” on the parties because the arbitrator’s decision remains subject to *de novo* review by the Commission.⁷ Given that an *Adelphia*-style arbitration scheme complies with the ADRA, we now turn to the specific features that will provide the fairest and most efficient program carriage dispute resolution while protecting competition and diversity of programming.

II. THE ARBITRATION PROCEDURE SHOULD PROMOTE BROAD RELIEF WITHOUT THE NEED TO PROVE THE MOTIVATION FOR AN MVPD’S ADVERSE TREATMENT.

Many commenters observed that the Commission’s existing program carriage regime has not been used heavily because, among other reasons, its standards appear to place a very high burden on complainants.⁸ To establish a *prima facie* case of program carriage discrimination, a complainant must show that the alleged discrimination is “on the basis of affiliation or nonaffiliation” of the programmer, and that “the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly.”⁹

As NFL Enterprises pointed out in its comments, the best evidence of discriminatory motive is under the exclusive control of the MVPD.¹⁰ Moreover, as NFL Enterprises’ recent experience has demonstrated, vertically integrated MVPDs are determined not to provide potential complainants with direct evidence of the underlying purpose of their

⁷ See *America Channel* at ¶ 4, n.13.

⁸ See, e.g., Comments of Black Television News Channel (“BTNC”) at 4, 12; Comments of Engle Broadcasting at 4; Comments of Pope Broadcasting Co. at 3.

⁹ *NPRM* at ¶ 14.

¹⁰ See Comments of NFL Enterprises at 7.

discriminatory conduct. For example, they hedge statements so they do not promise different treatment if an independent programmer becomes affiliated through ownership with the MVPD, and they refuse to send independent programmers written confirmation of offers made during carriage discussions, so there is no paper trail that can be used in a complaint proceeding.

NFL Enterprises firmly believes that although these obstacles are not insuperable, they (along with fear of cable company retaliation) have deterred many programmers from filing meritorious complaints in the past.

To remedy this problem, NFL Enterprises urges the Commission to focus its procedure more on obtaining equitable and objectively fair results, and less on demonstrating the wrongful motive of the MVPD.

A. Threshold Inquiry and Cost Allocation

In its comments, Time Warner asked the Commission to require documentary evidence of discrimination before a programmer can lodge a complaint, observing that programmers might otherwise bring baseless complaints.¹¹ Such a requirement, if interpreted to require documentary evidence of improper motive, would make it extremely difficult to bring any complaint, since (as noted above) vertically integrated MVPDs are skillful at ensuring that the best evidence of discrimination—and the only evidence of discriminatory intent—is found only in the control of the MVPD. A program carriage regime focused on equitable results rather than improper motive would address these concerns, but could pose risks of unfounded or frivolous claims. Although this legitimate and non-trivial concern of

¹¹ See Comments of Time Warner Cable at 26.

MVPDs cannot be ignored, NFL Enterprises believes it can be effectively addressed and largely eliminated through two threshold inquiries and a related cost-shifting scheme.

First, before a program carriage complaint can proceed to full arbitration, affirmative determination by an independent arbitrator on two threshold questions should be required in order to assure that the complaint actually involves discrimination by the MVPD. Those questions are:

(a) whether the service seeking carriage is carried on at least one MVPD in the country that is not affiliated with the complaining programmer, and that such MVPD has at least 20,000 subscribers (an affirmative answer will objectively demonstrate the judgment of at least one company selling video programming to consumers that there is consumer demand for the service seeking carriage); and

(b) whether the vertically-integrated MVPD has a channel in the same programming category as the party seeking carriage, and that channel is carried by the MVPD in at least 200,000 homes (an affirmative answer will objectively demonstrate that the MVPD has a conflict of interest in negotiating with the programmer that raises potential threats to competition and diversity of voices).¹²

If a programmer cannot satisfy these threshold inquiries, the neutral arbitrator should terminate the case immediately and allocate the cost of the arbitration to the programmer.

¹² Although there may be many categories of programming for the purpose of this inquiry, the Commission should consider programming services to be in the same category if they predominantly offer sports, news, or entertainment programming.

Second, as suggested by BTNC, to guard against frivolous complaints the Commission should adopt a cost-shifting scheme that would place on the losing party the financial burden of an arbitration that proceeds to a carriage decision.¹³ Like the threshold requirements, this scheme would dissuade programmers from initiating arbitration based on a remote chance of success and would encourage them to bargain reasonably during the course of negotiations.

Both of these features will help conserve Commission expertise and resources by discouraging complaints that do not have reasonable prospects of success. In addition, the threshold requirements and cost-shifting scheme will reinforce the benefits of the “baseball-style” arbitration: programmers will have incentive not just to meet the threshold showing, but also to make realistic “final offers” to avoid a cost-shifting penalty.

B. Timeline

In their comments, TAC and BTNC urged the Commission to adopt time limits to ensure that program carriage disputes will be resolved quickly and efficiently.¹⁴ NFL Enterprises agrees that, given the time-sensitivity of program carriage disputes, it is critical that the Commission adopt an expedited timeline for dispute resolution.

NFL Enterprises encourages the Commission to adopt its *Adelphia* arbitration schedule in this proceeding. Specifically, a programmer should notify an MVPD of its election to initiate arbitration within five days after the expiration of its existing agreement or

¹³ See Reply Comments of BTNC at 2.

¹⁴ See Comments of The America Channel (“TAC”) at 9; Comments of BTNC at 5, 6.

90 days after a first-time request for carriage.¹⁵ If an agreement still has not been reached, the programmer should submit a formal arbitration demand, along with its proposed final offer (which would include the form of carriage agreement that would govern the carriage relationship), to the arbitrator at least 10, but not more than 15, business days after its notice of arbitration was served. The MVPD should submit its response, including its own final offer within two business days after being notified of the arbitration. The MVPD's final offer would not be allowed to vary the terms of the form carriage agreement unless the MVPD is able objectively to demonstrate that the programmer's proposal would cause system operation issues or is otherwise inconsistent with good engineering and network management practices. The arbitrator should then have 45 days after being appointed to issue a decision. A party aggrieved by the arbitrator's award should be permitted to file a petition seeking *de novo* review within 30 days after the award is published, which the Commission should act upon within 60 days. If the Commission finds that it cannot act on the petition within 60 days, it should extend the review period for one additional 60-day period.¹⁶ The Commission should adopt this timeline for all program carriage disputes to ensure equitable resolution of time-sensitive conflicts.

C. Discovery

In result-oriented arbitrations like the approach proposed in these Reply Comments, evidence of a programming service's fair market value in the context of the

¹⁵ Obviously, transition rules would be needed to govern the applicability of these new procedures to disputes that pre-dated their adoption. NFL Enterprises suggests that carriage complaints in such pre-existing disputes should be accepted by the Commission for a period of 60 days following the effective date of the new rules, and that thereafter the regular time periods specified under the rules would apply.

¹⁶ *Adelphia Order* at Appendix B.

MVPD's business will most likely be in the possession of the MVPD when an arbitration is initiated. That evidence must be given to the arbitrator to ensure a complete record will inform the arbitral decision. For this reason, NFL Enterprises endorses discovery procedures consistent with those adopted in the Commission's recent *Program Access Report and Order* updating its program access rules.¹⁷

Under those procedures, the Commission would require a respondent to attach to its response "all documents that it expressly references or relies upon in defending [the claim]" and to provide all documents requested by the programmer, as long as those documents are in the MVPD's control and "relevant to the dispute."¹⁸ This approach ensures that the arbitrator and the parties have the opportunity to understand the course of the negotiations and the fair market value of the programming service, particularly as compared to affiliated programming services. In that regard, NFL Enterprises emphasizes that "relevant" information likely includes the MVPD's carriage arrangements with other programming services comparable—in terms of popularity and ratings, as well as content—with the programming service at issue; its carriage arrangements on its own system for program services affiliated with the MVPD; the MVPD's agreements for carriage of the programming services it owns on other MVPDs; and the complaining programmer's carriage arrangements with other MVPDs.

Despite the necessity of these documents for determining fair market value accurately, NFL Enterprises supports implementing enhanced confidentiality provisions

¹⁷ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 07-29, FCC 07-169, ¶¶ 91-103 (rel. Oct. 1, 2007) ("*Program Access Report and Order*").

¹⁸ *Id.* at ¶ 95.

through the Commission's issuance of protective orders. In particular, NFL Enterprises supports the expanded confidentiality provisions set forth in the Commission's *Program Access Report and Order*¹⁹ and agrees that, although the program carriage dispute rules should permit broad discovery without need for arbitrator oversight, they should also allow a party to object to discovery requests for documents that are either irrelevant or outside of its control.²⁰

D. Nationwide Carriage

BTNC suggests that programmers should be permitted to require MVPDs to negotiate for carriage on a nationwide basis rather than negotiating on a regional basis or system-by-system.²¹ It argues that nationwide carriage negotiations promote an ease of administration because they avoid a programmer having to negotiate with any number of individual systems. NFL Enterprises believes, however, that despite the ease of administration that is associated with national negotiation, such a broad scope of negotiation also increases the ability of an MVPD with broad national reach to behave anti-competitively, and thus if mandated could harm the important goal of diversity of voices.

Under the current rules, Comcast and Time Warner, with their broad national reach, highly concentrated system clusters, and dominant market share in their service areas, each have the power to decide the economic fate of a new programmer, and to dictate the grounds on which program carriage negotiation will occur. This concentrated power in many

¹⁹ *Id.* at ¶ 101.

²⁰ Consistent with the Commission's new program access discovery procedures, any party that fails to satisfy legitimate discovery requests would be subject to a default judgment or dismissal with prejudice.

²¹ *See* Comments of BTNC at 12.

cases allows a single MVPD to inequitably disadvantage a programmer and paves the way for unfair gamesmanship—especially because of the “follow-the-leader” behavior often exhibited by large cable MSOs. For instance, TAC detailed in its comments a demand by Comcast that it contact every Comcast system nationwide to discuss leased access arrangements.²²

Programmers are in the best position to understand the national, regional, or local nature of their services, and they should be permitted to approach MVPDs for carriage accordingly.

III. NFL’S PROPOSED PROGRAM CARRIAGE DISPUTE RESOLUTION PROCEDURE IS NOT CONTENT-BASED AND WOULD BE FULLY CONSISTENT WITH THE FIRST AMENDMENT.

In its comments, Time Warner claims that the First Amendment precludes the Commission from prohibiting discrimination in program carriage arrangements because such regulation fails strict scrutiny and, even under intermediate scrutiny, it fails because there is no risk that cable operators might discriminate against unaffiliated providers. This argument is unavailing.

The Commission’s program carriage rules, like the leased access rules upheld by the D.C. Circuit in *Time Warner Entertainment Co. v. FCC*,²³ regulate MVPDs in a content-neutral way. That is, program carriage regulation “do[es] not favor or disfavor speech on the basis of the ideas contained in the speech or the views expressed.”²⁴ Indeed, under NFL Enterprises’ proposed arbitration system, programmers’ “qualification to [be carried by an MVPD pursuant to program carriage arbitration] depends not on the content of their speech, but on their lack of affiliation with the operator, a distinguishing characteristic

²² See Comments of TAC at 13.

²³ 93 F.3d 957 (D.C. Cir. 1996).

²⁴ *Id.* at 969.

stemming from considerations relating to the structure of cable television.”²⁵ Accordingly, NFL Enterprises’ program carriage regulation proposals would be subject only to intermediate scrutiny and will be upheld “if the government’s interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim.”²⁶

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.²⁷ The Commission’s rules, adopted at the direction of Congress, aim to protect competition and

²⁵ *Id.* See also *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2457, 2460-61, 2467-68 (1994).

²⁶ *Id.*

²⁷ 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 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.

diversity in the video programming marketplace in an environment in which MVPD discrimination is both real and damaging to the public interest. The Supreme Court has found that these objectives—“promoting the widespread dissemination of information from a multiplicity of sources” and “promoting fair competition in the market for television programming”—are important governmental objectives unrelated to the suppression of speech.²⁸

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 competes against the independent service at issue for substantially similar demographic groups, and that MVPD is acting in a manner inconsistent with at least one other MVPD that does not have a financial interest in such a competing programming service.²⁹

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

²⁸ *Turner Broad. Sys.*, 114 S. Ct. at 2469-70.

²⁹ *See* Part II.A., *supra*. The other-system carriage condition proposed by NFL Enterprises also may bear on one possible argument of an MVPD during the arbitration: that the MVPD may desire not to carry the programming service at all. NFL Enterprises sees no reason that an MVPD should be barred from taking this position in the arbitration as long as the MVPD (a) provides evidence that its position is objectively reasonable and nondiscriminatory, and (b) explicitly and objectively demonstrates why it has reached the opposite conclusion about consumer interest in the programming service from the other system(s) that has/have chosen to carry the service. An arbitrator should not compel carriage of the service over an MVPD’s objection if the MVPD satisfies the burden of proof on these nondiscrimination questions.

cases³⁰—its only argument that program carriage 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.³¹ 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,³² Time Warner’s lone First Amendment argument is misplaced.

CONCLUSION

The Commission has undertaken to make important changes to its program carriage rules, which are critical to the ongoing viability of nonaffiliated programmers and a competitive marketplace. In order to protect this competition and ensure that viewers

³⁰ *Turner Broad. Sys.*, 114 S. Ct. at 2445; *Time Warner Ent. Co.*, 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 court has applied such a standard to a content-neutral regulation like the approach discussed here. See Comments of Time Warner at 10-13.

³¹ See Comments of Time Warner at 13. But independent economists have recently reached the opposite conclusion from that reflected in Time Warner’s self-serving statements, demonstrating that vertically-integrated MVPDs have both the ability and the incentive to discriminate against unaffiliated programmers. See Hal J. Singer & J. Gregory Sidak, “Vertical Foreclosure in Video Programming Markets: Implications for Cable Operators,” forthcoming in 6 *Review of Network Economics* ____ (2007), available at: <http://ssrn.com/abstract=1004369>.

³² *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.

continue to have a diversity of programming options, the Commission should adopt a streamlined baseball-style mandatory arbitration procedure designed to promote equitable relief, which also gives parties the opportunity for meaningful discovery and the choice to negotiate nationally or locally.

Respectfully submitted,



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